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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

PACIFIC GAS AND ELECTRIC COMPANY

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

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Docket Nos. 50-275 O.L.
50-323 O.L.

NRC STAFF REPLY TO INTERVENORS'
MOTION TO ADD NEW CONTENTIONS

In a pleading dated September 7, 1976, Scenic Shoreline Preservation Conference, Inc., San Luis Obispo Mothers for Peace, Sandra Silver, Ecology Action Club and John J. Forster (Intervenors) moved that three additional contentions be added to the already existing environmental contentions to be heard on October 13, 1976. For the reasons stated below, the Nuclear Regulatory Commission Staff (Staff) opposes the addition of contention 1 as a safety question, agrees that contention 2 would be a proper contention for the safety hearing, and opposes the addition of contention 3 as an environmental contention.

I. Background

The Notice of Opportunity for Hearing in this case was published by the then Atomic Energy Commission on October 19, 1973 (38 Fed. Reg. 29105). That notice advised, inter alia, that, "any person whose interest may be affected by this proceeding may file a petition to

intervene with respect to the issuance of the facility operating licenses" by filing a petition to intervene setting forth, in accordance with 10 C.F.R. §2.714, that person's interest in the proceeding, how that interest may be affected by the results of the proceeding and the contentions of the party. Petitions to Intervene were to be filed by November 19, 1976. 38 Fed. Reg. 29106. Thus, Intervenors' instant attempt to raise additional contentions is almost three years late.

II. Good Cause Under 10 C.F.R. §2.714

For the Intervenors' three proposed additional contentions to be accepted by the Atomic Safety and Licensing Board at this late date, the Intervenors are required by 10 C.F.R. §2.714 to "make a substantial showing of good cause for failure to file on time."

Intervenors have advanced as a general justification for the submission of new contentions out of time the fact that counsel and funding have only recently been obtained. While the Staff is not persuaded on the basis of Intervenors' motion that these facts give rise to an adequate justification for a late filing of contentions, we think it unnecessary for the Board to decide that question since the proper disposition of each of the three proposed contentions turns upon more specific considerations.^{1/}

^{1/} In this regard, the Waterford case is cited by Intervenors for the proposition that recent retention of counsel by citizen intervenors constituted good cause for a grant of an extension of time. However, the facts of that case were concerned with allowing recently retained counsel the time needed to assimilate the facts of the case in order to prepare a brief for the appeal board. Showing of good cause for filing late contentions was not at issue.

III. Proposed Contention 1 ^{2/}

Intervenors' Proposed Additional Contention 1 is stated as follows:

1. Whether the Environmental Impact Statement adequately assesses all adverse environmental impacts that could occur from credible earthquake caused accidents, including, but not limited to, Class 9 accidents, given the high potential seismicity of the site and the current seismic design and construction of the Diablo Canyon nuclear plant.

Intervenors' first contention, which concerns the "adverse environmental impacts that could occur from earthquake caused accidents, including, but not limited to, Class 9 accidents," is, in effect, an effort to re-raise the same issues which were espoused in the Intervenors' August 4, 1976 Motion to Delay the Evidentiary Hearings. We recognize that the seismic situation does involve relatively new information for the Diablo Canyon Plant (and is still in a state of flux at this time). But as pointed out in the Staff "Answer to Intervenors' Motion to Delay Evidentiary Hearing" dated August 17, 1976, the issue of the environmental acceptability of a seismically-induced class 9 accident is without merit. If it were shown by the Intervenors that a substantial threat existed to the public health and safety at Diablo Canyon (and a seismically-induced class 9 accident

^{2/} Although Intervenors' Counsel has agreed in a telephone conference call among the Board, the Intervenor and Applicant that proposed contentions 1 and 2 will not be ripe until the safety hearing, the admissibility of those contentions is addressed in this pleading.

would be such a threat) the unsafe condition would be required to be remedied before this plant were licensed. In such circumstances, the additional step of assessment of the environmental effect of the accident would be a useless exercise.

