

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

8-6-80

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 PG&E'S REQUEST FOR LOW POWER TEST  
LICENSE AND COMMENTS ON INTERVENORS' MOTION TO REOPEN  
RECORD ON CLASS-9 AND EMERGENCY PLANNING ISSUES

I. Introduction

On December 23, 1975, the Atomic Safety and Licensing Board (Licensing Board) denied the Joint Intervenors' <sup>1/</sup> Motion that nuclear fuel assemblies not be shipped through San Luis Obispo County, thus disposing of the contention that unirradiated fuel could not be shipped to Diablo Canyon without unreasonable risk to the health and safety of the public. <sup>2/</sup> Later in 1978, the Licensing Board issued its Partial Initial Decision disposing of all

1/ Joint Intervenors are Scenic Shoreline Preservation Conference, Inc., San Luis Obispo Mothers for Peace, Sandra Silver, Ecology Action Club and John J. Forster. The motion had been made by the Mothers for Peace and John J. Forster.

2/ Unreported Licensing Board Order Relative to Motions from San Luis Obispo Mothers for Peace and John J. Forster, Pertaining to Special Nuclear Fuel dated December 23, 1975 at 12; upheld in Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-334, 3 NRC 809 (June 22, 1976).

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contested environmental issues.<sup>3/</sup> Following safety hearings held in 1977 on non-seismic issues and in December of 1978 and January through February 1979 on Intervenor's seven seismic contentions, the Licensing Board in September of 1979 issued its Partial Initial Decision on certain of the safety issues raised in this proceeding.<sup>4/</sup>

In its decision, the Licensing Board addressed and resolved the Intervenor's seven seismic contentions, those contentions dealing with the potential for aircraft or missile crashes into the Plant and the contention which questioned the adequacy of the Diablo Canyon security plan.<sup>5/</sup> On May 9, 1979 Joint Intervenor's moved to reopen the record in this proceeding on "Class 9" and

3/ Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-78-19, 7 NRC 989 (June 12, 1978).

4/ Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-79-26, 10 NRC 453 (September 26, 1979) (PID). The issues of security and seismicity are pending before the Appeal Board. See Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-580, 11 NRC 227 (February 15, 1980) (security) and Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC \_\_\_\_ (slip op. dated June 24, 1980) (seismic).

5/ In its opinion the Licensing Board further stated that "[t]he record was closed at the end of the seismic hearing except for the generic safety issues and Table S-3 issues...." PID. at 459. Specifically, the Board stated that "[i]n the non-seismic issues hearing on October 18 and 19, 1977, four issues were heard: the Emergency Plan, Quality Assurance, Table S-3, and the probability and possible effect on Class I structures from aircraft and missile accidents. It is not now known how the lessons learned from Three Mile Island-2 will impact on the Emergency Plan or Quality Assurance so these matters will be deferred and are not a part of this Partial Initial Decision. The testimony on Table S-3 was updated as a separate matter at the conclusion of the seismic hearing but is now deferred due to ALAB-562. The only testimony from this segment of the proceeding holding firm is that concerning aircraft and missile accidents." Ibid.



emergency planning issues. In an Order dated June 5, 1979 the Atomic Safety and Licensing Board (Licensing Board) deferred ruling on Joint Intervenors' Motion until it received the Staff's report on the effects of the Three Mile Island accident on the Diablo Canyon operating license application. On June 20, 1980 the Nuclear Regulatory Commission issued a "Statement of Policy for Further Commission Guidance for Power Reactor Operating Licenses" (hereinafter, Policy Statement)<sup>6/</sup> which referenced, inter alia, all of the requirements for applicants seeking authorization to load fuel and conduct low power testing. These requirements were set forth in NUREG-0694, entitled "TMI-Related Requirements for New Operating License" (June, 1980).

On July 14, 1980, the Applicant requested that this Board authorize fuel loading and low power testing pursuant to 10 C.F.R. § 50.57(c) and the Commission's Policy Statement.<sup>7/</sup> Pursuant to this application, the NRC Staff has issued the enclosed SER Supplement Number 10 which addresses the status of Applicant's compliance with NUREG-0694. The SER Supplement indicates that certain of the low power test items will require further information prior to final resolution; however, the NRC Staff believes that the application is substantially completed and that therefore the Board and the parties should begin the process of examining the adequacy of the Applicant's low power test proposal.

<sup>6/</sup> 45 Fed. Reg. 41738 (June 20, 1980).

