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 Atomic Safety and Licensing Board Panel

SUBJECT: Views in support of applicant motion for low power license.
 Given opposition, ASLB must make finding as to whether
 opponent contentions are relevant to activity to be
 authorized. Certificate of Svc encl.

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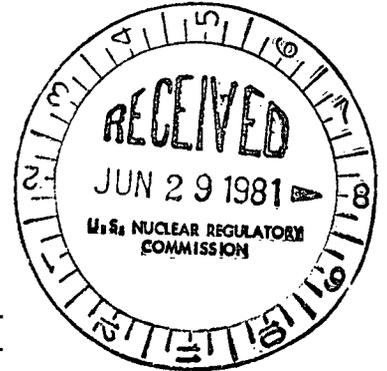
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June 26, 1981

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD



In the Matter of

SOUTHERN CALIFORNIA EDISON COMPANY,
ET AL.

(San Onofre Nuclear Generating
Station, Units 2 and 3)

Docket Nos. 50-361 OL
50-362 OL

NRC STAFF VIEWS WITH RESPECT TO ISSUANCE OF
A LOW-POWER LICENSE FOR SAN ONOFRE UNITS 2 AND 3

I. INTRODUCTION

At the prehearing conference held in this proceeding in San Diego, California, on June 18, 1981, hearing schedule with respect to the issue of emergency preparedness was an agenda item. The Applicants suggested that the hearing on emergency preparedness begin as soon after the close of seismic hearings, which are currently in session, as can be accommodated by the Board. The seismic hearings are tentatively scheduled to run through July 1981. The Staff indicated that in its view the case was sufficiently developed and discovery sufficiently complete that the Applicants' hearing request was a proper one. (Tr. 529-30.) The Staff further indicated that it would be in a position to contribute to the development of a record on the issue of emergency preparedness through the presentation of appropriate Federal Emergency Management Agency (FEMA) witnesses. (Tr. 514-15.) The Staff explained that the

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current FEMA findings and determinations^{1/} noted inadequacies in the implementation of emergency preparedness plans and that this view would be presented at any hearing to be held subject to any change in circumstances. (Tr. 516.) In any event, the Staff indicated it was prepared to provide for the record of any hearing held a safety evaluation report (SER) which would present FEMA's assessment of the state of emergency preparedness of off-site agencies and also the NRC Staff evaluation of on-site preparedness and overall preparedness. (Tr. 516.)

Given the FEMA findings of inadequate implementation of off-site emergency preparedness, and given representations by the Applicants that remedial measures dealing with at least some of the deficiencies noted by FEMA were being undertaken, the Board questioned the appropriateness of scheduling a hearing in such an evolving atmosphere. The Board suggested that a request for a low-power license by Applicants might be appropriate given the circumstances of the case, and the Board requested that the parties file with the Board written comments on the question of whether it is permissible to obtain a low-power license under 10 C.F.R. § 50.57(c) prior to a final determination by the Board on the adequacy of emergency preparedness. (Tr. 545.) The Staff's comments are provided below.

II. DISCUSSION

At the outset, the Staff would note that it continues of the view that the emergency preparedness issue has been sufficiently developed to

^{1/} See "Interim Findings and Determinations Relating to the Status of State and Local Emergency Preparedness for the San Onofre Nuclear Generating Station (Units 2 and 3)" dated June 3, 1981.

permit a meaningful hearing to be held. There has been a substantial opportunity for discovery in this area of which both Intervenor GUARD and Carstens, et al., have availed themselves. Formal discovery has been closed since February 20, 1981.^{2/} While Applicants are proposing to take remedial actions with respect to some of the deficiencies noted by FEMA, and consequently some new information will be injected into the case, this information is supplementary and hardly of such a nature as to give rise to additional discovery rights. To the extent that this information becomes a part of Applicants' case, it will be presented in testimony filed 15 days in advance of the hearing eliminating any claim to surprise and will be fully subject to cross-examination at the hearing. Discovery in this case has been substantial, and the issues are consequently well developed. All of FEMA's findings with respect to emergency preparedness have been provided to Intervenor, and in addition, the Intervenor had the benefit of an informal discovery session held in Anaheim, California, on June 15, 1981. Consequently, in the Staff's view, there is no meaningful obstacle to prevent scheduling of emergency preparedness hearings shortly following completion of the seismic hearings in this proceeding.

Turning to the Board's request for comments with respect to low-power licensing, the appropriate provision of the Commission's regulations is 10 C.F.R. § 50.57(c) which reads as follows:

^{2/} "Stipulation and Order Confirming Termination of Discovery on Issues in Contention and Supplementation of Answers to Prior Interrogatories."