While we believe the issue is a futile one, we would have no objection to the Board's denial of the motion without prejudice to the Intervenor's raising it again at the end of the safety hearings if: (1) it is shown that there is a credible or realistic probability of a seismically induced class nine accident at Diablo Canyon and (2) the Atomic Safety and Licensing Board decides that it will license the plant despite the fact that there could be a class 9 accident.

IV. Contention 2

Intervenor's proposed added contention 2 is stated as follows:

2. Whether the Environmental Impact Statement adequately considers the adverse environmental impacts of transporting nuclear fuel to and from the plant, storing fuel at the plant, reprocessing radioactive waste from the Diablo plant at reprocessing plants, and disposing of the radioactive waste from the Diablo Canyon plant, including, but not limited to, adverse environmental impacts produced by seismicity.

The NRC Staff does not oppose the admission of proposed contention number 2 as listed above. However, it should be understood that the bulk of the contention will be resolved by the Commission's generic hearings on the fuel cycle. 41 Fed. Reg. 34707. Thus, the only issue of relevance for the upcoming safety hearings will be the issue of the effect of seismicity on the local transportation of fuel to and from Diablo Canyon and storage of new and irradiated fuel at the Station.

V. Proposed Contention 3

Intervenors' proposed additional contention 3 is stated as follows:

3. Whether the Environmental Impact Statement adequately considers energy conservation and related reductions in energy demand and energy supply from alternate sources both as alternatives to operation of the Diablo Canyon nuclear plant and as elements of the NEPA cost-benefit balance.

The Staff opposes the addition of proposed contention 3 concerning energy conservation and alternative sources of power less than one month before the environmental hearings. At the outset, the Staff notes that the issue of energy conservation was raised and thoroughly litigated at the environmental hearing on Diablo Canyon, Unit 2, held pursuant to 10 C.F.R. Part 50, App. D, Section B in March of 1974.^{3/} At that environmental hearing, the issues of alternative energy sources, need for power, conservation of residential and commercial energy consumption (including energy taxes, inverted rate structure, improved efficiency of appliances, insulation and building design and utilization of waste heat), energy conservation in industry, revision of promotional practices, and revisions of utility rate bases and pricing of electricity were heard. In short, the issues of conservation and energy alternatives were thoroughly explored.^{4/}

^{3/} Scenic Shoreline Conference, Inc., Intervenor in this proceeding, was a party to that former proceeding. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Unit 2), LBP-74-60, 8 AEC 277, 278 (August 1, 1974). Scenic Shoreline

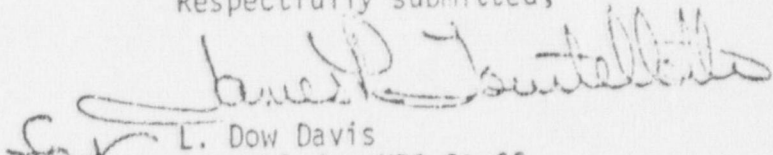
^{4/} Diablo Canyon, supra, 8 AEC 288-300.

Intervenors cite the Aeschliman^{5/} decision in support of their position. Neither the facts nor the law in Aeschliman support Intervenors' position. In fact, Aeschliman dictates that Intervenors' motion be denied. In Aeschliman the Court objected to the fact that the Board refused to entertain energy conservation contentions in an environmental hearing on an application for a construction permit. As noted, energy conservation issues were fully explored at the environmental hearings on the application for a construction permit for Diablo Canyon Unit 2, and Intervenors have not suggested any reason why the issues warrant re-examination at this time. In short, what has already occurred with respect to the instant facilities is precisely what the Court in Aeschliman stated should have occurred with respect to the Midland facilities.

Conclusion

For the reasons stated above, the NRC Staff asks that proposed additional contention 1 be denied, that proposed additional contention 2 be admitted as a contention in the safety hearing, and that proposed additional contention 3 be denied in its entirety.

Respectfully submitted,


for L. Dow Davis
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 20th day of September, 1976

^{5/} Aeschliman, et. al. v. NRC, Slip Op. No. 73-1776 (D. C. Cir., July 21, 1976).

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