UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S ANSWER TO JOINT INTERVENORS' PETITION FOR REVIEW OF ALAB-811

Lawrence J. Chandler
Special Litigation Counsel

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I. INTRODUCTION

On July 12, 1985, Joint Intervenors filed a petition for review of ALAB-811 (Petition) with the Nuclear Regulatory Commission, pursuant 10 C.F.R. § 2.786. Joint Intervenors therein request that the Commission grant review of and reverse ALAB-811. For reasons which follow, the NRC staff opposes the Petition.

II. BACKGROUND

In ALAB-811, __ NRC __, (slip op., June 27, 1985), the Atomic Safety and Licensing Appeal Board (Appeal Board) resolved the design verification issues for the Diablo Canyon Unit 2 facility; these issues had been severed from the Appeal Board's earlier decision on this matter, ALAB-763, 19 NRC 571 (1984). Specifically, the Appeal Board determined that the record already developed in this proceeding, which included substantial evidence regarding both Diablo Canyon Units 1 and 2, was adequate to enable it to make the necessary findings respecting Unit 2 design verification without the need for any further evidentiary hearing specifically addressing Unit 2 activities. In addition, the Appeal Board proceeded, on the basis of the

existing record, to make findings, favorably resolving all issues in controversy as they pertain to Unit 2 and authorizing the Director, Office of Nuclear Reactor Regulation to issue a full power operating license for that Unit. 1/ In so doing, the Appeal Board relied, in part, on findings it previously made in ALAB-763 to the extent that those findings deal with matters common to both Units.

III. DISCUSSION

Although the Commission has the ultimate discretion to review any decision of its subordinate boards, a petition for Commission review "will not ordinarily be granted unless important safety, environmental, procedural, common defense, antitrust, or public policy issues are involved. 10 C.F.R. § 2.786(b)(4). When measured against the standards of 10 C.F.R. § 2.786, the matters asserted by Joint Intervenors in their Petition do not warrant the exercise of the Commission's discretion to grant the Petition, i.e., important questions of fact, law, or policy in the context of the foregoing areas of concern are not presented. 10 C.F.R. § 2.786(b)(1).

Joint Intervenors' Petition is premised on five assertions. First, they note that the Appeal Board, in an order issued on August 16, 1983

1/ This authorization requires the imposition of two conditions in the Unit 2 operating license, not specifically in issue here. Each of these conditions was previously imposed by the Appeal Board for the Unit 1 operating license. See ALAB-811, supra, (slip op. at 21, 24-25); also, ALAB-763, supra, 19 NRC at 617-619 (1984).

Subsequent to the issuance of ALAB-811, by letter to the Commissioners dated July 26, 1985, PG&E informed the Commission, inter alia, of several minor problems encountered during Unit 2 startup testing and system walkdowns. Based on available information, it does not appear to the Staff that those matters bear on design verification issues addressed in ALAB-811.

(unpublished), had determined that, as a consequence of deficiencies in the Diablo Canyon quality assurance program for design activities, there was then "substantial uncertainty whether any particular structure, system or component was designed in accordance with stated criteria and commitments, (Order at 4-5)." Petition at 2. Thus, they observe, the Appeal Board stated that PG&E would have the burden of establishing that the Independent Design Verification Program (IDVP) and PG&E's Internal Technical Program (ITP) were adequate to demonstrate that the plant was properly designed. Id.

Second, Joint Intervenors note that, in ALAB-763, supra, the Appeal Board made findings only for Unit 1 and deferred any decision on Unit 2 because of the then ongoing status of the PG&E and Staff design verification efforts. Petition at 2-3.

Third, they assert seven factual matters which allegedly distinguish Unit 1 from Unit 2 in terms of both the Units themselves and the applicability of the verification efforts performed. Petition at 3-4.

Fourth, Joint Intervenors claim that post-hearing revelations, particularly those of an NRC inspector, Isa Yin, undermine the Appeal Board's reliance, in ALAB-811, on the ITP to assure the design of Unit 2. Petition at 4-5.

