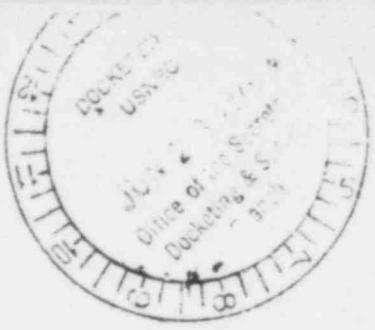

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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 Nos. 1 and 2)	)	

NRC STAFF RESPONSE TO INTERVENORS' MOTION TO REOPEN THE RECORD ON SECURITY PLAN MATTERS

I.

Background

In a pleading dated June 8, 1979, Mr. W. Andrew Baldwin, an attorney alleged to be representing the San Luis Obispo Mothers for Peace, moved that the Licensing Board in the above-captioned proceeding establish a schedule for inspection of the Diablo Canyon Power Plant security plan by Intervenors and that the now past security hearings[1/] in this case be reopened and rescheduled to allow them to litigate the adequacy of that security plan.[2/] As grounds for their motion, Intervenors allege that the Licensing Board erred in refusing to permit the Mothers for Peace to participate in the radiological health and safety hearings held on the Diablo Canyon security plan. Specifically, Intervenors assert that the Board erred in finding them in default under the provisions of

1/ Hearings on the security plan had previously been held on Monday, February 12, 1979.

2/ Intervenors' Motion at 6.

10 C.F.R. §2.707 and that it should instead have allowed Mr. Baldwin[1/] to enter an appearance on Thursday, February 8, 1979 and to cross-examine the security witnesses who were presented the following Monday, February 12, 1979.

Although the instant motion is styled a Motion to Reopen, the main thrust of Intervenors' pleading is directed toward reversing the Licensing Board's refusal to let Mr. Baldwin participate in the security hearings. Accordingly, the instant motion is essentially one to reconsider the Licensing Board's previous decision. For this reason, the NRC Staff will initially discuss below the correctness of the Licensing Board's refusal to allow participation of the Intervenors under the representation of new counsel and then will address the merits of Intervenors' motion to reopen the hearings under traditional caselaw.

For the reasons stated below, the Staff is of the opinion that the Board correctly ruled that Intervenors, through their new counsel, Mr. Baldwin, could not participate in the security hearings on such short notice and that Intervenors' instant Motion to Reopen adds no new reasons why that decision should be overturned.

1/ It is not clear to the Staff what the relationship between the MFP and their two counsel are. As far as the Staff knows (and no demonstration was made to the contrary), Mr. Valentine still remains their counsel in this matter and thus Mr. Baldwin's authority to countermand Mr. Valentine's decision is still unclear. However, for the reasons listed infra, the Staff believes that the Board does not need this information to correctly decide the issue.

II. Discussion

A. Board Ruling

Intervenors allege that the Licensing Board erred in barring them from participation in the security plan hearings by not allowing a new attorney, Mr. Baldwin, to enter an appearance and to cross-examine the witnesses presented by the Applicant and Staff.[1/] The Licensing Board found that the Intervenors had withdrawn themselves from the security issue by their counsel's letter of January 19, 1979,[2/] that the same letter had admitted that Intervenors had

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1/ Motion to Reopen at 2. The instant situation is readily distinguishable from the situation presented in Louisiana Power and Light Company (Waterford steam Electric Station, Unit 3), ALAB-117, 6 AEC 261 (April 20, 1973) where the entry of new counsel on appeal warranted good cause for a delay in the case to give counsel an opportunity to prepare an appellate brief. Public Service Electric and Gas Company (Atlantic Nuclear Generating Station, Units 1 and 2), LBP-75-62, 2 NRC 702, 703 (October 14, 1977). Here, no advance warning was given, no active participation in the case was had by counsel prior to his appearance and no good cause shown why his appearance, which radically changed the position taken by counsel in its January 19, 1979 letter, could not have been made in a more timely manner.

2/ The January 19, 1979 letter provided in pertinent part:

> This Intervenor has been denied access to the security plan and has been denied the qualification of expert witnesses to review the plan, either for preparation for cross-examination or the presentation of affirmative evidence as to the inadequacy of the applicant's security plan. Without the qualification of an expert witness to inspect the plan and advise Intervenor's attorney, it is impossible for this Intervenor to prepare, either for significant cross-examination on the inadequacies of the applicant's security plan or to present affirmative evidence to support Intervenor's contentions.
>
> Therefore, this Intervenor will not be able to participate in the hearings now scheduled for the first week of February as to the adequacy of applicant's security plan.

no contribution to make to the proceeding without witnesses[1] and that the request for participation by Mr. Baldwin was untimely since no security check could be made on Mr. Baldwin's credentials in the time left before the hearing. Tr. 9104-9107. The Board held that because of the findings above, the Intervenors had abandoned their contention on security and were in default under the provisions of 10 C.F.R. §2.707 and thus were not entitled to participate in the security tour or the in camera hearing sessions on security. Tr. 9376.

B. Applicable Law

Motions addressed to Licensing Boards to reconsider non-final decisions are covered by the provisions of 10 C.F.R. §2.771.[2] In the absence of a presentation of new evidence on security plan matters, the issue becomes whether the law and facts are sufficient to warrant exclusion of Intervenors' counsel from the hearings such that the Licensing Board should not exercise its discretion to reopen the record. 10 C.F.R. §2.707 provides that "On failure of a party to comply with any prehearing order .... the presiding officer may make such orders in regard to the failure as are just ....". In addition, a Licensing Board has inherent jurisdiction to control the course of a hearing procedurally.[3] For these reasons, if the Intervenors were not in compliance with the order of the

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1/ The Staff also notes that no explanation was given as to why Mr. Baldwin could be expected to contribute to the proceedings by cross-examination under the same circumstances which Mr. Valentine felt would not be meaningful. Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-397, 5 NRC 1143, 1149 (May 9, 1977).

