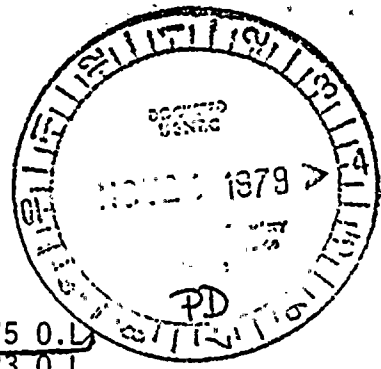


11/21/79

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION



In the Matter of)
)
PACIFIC GAS AND ELECTRIC COMPANY)
(Diablo Canyon Nuclear Power Plant)
Unit Nos. 1 and 2)

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

NRC STAFF RESPONSE TO APPLICANT'S MOTION
FOR OPERATING LICENSE ISSUANCE

I. Background

On October 26, 1979, Pacific Gas and Electric Company (PG&E or Applicant) moved the Commission to direct the Atomic Safety and Licensing Board assigned to this proceeding to "issue a partial initial decision covering the remaining issues ripe for decision" in this case and to "authorize the Director of the Office of Nuclear Reactor Regulation to issue an operating license for Unit 1 at the Diablo Canyon site." Applicant's Motion at 1.^{1/} Because of what the Applicant sees as a power shortage in California in the summer of 1980, and thus a critical need for Diablo Canyon Unit 1, it urges the Commission to entertain any TMI-related matters on a generic basis without a hearing

^{1/} It is unclear to the Staff as to the authority in the Commission's regulations for the Applicant's Motion since it is not an appeal of a licensing or appeal board ruling under the provisions of 10 C.F.R. §§2.730(f), 2.762 or §2.786, nor a certification of a matter by any Board to the Commission pursuant to §§2.718(i) or 2.785(d). In addition, the Applicants have not pointed to any erroneous decision or action by either the Licensing or Appeal Board "with respect to an important question of fact, law or policy." 10 C.F.R. §2.786(b)(i). For this reason, the NRC Staff believes that the instant motion falls within the prohibition described in 10 C.F.R. §2.786(b)(9), which reads: "except as provided in this section and §2.788, no petition or other request for Commission review of a decision or action of an Atomic Safety and Licensing Board will be entertained."

in this case. Alternatively, in the event the Commission decides that TMI hearings should be held in Diablo Canyon, PG&E has asked that those proceedings be held after the operating license for Unit 1 has been issued.^{2/} Applicant's Motion at 6-7.

For the reasons discussed below, the NRC Staff believes that the Applicant's Motion for an Operating License should be denied in all respects.^{3/}

II. Discussion

A. Procedural Posture of the Case

The hearings in this operating license proceeding ended in February of 1979^{4/}; seismicity was the last safety issue to be heard. Prior to the issuance of a

^{2/} Applicant's Motion at 6 cites the Commission's June 21, 1979 Order in Rancho Seco as precedent for permitting plants to begin operation prior to holding a hearing. The Staff disagrees with that interpretation since the Order in Rancho Seco allowed an operating license holder to resume operation after an enforcement action and thus was not concerned with the findings required by 10 C.F.R. 550.57 for an initial operation license.

^{3/} The Applicant's Motion also seeks to have the Commission order that if individual hearings on TMI are required for Diablo Canyon, those hearings be held without the reissuance of notice of opportunity for hearing and the extensive discovery recommended by the intervenors in their September 13, 1979 letter to the Commission. The Staff believes that under the provisions of 10 C.F.R. 52.718, the matter of notice, scheduling and discovery is one which should, in the first instance, be decided by the Licensing Board under its powers to regulate the course of the hearing and the conduct of the participants, e.g. Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-196, 7 AEC 457, 461 (1974), and for this reason, the Commission need not rule on the merits of these issues at this time.

^{4/} The environmental PID was issued in this case on June 12, 1978. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-78-19, 7 NRC 989 (1978). On September 27, 1979, the Licensing Board issued a PID covering all seismic and other remaining safety issues except for the emergency plan, the River Bend generic safety or Task Action Plan material, quality assurance and the Table S-3 or radon issue. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-79-___, 9 NRC ___, slip op. at 2 (1979).

decision by the Licensing Board in this case--but subsequent to the accident at the Three Mile Island facility--the Joint Intervenors filed a Motion^{5/} on May 9, 1979 requesting the Licensing Board to reopen the evidentiary hearings in this proceeding on the issue of the adequacy of emergency response planning at Diablo Canyon and to require the Staff to supplement the FES on the environmental consequences of a Class 9 accident, or in the alternative, to certify certain questions to the Commission on these issues.

At the suggestion of the Staff, the Licensing Board in its June 15, 1979 Order ruled that it would defer its ruling on the Joint Intervenors' Motion to Reopen or Certify pending a review by the Staff on the effect of the TMI accident on the Diablo Canyon proceeding. Following this Order, the Staff completed its initial review of the TMI-2 accident, and in July of this year the TMI-2 Lessons Learned Task Force issued a status report and its short-term recommendations.^{6/} The report set forth a number of actions in the areas of design, analysis and plant operation which the Task Force recommended be required in the short term to provide substantial additional protection for the public health and safety. Ibid. The Applicant in this case then filed a report with the NRC setting forth its commitment to comply with the recommendations of the TMI-2 Lessons Learned Task Force.^{7/} The Staff is now in the

^{5/} Intervenor's May 9, 1979, Request to Reopen the Record as supplemented by filings submitted on May 10, 16, and 17, 1979.

^{6/} TMI-2 Lessons Learned Task Force Status Report and Short-Term Recommendations, NUREG-0578 (July 1979).

