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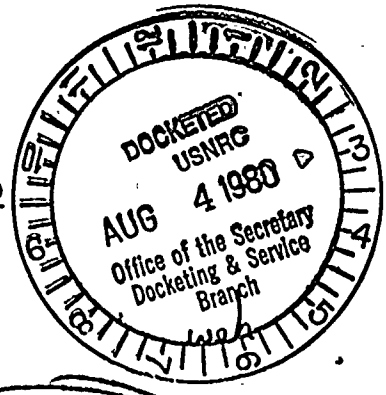
UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION



BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

ANSWER AND OPPOSITION OF GOVERNOR EDMUND G. BROWN, JR., TO MOTION OF PACIFIC GAS AND ELECTRIC COMPANY FOR LICENSES FOR FUEL LOADING AND LOW POWER TESTING

Governor Edmund G. Brown, Jr. hereby answers and opposes the motion of Pacific Gas and Electric Company ("PG&E") for licenses to load fuel and to perform low power testing. PG&E's motion should be dismissed and denied, purely as a matter of law, because the motion fails to comply with the NRC's mandatory procedural and substantive requirements for motions, as set forth in 10 C.F.R. §2.730(b). We demonstrate below that the motion is merely a conclusory assertion, devoid of the requisite content and evidentiary support. Under settled legal principles, these deficiencies render the motion fatally defective and subject to dismissal.

In particular, first, PG&E's motion ignores the explicit mandate of Section 2.730(b): (1) that a motion set forth "with particularity" the "relief sought" and the "grounds" therefor; and (2) that movants support their motion with "affidavits or other evidence." Second, these failings conclusively

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demonstrate that PG&E has not met its obligations to carry the burden of proof on its own motion, as mandated by Section 2.732. Third, PG&E does not even attempt to explain how the grant of its motion would satisfy the mandatory criteria of Sections 50.57(c) and (a).

Our opposition to PG&E's motion is not based on mere technicalities of pleading or procedure. The defects of PG&E's motion strike squarely at the substantive duty of a movant, here PG&E, to articulate the relief it requests, and more importantly, to notify the decisionmakers and the other participants of why it is entitled to that relief. In any contested proceeding, this requirement for clear notice is indispensable to fundamental fairness. In the instant proceeding, this requirement means even more, because it is highly questionable whether a low power test license should even be in issue before the Licensing Board while at the same time the most critical safety and security issues are open and at trial before the Appeal Board.

Under these circumstances, PG&E's motion must be denied out of hand. Only if there were a legally sufficient refiling by PG&E should the Governor and other participants in this proceeding be required to answer PG&E substantively. For the Board's convenience, a proposed Order denying PG&E's motion is attached to this Answer.

Content of PG&E's Motion

On July 16, 1980, PG&E moved pursuant to 10 C.F.R. §50.57(c) for licenses for fuel loading and low power testing. PG&E requests that the licenses be "substantially in the form

previously approved by the Nuclear Regulatory Commission (NRC) for other facilities", and that such licenses authorize fuel loading testing and operation at up to 5 percent of rated power. Motion, p. 1.

As purported grounds for its motion, PG&E "asserts" (p. 1) the following:

(1) That there are seven tests PG&E proposes to run (each described in an attachment), primarily designed to demonstrate that the plant can be cooled by natural circulation;

(2) That PG&E has complied with, or "prior to loading fuel will complay with" NUREG-0694 requirements;

(3) That the activities authorized by the requested licenses are "vital" to operator training, management organization, operating procedures and controls, and demonstration that NUREG-0694 requirements are met;

(4) That the authorized activities will provide meaningful technical information;

(5) That the authorized activities will not pose an undue risk to public health and safety, nor result in high risk of plant damage or high radiation levels in the plant; and

(6) That such licenses will advance the full-power operation dates of Units 1 and 2, thus accomplishing certain national and local energy objectives. Motion pp. 2-3.

PG&E accompanies the foregoing "assertions" with the Affidavit of Mr. James D. Shiffer, a PG&E nuclear engineer, who states, "[t]he information set forth [in the motion] is true and correct." Motion, Attachment B.