2/ "The power to reconsider is inherent in the power to decide," Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-235, 8 NRC 645, 646 (October 17, 1974) citing Spanish International Broadcasting Company v. FCC, 385 F.2d 615, 621 (D.C. Cir. 1967).

3/ Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-227, 1 NRC 539, 544 (1975).

Licensing or Appeal Boards, or the Intervenors waived their right to participate in the hearings, the Staff believes that the Board would be legally justified in ordering whatever just action it considered to be necessary to conduct the security hearings.

C. Waiver or Default

In the instant case, both the Appeal Board and the Licensing Board have made it extremely clear what procedures are to be complied with before a party, including counsel, has access to the Diablo Canyon security plan for cross-examination purposes. The clear thrust of these rulings has been to assure that only approved individuals can see the plan. In that regard, the Appeal Board in this case stated that:

> (2) If and to the extent released, the plan may -- and in most circumstances probably should -- be subject to a protective order. See 10 CFR §2.790(e) and §2.740(c). In considering a protective order, it is a material consideration whether the recipient of the information is likely to abide by such an order. If it is demonstrated that a particular individual is unlikely to do so, the Licensing Board might be justified in not permitting such individual to gain access to the information.1/ (Footnote omitted.)

1/ Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-410, 5 NRC 1398, 1405 (June 9, 1977).

In addition, the Licensing Board, both before and after ALAB-410, had ruled that counsel for the Intervenors must sign a protective order under oath before access can be had to the security plan.[1/]

In the present case, no protective agreements had been signed by Intervenors' new counsel[2/] nor was there a showing of good cause[3/] for not executing a protective agreement or furnishing reasonable notice to the parties of their intent to participate in the hearings at such a late date. Thus the procedure followed by Intervenors was not only violative of the Licensing and Appeal Board directives, but also did not give the parties adequate notice so that they might make appropriate inquiries concerning the new attorney. In that regard, Licensing Board and parties were not informed of the intent of Mr. Baldwin to participate in the hearings until a telegram arrived on the Thursday afternoon (February 8, 1979)[4/] before the Monday on which the security hearings were scheduled to begin (February 12, 1979). Moreover, Mr. Baldwin did not appear in person to explain his position until the day of the security hearings.

1/ Licensing Board Orders of June 23, 1976 and June 17, 1977.

2/ See Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), LBP-73-41, 6 AEC 1057 (1973).

3/ See e.g., Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-288, 2 NRC 390, 393 (1975).

4/ The telegram was dated 1545 of February 8, 1979 and read in its entirety: "Dear Mrs. Bowers, Please enter my appearance on behalf of San Luis Obispo Mothers for Peace in the above referenced matter. I am a member of the California Bar. I intend to participate in the Diablo Canyon security systems tour Monday, February 12. Please notify me by telephone or Elizabeth Apfelberg (805) 544-4955 or David Fleishacker where and when I should appear to begin the tour. Regret that another case required my return to San Francisco. Respectfully, W. Andrew Baldwin, Friends of the Earth."

Since no reasonable notice was given nor good cause furnished for not having done so, the Licensing Board cannot be faulted for continuing to consider the Intervenors in default under 10 C.F.R. §2.707. For this reason, the Staff believes that the Board correctly denied access to the security hearings and thus to the highly sensitive security plan and security devices in order to protect the plan itself and to keep the Intervenors and their counsel from "stepping in and out of a particular issue at will."[1/]

D. The Motion to Reopen

The Appeal Board has stated that a party seeking to persuade an adjudicatory tribunal to reopen the record bears a heavy burden[2/] to show a significant unresolved safety question.[3/] While the security plan for Diablo is certainly significant, it has now been reviewed by the Staff and the Licensing Board and thus is no longer unresolved or unreviewed. In this regard, while Intervenors would have no way of knowing the state of the record since they waived their right to participate, supra, the Staff notes that no specific new significant unreviewed matters or changed circumstances were mentioned in Intervenor's Motion to Reopen and thus no basis has been offered to alter the record as it currently exists regarding security.

1/ Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-288, 2 NRC 390, 393 (September 17, 1975).

2/ Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-359, 4 NRC 619, 620 (1976).

3/ Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973); reconsideration den., ALAB-141, 6 AEC 576 (1973). Kansas Gas and Electric Company (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978).

Since Intervenors have not yet met their burden of showing that the security hearings must be reopened, Intervenors' Motion to Reopen should be denied.

III.
Conclusion

For the reasons listed above, the NRC Staff believes that the Intervenors' January 19, 1979 letter has waived their right to participation in the security hearings by cross-examination and they have not shown good cause, furnished reasonable notice of their intent to participate in the security hearings, nor furnished any additional reason for the Licensing Board to allow them to participate in the security hearings. Thus, that portion of their motion which in effect asks for a reconsideration of the Licensing Board's previous exclusion of them from the security hearings should be denied. In addition, the NRC Staff believes that the Motion to Reopen must be denied for having failed to show a significant unreviewed safety item or changed circumstances which would satisfy their heavy burden of showing that the record must be reopened.

Respectfully submitted,

L. Dow Davis
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 28th day of June, 1979.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO INTERVENORS' MOTION TO REOPEN THE RECORD ON SECURITY PLAN MATTERS" dated June 28, 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 28th day of June, 1979.

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