UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

JOINT INTERVENORS' APPLICATION FOR A STAY

Pursuant to 10 C.F.R. §2.788, the SAN LUIS OBISPO MOTHERS FOR PEACE, SCENIC SHORELINE PRESERVATION CONFERENCE, INC., ECOLOGY ACTION CLUB, SANDRA SILVER, GORDON SILVER, ELIZABETH APFELBERG, and JOHN J. FORSTER ("Joint Intervenors") hereby apply to the Atomic Safety and Licensing Appeal Board ("Appeal Board") for an order staying the effectiveness of the Atomic Safety and Licensing Board's ("licensing board") July 17, 1981 decision which authorizes the issuance of licenses to load fuel and conduct low power tests at the Diablo Canyon Nuclear Power Plant ("Diablo Canyon"), Units 1 and 2. Under current NRC regulations, that decision, which requires the Director of Nuclear Reactor Regulation to issue the license within ten days, is immediately effective, unless the Commission, sua sponte, determines otherwise. For the reasons stated herein, Joint Intervenors request that the Appeal Board stay the licensing board's decision in order to prevent irreparable harm and to preserve the status quo pending due consideration of an appeal of that decision on the merits.

I. SUMMARY OF THE LICENSING BOARD'S DECISION

Briefly stated, the licensing board concluded that compliance with the Commission's emergency planning regulations is not required prior to low power operation and, further, that the standards which they prescribe need not even be addressed. Ignoring uncontradicted testimony as to the absence of effective offsite preparedness, the board concluded that the current level of preparedness is sufficient in light of the "reduced risk" of low power operations, a reduction which the board did not attempt to quantify. The board further concluded that NUREG-0737 valve performance testing need not be completed prior to low power licensing and that all issues previously held in abeyance -- e.g., quality assurance and generic unresolved safety issues -- were unaffected by the TMI-2 accident and could now be resolved in favor of licensing without further hearing.[1/]

II. GROUNDS FOR THE STAY

The factors to be considered by the Appeal Board in connection with a request for a stay are:

(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

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1/ On August 3, 1981, Joint Intervenors timely filed 165 exceptions to the licensing board's Partial Initial Decision and other orders issued during the course of the low power test proceeding. Only the most critical of the issues preserved by those exceptions are discussed in this application for a stay.

(4) where the public interest lies.[2/]

In the sections that follow, the Joint Intervenors examine each of the four factors and demonstrate that a stay is merited.[3/]

A. Joint Intervenors' Likelihood of Prevailing on the Merits Is Strong

1. The Licensing Board Improperly Denied Joint Intervenors' Right To Be Heard Under The Administrative Procedure Act, The Atomic Energy Act, And The Commission's December 18, 1980 Revised Statement Of Policy And April 1, 1981 Order In This Proceeding

The TMI accident challenged many of the assumptions upon which the licensing process had been based by exposing deficiencies in plant design and operating procedures that, before the accident, had been overlooked or judged as tolerable risks. Recognizing this, the Commission issued a series of TMI-related reports and policy statements culminating in additional licensing requirements published as NUREG-0737, "Clarification of TMI Action Plan Requirements," which were adopted by the Commission on December 18, 1980 in its

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2/ 10 C.F.R. §2.788.

3/ Unlike other proceedings in which low power licenses have been approved, this is not a case where such licensing is unopposed (In the Matter of Maine Yankee Atomic Power Co., 5 AEC 2 (1972); In the Matter of Consumers Power Co. (Palisades Plant), 4 AEC 503 (1971)), or, if opposed, where the reactor has already gone critical on a prior occasion pursuant to a stipulation of the parties (In the Matter of Consolidated Edison Co. of New York, Inc., 6 AEC 587 (1973)), where testing would not require that the reactor go critical (In the Matter of Virginia Electric and Power Co., 6 NRC 808 (1977)), or where an identical unit on the same site has already been operating for some time, the Licensing Board has made a finding of serious power shortage in the area, and full power licensing hearings are almsot complete (In the Matter of Wisconsin Electric Power Co. and Wisconsin Michigan Power Co., 4 AEC 951 (1972); see also 4 AEC 899 (1972) and 4 AEC 832 (1972)).

