

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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 BRIEF IN RESPONSE TO
OCTOBER 29, 1981 APPEAL BOARD ORDER



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I. INTRODUCTION

On March 24, 1981 the San Luis Obispo Mothers for Peace, Scenic Shoreline Preservation Conference, Inc., Ecology Action Club, Sandra Silver, Gordon Silver, Elizabeth Apfelberg and John J. Forester (collectively known as "Joint Intervenors") filed their third motion to reopen the full power record in the above proceeding. On June 30, 1981 Joint Intervenors filed a Statement of Clarified Contentions with the Licensing Board. Following a prehearing conference, the Licensing Board, on August 4, 1981, issued a Prehearing Conference Order which accepted Joint Intervenors' emergency planning contention, reopened the record on that issue, and rejected the remaining contentions. On August 14, 1981, Joint Intervenors filed a Notice of Objections to the Licensing Board's August 4, 1981 Order. On August 27, 1981 the Board denied Joint Intervenors' request for certification which was contained in their August 14, 1981 filing. On October 8, 1981 the Joint Intervenors filed a request for directed certification with the Commission, alleging that the August 4, 1981 Prehearing Conference Order was in error. On October 29, 1981, the Commission issued an order denying Joint Intervenors'

request for directed certification, but nevertheless directing the Appeal Board to review the Licensing Board's rulings on the admissibility of Joint Intervenors' contentions. On that same date the Appeal Board issued an order setting a schedule for briefing and oral argument on the correctness of the Licensing Board rulings. This brief is filed in compliance with that order.

II. ISSUES PRESENTED

- A. Whether the Joint Intervenors' Motion to Reopen and the contentions contained therein are untimely.
- B. Whether Joint Intervenors have met their burden of satisfying the standards for reopening a closed record.

III. STATEMENT OF THE CASE

On September 28, 1973 Pacific Gas and Electric Company (PG&E) filed a revised application with the Atomic Energy Commission for operating licenses for Diablo Canyon Units 1 and 2, which was docketed. The Licensing Board held evidentiary hearings on environmental issues during December 7-10 and 13-17, 1976; on non-seismic health and safety issues during October 18-19, 1977; and on seismic issues during December 4-23, 1978, January 3-16, 1979, and February 7-15, 1979. At the end of the seismic hearing, the record was closed. Subsequently, Governor Brown was allowed to participate as an interested state on November 16, 1979 provided he took the proceeding as he found it. However, on May 9, 1979, before the Licensing Board issued its Partial Initial Decision, Joint Intervenors filed a motion to reopen the record seeking to litigate additional contentions related to emergency planning and "Class-9

accidents." The basis for Joint Intervenors' motion was stated to be the Three Mile Island accident.

In an Order dated June 5, 1979 and in the September 27, 1979 Partial Initial Decision the 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. Subsequent to the Licensing Board's initial rulings on the Joint Intervenors' original motion to reopen, the Commission issued a policy statement specifically addressing the reopening of closed records and the admission of contentions based on TMI information. That policy statement, issued on June 20, 1980, was entitled "Further Commission Guidance for Power Reactor Operating Licenses" (45 Fed. Reg. 41738 (1980)).

In 1980, while the Licensing Board's September 27, 1979 Partial Initial Decision was pending before the Appeal Board, Joint Intervenors also sought to reopen the record on seismic issues. The basis for Joint Intervenors' motion was a recent earthquake in the Imperial Valley Region of California which provided significant new information concerning near-field accelerations. The Appeal Board reopened the record on that issue and subsequently held extensive hearings in which Joint Intervenors and Governor Brown participated culminating in a favorable resolution of the seismic issue in ALAB-644 issued June 16, 1981. The Appeal Board also reopened the evidentiary record to consider security matters and held hearings on that issue during November 10-15, 1980 in which Governor Brown participated. A favorable decision on security issues was issued on September 9, 1981 in ALAB-653.

On July 14, 1980, the Applicant filed a motion requesting authorization pursuant to 10 C.F.R. § 50.57(c) to load fuel and conduct low power testing. Pursuant to 10 C.F.R. § 50.57(c) the Licensing Board provided the Joint Intervenors and Governor Brown the opportunity to file additional contentions on the motion for low power testing. The Licensing Board's order did not provide that any additional contentions relating to full power operation could be filed since the low power application did not alter the full power application. Thus, on the limited issue of the low power motion which was submitted after the Commission's June 1980 policy statement, Governor Brown submitted a list of subjects on which he desired to participate and Joint Intervenors submitted a list of contentions. Hearings on the admitted contentions and subjects were conducted on May 19-22, 1981.

In December of 1980, the Commission issued an order which provided additional guidance on the application of the reopening and late filing standards for TMI-related contentions. "Statement of Policy: Further Commission Guidance for Power Reactor Operating Licenses" CLI-80-42, 12 NRC 654 (1980). In the six months since the Commission's original policy statement was issued, neither Governor Brown nor Joint Intervenors had filed any further motions to reopen the full power record. The December 18, 1980 policy statement did not change the essential elements for reopening or late filing as had been stated in the June 20, 1980 policy statement.

