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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 OL
	)	50-323 OL
(Diablo Canyon Nuclear Power Plant Units 1 and 2)	)	

NRC STAFF'S ANSWER TO
JOINT INTERVENORS' APPLICATION FOR A STAY

Lawrence J. Chandler
Special Litigation Counsel

July 31, 1985

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I. INTRODUCTION

On July 24, 1985, Joint Intervenors, in anticipation of a vote on the issuance of a full power license for Diablo Canyon Unit 2 then scheduled for July 30, 1985, filed an Application for a Stay (Application) with the Nuclear Regulatory Commission, [1/] pursuant to 10 C.F.R. § 2.788. Joint Intervenors seek a stay of the "Commission's anticipated authorization of full power operation of Unit 2 and all orders previously issued by the Commission or its licensing boards underlying the licensing of such reactor, including ALAB-781, -782, and -811." Application at 2. [2/]

1/ The same Application for a Stay was also filed on July 24, 1985 with the Atomic Safety and Licensing Appeal Board. On July 26, 1985, the Appeal Board issued an Order referring the Application to the Commission.

2/ To the extent that Joint Intervenors are seeking to stay the above Appeal Board decisions, their Application is out of time. Pursuant to 10 C.F.R. § 2.788(a), an application for a stay must be filed not

(FOOTNOTE CONTINUED ON NEXT PAGE)

For reasons which follow, the NRC staff (Staff) opposes the Application and urges that it be denied.

II. BACKGROUND

On August 31, 1982, following an evidentiary hearing, the Atomic Safety and Licensing Board issued an Initial Decision, LBP-82-70, 1[illegible] NRC 756 (1982), as clarified, LBP-82-85, 16 NRC 1187 (1982), authorizing the issuance of full power operating licenses for Diablo Canyon Units 1 and 2 subject to a number of conditions. Appeals of that decision were filed by all parties. The appeals taken by the Staff and Pacific Gas and Electric Company (PG&E) were favorably ruled upon by the Atomic Safety and Licensing Appeal Board. ALAB-776, 19 NRC 1373 (1984) (vacating the condition requiring formal findings by FEMA on the State of California emergency plan pursuant to 44 C.F.R. Part 350). The appeals taken by Joint Intervenors and the Governor were rejected, ALAB-781, 20 NRC 819 (1984); in this decision, the Appeal Board, noting its prior decision in ALAB-763, 19 NRC 571 (1984), stayed the effectiveness of the Licensing Board's authorization with respect to Unit 2 pending its findings

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(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

later than ten days after the issuance of the decision sought to be stayed; ALAB-781 and ALAB-782 were issued on September 6, 1984 and ALAB-811 was issued on June 27, 1985. Furthermore, the Commission's regulations do not contemplate an anticipatory application for stay such as is here requested by Joint Intervenors. Their application, thus, is premature.

expressly addressing Unit 2 design verification, 20 NRC at 837. 3/ In ALAB-811, (slip op., June 27, 1985), the Appeal Board favorably resolved all design verification issues in the context of Unit 2 and thus authorized the Director, Office of Nuclear Reactor Regulation, to issue a full power operating license for that Unit, subject to the imposition of two conditions, one requiring PG&E to perform certain jet impingement analyses, the second requiring a technical specification regarding CCW operability. ALAB-811, slip op. at 25. A petition for review of ALAB-811, filed by Joint Intervenors, is pending before the Commission.

All conditions precedent to the issuance of a full power operating license for Unit 2 imposed by the Licensing Board and Appeal Board have been satisfied by virtue of subsequent findings issued by the Federal Emergency Management Agency (FEMA) and the decision of the Appeal Board in ALAB-776 concluding that a final finding by FEMA pursuant to 44 C.F.R. Part 350 is not required and, as reflected in Supplement No. 29 to the Staff Safety Evaluation Report, NUREG-0675, by completion of the required jet impingement analysis and inclusion of the required CCW technical specification. See Board Notification No. 85-029, March 14, 1985.

3/ In ALAB-763, supra, the Appeal Board, in the reopened proceeding on issues concerning design quality assurance, favorably resolved the issues in controversy in regard to Unit 1. Because of the then-ongoing status of design verification efforts for Unit 2, the Appeal Board, in that decision, severed Unit 2 from the findings made and, therefore, stayed the effectiveness of the Licensing Board's authorization until such findings were made with respect to that Unit.

The Commission declined review of both ALAB-763, CLI-84-14, 20 NRC 285 (1984) and ALAB-781.

Inasmuch as all appeals having been adjudged on their merits, no immediate effectiveness review pursuant to 10 C.F.R. § 2.764(f)(2) is required; a full power operating license may be issued for Diablo Canyon Unit 2, subject to approval by the Commission after its consideration of matters not in controversy among the parties.