Revised Statement of Policy, "Further Commission Guidance for Power Reactor Operating Licenses" (45 Fed. Reg. 85236). Because none of these documents was submitted for notice and comment pursuant to the Administrative Procedure Act ("APA"), the Commission explicitly provided that "parties may challenge either the necessity for or sufficienc of the [NUREG-0737] requirements.[4/]

In disregard of this Commission directive, the licensing board rejected the majority of Joint Intervenors' TMI-related contentions in the low power test proceeding because they were "not directly related to NUREG-0737 requirements."[5/] When the Commission ruled once again on April 1, 1981 that contentions need not be limited to specific NUREG-0737 requirements,[6/] Joint Intervenors sought reconsideration of the previous denial of contentions,[7/] which request (supported by affidavit) was summarily denied by the licensing board.[8/]

4/ Revised Statement of Policy, at 8.

5/ Prehearing Conference Order, at 13-15 (February 13, 1981). The Board stated:

> [T]he Board does not believe it reasonable to interpret the provision permitting the challenge of the sufficiency of new regulatory requirements as permitting the addition of requirements not contained in NUREG-0737.

6/ In the Matter of Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ___ NRC ___ (April 1, 1981)

7/ Joint Intervenors' Response in Opposition to NRC Staff's and Pacific Gas and Electric Company's Motion for Reconsideration, at 8-20 (April 22, 1981).

8/ Memorandum and Order (Denying Motions for Reconsideration) (April 30, 1981).

The board's rejection of Joint Intervenors' TMI-related contentions was erroneous as a matter of fact and law. First, many of the rejected contentions were, in fact, related to specific NUREG-0737 requirements.[9/] Second, by citing NUREG-0737 as an inflexible limitation on Joint Intervenors' substantive right to litigate safety issues relevant to operating Diablo Canyon, the board improperly conferred on NUREG-0737 the status of substantive regulations. However, neither NUREG-0737 nor the Revised Policy Statement were subject to public notice and comment. Accordingly, the licensing board's ruling violates the APA provisions that preclude use of the NUREG-0737 criteria as binding norms absent an opportunity for public notice and comment.[10/]

In addition, by limiting the scope of contentions to the specific requirements of NUREG-0737, the board has effectively denied the right of interested persons to a hearing on all relevant contentions going beyond that limitation. Such a limitation constitutes a direct violation of §189(a) of the APA, which guarantees to all interested parties the right to a hearing upon request prior to issuance of a license.[11/] Therefore, the board's rejection of Joint Intervenors'

9/ See discussion in and affidavit attached to Joint Intervenors' filing cited at note 7 supra.

10/ See e.g., Chamber of Commerce of the United States v. Occupational Safety and Health Administration, ___ F.2d ___, 1980 (OSHD ¶24,596 at 30,191 (D.C. Cir. July 10, 1980); Joseph v. United States Civil Service Commission, 554 F.2d 1140, 1153-54 (D.C. Cir. 1977); American Iron and Steel Institute v. Environmental Protection Agency, 568 F.2d 284, 292 (3d Cir. 1977).

11/ See Brooks v. Atomic Energy Commission, 476 F.2d 924, 926 (D.C. Cir. 1973) (per curiam); Westinghouse Electric Corporation v. U.S. Nuclear Regulatory Commission, 598 F.2d 759, 772-73 (3d cir. 1979).

contentions because they were not "directly related" to NUREG-0737 requirements was improper and must be reversed.

2. The Licensing Board Misconstrued The Commission's Emergency Planning Regulations By Holding Them Inapplicable To Low Power Operation

As one of its primary responses to the TMI-2 accident, the Commission significantly revised the emergency planning regulations which became effective November 3, 1980. They reflect the Commission's conclusion that "adequate emergency preparedness is an essential aspect of the protection of the public health and safety,"[12/] and, as explained in the regulations themselves, they establish "minimum requirements for emergency plans for use in attaining an acceptable state of emergency preparedness."[13/] They consist of sixteen planning standards which must be complied with prior to issuance of any operating license,[14/] unless the applicant demonstrates under 10 C.F.R. §50.47(c) that a particular deficiency is insignificant for purpose of the activity sought to be authorized. The regulations provide no general exception for low power operation.