Finally, on March 24, 1981, 9 months after the Commission's original policy statement and 4 months after Joint Intervenors had identified virtually identical contentions for low power, the Joint Intervenors

filed an additional motion to reopen the full power record. Subsequent to the filing of their motion the Commission, acting on its own motion, issued an order on April 1, 1981 providing additional guidance in the Diablo Canyon proceeding regarding consideration of TMI-related matters. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2) CLI-81-5, 13 NRC 361 (1981).

The contentions contained in Joint Intervenors' March 24, 1981 motion were not, in fact, the subject of the Prehearing Conference Order of August 4, 1981 which is the subject of this review. On June 30, 1981, the Joint Intervenors filed a Statement of Clarified Contentions. The statement withdrew Contention 1 on quality assurance, Contention 5 on forced cooling of the reactor, Contention 6 on whether pressurizer heaters and associated controls are necessary to maintain natural circulation at hot stand-by conditions, Contention 7 on the addition of pressurizer heaters to the on-site emergency power supply, Contention 12 on the auxiliary feedwater system and Contention 13 on the emergency core cooling system. Joint Intervenors' statement clarified the remaining contentions which were originally submitted on March 24, 1981. Thus, those clarified contentions, submitted over a year after the Commission's Policy Statement and over 2 years after the TMI accident, were the subject of the Licensing Board's Prehearing Conference Order. Governor Brown did not file any subjects or contentions for full power.

In addition to the contentions in Joint Intervenors' Statement of Clarified Contentions, the Licensing Board has also resolved the admissibility of the emergency planning and "Class 9" contentions submitted in May of 1979.

After the Commission issued a statement of interim policy on May 16, 1980 which stated that consideration of "Class 9" accident analysis need not be addressed absent a showing of special circumstances, the Licensing Board ruled on June 19, 1981 that special circumstances did not exist to reopen the record on "Class-9" accidents. The emergency planning contention submitted in the Joint Intervenors' May 9, 1979 motion to reopen the record and in the Joint Intervenors' March 24, 1981 motion to reopen and in their June 30, 1981 Statement of Clarified Contentions was addressed in the Licensing Board's Memorandum and Order dated August 4, 1981. The Licensing Board admitted the emergency planning contention because Joint Intervenors' motion of May 9, 1979 was timely filed after the accident. (Tr. 11386).

The Licensing Board in its August 4, 1981 memorandum and order, however, did not admit Contentions 2 and 3 on hydrogen combustion, Contention 4 on decay heat removal, Contentions 8 and 9 on relief and block valves, Contention 10 on reactor vessel level instrumentation system, Contention 11 on small-break LOCA analysis, Contention 14 on environmental qualification of safety-related electrical equipment, Contentions 15 and 16 on systems interaction and Contention 17 on documentation of deviations. On September 21, 1981, the Commission issued a Memorandum and Order which, among other things, directed the Licensing Board to include Contentions 10 and 12 in the full-power proceeding. The Licensing Board had excluded these contentions in its low power review. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-22, 14 NRC ____ (1981).

It is the Licensing Board's August 4, 1981 Prehearing Conference Order which is the subject of the present Appeal Board review.

IV. ARGUMENT

An examination of the Commission's policy statements on litigation of TMI-related issues and the contentions submitted by Joint Intervenors reveals that the Licensing Board properly dismissed the Joint Intervenors contentions in its August 4, 1981 order. Those policy statements require that Joint Intervenors satisfy the 10 C.F.R. 2.714 standards for late filing and the standards for reopening a closed record to have admissible contentions. In addition, they must set forth with reasonable specificity the basis for the contentions. The contentions rejected by the Licensing Board failed to satisfy all these standards. The Licensing Board, therefore, was correct in admitting only the Emergency Planning Contention and in rejecting all others.

A. The Commission's Policy Statements, NUREG-0737, and the Applicable Standards

1. The Commission's Policy Statements

NUREG-0694, entitled "TMI-Related Requirements for New Operating Licenses", was published in June, 1980. The guidance in that document was subsequently superseded by NUREG-0737, entitled "Clarification of TMI Action Plan Requirements", which was published in November 1980. The Commission issued a policy statement entitled "Further Commission Guidance for Power Reactor Operating Licenses" on June 20, 1980. (45 Fed. Reg. 41738). That policy statement provided that parties could litigate issues related to NUREG-0694 guidance which alleged either that the recommendations were unnecessary on the one hand or insufficient on

the other, provided that the particular portion of NUREG-0694 which was involved only refined existing regulations. To the extent that the NUREG-0694 guidance went beyond existing regulations, the Commission stated that parties could challenge the necessity of and compliance with the guidance, but could not challenge its sufficiency.

On December 24, 1980, the Commission issued an additional policy statement addressing the litigation of NUREG-0737 issues in licensing proceedings. "Statement of Policy; Further Commission Guidance for Power Reactor Operating Licenses," CLI-80-42, 12 NRC 654 (1980). This statement, while confirming for the most part the Commission's early policy statement, did add that parties could challenge the sufficiency of the guidance in NUREG-0737 regardless of whether it clarified or expanded upon the regulations. The statement also noted that where the time for filing contentions had expired a party would have to make the showings required under 10 C.F.R. § 2.714 for late filing. Further, the standards for reopening a closed record would also apply to the TMI issues.

