UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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)	)	

NRC STAFF RESPONSE TO GOVERNOR BROWN'S MOTION FOR A STAY

William J. Olmstead
Deputy Chief Hearing Counsel

Bradley W. Jones
Counsel for NRC Staff

DS07
S
1/1

September 21, 1981

DESIGNATED ORIGINAL

Certified By _____

DS07

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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)	)	

NRC STAFF RESPONSE TO
GOVERNOR BROWN'S MOTION FOR A STAY

INTRODUCTION

On July 17, 1981, the Licensing Board in the above proceeding issued a Partial Initial Decision authorizing fuel loading and low power testing of the Diablo Canyon Nuclear Facility pending a favorable ruling on the security issues which were then before the Appeal Board. On September 9, 1981, the Appeal Board issued ALAB-653 which found the Diablo Canyon security plan adequate. On September 11, 1981, Governor Brown filed a request to stay the effectiveness of the Licensing Board's decision pending the completion of the administrative appellate review by the Commission of the seismic, security and low power decisions. The NRC Staff, for the reasons set forth below, opposes that motion.

DISCUSSION

The requirements for the granting of a stay by the Appeal Board are contained in 10 C.F.R. § 2.788. Section 2.788(e) sets out the factors to be considered by the Appeal Board in determining whether or not to grant a stay request. Those standards are:

(1) Whether the moving party has made a strong showing that it is likely to prevail on the merits.

(2) Whether the party will be irreparably injured unless a stay is granted.

(3) Whether the granting of a stay would harm the other parties; and

(4) Where the public interest lies.

The burden of persuasion on these factors is on the movant. Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-493, 8 NRC 253, 270 (1978). No single factor is dispositive; the granting or denying of a stay request turns on a balancing of all the factors. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-338, 4 NRC 10, 14-15 (1976). An examination of the stay motion filed by Governor Brown reveals that a balancing of the four factors in Section 2.788(e) does not weigh in favor of granting the requested stay. The Governor has failed to meet his burden of persuasion. The requested stay, therefore, should not be granted. The Staff will address in turn each of the four factors in 10 C.F.R. § 2.788(e).

Likelihood of Success on the Merits

Governor Brown lists three areas in which he alleges the Licensing Board erred and which he believes are adequate to serve as the basis for the Appeal Board granting a stay. Those three areas are: (1) emergency preparedness, (2) TMI-related contentions, and (3) necessity of preparing an environmental impact appraisal.

a. Emergency preparedness - The Governor essentially argues that the Board's rulings were incorrect in that the applicant failed to demonstrate compliance with 10 C.F.R. § 50.47 and that the facts presented at the hearing did not support nor provide a foundation for the Licensing Board's ruling in the Partial Initial Decision. (Governor Brown's Motion at 3-5). The Governor alleges that five "facts" listed in his motion

demonstrate these Board errors. An examination of those "facts" reveals that they are not a sufficiently complete representation of the presentations made at the low power proceeding, and that they do not accurately represent the bases the Licensing Board presented in its rulings in the Partial Initial Decision.

The Governor first alleges that the County of San Luis Obispo has no capability to respond to a radiological emergency. Governor Brown makes this statement based on the testimony of Mr. Jorgensen. (Governor Brown's Motion at 3). The Governor ignores the fact that the County Sheriff specifically testified as to his ability to evacuate the LPZ during a radiological emergency. The Sheriff testified that he did have the ability to evacuate the LPZ as required under the regulations. (Tr. 11323, 11337). The Board specifically addressed both Mr. Jorgensen's and Sheriff Whiting's testimony in their Partial Initial Decision. (PID at 45-51). Thus, Governor Brown's assertions that the Board failed to explain the basis for its decision and failed to address the Governor's evidence are not supported when the entire record is considered, rather than selected portions. It is evident that the Governor believes that the Board did not put appropriate weight on the testimony of his witness, but this should not be sufficient grounds for granting a request for stay. The likelihood of upsetting the Licensing Board's decision based on the weight it gave to testimony is extremely remote.
Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 404 (1976).

Second, Governor Brown alleges that PG&E does not comply with the 16 planning standards of 10 C.F.R. § 50.47(b). (Governor Brown's Motion at 4). The Licensing Board considered whether the 16 planning standards

must be met prior to low power testing. (PID at 19-24). It determined that complete implementation of the 16 standards was not required. 10 C.F.R. § 50.47(c)(1) specifically provides that an applicant can be excused from meeting the 16 standards if it is demonstrated that the deficiencies are not significant for the plant in question. Applying this regulation in the context of 10 C.F.R. 50.57(c), which requires findings on matters relevant to the activity to be authorized, and the Commission's policy pronouncements on low power authorizations, the Board, in fact, made a finding that the emergency planning deficiencies were insignificant based on the low risk during low power and the emergency planning that would be available during low power. (PID at 51).