^{7/} Applicant's October 26, 1979 Motion at 4.



process of reviewing that submission and will publish the results of its review in an SER supplement.

In October of this year the Staff issued the Final Report of its TMI-2 Lessons Learned Task Force setting forth suggested changes in several fundamental aspects of the basic safety policy for nuclear power plants.^{8/} Shortly thereafter the President's Commission issued its report on the accident at Three Mile Island which contained the findings of the Commission regarding the accident and its specific recommendations. The Staff is currently reviewing and evaluating these recommendations.

B. The Present Record

The Staff has a duty to assure that the record is complete and accurate, and to determine whether the present record should be modified, changed or supplemented in any areas.^{9/} Under the Atomic Energy Act of 1954, as amended, and the Commission's regulations, no operating license may be issued absent reasonable assurance that "the activities authorized by the operating license can be conducted without endangering the health and safety of the public * * * [and that] [t]he issuance of the license will not be inimical to the common defense and security or to the health and safety of the public." 10 C.F.R §50.57.

^{8/} TMI-2 Lessons Learned Task Force Final Report, NUREG-0585 (October 1979).

^{9/} Duke Power Company (McGuire Nuclear Station, Units 1 and 2), ALAB-143, 6 AEC 623, 625 (1973).



To date, the Staff has not completed its review of the record in the Diablo Canyon proceeding in the light of the lessons learned from TMI-2. Until such review is completed, the Staff will not be prepared to represent to the Commission or the Licensing Board that the pre-TMI record in this case is legally and factually sufficient. Nor is the Staff now prepared to state whether there exist any facts which would compel a "different result" on any of the issues previously considered by the Board and thus whether the record in this proceeding should be reopened and further hearings held. Kansas City Gas and Electric Co. (Wolf Creek Generating Station, Unit 2), ALAB-462, 7 NRC 320, 337-339 (1978).^{10/}

Accordingly, until a full review of the record in the Diablo Canyon case is completed in light of the TMI experience, it is the Staff's view that the

^{10/} The effects of the lessons learned reports on the Staff's Task Action Plan testimony submitted on February 13, 1979 are also deemed to warrant closer scrutiny in light of TMI. The items in question are Task Action Plans A-9 (ATWS) and A-17 (System Interactions). While investigation of such matters as the interaction of safety and non-safety systems is already under way, the Staff is unable to state that there has been compliance with the requirements of Gulf States Utilities Co. (River Bend Units 1 and 2), ALAB-444, 6 NRC 760 (1977). Applicants incorrectly cite this case for the proposition that generic TMI hearings can be held after the issuance of an OL in this case. Applicant's Motion at 3 and 6. However, as the Appeal Board made clear in that case, "unresolved issues cannot be resolved in individual licensing proceedings simply because they have generic applicability" but rather require, before licensing, (1) a description of the safety problem and its relationship to the plant under study; (2) an explanation of the program for the solution of the problem; and (3) a rational basis for the licensing or continued operation of the reactor under consideration despite the problem. Gulf States Utilities, supra, 6 NRC at 775.



pending motion urging issuance of an operating license in this proceeding is clearly premature.

The Commission has expressly observed that while "the Staff is authorized to proceed with licensing review and present evidence on the implications of the [TMI] accident," it is "free to conclude on a case-by-case basis that further consideration is required before it is prepared to speak to a particular issue or in a particular proceeding" and that it may "appropriately communicate any such conclusion to the Commission's adjudicatory boards."^{11/} For the reasons discussed above, the Staff believes that the present case presents just such a circumstance, and that pending further review of the Diablo Canyon record by the Staff, the present motion should be denied in all respects.

C. Appeal Board and Commission Review

In addition to an unfinished Staff review and an incomplete record, yet another substantive reason exists why an Initial Decision and Operating License cannot be issued at this point in the Diablo Canyon proceeding. In the Interim Policy Statement issued on October 10, 1979, the Commission expressly states that while licensing hearings might proceed in individual cases pending the promulgation of final licensing procedures, ". . . operating licenses for any nuclear power reactor [would] be issued only after action

^{11/} Interim Statement of Policy and Procedure, 44 Fed. Reg. 58559 (October 10, 1979).




of the Commission itself."^{12/} The need for that review was further elaborated upon by the Commission when it stated that the immediately effective rule contained in 10 C.F.R. §2.764 would be suspended pending appellate review of the record in individual licensing cases by both the Appeal Board and the Commission. NRC Policy Statement on Modified Adjudicatory Procedures in Domestic Licensing Proceedings, 44 Fed. Reg. 65049 (November 9, 1979). In the present proceeding neither the Appeal Board nor the Commission has conducted the requisite review of the record in the Diablo Canyon case, and absent such review no license should issue.

III. Conclusion

For the foregoing reasons, the NRC Staff believes that Applicant's Motion to Authorize the Issuance of an Operating License in this case should be denied for lack of a complete record on how the accident at Three Mile Island will affect the design and operation of the Diablo Canyon facility. In addition, the Motion must fail because the case has not yet been reviewed by the Appeal Board and Commission in accordance with announced licensing policies.

Respectfully submitted,


L. Dow Davis
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 21st day of November, 1979

^{12/} Interim Statement of Policy and Procedure, 44 Fed. Reg. 58559 (October 10, 1979).



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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO APPLICANT'S MOTION FOR OPERATING LICENSE ISSUANCE", dated November 21, 1979, 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 21st day of November, 1979.

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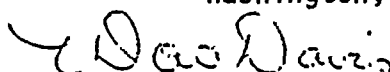
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