The application of the Commission's policy guidance was confirmed by the Commission in the present case in April 1980. Pacific Gas & Electric Co., (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361 (1981). In particular, the Commission re-emphasized that the reopening standards and the late filing standards both applied to the contentions in this proceeding. (Id. at 363-365).

2. The Late Filing and Reopening Standards

The relationship between the late filing standards, the reopening standard and the relationship between them, must be understood before proceeding to analyze the contentions put forth in the motions to reopen

on full power. The standard for reopening a closed record is that there must be significant new information such as would have changed the initial result if originally considered. (Id. at 362-363). As to the late filing of contentions, the Commission and its Boards have held that of greatest importance is the requirement contained in 10 C.F.R. § 2.714 that good cause for the failure to file on time be shown. Florida Power & Light Co. (St. Lucie Plant, Unit 2), CLI-78-12, 7 NRC 939, 948-949 (1978); Wisconsin Public Service Corporation (Kewaunee Nuclear Power Plant), LBP-78-24, 8 NRC 78, 81-82 (1978). The other factors listed in 10 C.F.R. § 2.714 as considerations for a late filing are (1) the availability of other means to protect petitioner's interest; (2) extent that petitioner's participation would contribute to the record; (3) extent to which petitioner's interest is represented by other parties; (4) extent to which proceeding will be delayed.

The interrelationship of the above tests becomes crucial to an analysis of the admissibility of contentions when an examination of whether significant new information satisfying the reopening standards will satisfy the good cause showing required for late filing is undertaken. The fact that significant new information for reopening does not always satisfy the good cause showing for late filing can be demonstrated by a review of each standard.

The reopening standard requires significant new information discovered after the record closed which if originally considered would have changed the initial result. The focus of this standard is on information arising since the record closed. Northern States Power Co. (Tyrone Energy Park, Unit 1), ALAB-464, 7 NRC 372, 374 at n. 4 (1978).

In essence, the standard requires a justification for not raising the information in the normal course of the proceeding.

On the other hand, the good cause portion of the late filing standard is broader. It focuses on both the justification for not filing within the times provided in the regulations and good cause for the untimely filing. For example, significant new information discovered six months after the hearings closed might justify the late filing of a contention at that time on the subject of that information. It would not continue to provide justification for filing that contention two or three years after the information became available. Such an application is consistent with past Commission decisions. In Vermont Yankee Nuclear Power Co. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973) the Appeal Board stated that the timeliness of the filing of the Motion to Reopen was a consideration. Such a determination, the Appeal Board explained, must be made "[r]egardless of when the motion is presented, the question in each case must center on whether the matter could have been raised earlier." (Id. at 523, n. 12). The application of the 10 C.F.R. § 2.714 standards does determine whether the petitioner has raised the issues in a timely manner. The Commission recognized the use of 10 C.F.R. § 2.714 as the late filing standards in conjunction with the reopening standards in Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361 (1981). The Commission stated that "the specificity and lateness requirements of 10 C.F.R. § 2.714 must be satisfied, where applicable, and the standards for reopening records must be satisfied, where applicable." [emphasis added]. (Id. at 364).

3. Application of the Standards to the Present Contentions

The importance of the above relationship to the present case can not be overemphasized. Most, if not all, of Joint Intervenors' contentions are ostensibly based on the TMI accident. That accident occurred over 2½ years ago. Thus, while the Staff concedes that the TMI accident provided significant new information in a number of areas, it is not evident that Joint Intervenors are justified in waiting over two years after the accident to raise most of their full power contentions. This is particularly true in that the Commission, through its policy statements, repeatedly provided guidance on raising TMI issues in licensing proceedings, and consistently emphasized that both the standards for late filing and for reopening a closed record applied to contentions in this proceeding.

Before addressing each individual contention, it should be noted generally that the TMI accident has generated a number of reports and NUREGs. These documents were issued beginning a few months after the TMI accident. While the Joint Intervenors and Governor Brown rely on TMI, in general, and NUREG-0737, in particular, to justify their motion to reopen and their late filing, in fact much of the information in NUREG-0737 is not "new". As will be noted for the individual contentions, the portions of NUREG-0737 relied on by Joint Intervenors do not provide information other than what was provided in earlier TMI-related documents. That information, therefore, does not provide good cause for filing the contentions late in the proceeding rather than at some earlier time. These contentions fail to meet the good cause showing required under 10 C.F.R. § 2.714 to justify the late filing of these contentions at this time.

Joint Intervenors have argued that they "repeatedly addressed" the Commission's standards for late-filed contentions and for reopening closed records (Request for Directed Certification, p. 4). The Staff disagrees that Joint Intervenors presented such arguments in a timely fashion in their original filings. Furthermore, the Staff believes that Joint Intervenors failed to satisfy the good-cause standard for late-filing under § 2.714(a)(1)(i); and that the late admission of these contentions would broaden or delay the proceeding (§ 2.714(a)(1)(v)). These two factors weigh heavily against admission of late contentions in this proceeding. The other three standards of § 2.714(a)(1) do not require a contention by contention discussion since the existence of a closed record precludes arguments that other parties could protect Joint Intervenors' interests, that their participation would or would not assist the development of a sound record or that other on-the-record means exist to protect their interests. The applicability of § 2.714(a)(1)(i) and § 2.714(a)(1)(v) to each of the rejected contentions is discussed infra.