SECTIONS 2.730(b) AND 2.732 OF THE NRC'S REGULATIONS CONTROL DISPOSITION OF PG&E'S MOTION

The NRC's regulations mandate categorical requirements for motions:

> Unless made orally on the record during a hearing, or the presiding officer directs otherwise, a motion shall be in writing, shall state with particularity the grounds and the relief sought, and shall be accompanied by any affidavits or other evidence relied on, and, as appropriate, a proposed form of order. 10 C.F.R. §2.730(b) (emphasis supplied).

In the Indian Point case, the Commission strictly applied this regulation in conjunction with Section 2.732, which imposes the burden of proof on the moving party. Thus, the Commission sanctioned the summary dismissal of a motion that does not comply with the requirements of Section 2.730(b). In the Matter of Consolidated Edison Co. of New York (Indian Point Units 1, 2 and 3), CCH Nuc. Reg. Rptr. ¶¶30,120, 30,133.

In Indian Point, the applicant had previously been granted a low power test license, subject to certain license conditions. One condition required the utility to install an expanded monitoring system and to submit the monitoring results within a specific time. Pursuant to Section 2.730, the licensee moved to postpone imposition of the monitoring condition, questioning its validity, effectiveness, and legality. The primary grounds for the licensee's motion were that the condition "may be either mooted, modified, or superseded by the final decision in [the] proceeding." Id. ¶30,120, at 27,707-08.

In noting that the licensee proffered no evidence in support of its motion, the Appeal Board found that the licensee failed to meet its burden of proof and, accordingly, that the motion could be denied "out of hand." Id. at 27,708. Over the vigorous dissent of one ALAB member,[1] however, the Indian Point Appeal Board did not deny the licensee's motion. Instead, the majority of the Board identified "other reasons" that justified the Board in taking a more lenient course of action.

On review, the Commission rebuked the Board for taking that course.[2] First, the Commission cited the moving party's unqualified obligations:

> The moving party, here the licensee, has the burden of proving that its motion should be granted. 10 CFR §2.732. Since the licensee failed to provide information tending to show that the allegations in support of its motion were true, it failed to carry its burden, whatever the appropriate quantum of proof may be. In the Matter of Consolidated Edison Co. of New York (Indian Point Units 1, 2 and 3), CCH Nuc. Reg. Rptr. ¶30,133 (NRC 1977).

Then, the Commission found that the Appeal Board had erred in considering the legally defective motion on the merits.

> The Commission is sensitive to the concerns expressed by the dissenter here. We have previously recognized the "public interest in the timely and orderly conduct in the

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1/ The dissenter protested granting the licensee any relief because of the licensee's failure to meet its burden of proof. The dissenter was particularly concerned that the licensee had barely addressed the NRC's applicable criteria for the grant of a stay of a license condition.

2/ For reasons not here pertinent, the Commission chose not to reverse the Appeal Board. But, the Commission, in no uncertain terms, instructed "future boards" to adhere strictly to the requirements for motions. Id. ¶30,133.

> proceedings." . . . We observe here that the Commission's adjudicatory system requires a certain discipline to keep it operating efficiently. It assumes that parties will assert their own interests in a timely fashion with adequate support, and that they will live with the costs of their burdens. As we view it, the majority's decision represents a departure from these basic assumptions. Id. (emphasis supplied).

The Commission's Indian Point decision is legally dispositive of PG&E's motion. Thus, it is settled that:

(1) The movant, PG&E, has the burden of proof;

(2) To meet that burden, PG&E must set forth with precision the relief it seeks and must provide information tending to show:

(a) that the allegations in support of the motion are grounded on evidence; and

(b) that the controlling regulatory criteria are satisfied; and

(3) If PG&E fails to meet the foregoing burden of proof, the motion should be denied out of hand.