An applicant may, in a case where hearing is held in connection with a pending proceeding under this section make a motion in writing, pursuant to this paragraph (c), for an operating license authorizing low-power testing (operation at not more than 1 percent of full power for the purpose of testing the facility), and further operations short of full power operation. Action on such a motion by the presiding officer shall be taken with due regard to the rights of the parties to the proceedings, including the right of any party to be heard to the extent that his contentions are relevant to the activity to be authorized. Prior to taking any action on such a motion which any party opposes, the presiding officer shall make findings on the matter specified in paragraph (a) of this section as to which there is a controversy, in the form of an initial decision with respect to the contested activity sought to be authorized. The Director of Nuclear Reactor Regulation will make findings on all other matters specified in paragraph (a) of this section. If no party opposes the motion, the presiding officer will issue an order pursuant to § 2.730(e) of this chapter, authorizing the Director of Nuclear Reactor Regulation to make appropriate findings on the matter specified in paragraph (a) of this section and to issue a license for the requested operation.

Given that the seismic hearing is currently in progress and that the record on that issue will be developed by the end of July 1981, it appears reasonable that the Licensing Board would be in a position to decide the seismic issue irrespective of any low-power considerations. While one could postulate an approach which would require discussion of the seismic issue in the context of low-power licensing, such an approach would be time consuming and would likely add confusion to an already complex seismic issue. Consequently, for purposes of further Staff comment, the Staff presumes that the Licensing Board would consider the seismic issue in the context of a full-power operating license and would reach a determination on the seismic issue expeditiously following the

close of the record and prior to its consideration of any motion with respect to low-power operation. This is the approach suggested by the Board. (Tr. 538-39.)

Thus, the only remaining issue presently before the Board in this case would involve the area of emergency preparedness. Both Intervenors GUARD and Carstens, et al., are pressing contentions in this area. However, it is not clear that the breadth of these contentions extends to low-power operation of the San Onofre Units 2 and 3. Clearly, if Intervenors GUARD and Carstens, et al., were agreed that their contentions in the area of emergency preparedness related solely to operation of the San Onofre Units 2 and 3 at substantial or full-power levels and did not relate to any low-power testing or operation which could be the subject of a potential motion from Applicants, there would be no opposition to the motion. And the Board, pursuant to § 50.57(c) would ". . . issue an order pursuant to § 2.730(e) of this chapter, authorizing the Director of Nuclear Reactor Regulation to make appropriate findings on the matters specified in paragraph (a) of this section and to issue a license for the requested operation."^{3/} In this

^{3/} Among the findings required of the Director is a finding that the activity authorized, in this instance low power operation, "...will be conducted in compliance with the regulations in this chapter." With respect to the emergency preparedness issue, the Director could find that the pertinent regulations, i.e., 10 C.F.R. § 50.47(b), have been met notwithstanding FEMA's interim findings of June 3, 1981. Or, if those regulations have not been fully complied with, the Director could still determine under 10 C.F.R. § 50.47(c)(1) that the deficiencies are not significant, or that adequate interim compensating actions have been or will be taken promptly, or that there are other compelling reasons to permit plant operation. Or the Director could exercise the exemption provisions of 10 C.F.R. § 50.12.

instance, there would be no issue before the Board and it must properly grant the motion.^{4/}

Should the motion be opposed, the Board is called upon under Section 50.57(c) to make at least one finding. The Board must consider the contentions of the opponent of the motion and must determine whether the ". . . contentions are relevant to the activity to be authorized." Such a finding may be simply arrived at by the Board in some instances. For example, if a contention is narrowly drawn and relates to only facility operation at full power, it would then on its face not be relevant to the activity to be authorized, namely, low-power operation. In other instances, a contention may be broad, and it may be difficult for the Board to discern from the language of the contention itself the question of relevancy. Should there be a dispute over relevancy, this would be a proper subject for hearing prior to any action by the Board with regard to disposition of the motion.^{5/} An alternative to a hearing on this question would be initiation by any party of summary disposition

^{4/} Virginia Electric and Power Company (North Anna Power Station, Units 2 and 3), LBP-77-64, 6 NRC 808, 813 (1977).

^{5/} In the Staff's view, questions of relevancy would almost always be factual in nature. Presuming the existence of a contention to be litigated in the context of full power operation of a facility, any arguments with respect to the relevancy of the contention to low power operation would involve factual determinations. With respect to the requirement for a hearing, see the Statement of Considerations accompanying the issuance of 10 C.F.R. § 50.57, 36 Fed. Reg. 8861 (May 14, 1971).

proceedings which would place papers before the Board in accordance with 10 C.F.R. § 2.749 upon which it could determine the issue provided the standard for summary disposition has been met, i.e., that there is no genuine issue to be heard at a hearing.

If the Board determines either as a result of either a hearing or as a result of summary disposition proceedings that the opponent of the motion has no contentions relevant to the activities to be authorized, the Board need make no additional findings and may grant the motion and issue an order to the Director of Nuclear Reactor Regulation as in the instance where the motion was unopposed, supra, p. 5.

