

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before The Atomic Safety & Licensing Appeal Board



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

SUPPLEMENT TO JOINT INTERVENORS' REQUEST
FOR DIRECTED CERTIFICATION

On December 31st, 1978, the Joint Intervenors submitted to this Appeal Board a request to certify for its consideration the question of whether exceptional circumstances exist which support the issuance of subpoenas pursuant to 10 CFR 2.20(h) to Drs. Mihailo Trifunac and Enrique Luco, consultants to the Advisory Committee on Reactor Safeguards (ACRS), in that Committee's review of the operating license for the Diablo Canyon Nuclear Power Plant (DCNPP). On January 4th, 1979, the Appeal Board directed Pacific Gas & Electric Company (Applicant) and the NRC Staff (Staff) to show cause why the Atomic Safety & Licensing Board's (ASLB) ruling should not be summarily reversed and the subpoenas issued. That order precipitated a series of legal maneuvers, arguments by parties, and two rulings by the ASLB directly related to the subpoena question pending before the Appeal Board.

The Joint Intervenors would not agree to the stipulation on the basis that the parties could not, by agreement, confer on the Licensing Board an authority that it did not have.^{4/} Both 10 CFR 2.720(h) and the Commission's recent policy statement^{5/} make clear that the ASLB must find exceptional circumstances as a prerequisite to subpoenaing consultants to the ACRS.^{6/}

The ASLB ruled that first, even with a stipulation, the subpoena could not issue absent a finding of exceptional circumstances; and, second, upon reconsideration, the ASLB found no exceptional circumstances.

4/ TRANSCRIPT, at 7496-99 and 7506-08.

5/ INTERPRETATIVE COMMISSION STATEMENT ON AMENABILITY TO SUBPOENA OF CONSULTANTS TO THE ADVISORY COMMITTEE ON REACTOR SAFEGUARDS UNDER 10 CFR 2.720. The Staff argued that since 2.720(h) sought to protect the Staff's interest, it could stipulate around the requirement for a finding of exceptional circumstances. However, as the Commission's Statement makes clear, it is the ACRS' interest that is sought to be protected: that interest is accessibility to experts. Thus, the parties to the proceeding cannot stipulate around the requirement and the ASLB should make the finding of exceptional circumstances in order to protect the ACRS' interest.

6/ It should be pointed out that under 10 CFR 2.720(h), the Executive Director of Operations could consult with the ACRS and reach agreement to produce Drs. Trifunac and Luco, thereby eliminating the need to issue subpoena. This was suggested by counsel for the Joint Intervenors [TRANSCRIPT, at 7499], but apparently was not explored by the Staff.

The purpose of this supplemental filing is to bring the Appeal Board up-to-date, and to request review of the ASLB ruling to withdraw from evidence the document submitted to the ACRS by Drs. Trifunac and Luco. These documents, marked as BOARD'S EXHIBIT NO. 2, ATTACHMENTS A-J, were submitted into evidence by the ASLB upon its own motion with no objections from the parties. ^{1/}

I.

On January 5, 1979, following receipt of the Appeal Board's Order, the Applicant requested the ASLB to consider the JOINT INTERVENORS' REQUEST FOR DIRECTED CERTIFICATION as a motion for reconsideration. After some discussion, ^{2/} the Applicant and the Staff suggested that the parties enter into a stipulation that subpoenas be issued to Drs. Trifunac and Luco on the basis that it would expedite matters and "was in the public interest." ^{3/} Neither the Staff nor the Applicant would agree to stipulate that exceptional circumstances existed.

^{1/} TRANSCRIPT, at 4683-88. Attachments A-I were admitted on December 8, 1978; Attachment J was admitted later.

^{2/} Early in the discussion, the Applicant suggested that Drs. Trifunac and Luco be telephoned, told that the Staff and Applicant had dropped opposition to their appearance, and asked whether they would now appear voluntarily. Voluntary appearance by Drs. Trifunac and Luco would, of course, eliminate the necessity for issuance of subpoenas. It was determined through telephone conversations that the two experts were unwilling to appear voluntarily unless requested to do so by the ACRS.

