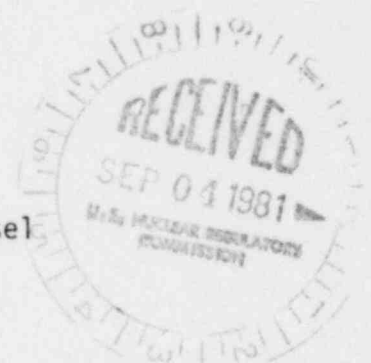
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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, Unit Nos. 1 and 2)	)	

STAFF RESPONSE TO AUGUST 14, 1981
MOTION OF JOINT INTERVENORS



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September 3, 1981

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I. INTRODUCTION

On July 17, 1981, the Atomic Safety and Licensing Board in the above proceeding issued a Partial Initial Decision (PID) on the application of PG&E for a fuel load and low power license for the Diablo Canyon Nuclear Facility. That decision authorized issuance of the fuel load and low power operating license upon a favorable ruling by the Appeal Board on certain security issues pending before it. The Commission issued an order on July 22, 1981 indicating that the period for review of the licensing decision would not begin to run until the Appeal Board issued its security decision. As of the date of this document no security decision had been issued by the Appeal Board. On August 14, 1981, the Joint Intervenors filed "Joint Intervenors' Request for Waiver of the Immediate Effectiveness Rule". The Staff opposes the Joint Intervenors' motion.

II. DISCUSSION

Joint Intervenors urge that the provisions of 10 C.F.R. § 2.764, which bar the filing of pleadings with the Commission during the low

power review process provided for in that regulation, be waived in the Diablo Canyon proceeding. The Joint Intervenors argue that application of the rule, due to special circumstances in this proceeding, would not serve the rule's intended purpose. The Joint Intervenors state that the purpose of the rule is to expedite the licensing process by reducing the time between completion of plant construction and a final Commission decision authorizing plant operation. (Joint Intervenors' Motion at 2). Indeed, 10 C.F.R. § 2.758(b) does provide that the sole grounds for a waiver shall be that special circumstances exist such that application of the rule would not serve the purposes for which the rule exists. Joint Intervenors correctly note that one purpose of the immediate effectiveness rule, as set out in the summary portion of the Statement of Considerations on the rule, is to reduce the length of time between a Licensing Board's decision to license plant operation and actual issuance of the license. (46 Fed. Reg. 28627, May 28, 1981). However, an examination of the entire Statement of Considerations reveals that, although perhaps a major purpose of the rule, the purpose identified by the Joint Intervenors is not the only purpose for the rule. In addition to noting the desire to eliminate unnecessary delay in licensing, the "summary" portion of the Statement of Considerations notes that the review process is designed to determine whether effectiveness of a Licensing Board's decision should be delayed pending normal appellate review procedures. The "additional information" section of the Statement of Considerations for the rule also indicates that the review process is designed to focus on significant policy issues and it is not intended to involve a review of the entire record established by the Licensing Board. (Id. at 28628).

Thus, Joint Intervenors' motion to waive 10 C.F.R. § 2.764 must be analyzed to determine; 1) whether there are special circumstances and 2) whether application of the rule in this proceeding would fail to serve the purpose of eliminating delay in licensing or the purpose of focusing on significant policy issues.

A. Application of the Rule Will Serve Its Intended Purpose

Treating the second issue first, the question is whether the application of the rule would fail to serve the purposes of the rule. While the Staff agrees that the fuel load and low power testing program could, as alleged by Joint Intervenors, conceivably be completed in three months, this does not necessarily mean that application of the rule would not serve the purpose of expediting issuance of a license. The Joint Intervenors allege that an application of the 10 day "deadline" for review of the Licensing Board's decision would not expedite the eventual issuance of a full power operating license. (Joint Intervenors' Motion at 14). Joint Intervenors' impression that there is such a "deadline" is erroneous. The rule states that "the Commission intends to issue a decision regarding each fuel loading and low power testing license within 10 days of receipt of the Licensing Board's decision..." [emphasis added] (10 C.F.R. § 2.764(f)(2)(iv)). In addition, in 10 C.F.R. § 2.764(f)(2)(iii), the regulations refer to the schedule in the following paragraph as "target schedule[s]". This reference to "target schedules" and use of the term "intends" rather than a binding term such as "must", indicate that the Commission is not bound by a 10 day limit, and no waiver of the regulation is necessary in order for the Commission to have additional

time to review the Licensing Board's decision, should they determine that additional time is needed. In fact, the decision does not become effective until the Commission affirmatively acts.

