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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Richard S. Salzman, Chairman
Alan S. Rosenthal
Dr. W. Reed Johnson



In the Matter of)
)
PACIFIC GAS AND ELECTRIC COMPANY)
)
(Diablo Canyon Nuclear Power)
Plant, Units 1 and 2))
_____)

Docket Nos. 50-275 OL
50-323 OL

Messrs. Paul C. Valentine, Palo Alto, California,
and Yale I. Jones, San Francisco, California,
for the intervenor San Luis Obispo Mothers
for Peace.

Messrs. John C. Morrissey, Malcolm H. Furbush and
Philip A. Crane, Jr., San Francisco, California,
and Arthur C. Gehr and Bruce Norton, Phoenix
Arizona, for the applicant Pacific Gas and
Electric Company.

Mr. Marc R. Staenberg for the Nuclear Regulatory
Commission staff.

MEMORANDUM AND ORDER

December 22, 1978

(ALAB - 514)

Opinion of the Board by Mr. Rosenthal and Dr. Johnson:

Once again we have before us the controversy over
whether the security plan for the Diablo Canyon facility

should be made available under protective order to David Dinamore Comey, a prospective witness for the intervenor San Luis Obispo Mothers for Peace in this operating license proceeding concerning that facility. In an unpublished order entered on September 5, 1978, the Licensing Board resolved that question against the intervenor, ruling that Mr. Comey was not qualified to evaluate the plan within the meaning of our decision in ALAB-410, 5 NRC 1398, Commission review declined, CLI-77-23, 6 NRC 455 (1977). On the intervenor's petition for directed certification of that ruling,^{1/} we determined that the Licensing Board had not sufficiently developed the basis for its conclusion regarding Mr. Comey's lack of acceptable qualifications. ALAB-504, 8 NRC ____ (October 27, 1978). We accordingly vacated the September 5 order and remanded to the Licensing Board for prompt reconsideration and "a full explication of the reasons underlying whatever result that Board might reach upon such reconsideration". Id. at ____ (slip opinion, p. 11). On November 3, the Licensing Board entered a new order in which it adhered to its prior ruling. LBP-78-36, 8 NRC ____ . The intervenor has now returned to us with a petition that we review that order by way of directed certification.

1/ See 10 CFR 2.718(i); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478 (1975).

The petition is denied. As we stressed in ALAB-504, 3 NRC at ___ (slip opinion, p.7), our directed certification authority is exercised most sparingly. We further made it clear in that opinion that we were setting the September 5 order aside only because of its failure satisfactorily to illumine its underlying basis. As we explained:

It is one thing to defer appellate review of an adequately developed interlocutory ruling until the initial decision is rendered -- irrespective of whether on a preliminary look the ruling appears to be right or wrong in result. But it is another matter to let pass until the end of the case a ruling of obvious crucial importance which has no reasoned basis assigned for it. Indeed, as we see it, our failure to intercede in the situation at bar would constitute an abdication of the oversight responsibilities vested in us by the Commission.

Id. at ___ (slip opinion, p. 11).

The November 3 order does not suffer from the same infirmity. Whatever might be said regarding the correctness of the analysis contained in it, the Licensing Board has laid bare each of the ingredients of that analysis. There thus is no longer any doubt as to either what the Board decided or how it arrived at its decision. Moreover, the order confirms that, at bottom, the question which the intervenor asks us to decide at this interlocutory stage is essentially one of "the application by the Licensing

Board of the guidelines laid down in ALAB-410 to the specific facts of record in this case as they pertain to the qualifications of Mr. Comey as a security expert". See ALAB-504, supra, 8 NRC at ____ (slip opinion, p. 7). But questions of that stripe do not normally warrant our scrutiny prior to the rendition of the Licensing Board's initial decision.

We need add only that, with due respect for the contrary view of our dissenting colleague, we perceive no exceptional circumstances which might justify a departure from our settled policy not to monitor the day-to-day conduct of licensing proceedings through the directed certification of interlocutory rulings. See ALAB-504, supra, 8 NRC at ____ (slip opinion, p. 7) and cases there cited.^{2/} In this connection, the sole reason assigned by the intervenor for seeking our involvement at this juncture was that it desired to present expert testimony respecting the adequacy of the applicant's security plan during the course of an evidentiary hearing which commenced on December 4. It is unnecessary to decide here how much weight, if any, properly might attach to such a consideration. For that hearing -- which was convened primarily to explore seismic issues -- is well along the road to completion.

^{2/} The policy implicitly acknowledges and accepts "the risks which attend [upon] a deferral to the time of initial decision of the appellate review of procedural rulings made during the course of trial". Toledo Edison Co. (Davis-Besse Nuclear Power Station, Unit 1), ALAB-314, 3 NRC 98, 100 (1976)

Thus, even were we now to entertain and to agree with the intervenor's claim that Mr. Comey has sufficient expert qualifications in the security area, his testimony would have to be received at a separate hearing at a later date. ^{3/}

The petition for directed certification is denied. ^{4/}
It is so ORDERED.