^{3/} TRANSCRIPT, at 7421; 7425; and 7431.

II.

The legal arguments relating to the ASLB's authority to subpoena vs. Trifunac and Luco precipitated motions by the Applicant, supported by the Staff and opposed by the Joint Intervenors, to withdraw from evidence the Board's Exhibit No. 2, Attachments A-J. The basis for the Applicant's motion was stated as follows:

MR. NORTON:

Mrs. Bowers, the basis for our objection for having them removed is that if there were no stipulations from the parties as pointed out by Mr. Fleischaker then there is no basis for the records to be in evidence because there is no foundation for those exhibits and that was the basis for our objection. 7/

The ASLB granted the Applicant's motion and withdrew from evidence the Board's Exhibit No. 2, Attachments A-J. The basis for the ruling is not entirely clear. In announcing its position to remove the Board's Exhibit No. 2, Attachments A-J, the ASLB stated as follows:

MRS. BOWERS:

[S]o we've also determined that since this matter is before the Appeal Board that we will withdraw Board Exhibit No. 2. Now if the Appeal Board determines that the two witnesses should be subpoenaed, of course that would also automatically bring into the picture those documents.

MR. FLEISCHAKER:

What if the Board determines not to subpoena them?

MRS. BOWERS:

Well, we were trying to work out an accommodation that didn't fly very far, and we now have the matter -- our thoughts at the time by taking the documents in was that the Intervenors would feel that they were getting their day in Court on the documents. We now know that is not true. And so, we see no reason to leave them in the record.

And if the Appeal Board determines that the witnesses should not be subpoenaed, we would make no change as far as the record. So the Board's Exhibit No. 2 is simply withdrawn. 8/

When requested to explain the basis for the decision further, the ASLB stated:

MRS. BOWERS:

We admitted them in the first place thinking that that would be a satisfactory solution to all parties. We know now that that is not a satisfactory solution because we have the motion before the Appeal Board that Drs. Trifunac and Luco be subpoenaed. So our purpose is no longer accomplishing anything. So we simply will withdraw the document, and if the Appeal Board feels that the subpoenas should be issued, then the documents of course would come back in. 9/

For the reasons set forth below, we request the Appeal Board to reverse the ASLB's decision and to order that the Board's Exhibit No. 2, Attachments A-J be placed back into evidence. This action, of course, will be unnecessary should the Appeal Board order subpoenas issued for Drs. Trifunac and Luco.

3/ TRANSCRIPT, at 7518-19.

9/ TRANSCRIPT, at 7519-20.

III.

A. The Licensing Board's action, in removing those documents at this late stage of the proceedings, is extraordinarily prejudicial to the Joint Intervenors. Those documents were placed into evidence on the third day of the hearings. Since that time, the Joint Intervenors have conducted their cross-examination of the Applicant's panels, assuming that the Trifunac and Luco comments were in evidence. Now, after completion of several days of cross-examination, the ASLB has removed from the record substantial amounts of evidence upon which the Joint Intervenors relied in determining their tactics for cross-examination.

For example, certain areas were expressly explored in a more limited fashion with both the Applicant's panel on seismology and the panel on engineering because the Joint Intervenors knew that they would rely upon the affirmative statements of Drs. Trifunac and Luco. Those areas include the adequacy of the Sand V Model, addressed in the Board's Exhibit No. 2, Attachment E; the adequacy of the Applicant's conclusions regarding torsional and rocking excitations, addressed in the Board's Exhibit No. 2, Attachment C, D, H and I; and the adequacy of the Applicant's seismic risk analysis, addressed in the Board's Exhibit No. 2, Attachment C, D and J. In addition, certain areas were explored with specific reference to the expunged documents. For example, Dr. Seed was examined in order to permit comparison between

his soil structure interaction analysis and the analyses recommended by Drs. Trifunac and Luco. ^{10/}

In short, the Joint Intervenors spent weeks assessing cross-examination relying on the Trifunac and Luco comments to establish points fundamental to their case. Now, after cross-examination of the Applicant's case-in-chief has been completed, that evidence is removed from the record.