The other portion of the regulation which Joint Intervenors wish to have waived is the bar on the filing of pleadings with the Commission to assist it in its limited review under 10 C.F.R. § 2.764 of the Diablo Canyon fuel loading and low power testing authorization by the Licensing Board. The circumstances surrounding the Joint Intervenors' argument that the purpose of the rule would not be served, in actuality, demonstrate that the waiver requested would frustrate the purposes of the rule. Indeed, there are at least two valid and readily apparent reasons which convincingly demonstrate the appropriateness of applying the rule to the issues identified by the Joint Intervenors. First, the issues identified involve detailed analysis of factual and legal disagreements which are not of the "significant policy issue" category which the review process created by the rule is intended to cover. Second, the issues raised by Joint Intervenors are of the type which are more appropriately reviewed in the normal appellate review process which is expressly preserved under the regulation. (10 C.F.R. § 2.764(f)(2)(vi)). The waiver which Joint Intervenors have requested would result in a detailed review which could result in lengthy delays in licensing. The resolution of the individual concerns of Joint Intervenors would necessarily involve the Commission in a review of the lengthy record in this proceeding, in addition to a review of the pleadings the Joint Intervenors wish to file. These results are incompatible with the limited review objectives of 10 C.F.R. 2.764. Thus, rather than demonstrating that the purposes of

the rule will not be served, the Joint Intervenors' arguments demonstrate that the waiver they have requested would frustrate the purposes of that rule.

B. No "Special Circumstances" Are Present

Joint Intervenors must also, under 10 C.F.R. § 2.758, demonstrate "special circumstances" showing that the application of § 2.764 in this proceeding would not serve the purposes for which the rule exists. We have just seen that the application of the rule here would serve its intended purpose. We will now consider whether there are any special circumstances which would tend to cast doubt on that conclusion. There are none. An examination of each of the categories of "special" circumstances identified by Joint Intervenors reveals that the circumstances are not, in fact, "special". The first category of issues raised by Joint Intervenors covers issues which are either seismic or security related. As Joint Intervenors note in footnote 11 of their motion, the arguments presented in their present motion were also presented in a Petition for Review filed with the Commission on July 6, 1981. A decision on that petition has not yet been issued. The arguments presented by Joint Intervenors are not new, but are simply repetitions of arguments which were presented to the Appeal Board or Licensing Board (or both) and which were rejected by those Boards. (Joint Intervenors' Proposed Findings of Fact and Conclusions of Law, March 25, 1979, p. 23-25; Joint Intervenors' Proposed Findings of Fact and Conclusions of Law, December 15, 1980, p. 47-49). There is no new information or other

special circumstances which would indicate that the 10 C.F.R. § 2.764 review should be converted into a detailed review of seismic issues.

Joint Intervenors' arguments are more appropriately considered in connection with their petition for review of the Appeal Board's decision pursuant to 10 C.F.R. § 2.786. Thus, in order for Joint Intervenors to bring these issues to the Commission's attention as they have done, a waiver of the rules is not necessary. In addition, 10 C.F.R. § 2.764(f)(2)(vi) specifically provides that the stay provisions of 10 C.F.R. § 2.788 are still applicable to the review process. If Joint Intervenors can demonstrate circumstances which necessitate delaying issuance of the fuel load and low power license, they could, in compliance with 10 C.F.R. § 2.788, apply to the Commission's Licensing or Appeal boards for a stay. The regulations, therefore, specifically provide mechanisms to address the type of concerns raised by Joint Intervenors, and there is no reason to try to fashion 10 C.F.R. § 2.764 to provide such a procedural mechanism, one, as we have shown, it was never designed to provide.

The second set of circumstances raised by Joint Intervenors involves emergency planning. Joint Intervenors raise two issues under this category. The first issue raised is whether the plant can be licensed for fuel load and low power testing without complete compliance with the provisions of 10 C.F.R. 50.47(b). This issue was thoroughly briefed during the low power proceedings before the Licensing Board. (Joint Intervenors' Proposed Findings of Fact and Conclusions of Law, June 16, 1981, p. 9-14). The basis for Joint Intervenors' challenge to the Licensing Board's determination of this issue is that the Licensing Board

was incorrect in finding that SECY 81-188 justified less than full compliance with 10 C.F.R. § 50.47(b). (Joint Intervenors' Motion at 7). The Joint Intervenors misinterpret the Licensing Board's ruling when they allege that the Board, based on SECY 81-188, determined that the Commission's emergency planning regulations need not be considered in reviewing an application for a license to load fuel and conduct low power tests. (Joint Intervenors' Motion at 7). As the Licensing Board was careful to point out with respect to the argument Joint Intervenors now advance, the substance of Section 50.47 is not altered by SECY 81-188. The SECY paper only deals with the schedule for implementation of the emergency planning requirements, a subject not specifically dealt with in Section 50.47. (Partial Initial Decision, July 17, 1981, p. 22-24).