4. Additional Standards which Must Be Met

Beyond the late filing and reopening standards, Joint Intervenors must meet the requirements for the admission of contentions contained in 10 C.F.R. § 2.714 which apply to all contentions whether or not they are filed late.

10 C.F.R. § 2.714(a)(1) requires that a list of contentions which intervenors seek to have litigated be filed along with the bases for those contentions set forth with reasonable specificity. A contention must be rejected where:

- (a) it constitutes an attack on applicable statutory requirements;

- (b) it challenges the basic structure of the Commission's regulatory process or is an attack on the regulations;
- (c) it is nothing more than a generalization regarding the intervenor's views of what applicable policies ought to be;
- (d) it seeks to raise an issue which is not proper for adjudication in the proceeding or does not apply to the facility in question; or
- (e) it seeks to raise an issue which is not concrete or litigable.

Philadelphia Electric Co. (Feach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974).

The purpose of the basis requirement of 10 C.F.R. § 2.714 is to assure that the contention in question does not suffer from any of the infirmities listed above, to establish sufficient foundation for the contention to warrant further inquiry of the subject matter in the proceeding, and to put other parties sufficiently on notice "so that they will know at least generally what they will have to defend against or oppose." (Id.).

B. The emergency planning and Class 9 issues

Joint Intervenors filed a motion to reopen the full power licensing proceeding to consider emergency planning and Class 9 accident issues on May 9, 1979 shortly after the TMI accident. This motion was filed on a timely basis. The Staff mentions the above two contentions only to illustrate that Joint Intervenors were well aware of the Commission's regulations governing reopening and late contentions. The Staff believes that the emergency planning issues raised by the Joint Intervenors, although not as specific as they should be, do present information justifying reopening the record.

As to the Class 9 issue, under the Commission's Interim Policy Statement entitled "Nuclear Power Plant Accident Considerations Under the National Environmental Policy Act of 1969" 45 Fed. Reg. 40101 (June 13, 1980), Joint Intervenors would be entitled to reopen the record to consider Class 9 accidents only if they could demonstrate special circumstances. (Id. at 40103). That policy statement notes that the Staff should take steps to identify plants which, because of such factors as population density or special site features, should be required to have the class 9 analysis. As noted in the Director of Nuclear Reactor Regulation's decision under 10 C.F.R. § 2.206 issued June 19, 1980, the Staff is of the opinion that the Diablo Canyon site is not located in an area of high population density, that the reactors are not of novel design or involve unique siting or a combination thereof and that, therefore, no special circumstances exist to consider Class 9 accidents at the site. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), DD-80-22, 11 NRC 919, 925-926 (1980).

The only special circumstance which has ever been advanced by Joint Intervenors to justify reopening the environmental record is the adequacy of Diablo Canyon's seismic design. After hearings on that issue, in which Joint Intervenors participated, the Appeal Board ruled that the plant was adequately designed from a seismic standpoint. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-644, 13 NRC ____ (June 16, 1981). Thus, the seismic issue does not present special circumstances requiring a reopening of the record.

Further illustrating that Joint Intervenors were aware of the Commission's regulations governing reopening and late contentions is

that Joint Intervenors also filed a timely motion to reopen on seismic issues as a result of the Imperial Valley Earthquake in 1979. In fact Joint Intervenors had no new information in June 1981 to justify late filing the contentions at issue here, other than the confusion created by the motion for low power testing filed by PG&E after the Commissions first policy statement in June 1980. While that motion may have justified additional arguments and contentions concerning low power operation it certainly cannot form the basis for additional contentions on full power issues.

C. The individual contentions in the Statement of Clarified Contentions

Joint Intervenors filed a motion to reopen the full power record on March 24, 1981 which contained 17 contentions. Just prior to the prehearing conference held on July 1, 1981 Joint Intervenors filed a document entitled "Joint Intervenors' Statement of Clarified Contentions" dated June 30, 1981. That document withdrew some contentions and slightly modified or combined others. It is the revised contentions which will now be addressed. Since the Statement of Clarified Contentions did not renumber the contentions, the contention numbers given below correspond to those in Joint Intervenors' March 24, 1981 filing.

1) Contention 1 - This contention was withdrawn by Joint Intervenors in their June 30, 1981 Statement of Clarified Contentions.

2) Contentions 2 and 3 - These contentions were combined and rewritten in the Statement of Clarified Contentions.