B. The ASLB erred in entertaining the Applicant's motion. Neither the Applicant nor the Staff should be heard to complain about the admission of the Board's Exhibit No. 2, Attachments A-J. After all, it was the Applicant who suggested putting the documents into the record in the first place:

MR. NORTON:

In that case, we would suggest to the Board and we would stipulate to entering into the record as evidence every single document submitted by Drs. Trifunac and Luco before the ACRS every word, every analysis, every attachment, their qualifications. We would stipulate that indeed they are qualified by their qualifications which Mr. Fleischaker has put in the record today. ^{11/}

That suggestion was endorsed by the Staff. ^{12/} Nothing has changed which would give rise to a legal objection that the Applicant and the Staff earlier chose to forego. The authenticity of the documents has not been questioned; no one has suggested that Drs. Trifunac and Luco hold views different from those expressed in the Board's Exhibit No. 2,

^{10/} TRANSCRIPT, at 6776-90.

^{11/} TRANSCRIPT, at 4309.

^{12/} TRANSCRIPT, at 4332.

Attachments A-J. ^{13/}

C. The ASLB failed to provide an adequate basis for its decision. Boiled-down, the ASLB's reasoning is that the documents can be tossed out as evidence because their admission fails to serve its principle purpose - accomodation of the Joint Intervenors. ^{14/} That is not a legal¹ adequate reason for deleting the documents. Moreover, net effect of the ASLB's decision is to penalize the Joint Intervenors for exercising a legal right: the right to appeal the ASLB decision.

IV.

Rather than argue that this matter, standing alone, merits direct certification, we should submit that it is so clearly related to the issue presently pending before the Appeal Board that it should receive the Board's consideration. As is noted above, should the Appeal Board direct

^{13/} At one point, the Applicant argued that the documents must be withdrawn from evidence because the Joint Intervenors have abandoned the stipulation through which the documents were originally admitted. That argument ignores the facts. The documents were admitted by the ASLB on its own motion. No party objected. [TRANSCRIPT, at 4684-87; See, also, TRANSCRIPT, at 7515.]

^{14/} The ASLB fails even to address the reasons it had given for admitting the documents into the record in the first place: (1) the documents would contribute to a "good" record; (2) their admission would permit consideration of the position of the ACRS consultants even though they could not be subpoenaed; and (3) neither the Staff nor the Applicant objected to their admission. [TRANSCRIPT, at 4685.] In addition, the Joint Intervenors expressly refused to stipulate that the Trifunac and Luco documents be brought into the record as a trade-off for calling the experts to testify. [TRANSCRIPT, at 4313-14; 4685 and 7512-15.]

that subpoenas be issued to Drs. Trifunac and Luco, there is no reason to reach the question raised in this supplemental pleading. However, should the Appeal Board find that exceptional circumstances are lacking, we request, for the reasons stated above, that the Licensing Board be directed to readmit ^{15/} into evidence the Board's Exhibit No. 2, Attachments A-J.

Respectfully submitted,

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15/ An Attachment containing relevant portions of the Transcript will be forwarded to the Appeal Board from California. This motion, however, is typed in Joint Intervenors' counsel's office in Washington, D.C. Therefore, it is expected that the Attachments and this motion will arrive under separate cover.

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CERTIFICATE OF SERVICE

I hereby certify that I have this 11th day of January, 1979 served copies of the foregoing SUPPLEMENT TO JOINT INTERVENORS' REQUEST FOR DIRECTED CERTIFICATION by depositing copies thereof in the U.S. Mails, first class, postage prepaid to the following parties:

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