<sup>7/</sup> Motion of Applicant Pacific Gas and Electric Company for Licenses for Fuel Loading and Low Power Testing dated July 14, 1980.



## II. Discussion

### A. The Appropriateness of the Application Under 10 C.F.R. § 50.57(c)

Applicant's motion for a fuel loading and low power testing license is made pursuant to 10 C.F.R. §50.57(c). That regulation provides that such a motion shall be acted upon:

"...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."

and that:

"...If no party opposes the motion, the presiding officer will issue an order pursuant to §2.730(e)...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."

The Commission and its Boards have long recognized the validity of a motion filed pursuant to 10 C.F.R. § 50.57(c).<sup>8/</sup> In Maine Yankee<sup>9/</sup> the Commission had occasion to consider a situation analogous to the instant case. The Maine Yankee Applicant was in the process of seeking a full term operating license when an intervening event (passage of the National Environmental Policy Act) resulted in a delay of those proceedings. Pending implementation of NEPA in the form of Appendix D to Part 50, the then Atomic Energy

<sup>8/</sup> Maine Yankee Atomic Power Company (Maine Yankee), CLI-72-22, 5 AEC 2 (1972); Consolidated Edison Company of New York, Inc. (Indian Point, Unit 2), ALAB-142, 6 AEC 587 (1973); but cf. Northern States Power Co. (Prairie Island Units 1 and 2), LBP-77-33, 5 NRC 1267 (1977). See also Virginia Electric Power Company, LBP-77-64, 6 NRC 808, 810 (Nov. 26, 1977).

<sup>9/</sup> Maine Yankee, Id.





Commission subsequently issued a supplementary notice setting forth additional matters for licensing boards to consider pursuant to NEPA but also providing for the consideration of requests for interim low power licenses pursuant to 10 C.F.R. 50.57(c). In the Maine Yankee decision, supra, the Commission upheld the Board's decision authorizing interim operation pursuant to § 50.57(c).

Moreover, the issuance of a low power test license has been upheld in contested proceedings. On a motion by an applicant similar to the one at bar for authorization for limited operation pursuant to 10 C.F.R. § 50.57(c), the Appeal Board in Indian Point, supra, noted that while the presence or absence of a stipulation disposing of controverted issues is significant concerning "...whether there are issues relating to the requested authority which must be adjudicated by the Licensing Board before operation at any power is authorized" the presence or absence of a stipulation "has no bearing at all on the level of testing operations which can be authorized under section 50.57(c), assuming all of its requirements are satisfied."<sup>10/</sup>

Here, the Licensing Board has already rendered a favorable decision on the "contested issues" defined in Section 50.57(c) except for those expressly reserved for later resolution.<sup>11/</sup> Thus, if the Applicant's motion is not

<sup>10/</sup> Indian Point, Id. at 589, n. 14.

<sup>11/</sup> Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2) LBP-79-26, 10 NRC 435 (Sept. 26, 1979). See note 5 infra at page 2 of this Brief.



opposed, this Board should resolve those necessary issues expressly reserved and issue an order pursuant to 10 C.F.R. § 2.730(e) authorizing the Director of Nuclear Reactor Regulation to make the required findings on both the requirements contained in Section 50.57 and the requirements identified in NUREG-0694. However, as noted above, the regulation also provides a right to any party to be heard to the extent that such a party has contentions relevant to the activity for which authorization is sought. Consequently, if the motion is opposed, it would be necessary for the Licensing Board to consider the effects, if any, of the Commission's Policy Statement and Joint Intervenors' Motion to Reopen<sup>12/</sup> in order to determine whether Applicant's present § 50.57(c) motion should be granted.

B. The Commission's Policy Statement

In regard to the possible issues under discussion in a low power test license proceeding, the Commission's Policy Statement indicates that "...the Commission has concluded that the ... list of TMI-related requirements for new operating licenses found in NUREG-0694 is necessary and sufficient for responding to the TMI-2 accident." NUREG-0694, entitled "Requirements for New Operating Licenses", sets forth, inter alia, the Commission-approved list of requirements to be completed by a license applicant prior to fuel loading and receipt of a low power testing license. 45 Fed. Reg. at 41739. Each of the requirements listed in NUREG-0694 which need be met before a low power test license can be issued are addressed by the NRC Staff in the

<sup>12/</sup> A discussion of the significance of the issues on appeal is contained at page 10 of this brief.



enclosed low power testing Safety Evaluation Report Supplement Number 10. The Policy Statement further provides that "The Commission believes the TMI-related operating license requirements list ... must be the principal basis for consideration of TMI-related issues in the adjudicatory process."