Ignoring this background and the explicit language of the regulations, the licensing board held them inapplicable to PG&E's low power testing application.[15/] The board based its conclusion on a docu-

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12/ Emergency Planning: Final Regulations, 45 Fed. Reg. 55402, 55404 (August 19, 1980).

13/ 10 C.F.R. Part 50, Appendix E, id., at 55411.

14/ 10 C.F.R. §50.47(b)(1) provides that "[t]he onsite and offsite emergency response plans must meet the following [sixteen] standards: ...."

15/ Partial Initial Decision, at 22-24.

ment which by its terms justifies no such conclusion. Indeed, that document -- which is not a regulation and has never been submitted for public notice and comment under the Administrative Procedure Act -- merely reaffirms the applicant's right under §50.47(c) to demonstrate the insignificance of any noncompliance for the activity sought to be authorized. The document does not -- nor could it since it is not a regulation[16/] -- in any way alter either the effective date of the regulations or the obligations of the board to require a showing and make specific findings as to each regulatory standard not complied with. Ignoring the conceded deficiencies of existing applicant, state, and local plans, under each of the sixteen standards,[17/] the board concluded that "a point by point examination of the planning standards of NUREG-0654, which would be necessary to obtain an exemption from full compliance with 50.47 under 50.47(c)(1), is no longer needed [prior to low power operation]."[18/]

3. The Licensing Board Impermissibly Relied on Generalized Estimates Of Low Probability Of Accidents In Justifying The Absence Of Offsite Emergency Preparedness

The licensing board justified the virtual absence of offsite preparedness at Diablo Canyon on generalized estimates of the low probability of accidents or risk during low power operations.[19/] In so doing, it violated the basic principle of our regulatory process that

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16/ See note 9 and accompanying text supra.

17/ See Joint Intervenors' Proposed Findings of Fact and Conclusions of Law, at 11-29

18/ Partial Initial Decision, at 23.

19/ See 42 U.S.C. §§2233(d), 2236(g), and 2237.

even events with a low probability of occurrence must be anticipated and prepared for, a principle particularly applicable to emergency response planning. Indeed, the Commission's emergency planning regulations are predicated upon the principle that "onsite conditions and actions, even if they do not cause significant off-site radiological consequences, will affect the way the various State and local entities react to protect the public from dangers, real or imagined, associated with [an] accident."[20/] Moreover, one of the critical lessons learned from TMI is that "[o]ne must do everything possible to prevent accidents of this seriousness, but at the same time assume that such an accident may occur and be prepared for response to the resulting emergency."[21/]

The board's reliance on estimates of low accident probability constitutes, in effect, an impermissible attack on the regulations themselves in that its purpose is to permit operation of the Diablo Canyon facility despite noncompliance with the regulations in question. Under the principle established in In the Matter of Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-138 RAI-73-7, 520, 528-29 (1973), such a ruling violates the Atomic Energy Act and must be reversed.

20/ Notice of Proposed Rulemaking, "Emergency Planning," Preamble, 44 Fed. Reg. 75167, 75169 (December 19, 1979)(emphasis added); "Report to Congress on Status of Emergency Response Planning for Nuclear Power Plants," NUREG-0775, at 1 (March 1981).

21/ Report of the President's Commission on the Accident at Three Mile Island, "The Need for Change: The Legacy of TMI" (Kemeny Commission Report), at 17.

4. The Licensing Board Erred in Ignoring The Conceded Failure Of Existing Emergency Plans To Consider The Effects Of An Earthquake

The evidence at the hearing was uncontradicted and all parties conceded that existing applicant, state, and local emergency plans fail to consider and allow for the effects of a major earthquake on the Hosgri fault occurring simultaneously with a radiological emergency at Diablo Canyon.[22/] Particularly in light of the Commission's appreciation of the greater seismic risk associated with nuclear plants in California and the continuing importance of seismic safety in this proceeding, this failure is a critical deficiency in emergency preparedness at Diablo Canyon.[23/]

In this case, the licensing board ignored the undisputed testimony that existing plans do not allow for the effects of earthquakes. Further, the board failed completely to give any reason for its apparent conclusion that this critical deficiency need not be corrected prior to issuance of a low power operating license. This failure to supply even a minimal explanation of its reasons for rejecting competent evidence on an issue of critical importance violates established Commission precedent. In the Matter of Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33 (1977).