Contentions 2 and 3 as rewritten addressed the hydrogen control system at Diablo Canyon. The Joint Intervenors' contentions do not meet the requirements of 10 C.F.R. § 2.714 for late filing and are untimely. In the Joint Intervenors' explanation of their contentions it becomes clear that they rely on NUREG-0578 as having initially raised this issue. (Joint Intervenors' Motion to Reopen at 22-24). Under this circumstance the Joint Intervenors have not demonstrated good cause for waiting until 1981 to file these contentions. NUREG-0578 was issued in July of 1979, over two years ago. The fact that other TMI-related documents have issued since that time does not extend indefinitely the Joint Intervenors' ability to file contentions on issues which are based on information available for over 21 months. Joint Intervenors were parties to this proceeding long before TMI occurred. They were aware of the public documents on which they rely, such as NUREG-0578 for these contentions, within a relatively short time after the documents were made public. Joint Intervenors' attempt to cure their tardiness by reciting a NUREG-0737 item which references the NUREG-0578 issue but which provides no new information on which Joint Intervenors base their contentions. Further, NUREG-0737 is a revision of NUREG-0694 available in June, 1980. Even if NUREG-0694 were sufficient in itself to provide a basis for late filing there is no justification for waiting nearly a year to file contentions on matters contained therein. Joint Intervenors' tactic should be rejected since they have shown no interest in the issue for almost two years after the basis for their contention was made public. In fact, as noted above, Joint Intervenors filed several other motions to reopen after NUREG-0578 was published in which they did not seek to raise this issue. Their

Statement of Clarified Contentions does not give any additional information which would justify their long delay in raising this issue. The Joint Intervenors are not relieved of their responsibility to address the requirements of 10 C.F.R. § 2.714 on late filing and reopening because they are challenging compliance with the regulations. (13 NRC at 363). In addition, the admission of these contentions would result in delay of the proceeding by necessitating an evidentiary hearing on them. A balancing of the factors in 10 C.F.R. § 2.714, therefore, weighs in favor of not accepting these late filed contentions.

Moreover, even if these late filed contentions were accepted for the purpose of deciding whether to reopen the record, they failed to meet the standards for reopening.

The Joint Intervenors failed to identify any significant new information about Diablo Canyon. They request that PG&E be required to demonstrate the ability of the containment to withstand certain highly speculative situations. They have failed to meet their burden to identify even one possible deficiency at Diablo Canyon, and in fact acknowledge that Diablo Canyon has internal recombiners to deal with the particular circumstances Joint Intervenors are concerned with. They have not identified any new information which indicates a safety problem or shortfall at Diablo. Under these circumstances not only have they failed to satisfy the specificity requirements for contentions by not identifying an issue directly related to the Diablo Canyon facility, but they have failed to make any showing that the new information would have changed the initial result if originally considered. The Commission stated that the parties, in challenging compliance with the regulations,

must make the initial case that significant new evidence is available, not merely claims to that effect. [emphasis added] (Id.). Joint Interveners only discuss TMI events in general, and claim certain General Design Criteria (GDC's) were not complied with for Diablo Canyon. (Motion for Directed Certification at 11). The Joint Interveners, therefore, in addition to the late filing of contentions which lack specificity have failed to satisfy the requirements for reopening. Accordingly, these contentions should be dismissed.

Finally, the Joint Interveners clarified contention is a challenge to the 5% hydrogen production assumption in 10 C.F.R. § 50.44. The Commission specifically addressed this issue in Metropolitan Edison Company (Three Mile Island, Unit 1), CLI-80-16, 11 NRC 674 (1980). The Commission explained that the concern addressed by the question in that proceeding (which raised the same 10 C.F.R. § 50.44 issue as in Joint Interveners' Contention) was a common concern to all light water power reactors. Thus, the concern expressed did not amount to "special circumstances" sufficient to allow a challenge to 10 C.F.R. § 50.44 under 10 C.F.R. § 2.758. The Commission did state that hydrogen gas control could be litigated under 10 C.F.R. Part 100 if it is determined that there is a credible loss-of-coolant accident scenario entailing hydrogen generation, hydrogen combustion, containment breach and offsite radiation doses in excess of Part 100 guideline values. (Id. at 675). Joint Interveners' contention fails to give any accident scenario which would justify litigation of this contention. As the Commission noted, it is planning broad rulemaking which will address the particular concern of hydrogen production. (Id.). This contention, even if the standards for

timeliness and reopening the record are met, should be rejected as a challenge to the regulations.

3) Contention 4 - This contention was rewritten in Joint Intervenor's Statement of Clarified contentions.

As rewritten this contention alleges that the Staff should address the shutdown decay heat removal system issue in an SER supplement. This issue is an unresolved safety issue. (Task A-45). Joint Intervenor's contention does not provide any information to explain the late filing of this contention. No significant new information which would change the initial result is presented to satisfy the standards for reopening a closed record. Neither Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760 (1977) nor Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-491, 8 NRC 245 (1978) cited by Joint Intervenor's provide a basis for a showing of good cause for the late filing or significant new information justifying a reopening of the record on this issue. The burden is on Joint Intervenor's to make the required showings to satisfy the late filing and reopening standards. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-615, 12 NRC 350, 352 (1980) and (Catawba Nuclear Station, Units 1 & 2), ALAB-359, 4 NRC 619 (1976). The Joint Intervenor's failed to address either of these standards as they apply to this contention. Accordingly, this contention was properly rejected by the Licensing Board.

4) Contentions 5-7 - These contentions were withdrawn in Joint Intervenor's Statement of Clarified Contentions.

5) Contentions 8 and 9 - These contentions were combined and rewritten in Joint Intervenors' Statement of Clarified Contentions.

The Commission ordered that Contentions 10 and 12 from the low power proceeding, which were not admitted in the low power proceeding, be considered in the Diablo Canyon full power proceeding. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-22, 14 NRC ____ (September 21, 1981). Those two contentions were identical to Joint Intervenors' original Contentions 6 and 8 which were submitted in the full power proceeding. In Joint Intervenors' Statement of Clarified Contentions, Contention 6 was withdrawn and Contention 8 was rewritten in combination with Contention 9.