Finally, they suggest that the predictive nature of the Appeal Board's determinations was inappropriate. In particular, they contend that the existing record does not show what actually has been done to verify the Unit 2 design, what deficiencies were found, how many modifications were made and their nature, and how much has been completed. Accordingly, Joint Intervenors would require each of the foregoing to be completed and subjected to litigation, rather than left to staff inspection, prior to a decision. Petition at 5-6.

Each of the above elements of Joint Intervenors' Petition is fully addressed by the Appeal Board in ALAB-811 and is properly disposed of. 2/ As will be recalled, the genesis of this reopened proceeding was in the Order Suspending Licensing issued by the Commission in regard to Diablo Canyon Unit 1 on November 19, 1981, CLI-81-30, 14 NRC 950 (1981). That action was predicated on deficiencies identified in the design quality assurance process as implemented for Unit 1. That Order does not explicitly address Unit 2 and, given the information then available, could implicate Unit 2 at most only by inference. Nonetheless, it has not been disputed by any of the parties that PG&E was obligated to establish the design adequacy of Unit 2, 3/ and, in fact, certain of the issues admitted by the Appeal Board expressly call in question the measures to be taken to assure the adequacy of the Unit 2. Thus, the parties prepared for, went to hearing

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2/ In passing, we would note the failure of Joint Intervenors to comply with the key requirements of 10 C.F.R. § 2.786(b)(2); most notably, the Petition contains no concise summary of ALAB-811, or concise statement of why the decision is erroneous; indeed, the Appeal Board's analysis is virtually ignored. Moreover, they do not even pay lip service to 10 C.F.R. § 2.786(b)(1) or (4)(i) by specifying what important question of fact, law, or policy purportedly exists so as to warrant Commission review.

3/ Contrary to Joint Intervenors' contention, see Petition at 6, n. 2, the breakdown in design QA which was found to exist with respect to Unit 1, was not found to apply equally to Unit 2. Indeed, no citation to the record in support of such proposition is provided. Moreover, the inference that Joint Intervenors draw from the fact that "the Commission did not then have before it any question of licensing or enforcement for Unit 2," id., namely, that if it were, the Commission would have imposed the same requirements, id., does not perforce follow. Unit 2 was then and continues to be a licensed facility thus subject to the Commission's enforcement authority and, had the facts available in late 1981 so indicated, it is fair to assume that the Commission would have taken equally swift and thorough action with respect to that Unit; that there was no Unit 2 licensing action pending before the Commission at that time would have been of little moment.

on and engaged in both direct and cross examination of witnesses and otherwise presented evidence regarding both Units; Joint Intervenors do not contend otherwise. ALAB-811 is replete with citations to the record which address Unit 2, citations which support each of the findings made by the Appeal Board.

In spite of their factual assertions, Petition at 3-4, it is most significant that Joint Intervenors do not dispute the Appeal Board's findings respecting the lack of material differences in the two Units for purposes of design, ALAB-811, slip op. at 10-13, and ignore the Appeal Board's ample discussion of the verification process as applied to Unit 2, id. at 14-17, as well as the specific findings on contested issues, id., at 18-25. 4/ Their unsupported conclusion that the ITP, as implemented for purposes of Unit 2 design verification, is inadequate, flies in the face of the Appeal Board's earlier decision confirming its adequacy, ALAB-763, supra, a decision which, although made initially with respect to Unit 1, is, in large measure, applicable to Unit 2. Joint Intervenors similarly ignore the credit appropriately given by the Appeal Board to the IDVP in contributing to the assurance that the design of Unit 2 is adequate. See, ALAB-811, slip op. at 18-19. ALAB-763 was not disturbed by the Commission, CLI-84-14, 20 NRC 285 (1984); aff'd sub nom., San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. (1984), vacated in part and rehearing en banc granted on other grounds, 760 F.2d 1320 (1985). Because of the fundamental similarity of the two Units and of the verfication efforts to be applied to each, for purposes of the issues before it,

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4/ None of these findings is individually challenged in the Petition as being erroneous.

the Appeal Board's reliance on ALAB-763 in ALAB-811 is wholly justified. In terms of substance, Joint Intervenors point to nothing which would compel a departure from the prior determinations.