FOR THE APPEAL BOARD

Eleanor E. Hagins
Eleanor E. Hagins
Secretary to the
Appeal Board

The dissenting opinion of Mr. Salzman follows, p. 6, et. seq.

^{3/} It seems most unlikely that, given the time period required for briefing and probable oral argument of the issue, we could reach a decision before late February at the earliest. Were the intervenor to prevail, at least another month undoubtedly would then be consumed by Mr. Comey's examination of the security plan and preparation of testimony based thereon. It is readily apparent from these considerations that, even had we agreed to decide the merits of the dispute in response to the first petition for directed certification, it almost assuredly still would not have been possible for the intervenor to have realized its objective to have Mr. Comey testify at the hearing commenced on December 4.

^{4/} As should be clear from the text of this opinion, we need not and do not intimate any present views regarding the merits of the dispute. The intervenor will be free, of course, to renew its challenge to the November 3 order in connection with any appeal it may take from the Licensing Board's eventual initial decision on the operating license applications.

Mr Salzman, dissenting:

The intervenor has drawn into question the sufficiency of applicant's plan to assure the physical security of the Diablo Canyon facility. The Board below ruled that none of intervenor's proposed witnesses was qualified to review that plan, thereby effectively precluding them from addressing its adequacy. Among those found "unqualified" is Mr. David Dinsmore Comey,^{1/} notwithstanding that he has previously reviewed and testified about security plans in other licensing proceedings before this Commission. Mr. Comey currently serves on the Nuclear Proliferation and Safeguards Advisory Panel, Office of Technology Assessment, United States Congress.^{2/}

1/ Only Mr. Comey's qualifications are at issue. The Board disclaimed any "reason to believe that Mr. Comey would in any way violate the restrictions of a protective order, and this factor did not enter into the Board's original disqualification of Mr. Comey." LBP-78-36, 8 NRC ____, __ (slip opinion at 5, fn. 3).

2/ We are informed that other members of that Panel include Frederick S. Carney, Southern Methodist University; Thomas B. Cochran, Natural Resources Defense Council; Chester L. Cooper, Institute for Energy Analysis; William A. Higinbotham, Brookhaven National Laboratory; Leonid Hurwicz, University of Minnesota; George B. Kistiakowsky, Harvard University; Georga Quester, Cornell University; Herbert Scoville, Consultant; Henry De Wolf Smyth, Princeton University; George J. Stathakis, General Electric Company; Theodore B. Taylor, Princeton University; Alvin M. Weinberg, Institute for Energy Analysis; Mason Willrich, University of Virginia; and Cyrus R. Vance (on leave of absence). See Office of Technology Assessment report on "Nuclear Proliferation and Safeguards", attached as Appendix "D" to Intervenor's Petition for Directed Certification on the instant matter, filed November 21, 1978.

Before us is intervenor's motion to have us take up at this point the question of Mr. Comey's qualifications.^{3/} My colleagues have voted to deny the motion. Reduced to essentials, their action rests on the grounds that Commission policy disfavors interlocutory appeals and, assuming that the witness was erroneously rejected, avenues of relief will be open upon completion of the hearing below. With all deference, I respectfully disagree.

This is an operating license proceeding. Commission rules make a licensing board decision approving the application immediately effective. 10 C.F.R. §2.764. Thus (unless we were later to grant a stay), this plant may well commence operating without its security arrangements having received scrutiny by persons other than those who drew them up and approved them. "Outside" reviews have proved helpful before;^{4/} indeed, the Commission itself has stressed the usefulness of intervenor participation in this area.^{5/}

^{3/} This is the second such motion by intervenor. On the first we vacated the decision below and instructed the Board to provide a reasoned decision why it had rejected Mr. Comey as a witness. ALAB-504, 8 NPC (October 27, 1978).

^{4/} See ALAB-410, 5 NPC 1398, 1403 (1977).

^{5/} See Consolidated Edison Co. (Indian Point, Unit 2), CLI-74-23, 7 AEC 947, 949 (1974).

Assuring the adequacy of security arrangements is a very serious matter. Yet, aside from ALAB-410, it has received scant attention from either us or the Commission in the context of a specific licensing proceeding. In my judgment, the face of the decision below suggests that the important issues involved were treated mechanically at best. It demonstrates little sensitivity to what Commission regulations, controlling precedents, and analogous court decisions seem to require and, moreover, appears to have been influenced by matters outside the record. In the circumstances, the question presented is of sufficient importance to warrant taking up and deciding now.

I would therefore grant the motion for certification and calendar the matter for argument. My colleagues' refusal to do so is elaborately justified. But what it actually boils down to is that we will simply have to face the issue later -- doubtless in the context of a motion to stay operation of the facility pending our ruling. This manifestly unwise course is compelled not by the Rules of Practice but by my colleagues' overly rigid application of them. I therefore respectfully note my dissent.