While the Staff recognizes that, by Commission order, these contentions are presently issues in the full power proceeding, the Commission's order makes it clear that this should not prevent the Appeal Board from determining whether these issues, as they appeared in the rewritten contentions, were properly excluded from the full power proceeding by the Licensing Board under the Commission's Policy Statements. The Commission specifically stated that the inclusion of Contentions 10 and 12 from the low power proceeding in the full power proceeding was "without prejudice to the Appeal Board review (and later Commission review) of the exclusion of these and other contentions in both the low power and the full power proceedings." (CLI-81-22, Slip op. at 2-3). The only way in which the Commission's decision can be interpreted so that it is internally consistent is if the directed inclusion of Contentions 10 and 12 in the full power proceeding was the result of the Commission's desire to hear those particular issues irrespective of whether they would be admissible under the Policy Statements. The Commission could not have

been, at that time, determining whether the contentions were admissible under the Commission's policy statements since such a finding would indeed prejudice the Appeal Board's review of the exclusion of the contentions - a result the Commission specifically disavowed. The Commission specifically affirmed this interpretation of their actions in a Memorandum and Order dated November 13, 1981 in which it stated "[The Commission] did not intend to address the admissibility of Contentions 10 and 12 under the standards of 10 C.F.R. § 2.714 or standards for reopening a closed record.

In addition, as combined and rewritten with Contention 9, Contention 8 from the full power proceeding is no longer identical to Contention 12 from the low power proceeding. In contrast to full power Contention 12, the presently rewritten contention discusses safety valves in addition to relief and block valves. It also alleges that adequate qualification testing has not been performed on block valves. These additional issues were not directed to be admitted into this proceeding by the Commission's order. The Appeal Board should, at the very least, determine whether these additional issues were properly excluded by the Licensing Board.

The Staff believes the Appeal Board should affirm the rejection by the Licensing Board of the entire rewritten contention combining Contentions 8 and 9.

Joint Intervenors did not meet the requirements of 10 C.F.R. § 2.714 for late filing of the rewritten contentions. As noted by Joint Intervenors, the question of relief and safety valve operation was raised in NUREG-0578 some 21 months ago. (Motion to Reopen at 29-32). The issues raised by Joint Intervenors do not relate specifically to new information contained in NUREG-0737 or other recent documents. Their contentions raise issues that arise from a generic concern identified almost two years ago.

The Joint Intervenors have not presented any evidence that would justify the lengthy delay in raising any questions on these long identified concerns. In addition, admission of these contentions would result in there being an additional evidentiary hearing which would delay the conclusion of this proceeding. The above factors, therefore, weigh for dismissing rewritten Contentions 8 and 9 as being untimely under 10 C.F.R. § 2.714.

Even if these contentions were not untimely, the Joint Intervenors have failed to meet the requirements for reopening a closed record.

The first portion of the rewritten contention addresses the classification of the relief and block valves as safety or non-safety grade. The safety issue on which the NUREG items focus is the testing of these valves. The Joint Intervenors, therefore, are not focusing on the same safety issue as the NUREG requirement. As such, for Contention 8, Joint Intervenors must demonstrate that the new information is "significant new information" regarding the issue of classification of the valves. (13 NRC at 363-364). This they have not done. The second argument related to testing appears to focus on the same safety concern as the NUREG items and, as such, may satisfy the "significant new information" requirement for reopening. Nevertheless, to have that portion of the contention admitted, Joint Intervenors must satisfy the second part of the reopening requirement by showing that the information would change the result, in order to justify reopening the record in this proceeding. Neither of the contentions, nor the elaboration on them by Joint Intervenors in their Motion to Reopen, Statement of Clarified Contentions, or Motion for Directed Certification establish that the information is such as would have changed the initial result if originally considered. Since the Joint Intervenors have failed to meet the requirements for late

filing of contentions and reopening of the record, combined Contentions 8 and 9 were properly dismissed from this proceeding.

6) Contention 10 - This contention was rewritten in Joint Intervenors Statement of Clarified Contentions.

Contention 10 relates to the inadequate core cooling instrumentation system. The contention as proposed originally and as rewritten, fails to satisfy the late filing standards of 10 C.F.R. § 2.714. The basic recommendation that accurate and unambiguous measurements of variables be made available, based on the accident at TMI, was identified in NUREG-0578 some 21 months ago as noted by Joint Intervenors. Since Diablo Canyon did not have any direct water level indicator at that time, the basis for Joint Intervenors' contention has been or should have been known to them for almost 2 years. The Joint Intervenors have not demonstrated that any more recent information justifies bringing the issue at this late date. As such, the Joint Intervenors have completely failed to justify the acceptance of the contention at this time. In addition, acceptance of this contention would result in an additional evidentiary hearing which would delay the final resolution of this proceeding. In view of these circumstances, Joint Intervenors have failed to show that a balancing of the factors in 10 C.F.R. § 2.714 justifies accepting these late filed contentions.