The Commission's conclusive "guidance . . . to future boards" in Indian Point dictates that this Licensing Board summarily dismiss PG&E's motion. As demonstrated below, any other decision would be "a departure from basic assumptions" no less serious than the Appeal Board's improper action in Indian Point.[3/]

3/ Federal court decisions supply further support for summary dismissal of PG&E's motion, because Section 2.730(b) is similar to Rule 7(b) of the Federal Rules of Civil Procedure. See In the Matter of Union Elect. Co. (Callaway Plants, Units 1 and 2), CCH Nuc. Reg. Rptr. ¶30,102.01 (ALAB 347) (Appeal Board may look to Rule 7(b) cases in construing Section 2.730). Under the Federal Rules, courts often have dismissed

(continued on page 7)

PG&E'S MOTION DOES NOT SATISFY THE REQUIREMENTS OF SECTIONS 2.730(b) AND 2.732

The Motion Lacks Required Content. To begin, PG&E's motion does not state with particularity the specific relief that PG&E seeks, as required by Section 2.730(b). Instead, while stating its desire to load fuel and to perform low power tests, PG&E requests a license "substantially in the form previously approved by the Nuclear Regulatory Commission (NRC) for other facilities." This ambiguously phrased prayer for relief raises questions and uncertainties; it does not resolve them. For example, first, what does "substantially in the form" mean in reference to an NRC license? In what ways does PG&E's language "substantially in the form" imply necessary differences which PG&E contemplates but does not specify to this Board and to other participants?

Second, what does "previously approved by the NRC" mean? Is "previously" the period from the establishment of the NRC in 1975 through the date of the Three Mile Island ("TMI") accident? Or, is it the period since TMI? Does PG&E ask this Board to look to low power test licenses "previously" issued by the NRC's predecessor, the Atomic Energy Commission?

Finally, what does PG&E mean by "other facilities?" Which

3/ (continued from page 6)

motions which have failed to satisfy the requirements of Rule 7(b). See United States v. 64.88 Acres of Land, 25 F.R.D. 88 (E.D. Pa. 1960); United States v. Krasnov, 143 F. Supp. 184 (E.D. Pa. 1956), aff'd, 355 U.S. 5 (1957); Bartholomew v. Port, 309 F. Supp. 1340 (E.D. Wisc. 1970); Stinebower v. Scala, 331 F.2d 366 (7th Cir. 1967). See also Municipal Light Boards v. Federal Power Commission, 450 F.2d 1341 (D.C. Cir. 1971), cert. denied, 405 U.S. 989 (1972); North Central Truck Lines, Inc. v. Interstate Commerce Commission, 559 F.2d 802, 804-805 (D.C. Cir. 1977)

other facilities have received licenses that PG&E wishes this Board to replicate "substantially?" Were the licenses for these facilities granted in uncontested proceedings? Were these other facilities granted licenses when major safety and security issues were then at trial?

None of the foregoing central questions, which PG&E itself raises with its ambiguously phrased motion, are even addressed by PG&E. The inescapable fact is that PG&E's motion fails, profoundly, to inform anyone -- particularly this Board and the participants -- of precisely what PG&E requests. This violates Section 2.730(b), which plainly is designed to ensure that participants will be apprised of the movant's position so that issues can be circumscribed and meaningfully debated.

The Affidavit Contains No Evidence. Perhaps even more serious than PG&E's foregoing violation of NRC Regulations is PG&E's failure to provide evidence or other probative information tending to show that its motion should be granted, as required by Sections 2.730(b) and 2.732. The only purported information proffered by PG&E is the affidavit of Mr. Shiffer, which was appended to PG&E's motion.

Mr. Shiffer's affidavit is of no probative value under the present circumstances, because the affidavit lacks content. Section 2.730(b) requires an "affidavit or other evidence." This regulation obviously, under the rule of ejusdem generis, mandates that PG&E submit substantive evidence. The regulation calls for probative information, not conclusory assertions and a pro forma affidavit.

On analysis, Mr. Shiffer's affidavit merely begs the question. The affiant swears that "[t]he information set forth [in the motion] is true and correct." But there is no probative information in the motion, which instead merely makes general, conclusory assertions and then cites Mr. Shiffer's affidavit as "further support." Thus, PG&E's motion, which contains none of the evidence required by Section 2.730(b), directs this Board to the affidavit which similarly contains no evidence. The result is an exercise in circuitry, barren of substance and in disregard of Section 2.730(b).

Finally, PG&E's motion does not substantively address the criteria of Section 50.57(a), which must be satisfied before a low power test license may be issued. At a minimum, of course, no low power test license could be issued absent a finding, based on evidence, that the authorized activities would not be inimical to the public health and safety and to the common defense and security.