In addition, 10 C.F.R. § 50.47(c)(1) specifically allows the applicant to demonstrate that the deficiencies in the plans are not significant for the plant in question. There is nothing in that provision which prevents the applicant from making a showing of insignificance on a basis which applies to all the deficiencies. There is no explicit requirement that a deficiency-by-deficiency examination be conducted by the Board. If the Board has determined, by considering the present state of emergency planning and the low risk during low power operation, that adequate protection exists so that any further deficiencies are insignificant, then the exemption provisions of 10 C.F.R. § 50.47(c) have been met.

Joint Intervenors argue that by determining that the low risk during low power renders the deficiencies in the emergency plan insignificant, the Board, is, in effect, challenging the regulations. (Joint Intervenors' Motion at 8). However, this argument ignores the Board's

rationale that emergency planning deficiencies can be rendered insignificant pursuant to Section 50.47(c) because of the low risk associated with low power operation. Such an analysis can hardly be a challenge to the regulation when its very purpose is to review compliance with the regulation.

For low power authorization a Board is required to make only those findings relevant to the activity to be authorized. (10 C.F.R. § 50.57(c)). An analogous situation exists with respect to the consideration of accidents for the purposes of conducting an environmental review under the Commission's regulations. While the consideration of the effect of accidents on the environment assumes that an unlikely accident has occurred, the Commission has specifically noted that it was appropriate to consider the probability of occurrence of the events. (Commission Statement of Interim Policy, 45 Fed. Reg. 40101, 40103 (1980)). Thus, the fact that some unlikely events are assumed for analysis does not mean that every conceivable event, no matter how unlikely, should be considered.

However, it is not necessary to reach a determination of whether the extremely low probabilities presented during low power testing are so remote as to make their consideration unnecessary. 10 C.F.R. § 50.47(c) places no restrictions on the reasons which the Licensing Board may find to demonstrate the insignificance of deficiencies in a particular emergency plan. Unlike the situation in Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520 (1973) which was cited by Joint Intervenors, the Commission's emergency planning regulation allows the Licensing Board to determine whether the

deficiencies in the emergency plan are insignificant. Thus, the Licensing Board followed the specific process provided in the regulations.

The second issue which Joint Intervenors raise with regard to emergency planning is whether the Licensing Board adequately considered the effect of an earthquake occurring simultaneously with a radiological emergency at the site. (Joint Intervenors' Motion at 6). As testified to by Staff witnesses, and as noted by the Board, the effect of earthquakes on the emergency plan is the subject of a study presently being conducted and PG&E will make any modifications indicated by the study as being necessary. (Sears Testimony at 7; Tr. at 11057-11060, PID at 47). The Licensing Board considered the arguments and made findings on this issue. (Tr. at 11283-11289, PID at 47). The Joint Intervenors have not presented any information additional to that already considered by the Licensing Board which might be considered as raising special circumstances. As with the seismic and security issues, the reargument of these positions is appropriately handled through the appeal provisions of 10 C.F.R. § 2.762 and § 2.785, and through the stay provisions of 10 C.F.R. § 2.788. The Joint Intervenors have not presented anything special about their arguments other than the fact that they were rejected by the Licensing Board. This is not a case where the Licensing Board has ruled on the basis of some new theory or position which Joint Intervenors were not previously allowed to address. If such an adverse ruling were to constitute "special circumstances" under 10 C.F.R. § 2.758, the exceptions to 10 C.F.R. § 2.764 would swallow the rule.

The third category of issues Joint Intervenors maintain establish "special circumstances" justifying a waiver of 10 C.F.R. § 2.764, is the rejection by the Licensing Board of certain contentions proposed by Joint Intervenors. Joint Intervenors argue that the Licensing Board's treatment of NUREG-0737 elevated that document to the status of a rule without the public notice and comment requirements of the Administrative Procedure Act of 1946 being met. (Joint Intervenors' Motion at 12; 5 U.S.C. § 553 (1976 & Supp. III 1979)). An examination of the Licensing Board's Prehearing Conference Order of February 13, 1981, and the Commission's clarification of the Revised Policy Statement on NUREG-0737 show that interpretation to be groundless.

In Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC ____ (1981), the Commision provided guidance on the proper application of the Revised Statement of Policy, CLI-80-42, 12 NRC 654 (1980), and NUREG-0737 to contentions submitted in proceedings where the record has been closed. That order made it clear that the requirements of 10 C.F.R. § 2.714 on late filed contentions, and the requirements for reopening a closed record in Kansas Gas and Electric Co. et. al. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978), apply to late filed contentions which relate to NUREG-0737. (CLI-81-5 at 5-6). The Commission did note that NUREG-0737 could satisfy the requirement for significant new information necessary to reopen a closed record under the Wolf Creek standard. However, the Commission also noted that it must still be demonstrated that the information would have changed the initial result in order to justify reopening the record. (CLI-81-5 at 6). Thus, the Commission was

not establishing NUREG-0737 as a rule by its treatment of the contentions, but was merely making a determination of whether the information in NUREG-0737 satisfied the Commission's regulations for late filing of contentions and reopening closed records. An examination of the Licensing Board's treatment of the contentions reveals that the Licensing Board, similarly, did not treat the NUREG-0737 as a rule, but simply made a determination of whether the Commission's rules for late filing of contentions and reopening a closed record were satisfied.

The Licensing Board stated in the February 13, 1981 Prehearing Conference Order that the Joint Intervenors had not at that time attempted to demonstrate good cause for late filing of contentions and reopening a closed record. (Prehearing Conference Order at 8). However, rather than rejecting all of the Joint Intervenors' contentions, the Licensing Board found that NUREG-0737 would constitute good cause for both reopening the record and for late filing of contentions. (Id. at 12). Rather than applying NUREG-0737 as a rigid rule which prevents the admission of Joint Intervenors' contentions, the Licensing Board was giving more benefit to the Joint Intervenors on the basis of NUREG-0737 then was necessary under the Commission's guidance in CLI-81-5. Since the Licensing Board was simply using NUREG-0737 as information which might meet the provisions of 10 C.F.R. § 2.714 and which might satisfy the requirement for reopening a closed record, NUREG-0737 would not be the equivalent of a rule requiring notice and comment as alleged by Joint Intervenors. The Licensing Board's method of using NUREG-0737, therefore, does not constitute special circumstances justifying a waiver of 10 C.F.R. § 2.764. Rather, what is involved is the application of

well established Commission rules for late filing of contentions and reopening of closed records.

The Joint Intervenors further allege that by limiting the scope of contentions, the Licensing Board denied Joint Intervenors their right to a hearing under Section 189(a) of the Atomic Energy Act of 1954 (as amended). (Joint Intervenors' Motion at 12; 42 U.S.C. § 2239 (1976 & Supp. III 1979)). This argument is specious at best. Joint Intervenors have, in fact had a hearing of great length on this application. In addition, the record was reopened to further consider TMI-related low power contentions. The latter reopened hearing lasted from May 19-22, 1981. The opportunity for hearing which Section 189(a) affords does not necessarily mean that an interested party, such as Joint Intervenors, has the right to litigate in that hearing all of the contentions which they allege. The Joint Intervenors have presented their contentions to the Licensing Board and were given an opportunity to present arguments in support of them. As demonstrated above, that Board gave them generous treatment in setting the issues for hearing. As far as the consideration of contentions is concerned, Section 189(a) does not require anything more. Thus, the rejection of Joint Intervenors' contentions does not raise special circumstances which would justify the waiver of 10 C.F.R. § 2.764 so that it would be changed from a limited review, for specific purposes, of significant policy issues by the Commission into a detailed review of the Licensing Board's acceptance or rejection of some contentions. A detailed review of such rulings, while the antithesis of the 10 C.F.R. § 2.764 Commission review, is a typical ingredient for the regular appellate process for the review of ASLB decisions. As far as

10 C.F.R. § 2.764 is concerned, Joint Intervenors are in no different position than any person who participates in a proceeding and has some contentions rejected and some accepted.

III. CONCLUSION

A waiver of a rule is appropriate under 10 C.F.R. § 2.758 if special circumstances exist such that the purposes of the rule would not be served by applying it to the proceeding in question. As has been demonstrated above, the waiver requested by Joint Intervenors does not present special circumstances, but rather presents the panoply of positions and issues which are expected in any adversarial proceeding where a ruling is unfavorable to one of the parties. Joint Intervenors have shown no special circumstances which would warrant the waiver of 10 C.F.R. § 2.764. That section serves the limited purpose of providing the Commission, without unnecessary delay, with an opportunity to review significant questions of policy before allowing a ASLB decision to become effective. This limited review procedure is not, however, in lieu of, and, indeed, has no affect on the normal appellate procedures which remain available to the Joint Intervenors.

Respectfully submitted,

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Dated at Bethesda, Maryland
this 3rd day of September, 1981.

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CERTIFICATE OF SERVICE

I hereby certify that copies of STAFF RESPONSE TO AUGUST 14, 1981 MOTION OF JOINT INTERVENORS 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 3rd day of September, 1981:

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