Even if this contention were not rejected as untimely, the Joint Intervenors have failed to meet the requirements for reopening a closed record. The NUREG items identified by Joint Intervenors as the basis for their contention relate to a requirement that there be unambiguous, accurate measures of variables at nuclear plants. The

contention, however, focuses on the need for a particular kind of readout instrument, a direct water level indicator, which is not the same safety concern as the NUREG items. Joint Intervenors therefore, to justify reopening the closed record, must demonstrate that the new information is significant with regard to water level indicators and that such information would require a change in the initial result if originally considered. The Joint Intervenors have presented no basis for concluding that the information, even if considered significant, would result in a change in the initial result.

In view of the above deficiencies in meeting the late filing and reopening requirements, the Board properly dismissed Contention 10.

7) Contention 11 - This contention was rewritten in Joint Intervenors' Statement of Clarified Contentions.

Contention 11 does not meet the requirements of 10 C.F.R. § 2.714 for late filing. As becomes clear in the Joint Intervenors' elaboration on this contention in their Motion to Reopen, they rely on information appearing in the Standard Review Plan, NUREG-0578 and NUREG-0585 as the basis for this contention. The latest of these documents is NUREG-0585 which was published in October of 1979. Although Joint Intervenors originally footnoted a requirement in NUREG-0737, they do not identify any new information in that document which serves as the basis for their contentions. The rewritten contention also fails to give any explanation for filing this contention in March of 1981. Based on the above facts, the Joint Intervenors have not demonstrated why it took them 18 months to raise this issue after the last of the documents which form the basis for their contention was issued. In addition, the admission of this

Contention would require an additional evidentiary hearing on this issue and would delay the ultimate resolution of this proceeding. A balancing of the factors in 10 C.F.R. § 2.714 for filing late contentions, therefore, weighs against admitting Contention 11.

Even if the Joint Intervenors were justified in filing this contention in so untimely a fashion, they still failed to meet the requirements for reopening a closed record. The Joint Intervenors' contention, as elaborated upon in their Motion to Reopen, argues that the full spectrum of postulated loss-of-coolant accidents at Diablo Canyon should be analyzed. Joint Intervenors then listed some particular items they believed should be considered during such analysis. What Joint Intervenors have failed to do is show that there is significant new information on the question of whether the analysis should be made. Their preface to demanding the analysis is that certain performance criteria was exceeded at TMI-2 during the TMI accident. However, there is no logical progression from that preface to the demand for an analysis of the full spectrum of postulated accidents at Diablo Canyon. Neither the original contention nor the rewritten contention provides a nexus between the two plants on this issue. In fact, TMI is a Babcock and Wilcox plant and Diablo Canyon is a Westinghouse plant. Thus any direct relationship between them on this issue is not self-evident. In addition to failing to show that there is significant new information justifying such wide range analysis, Joint Intervenors have not shown that the information they have cited is such as would have changed the initial result if originally considered. The Joint Intervenors, therefore, have

failed to meet either of the requirements for reopening the record and late filed Contention 11 was properly dismissed.

8) Contention 14 - This contention was rewritten in Joint Intervenors' Statement of Clarified Contentions.

Contention 14 addresses the environmental qualification of equipment at Diablo Canyon. The first part of the contention relates to whether PG&E has complied with the regulations. The second part relates to whether the Staff has adequately addressed the environmental qualification issue. Joint Intervenors' request to overturn the Licensing Board's ruling on this issue is difficult to understand. The Licensing Board agreed with the Joint Intervenors that certain deficiencies in identified equipment did exist as admitted in a June 10, 1981 submittal by PG&E to the Staff. The Licensing Board stated that it expected that Diablo Canyon would not be allowed to operate until the regulations were complied with. The Staff position is that the Applicant must provide a justification for operating with the deficiencies prior to full power operation. This is consistent with the Commission's directions that the environmental qualification of equipment need not be completed until June 30, 1982 and that the Staff should determine in the interim whether to allow operation where equipment had not been documented as qualified. Petition for Emergency and Remedial Action, CLI-80-21, 11 NRC 707, 715 (1980). Nothing remains for Joint Intervenors to litigate on this portion of the contention.

As to the second portion of the contention, the Licensing Board directed that the Joint Intervenors could file further contentions on the Staff's analysis of the environmental qualification issue within fifteen

days of the issuance of the Staff's SER supplement on that issue. The Staff SER Supplement on environmental qualification was issued on October 2, 1981. A contention on the environmental qualification issue was submitted on October 23, 1981 by Joint Intervenors. The Licensing Board has not yet ruled on the admissibility of the new contention.

To the extent the Joint Intervenors rely on the June 10, 1981 letter as the basis for this contention, the Staff would concede that it was not filed in an untimely manner. However, in view of the Licensing Board's ruling on this contention, there does not appear to be any basis for finding that the information in the June 10, 1981 letter is significant new information which would change the initial result. To the extent the original contention relied on the TMI accident for its basis, the contention fails to meet both the requirements for late filing and the requirements for reopening a closed record.^{1/}

9) Contentions 15 and 16 - These contentions were combined and rewritten in Joint Intervenors' Statement of Clarified Contentions.

Combined Contentions 15 and 16 relate to the analysis of systems interaction. These contentions do not comply with the requirements of 10 C.F.R. § 2.714 for late filing. Joint Intervenors' argument in their Appeal Brief again ignores these requirements.