With respect to the first criterion, PG&E merely asserts that a license under Section 50.57(c) would not be inimical to the public health and safety. Again, no evidence is cited. PG&E's bold assertion is suspect at best, coming only weeks after the Appeal Board reopened the record on the seismic issue to consider the regulatory impact of the Imperial Valley earthquake. Indeed, the Appeal Board stated, ". . . the [Imperial Valley earthquake] data does raise factual issues bearing on the safety of the plant and their resolution might lead us to a different result than the one the Licensing Board reached." (ALAB-598, p. 9. Emphasis

supplied.) Moreover, counsel for PG&E and all other parties were present at the June 23, 1980, meeting in San Luis Obispo between the NRC staff and PG&E's staff, when an elected official of San Luis Obispo County explained at length that the county's radiological emergency plan is totally inadequate.

With respect to the common defense and security criterion, PG&E does not even assert that the regulatory requirements would be met. We submit that there is good reason for this omission, because such a finding could not possibly be made, given that the Appeal Board "vacated" the Licensing Board's earlier findings on PG&E's security plan (ALAB-580) and that the de novo hearing on the security plan issue is pending before the Appeal Board. Indeed, the Appeal Board stated: "our concerns about the Diablo Canyon security plan are sufficiently numerous that the question of its adequacy merits consideration de novo." ALAB-580, CCH Nuc. Reg. Reptr. ¶30,451 at 29,282.

In sum, there is no basis upon which this Board could legally grant PG&E's motion. We suggest, further, that it may be inappropriate for a low power test license even to be considered in this proceeding. Indeed, we submit that it would be prudent for PG&E to defer low power testing until after it has in hand a full-power operating license, should such a

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license be forthcoming.[4/]

For the foregoing reasons, we request that this Board summarily dismiss and deny PG&E's motion.

Respectfully submitted,

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August 4, 1980

4/ In the event that PG&E refiles its motion, we shall, of course, carefully assess our response thereto. We would expect, however, to contest the grant of such a motion on grounds including those related to the security plan, seismic design, emergency planning, and compliance with post-TMI requirements. If this Board were to rule that PG&E's motion complies with Sections 2.730(b) and 2.732 -- and we strongly contend that it does not -- we request a 30-day period in which to prepare a substantive response to PG&E's motion. Such time would be needed to formulate complete replies to the ambiguous assertions contained in PG&E's motion.

ORDER DISMISSING MOTION FOR FUEL LOADING

AND LOW POWER TEST LICENSES

Upon consideration of PG&E's motion for the licensing of fuel loading and low-power testing and the responses thereto, and finding that PG&E has failed to state with particularity the relief it seeks or to provide probative evidence in support of the motion, as required by 10 C.F.R. Section 2.730(b), and finding futher that PG&E has failed to meet its burden of proof, as required by 10 C.F.R. Section 2.732, it is this _____ day of _____, 1980

ORDERED, that PG&E's motion be and the same is hereby denied.

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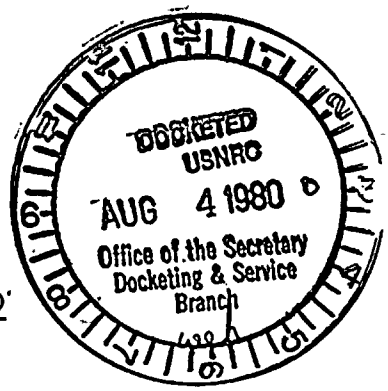
Atomic Safety and Licensing Board



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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the "ANSWER AND OPPOSITION OF GOVERNOR EDMUND G. BROWN, JR., TO MOTION OF PACIFIC GAS AND ELECTRIC COMPANY FOR LICENSES FOR FUEL LOADING AND LOW POWER TESTING" dated August 4, 1980, in the above-captioned proceeding, have been served on the following, by deposit in the United States mail, first class, this 4th day of August, 1980.

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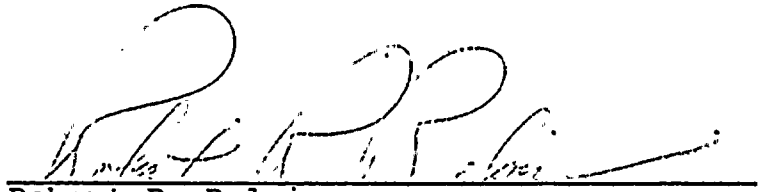

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