III. DISCUSSION

The requirements pertinent to issuance of a stay, 10 C.F.R. § 2.788(e) are not in dispute, see, Application at 2-3, n.1, and need not be restated herein. In determining whether the movant has satisfied the four factors set forth in 10 C.F.R. § 2.788(e), it must be recognized that:

> The burden of persuasion on these factors rests on the moving party. While no single factor is dispositive, the most crucial is whether irreparable injury will be incurred by the movant absent a stay. To meet the standard of making a strong showing that it is likely to prevail on the merits of its appeal, the movant must do more than merely establish possible grounds for appeal. In addition, an "overwhelming showing of likelihood of success on the merits" is necessary to obtain a stay where the showing on the other three factors is weak.

Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795 (1981; footnotes omitted); see also, Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-437, 6 NRC 630, 632 (1977). The significance of the first two factors was recently confirmed by the U.S. Court of Appeals:

> To justify the granting of a stay, a movant need not always establish a high probability of success on the merits. Probability of success is inversely proportional to the degree of irreparable injury evidenced. A stay may be granted with either a

> high probability of success and some injury, or vice versa.

Cuomo v. NRC, No. 85-1042, slip op. at 1 (July 3, 1985, D.C. Cir. 1985). By any measure, Joint Intervenors have failed to sustain their burden.

A. With respect to the first factor, likelihood of prevailing on the merits, Joint Intervenors advance three issues on which they contend they are likely to prevail. Application at 2-6. The first, Earthquake Emergency Preparedness, Application at 2-4, is readily disposed of. The Commission's conclusion regarding this issue, viz, that the complicating effects of earthquakes need not be considered in emergency planning, CLI-84-12, 20 NRC 249 (1984), has been affirmed by the Court of Appeals on review, sub nom. San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984). And while the Court has granted rehearing en banc on this issue, 760 F.2d 1320 (1985), to now engage in conjecture and speculate that the outcome of such rehearing will, a fortiori, be adverse to the Commission, would be folly. As the matter now stands, the law of the case is as articulated by the Commission in CLI-84-12, supra, and Joint Intervenors have brought forward no new evidence warranting a departure from that determination at this time.

The second issue on which Joint Intervenors assert they are likely to prevail, Seismic Safety, Application at 4-5, likewise, is of no avail. As they note, Joint Intervenors motion to reopen the record of this proceeding on issues of seismic safety was dismissed by the Appeal Board in ALAB-782, on grounds that it lacked jurisdiction over this issue. 20 NRC 838 (1984). This decision is pending before the Commission on the basis of the Joint Intervenors' Petition for Review.

Nonetheless, the significance of the very information alluded to by Joint Intervenors was considered and rejected by the Commission a year ago in passing on the Unit 1 full power operating license and in explicit consideration of Joint Intervenors' Application for Stay regarding that action. CLI-84-13, 20 NRC 267, 275-278 (1984). Joint Intervenors have provided nothing new to suggest they would fare better now.

Finally, Joint Intervenors contend, with respect to Quality Assurance, that for reasons presented in their Petition for Review of ALAB-811, the requisite finding of reasonable assurance cannot be made. Application at 5-6. But as discussed in the NRC Staff's Answer to Joint Intervenors' Petition for Review of ALAB-811, July 29, 1985, Joint Intervenors have wholly failed to establish that the Appeal Board's decision is in any way erroneous. And viewed by itself, Joint Intervenors' Application is similarly devoid of any basis to sustain their argument that they are likely to prevail.

In sum, Joint Intervenors have wholly failed to make even a minimal showing that they are likely to prevail on any of the foregoing issues.

B. Joint Intervenors' argument concerning the second factor, irreparable harm, Application at 6-7, stands no firmer. As they acknowledge, their supporting affidavits were previously submitted in support of their Application for a Stay of the Unit 1 full power operating license a year ago. But they fail to acknowledge that the assertions contained in those affidavits were rejected by the Commission as insufficient to establish irreparable harm. See, CLI-84-13, supra, 20 NRC at 279-280.

Joint Intervenors also seek support from the Court of Appeals' Order initially staying the Unit 1 full power operating license, San Luis Obispo Mothers for Peace v. NRC, No. 81-2035 and consolidated cases (August 17, 1984). They fail, however, to point out the subsequent vacation of that stay, on October 31, 1984, after consideration of its merits by the Court.