The Joint Intervenors, both in their version of these contentions and in their Motion to Reopen, relied heavily on factors which they

^{1/} For the Staff discussion of the failure of the original contention to meet the late filing and reopening requirements, see Staff "Response to Motion to Reopen" filed with the Licensing Board on March 13, 1981 at pp. 24-26.

referenced as coming from NUREG-0578 and NUREG-0585. The latest of these two documents was published in October, 1979, some 1½ years ago. In fact, it is the recommendations of these two NUREG's which Joint Intervenors attacked. Although the Joint Intervenors cited a November 1980 Board Notification, they did not identify or rely on any new information which it provided. In view of this failure, the Joint Intervenors did not demonstrate good cause for waiting almost 18 months after the basis for their contentions was available to file this contention. This failure is particularly noteworthy because Joint Intervenors were parties to this proceeding throughout this period, have been aware of and provided public documents (including NUREG's) which might affect the proceeding, and have regularly filed motions to reopen when they believed circumstances warranted. Admission of these contentions would result in substantial delay by requiring an additional evidentiary hearing before there would be a resolution of this proceeding. In view of the above discussion, it does not appear Joint Intervenors have met their burden under 10 C.F.R. § 2.714 to justify this untimely filing. Those contentions were, therefore, properly dismissed.

Even if these contentions were not rejected for being untimely, they failed to meet the requirements for reopening a closed record. The Joint Intervenors claimed that a number of interactions had not been analyzed which took place at TMI. However, they alleged no failure of the systems as a result of not analyzing these interactions. Nor did they show the nexus between the interactions at TMI and at Diablo Canyon. They, therefore, failed to show any significant new information affecting health and safety related to these contentions. Even if this information was

considered significant, the Joint Intervenors did not show that the information was such as would have changed an initial result if originally considered. Thus, the Joint Intervenors failed to make the required showings to reopen a closed record, these contentions were properly dismissed on this additional ground.

10) Contention 17 - This contention was rewritten in the Joint Intervenors' Statement of Clarified Contentions.

Contention 17 relates to Joint Intervenors' desire to have documentation of compliance with each regulation and regulatory guide applicable to Diablo Canyon. This contention does not meet the requirements of 10 C.F.R. § 2.714 for late filing. As noted by the Joint Intervenors this proposal, as applied to all plants, has been under consideration since at least June 18, 1976. Thus, this concern pre-dated the TMI accident. The Diablo Canyon licensing proceeding had begun prior to that June 18, 1976 date. Nevertheless, although several documents in 1976 and 1977 were cited by Joint Intervenors, they expressed no interest in this issue in this proceeding, until 1981. Under these circumstances the Joint Intervenors did not show good cause for the late filing of Contention 17. Admission of Contention 17 would result in an additional evidentiary hearing which would substantially delay a resolution of this proceeding. Considering the magnitude of the review Joint Intervenors propose, this delay could be extraordinarily great. A balancing of the factors in 10 C.F.R. § 2.714 would not, therefore, favor admitting this late filed contention.

Even if this contention were not untimely, the Joint Intervenors failed to satisfy the requirements for reopening a closed record. The

Joint Intervenors have presented no significant new information on Diablo Canyon which would justify reopening the closed record on this issue. The Joint Intervenors did not identify any deficiency at Diablo Canyon, or any history of deficiencies which would justify allowing a regulation by regulation examination of Diablo Canyon. In effect, Joint Intervenors wanted the Board to embark on the most comprehensive of fishing expeditions. Manifestly, this is not the type of information on which a closed record should be reopened. Indeed, in failing to identify any failure to comply with the regulations at Diablo Canyon, Joint Intervenors cannot argue that the result reached by the Licensing Board would be changed by such failure. Contention 17 was, therefore, also properly dismissed since the requirements for reopening a closed record have not been met by Joint Intervenors.

VI. CONCLUSION

The Commission Policy Statements and Orders clearly direct that both the late filing and reopening standards apply when a party seeks to reopen a closed record to consider TMI-related issues. Such is the case in the Diablo Canyon proceeding. Joint Intervenors have failed to demonstrate any of the contentions rejected by Licensing Board meet those requirements. Joint Intervenors' contentions should be rejected because Joint Intervenors failed to show with respect to each contention any justification for the late filing of the contention, or any significant new information justifying a reopening of the record, or both. The Staff urges the Appeal Board to affirm the Licensing Board's Prehearing

Conference Order of August 4, 1981 as respects the admissibility of the
Joint Intervenors' contentions.

Respectfully submitted,

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Dated at Bethesda, Maryland
this 16th day of November, 1981.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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.

CERTIFICATE OF SERVICE

I hereby certify that copies of NRC STAFF BRIEF IN RESPONSE TO OCTOBER 29, 1981 APPEAL BOARD ORDER in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, except as indicated by an asterisk(s), this 16th day of November, 1981.

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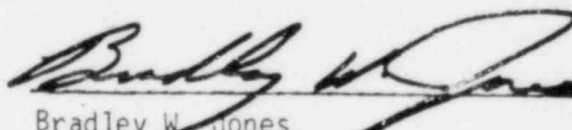
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