With regard to proceedings, such as Diablo, where the time for filing contentions has expired, the Policy Statement provides that "...[N]o new TMI-related contentions should be accepted absent a showing of good cause and balancing of the factors in 10 C.F.R. 2.714(a)(1)." Thus, reading the provisions of Section 50.57(c) in conjunction with the Policy Statement, the scope of the matters in any proceeding concerning the safety of fuel loading and low power testing would include any contested low power test items listed in NUREG-0694 and described by the Staff in its SER Supplement Number 10. Of course, upon completion of any low power test proceedings, under the provisions of the Commission's Statement of Policy on Conduct of Adjudicatory Proceedings contained in Appendix B to Part 2 of the Commission's rules, any Licensing Board recommendation for the issuance of a low power test license would have to be reviewed by the Commission before becoming final and the license issued by the Staff.<sup>13/</sup>

<sup>13/</sup> Moreover, in this regard, NRC Chairman John Ahearne recently observed that:

Should any question be raised before the Commission itself under Appendix B regarding that validity of any part of the Policy Statement as applied to a particular case, the Commission recognizes its obligation to consider the questions and reply on the the merits based on the state of the record before it.

Hearings before the Environment, Energy and Natural Resources Subcommittee of the House Government Operations Committee, 96th Cong., 2d Sess. (Statement of NRC Chairman John Ahearne) (July 2, 1980).



C. Intervenors' Motion to Reopen the Record

Following completion of the seismic hearings in this case, on May 9, 1979, Joint Intervenors requested that the Licensing Board reopen the completed evidentiary hearings to: (1) require the Staff to supplement the Diablo Canyon final environmental impact statement to address the environmental consequences of a Class 9 accident, and (2) determine the adequacy of the Diablo Canyon emergency response planning.<sup>14/</sup> In the alternative, Joint Intervenors requested that the Licensing Board certify certain questions dealing with Class 9 accidents and emergency planning information to the Commission pursuant to the provisions in 10 C.F.R. § 2.718(i). At the suggestion of the Staff,<sup>15/</sup> the Licensing Board on June 5, 1979 deferred its ruling on the May 9, 1979 motion until it received the Staff report on the effects of the Three Mile Island accident on this proceeding.

Diablo Canyon SER Supplement Number 10 which is being submitted to the Licensing Board and parties today is not the final Staff review of TMI matters. Rather, in accordance with the Commission's Policy Statement, the supplement contains only that part of the Staff's safety analysis which takes into consideration those TMI issues which impact fuel loading and low power testing. Thus, in the Staff's view, the matter of reopening the

<sup>14/</sup> Intervenors' Request to Reopen or, in the Alternative, Request for Directed Certification dated May 9, 1979.

<sup>15/</sup> NRC Staff Response to Intervenors' Request to Reopen or Direct Certification dated May 24, 1979.





record on the emergency planning issue as requested in the Intervenor's Motion to Reopen is not yet ripe for adjudication since, as indicated in the SER Supplement, the Applicant is currently in compliance with Appendix E and therefore is not yet required by the Commission to comply with final emergency plan requirements until a full power license is under consideration.<sup>16/</sup>

Insofar as the consideration of the environmental effects of Class 9 accidents is concerned, again this issue is not relevant to fuel loading and low power testing since reactor operation at such low power levels does not present a core melt and breach of containment situation. Moreover, while the Commission has withdrawn the proposed Annex to Appendix D to Part 50<sup>17/</sup> and thus has revoked its former legal basis for not considering the environmental effects of Class 9 accidents, the Commission's Statement of Interim Policy on Class 9 Accidents, 45 Fed. Reg. 40101 (June 13, 1980), reflects the fact that before Class 9 issues can be addressed in an individual licensing proceeding where, as here, an FES has already been issued, special

<sup>16/</sup> Compare the full power emergency requirements contained in Section III.A.1.2 of NUREG-0694 at 25 with the low power testing emergency requirements contained in Section III.A.1.1 at page 19.

<sup>17/</sup> "Consideration of Accidents in Implementation of the National Environmental Policy Act of 1969." 36 Fed. Reg. 22851 (1971).



circumstances must be demonstrated before the Class 9 issue can be litigated. Interim Class 9 Policy Statement at 10.<sup>18/</sup>

The Staff notes that the Intervenors have not substantiated any special circumstances in their Motion to Reopen, nor does the NRC Staff know of any such special circumstances.<sup>19/</sup> Consequently, even if a motion to consider Class 9 accidents could be considered at this time, their Motion to Reopen is inadequately supported and for that reason is not properly joined.