The post-hearing allegations cited by Joint Intervenors, largely the findings of Isa Yin, Petition at 4-5, likewise lend no support to the Petition. The lack of materiality of these findings has already been determined by the Appeal Board in denying a motion to reopen the proceeding filed by Joint Intervenors in February 1984, again based in large part, on Mr. Yin's efforts. ALAB-775, 19 NRC 1361, 1367-1368 (1984). Nor are Mr. Yin's findings new to the Commission - they were explicitly considered in the Commission's effectiveness review regarding the issuance of a full power license for Unit 1. CLI-84-13, 20 NRC 267, 270-271 (1984). Nothing new is presented by Joint Intervenors in their Petition to now merit a different outcome.

At most, then, what remains of Joint Intervenors' Petition is the assertion that the record is incomplete in that, in their view, it does not establish "(1) what has already been done to verify the design of Unit 2; (2) the extent of deficiencies discovered; (3) the number and nature of modifications; and (4) the extent to which that verification has been completed." Petition at 5. These matters, Joint Intervenors argue, are not amenable to resolution by the Staff through routine inspection and audit efforts but rather are so fundamental as to require consideration by the Appeal Board prior to a decision. But again, this argument withstands scrutiny only if one ignores the record already developed as reflected in ALAB-811 and ALAB-763. For while it is undeniable that there are limitations on those matters which can be left to the Staff for its resolution outside the hearing process, see, Southern California Edison Company et al.

(San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 380 n. 57 (1983), the parties to this proceeding were in fact afforded and availed themselves of the opportunity to fully litigate all substantive issues concerning Unit 2 design verification necessary to determine whether there is reasonable assurance that the facility has been properly designed. See, Consolidated Edison Co. of New York (Indian Point Station, Unit 2), CLI-74-23, 7 AEC 947, 951-952 (1974). As is borne out by a review of the record citations provided in ALAB-811, the record is adequate to permit the Appeal Board to make the "basic findings prerequisite to an operating license", id., which they in fact made; contrary to Joint Intervenors' claim, Pet at 5, the record establishes the scope and adequacy of and the criteria to be applied in the verification process, see, ALAB-811, slip op. at 14-17, leaving to the Staff only the confirmation that the program was implemented. 5/ Such exercise is one clearly within the Staff's technical expertise and can be conducted outside the adjudicatory process. C.f., Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1451 (D.C. Cir. 1984).

It is thus clear that the record developed in this proceeding was adequate, without the need for a further hearing, to enable the Appeal Board to make its findings and that the record, in fact, supports the

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5/ As discussed by the Appeal Board, implementation of the various design verification efforts was previously addressed in the context of Unit 1 and is reflected in ALAB-763. Fundamentally, the only significant issue relative to Unit 2 remaining at the close of the hearing was the transfer of the lessons learned from Unit 1 to Unit 2, that is, implementation. The "detailed evidence of the extent and the results of the Unit 1 verification," ALAB-811, slip op. at 10, appropriately contribute to the foundation for the Appeal Board's predictive findings on Unit 2.

findings made. Joint Intervenors are, no doubt, dissatisfied with the outcome of the proceeding but their failure to present persuasive evidence before the Appeal Board in support of their position falls short of establishing that there exists an important question of fact, law or policy warranting review by the Commission.

IV. CONCLUSION

For the foregoing reasons, the Staff submits that Joint Intervenors have failed to satisfy the requirements of 10 C.F.R. § 2.786 and, accordingly, their Petition should be denied.

Respectfully submitted,

Lawrence J. Chandler
Special Litigation Counsel

Dated at Bethesda, Maryland
this 29th day of July, 1985

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER TO JOINT INTERVENORS' PETITION FOR REVIEW OF ALAB-811" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, this 29th day of July, 1985:

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