On the other hand, if the Board determines that there are contentions relevant to the activity to be authorized, the Board must make additional findings prior to disposition of the motion under Section 50.57(c). Specifically, the Board must make findings on the matters specified in paragraph (a) of Section 50.57 ". . . as to which there is a controversy, in the form of an initial decision with respect to the contested activity sought to be authorized."^{6/} Again, either a hearing or summary disposition proceedings would be required to permit the opponents to be heard prior to an initial decision by the Board.^{7/}

^{6/} North Anna, supra, at 810.

^{7/} The "initial decision" referred to in Section 50.57(c) would determine only the issues with respect to low-power operation. Additional hearings or summary disposition proceedings would be required to finally determine the issues in the context of full power operation.

Turning to the application of these principles to the present case, there would first be required a determination by the Board as to whether or not off-site emergency preparedness was a relevant consideration for low-power operation. This very question is before the Licensing Board in the Diablo Canyon proceeding.^{8/} Off-site emergency preparedness in that proceeding was not as fully developed as in this proceeding as there had been no exercise in that case such as the one held with respect to San Onofre in May of 1981. Nonetheless, the Staff in that proceeding presented evidence to show that off-site emergency planning was not a relevant issue for low-power testing. The Staff's position was essentially that the risk of any off-site exposure requiring the operation of off-site emergency plans is extremely remote, and that due to this low risk, off-site planning is irrelevant for fuel load and low-power testing, which was the activity for which authorization was sought. Consequently, under 10 C.F.R. § 50.57(c), the Board may rule that no determination of the adequacy of emergency planning need be made by the Licensing Board, but rather, the low-power license may be issued by the Director of the Division of Nuclear Reactor Regulation upon making the findings called for under Section 50.57(a).

^{8/} Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Unit Nos. 1 and 2), Docket Nos. 50-275 OL, 50-323 OL.

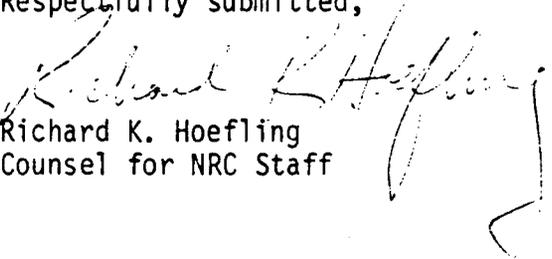
Should the Licensing Board determine that off-site emergency planning is relevant for low-power testing, then the question before the Board becomes compliance in this area with the Commission's regulations, specifically 10 C.F.R. § 50.47. Two approaches would be available to Applicants to meet their burden under their motion for a low-power license. First, the Applicants could urge that, irrespective of the findings of FEMA, they comply with the planning standards set forth in Section 50.47(b) of the Commission's regulations. Or, alternatively, the Applicants may argue under Section 50.47(c)(1) that, while they fail to meet the standards set forth in paragraph (b) of Section 50.47, nonetheless, the deficiencies are not significant for the plant in question, or adequate interim compensating actions have been or will be taken promptly, or that there are other compelling reasons to permit plant operation which in this context would be low-power operation.

III. CONCLUSION

Absent any opposition to a motion under 10 C.F.R. § 50.57(c), the motion should be granted by the Licensing Board. Given opposition to the motion, the Board must make a finding as to whether the opponents' contentions are relevant to the activity to be authorized. If the Board finds that the opponents' contentions are not relevant to the activity to be authorized, which finding is to be made based on a record developed either through a hearing or summary disposition proceedings, the Board

should grant the motion. If the Board determines that the opponents' contentions are relevant to the activity to be authorized, again a hearing or summary disposition proceedings would be required to enable the Board to make the further findings which are specified in paragraph (a) of Section 50.57 as to which there is a controversy with respect to the contested activity sought to be authorized.

Respectfully submitted,


Richard K. Hoefling
Counsel for NRC Staff

Dated at Bethesda, Maryland,
this 26th day of June, 1981.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
SOUTHERN CALIFORNIA EDISON COMPANY,) Docket Nos. 50-351 OL
 ET AL.) 50-362 OL
)
(San Onofre Nuclear Generating Station,)
 Units 2 and 3))

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF VIEWS WITH RESPECT TO ISSUANCE OF A LOW-POWER LICENSE FOR SAN ONOFRE UNITS 2 AND 3" 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 by deposit in the Nuclear Regulatory Commission's internal mail system, or as indicated by a double asterisk by special delivery service, this 26th day of June, 1981:

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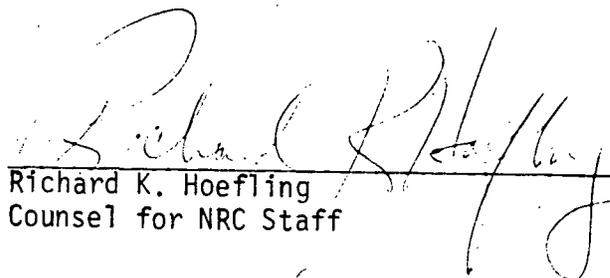
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