22/ See Jorgensen, at 2; Sears, at 7; Sears Tr. 11060, 11283; Schiffer Tr. 10878-79.

23/ In the Matter of Southern California Edison Company (San Onofre Nuclear Generating Station, Units 2 and 3), Nos. 50-361-OL, (50-362-OL, Order (Raising on the Board's Motion an Issue Concerning Earthquakes and Emergency Planning), at 3 (July 29, 1981); see also, In The Matter of Southern California Edison Co (San Onofre Nuclear Power Generating Station), Memorandum and Order, at 2 (April 8, 1981).

5. Issuance Of A Low Power License Would Violate The National Environmental Policy Act ("NEPA")

Issuance of low power licenses by the licensing board would violate NEPA in two principal respects. First, the consequences of a Class 9 accident at Diablo Canyon have never been addressed by the applicant or by the Staff. Although the Commission had in the past excluded consideration of core melt accidents on the premise that their occurrence was of such low probability that neither NEPA nor the AEA required their consideration, the TMI accident destroyed that premise. In fact, on June 13, 1980, the Commission issued a "Statement of Interim Policy" requiring that environmental impact statements include consideration of Class 9 accident sequences.[24/] Notwithstanding this change of policy, the licensing board on June 19, 1981 -- over two years after the TMI accident -- rejected Joint Intervenors' right to litigate the absence of such consideration in this case.[25/]

Second, neither an EIS nor an environmental impact appraisal has been prepared to consider the special environmental effects of

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24/ The Commission's Interim Statement, entitled "Nuclear Plant Accident Consideration Under the National Environmental Policy Act of 1969" (45 Fed. Reg. 40101), provided that environmental impact statements:

> shall include coordination of the site-specific environmental impacts attributable to accident sequences that lead to releases of radiation and/or radioactive materials, including sequences that can result in inadequate cooling of reactor fuel and to melting of the reactor core.

The Commission characterized its former policy excluding consideration of Class 9 accidents as "erroneous." 45 Fed. Reg. at 40103.

25/ In the Matter of Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Memorandum and Order Denying Joint Intervenors Motion to Reopen Environmental Record for Consideration of Class Nine Accidents, LBP-81-___, ___ NRC ___ (June 19, 1981).

low power testing at Diablo Canyon. Because licensing of nuclear facilities constitutes major federal action within the meaning of NEPA, the preparation of an adequate EIS is a mandatory prerequisite to any decision by the Commission concerning a license application. The failure of the board to require either an EIS or an environmental impact appraisal violates the explicit requirement of 10 C.F.R. §51.5(b) and (c) that either an EIS or a negative declaration and environmental impact appraisal be prepared prior to "[i]ssuance of a license to operate a power reactor...at less than full power...." Failure to comply with this unambiguous requirement mandates denial of the requested licenses. 42 U.S.C. §§2233(d), 2236(a), and 2237; 10 C.F.R. §50.57(a) and (c).

6. Issuance Of A Low Power License Prior To Definitive Resolution Of Critical Safety Issues By The Commission Violates The Atomic Energy Act Of 1954 ("AEA") And Regulations Promulgated Thereunder

Currently pending before the Commission are various Petitions for Review of the recent Appeal Board decision regarding seismic safety at Diablo Canyon. Similar petitions will soon be filed concerning plant security. Both issues are uniquely important in this proceeding, involving novel questions never before presented to the Commission. Both are fundamental to the assurances of protection of the public health, safety, and security which are mandatory prerequisites to licensing under the AEA and the Commission's regulations. 42 U.S.C. §2233(d); 10 C.F.R. §50.57(a). As such, they bear directly on the "definitive safety finding" which both the United States Supreme Court and the Commission have required as a condition to issuance of any operating license under the AEA. Power Reactor Development Company

v. International Union of Electrical, Radio and Machine Workers, AFL-CIO, 367 U.S. 396, 398, 407-11, 81 S.Ct. 1529 (1961); In the Matter of Long Island Lighting Co. (Shoreham Nuclear Power Station), ALAB-196, 6 AEC 831, 844-45 (1973). Particularly in light of the unique importance of the seismic safety issue in this proceeding -- resulting from the confirmation, after construction had begun, of the existence of the Hosgri fault offshore and running within only a few miles of the plant -- no action should be taken which might materially alter the status quo or tip the balance away from concerns of safety so basic to the AEA.