D. Issues Before the Appeal Board

At the present time, the two issues currently before the Appeal Board are the de novo hearings on the adequacy of the security plans for Diablo Canyon and, as a part of the appeal of the seismic decision in this case, reopened

<sup>18/</sup> With respect to plants for which Final Environmental Statements have been issued, such as Diablo, the Commission stated in its new interim policy that:

It is expected that these revised treatments will lead to conclusions regarding the environmental risks of accidents similar to those that would be reached by a continuation of current practices, particularly for cases involving special circumstances where Class 9 risks have been considered by the staff.... Thus, this change in policy is not to be construed as any lack of confidence in conclusions regarding the environmental risks of accidents expressed in any previously issued Statements, nor, absent a showing of similar special circumstances, as a basis for opening, reopening for expanding any previous or on-going proceeding.

But see the dissenting comments of Commissioners Gilinsky and Bradford, 45 Fed. Reg. at 40103, n. 5.

<sup>19/</sup> As noted in the Director of Nuclear Reactor Regulation's Decision under 10 C.F.R. §2.206 issued June 19, 1980 at pages 6-10, the Staff is of the opinion that the Diablo Canyon site is not located in an area of high population density and that the reactors are not of novel design or involve unique siting or a combination thereof.



testimony on the effect of the Imperial Valley Earthquake data on the Diablo Canyon seismic analysis. However, since the Licensing Board has already decided these issues, it has met the § 50.57(c) requirement that "findings [be made]... on the matters ... as to which there is a controversy". For this reason, this Licensing Board need not await resolution of these issues before the Appeal Board.

E. Proposed Actions

As stated above, the NRC Staff believes that the Applicant has properly applied for and, during the course of the past few months, submitted the bulk of the technical information needed to complete its application for a low power test license. Accordingly, based on the information submitted thus far, the Staff has compiled and published the enclosed SER Supplement Number 10. That document addresses the state of the Applicant's compliance with those items set forth in NUREG-0694. By reason of the Commission's newly issued "Statement of Policy for Further Commission Guidance for Power Reactor Operating Licenses" reported at 45 Fed. Reg. 41738 (June 20, 1980), an applicant must comply with each low power test item contained in NUREG-0694 prior to receiving a fuel loading and low power test license. As the SER Supplement indicates, while some low power test items require final resolution (for instance, the Applicant is awaiting the testing of its plant operators and the factoring of the results of the Sequoyah low power tests into its testing program) the NRC Staff believes that the application is substantially completed and that therefore the Board and parties should



begin the process of consideration of the adequacy of the Applicant's low power test proposal.

### III. Conclusion

In the event that a party to this proceeding objects to Applicant's motion, such a party should be required to state such objections in contention form and to indicate with specificity the relevance of that party's contention or contentions to the fuel load and low power operation activities for which the Applicant seeks authorization. In this proceeding, the issues remaining before this Board are those put forward by Joint Intervenors' Motion to reopen on Class 9 and emergency planning issues and by the Board's Order deferring consideration of TMI-related safety issues.<sup>20/</sup> As to the latter issues, the SER supplement provided as a part of this response serves as the Staff report on those TMI-related issues relevant to the Applicant's request for fuel load and low power testing authorization. Consequently, any objection to the Applicant's request should be couched and considered in terms of relevance to the low power testing application. If objections are not relevant, or, if no objection is made, the Licensing Board should, pursuant to 10 C.F.R. § 50.57, issue an Order authorizing the Director of Nuclear Reactor Regulation to make the the appropriate findings set forth in 10 C.F.R. § 50.57(a) and to issue licenses for the requested operation. However, if an appropriate objection is received, the Licensing Board should

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<sup>20/</sup> See footnote 5, supra.



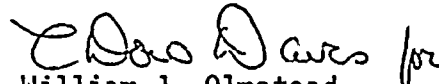


set a schedule in consultation with the parties to consider the objections as contested matters relating to Applicant's request.

Respectfully Submitted,



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Dated at Bethesda, Maryland  
this 6th day of August, 1980.



UNITED STATES OF AMERICA  
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO PG&E'S REQUEST FOR LOW POWER TEST LICENSE AND COMMENTS ON INTERVENORS' MOTION TO REOPEN RECORD ON CLASS-9 AND EMERGENCY PLANNING ISSUES", dated August 6, 1980, 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 6th day of August 6, 1980:

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