

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION



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))

UNION OF CONCERNED SCIENTISTS MEMORANDUM
IN SUPPORT OF REQUESTS FOR DIRECTED CERTIFICATION



Introduction

The Licensing Board decision in this matter represents a clear misinterpretation of the Commission's direction in "Further Commission Guidance for Power Reactor Operating Licensing: Revised Statement of Policy," December 18, 1980 (45 Fed. Reg. 85236). While the rationale behind the Board's distinction between contentions it considered admissible and inadmissible must largely be deduced, it is apparent that the Board illegally constricted intervenors' rights to challenge the sufficiency of TMI-related safety requirements, contrary to the Commission's intent, the language of the Revised Policy Statement and applicable law. The Licensing Board rejected all contentions alleging that the accident at TMI-2 demonstrated the need for measures in addition to those contained in NUREG-0737 unless the contention identified a specific item in NUREG-0737 that is insufficient^{1/}. That

^{1/} See, e.g., Prehearing Conference Order, February 17, 1981, Sl.op., pp. 22, 23.

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is, contentions alleging that the requirements in NUREG-0737 are insufficient because they do not address safety problems demonstrated by the accident were uniformly rejected, even though these contentions showed a clear nexus to the accident.^{2/}

As we will demonstrate below, this interpretation of the Policy Statement is contrary to law; it is subject to the same infirmities as the original Policy Statement of June 16, 1980 which it replaced. It is vital that the Commission correct this error now before it is replicated by other Boards, either by accepting certification or clarifying the Revised Policy Statement.

Argument

The Commission is well aware of the history of its June 16, 1980 "Statement of Policy for Further Commission Guidance for Power Reactor Operating Licenses" 45 Fed. Reg. 41738; we will outline it only briefly here.

The June, 1980, Policy Statement endorsed a short list of TMI-related safety requirements contained in NUREG-0694 as "necessary and sufficient" for the issuance of so-called "near-term operating licenses." The development of the list of items was done without soliciting or considering the comments of the public, although the nuclear industry was heavily involved. The Policy Statement went on to direct

^{2/} E.g., Joint Intervenors Contention 12, alleging that the PORV, block valves, instruments and controls should be safety grade was rejected because it "does not specifically identify an item in NUREG-0737 which has not been complied with nor has a showing been made that any item is sufficient." Id. p. 23.

that while parties to individual licensing hearings would be permitted to challenge the need for all new requirements which "supplement the existing regulations by imposing requirements in addition to specific ones" previously existing, no party would be permitted to challenge the sufficiency of the new requirements. In other words, while the applicant for an operating license might introduce evidence and argue that the new requirements are not necessary for safety, intervenors in those same proceedings were strictly prohibited from attempting to show that the requirements do not go far enough to protect safety and that different or additional measures are required. Thus, the legal and practical effect of the Policy Statement was to establish a new set of substantive rules representing the maximum required for safety, challengeable by only one party to the licensing process.

The Union of Concerned Scientists and five groups from around the country filed a Petition for Review of the June 16, Policy Statement in the United States Court of Appeals for the District of Columbia Circuit. Our argument, in brief, was that the Policy Statement violated the provisions of the Federal Administrative Procedure Act, particularly 5 U.S.C. §553, 556 and 557 by establishing substantive rules without providing for the participation or considering the input of the interested public.

Along with virtually all other administrative agencies, there are two ways in which the Commission may establish