B. Joint Intervenors Will Be Irreparably Injured In The Absence Of A Stay

If a license is issued for fuel loading and low power testing at Diablo Canyon, Joint Intervenors will be irreparably harmed in several significant respects. First, nuclear materials will for the first time be introduced into the reactors, thereby posing a risk not only of worker exposure but of contamination of the facility's components and systems. (Affidavit of Dale Bridenbaugh, attached). This irretrievable commitment of resources prejudices the Joint Intervenors' rights by committing this agency even further to issuing a full power license for the plant prior to final disposition of significant safety issues (particularly seismic). In addition, it tips the scale away from further plant modification, even though such modification may later be determined to be necessary.

Second, the conceded significant noncompliance of relevant emergency plans with the Commission's revised regulations poses a

danger that, in the event of an accident, the public will not be adequately prepared to respond. As discussed supra, the board improperly approved the license applications despite the virtual absence of offsite preparedness, in complete disregard of the TMI experience. Unless that approval is stayed, the plant will operate, thereby posing a significant risk of irreparable and permanent harm to Joint Intervenors and the public generally should an accident occur and the public be unable to respond.

Third, if low power operations are allowed to commence, Joint Intervenors will in effect be deprived of any right to appeal because the proposed low power test program will be completed before appellate review can be obtained. Irreparable harm of this sort -- the loss of a right to judicial review before the activity in dispute has been completed -- has been recognized by numerous courts in granting a stay 26/

Fourth, in the event the stay is denied and the licensing board is subsequently reversed on appeal, the costs of decontamination of the reactor would be substantial. In the absence of the most compelling reasons for testing, common sense dictates that it be deferred for the minimal time necessary to decide the merits of Joint Intervenors' appeal.

26/ See e.g., Isbrandtsen Co. v. United States, 211 F.2d 51, 55 (D.C. Cir.), cert. denied, 347 U.S. 990, 74 S.Ct. 852 (1954); Dalmo Sales Co. v. Tysons Corner Regional Shopping Center, 308 F.Supp 988 (D.D.C. 1970); Zenith Radio Corporation v. United States, 505 F.Supp. 216, 219 (U.S. Ct. Int. Trade 1980).

C. The Granting Of A Stay Will Do No Harm To Others

As the affidavit of Richard Hubbard indicates, the time necessary to complete the proposed low power test program is approximately 55 days. Diablo Canyon is currently scheduled to be licensed for full power in January 1982, assuming all issues are resolved favorably to PG&E. (The licensing board has admitted one contention -- emergency planning -- in the full power proceeding. Additional hearings and a decision favorable to PG&E must precede issuance of a full power license). Thus, PG&E will not be harmed by the brief delay necessary to hear the appeal on the merits. In the event a stay is issued, there would still be ample time to complete low power testing prior to the earliest possible date for full power licensing.

D. The Public Interest Favors A Stay

The public interest would be best served by granting of a stay in order to assure that operation of the plant will be safe and will comply with all applicable regulations. Further, a stay of the licensing board's decision would assure that the resolution of all pending issues, in both the low and full power proceedings, will not be prejudiced by the premature contamination of the reactor by radioactive material.

IV. CONCLUSION

For the reasons stated above, Joint Intervenors submit that each of the factors set forth at 10 C.F.R. §2.788(d) weighs heavily in favor of granting a stay. Accordingly, Joint Intervenors hereby tervenors hereby request this Appeal Board to stay the effectiveness of the licensing board's July 17, 1981 decision pending consideration and resolution of the merits of Joint Intervenors' appeal of that decision.

Dated: September (4) 10, 1981

Respectfully submitted,

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