As a second argument regarding irreparable harm, Joint Intervenors assert that the facility will be exposed to increased radiation which, they allege, will prejudice, in some undefined way, their rights on appeal and make more costly and difficult any future modifications found necessary. Application at 7. Such generalized claims have been previously rejected as constituting an insufficient showing of harm for purposes of issuance of a stay. Cf. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plants, Units 1 and 2), CLI-84-5, 19 NRC 953, 963-964 (1984) (unspecific allegations of risk and speculation about nuclear accidents do not, as a matter of law, constitute irreparable harm); Cuomo v. NRC, supra, slip op. at 6-7 ("A party moving for a stay is required to demonstrate that the injury claimed is 'both certain and great.' Wisconsin Gas Co. v FERC, 758 F.2d 669, 674 (D.C. Cir. 1985").

Finally, Joint Intervenors argue that a stay is required as a consequence of alleged violations of "federal statutes and regulations." Application at 7. Inasmuch as they do not, at this point, identify what statutes and regulations have allegedly been violated, one can only assume that they intend that reference be made to those issues previously identified in their Application, namely, Earthquake Emergency Preparedness, Seismic Safety and Quality Assurance, matters addressed in

ALABs-781, -782 and -811, respectively. In each instance, however, they fail, for reasons discussed in A. above, [4/] to make even a colorable showing that the Commission has violated the Atomic Energy Act or its regulations.

Thus, with respect to this most crucial factor, irreparable harm, Farley, supra, Joint Intervenors have failed to make a sufficient showing.

C. In connection with the third factor under 10 C.F.R. § 2.788(e), harm to other parties, Joint Intervenors, while recognizing a potential harm to PG&E, suggest that it is merely de minimis. Application at 7-8. Given that Joint Intervenors have wholly failed to satisfy the first two factors for issuance of a stay, even a harm which might be de minimis does not warrant the relief requested.

D. The fourth factor, where the public interest lies, similarly does not favor the issuance of a stay. See, Application at 8. Where, as here, there has been a failure to satisfy the first two factors, most significantly in light of the failure to present a significant safety issue, the public interest does not favor issuance of a stay. Southern California Edison Company et al. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 692 (1982).

4/ As previously noted, the Commission declined to review ALAB-781. With respect to ALABs-782 and -811, see also, NRC Staff's Answer to Joint Intervenors' Petition for Review of ALAB-782, October 12, 1984, and NRC Staff's Answer to Joint Intervenors' Petition for Review of ALAB-811, July 29, 1985.

IV. CONCLUSION

For the foregoing reasons, Joint Intervenors have failed to satisfy the requirements of 10 C.F.R. § 2.788 and thus their Application for a Stay should be denied.

Respectfully submitted,

Lawrence J. Chandler
Special Litigation Counsel

Dated at Bethesda, Maryland
this 31st day of July, 1985

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER TO JOINT INTERVENORS' APPLICATION FOR A STAY" 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 31st day of July, 1985:

Samuel J. Chilk
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555*

Herzel H. E. Plaine, Esq.
General Counsel
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555*

Dr. Jerry Kline
Administrative Judge
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555*

Mr. Glenn O. Bright
Administrative Judge
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555*

Philip A. Crane, Jr., Esq.
P.O. Box 7442
San Francisco, CA 94106

Elizabeth Apfelberg
1415 Cozadero
San Luis Obispo, CA

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

Richard E. Blankenburg, Co-publisher
Wayne A. Soroyan, News Reporter
South County Publishing Company
P.O. Box 460
Arroyo Grande, CA 93420

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

Michael J. Strumwasser, Esq.
Susan L. Durbin, Esq.
Peter H. Kaufman, Esq.
3580 Wilshire Blvd., Suite 600
Los Angeles, CA 90010

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

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

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

Mr. H. Daniel Nix
California Energy Commission
MS-17
1516 9th Street
Sacramento, CA 95814

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

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

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

Lewis Shollenberger
Regional Counsel
USNRC, Region V
1450 Maria Lane, Suite 210
Walnut Creek, CA 94596

Harry M. Willis
Seymour & Willis
601 California St., Suite 2100
San Francisco, CA 94108

Janice E. Kerr, Esq.
Lawrence Q. Garcia, Esq.
350 McAllister Street
San Francisco, CA 94102

Mr. J. D. Shiffer, Vice President
Nuclear Power Generation
c/o Nuclear Power Generation, Licensing
Pacific Gas and Electric Company
77 Beale Street, Room 1451
San Francisco, CA 94106

Mr. Thomas H. Harris, Energy Writer
San Jose Mercury News
750 Ridder Park Drive
San Jose, CA 95125

Atomic Safety and Licensing Appeal Board Panel (8)
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555*

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

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555*

Mr. Lee M. Gustafson
Pacific Gas and Electric Co.
1050-17th Street, N.W.
Washington, D.C. 20036-5574

John Marrs, Managing Editor
San Luis Obispo County
Telegram-Tribune
1321 Johnson Avenue
P.O. Box 112
San Luis Obispo, CA 93406

Lawrence J. Chandler
Special Litigation Counsel