Third, Governor Brown alleges that there is no demonstrated means for notification of the persons in Montana de Oro State Park. (Governor Brown's Motion at 4). The Board's findings and the emergency plans indicate the possibility of notification by ground vehicles, by horses, by persons on foot and by helicopter. (PID at 45-46, San Luis Obispo County Nuclear Power Plant Emergency Evacuation Plan, 1976, p. 35). Evacuation could similarly be undertaken for the park by these methods. (Tr. 11068). No evidence to the contrary was presented at the low power hearing. Thus, the Board's findings are explained and supported by the record and it is not at all evident that the Governor is likely to prevail on the merits of this issue.

The Governor's fourth argument on the merits is that inadequate consideration was given to the complicating effects of an earthquake on the emergency plan. The Licensing Board made findings on this issue, noting that a study on the effects of earthquakes on the emergency plans was being conducted and that changes to the plan would be made in

response to that report (PID at 47). That report has been completed by the TERA Corporation since the Licensing Board's decision and is now being reviewed by the Staff. ("Earthquake Emergency Planning at Diablo Canyon", dated September 2, 1981). In view of PG&E's commitment to make any changes the report suggests, the Staff maintains that adequate consideration was given to this factor. (Sears Testimony at 7). Further, the Governor ignores the analysis of risk which the Board carefully made and found significant to its decision. Failure to address the significant bases for the findings is fatal to Governor Brown's chances of making the requisite showings of success on the merits necessary for the granting of a stay.

The Governor's final argument is that emergency preparedness within the LPZ is not adequate. (Governor Brown's Motion at 4). Once again, the Governor ignores the fact that under 10 C.F.R. § 50.47(c)(1) the applicant may demonstrate that any deficiencies in the emergency plans are insignificant. While low risk does justify a smaller area of concern such as the LPZ for low power, there is nothing in Section 50.47(c)(1) which prevents the low risk from also affecting the level of planning which is crucial within that zone. The Licensing Board determined that any deficiencies that remained in the LPZ were not significant for low power based on the planning that was available and the low risk during low power testing. (PID at 51). Governor Brown's dispute with the Licensing Board's findings is not one on which it would appear the Governor is likely to succeed on the merits, since he has not demonstrated the significance of the deficiencies which would indicate any clear error in the Board's conclusion.

b. TMI-related Contentions - Governor Brown argues that the Licensing Board improperly excluded some of his contentions. (Governor Brown's Motion at 5). The Commission had the opportunity to review for itself the treatment the Licensing Board gave to Joint Intervenors' contentions and issued a clarification on the standard for admitting contentions in a closed proceeding. (Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361 (1981). The Commission, having before it the very same arguments the Governor again presents now, did not find any error requiring reversal of the Licensing Board's rulings which excluded contentions. In fact, the Commission stated that reopening should only be granted where there were new contentions raising new evidence directly relevant to the low power test request and that the Board must find that if such evidence was adduced it would materially affect the decision. (Id. at 362). The Governor made no such showing on his rejected subjects. The Staff has maintained that under that clarification even fewer of the contentions would have been admitted. 2/ Thus, considering the review already per-

---

1/ None of the Governor's arguments present anything new. The following Staff pleadings address the Governor's positions in detail: 1) December 28, 1980 "NRC Staff's Response to Statement of Subjects on which Governor Brown intends to participate," 2) December 23, 1980 "NRC Staff's Response to Intervenors' Statement of Contentions Relative to fuel loading and low power testing," and 3) April 7, 1981 "Motion for Reconsideration of Licensing Board's Order."

formed by the Commission, it can not be said that Governor Brown is likely to succeed on the merits of his arguments on the admission of contentions.

c. Environmental Appraisal - Governor Brown asserts as an error in the Licensing Board's decision the fact that a separate environmental impact appraisal was not prepared for the low power testing program. (Governor Brown's Motion at 5). The Staff position, previously articulated in this proceeding, is that the EIS prepared to cover operation of the Diablo Canyon Facility up to full power necessarily includes operation of the plant at 5% power. (December 23, 1980 "NRC Staff Response to Gov. Brown's Motion to Stay Proceeding"; Citizens for Safe Power v. NRC, 524 F.2d 1291, 1301 (D.C. Cir. 1975)). Although alleging that the full power EIS is irrelevant to low power, the Governor fails to cite any legal authority which would be contrary to the consistent policy that the full power EIS fulfills the agency's responsibilities under NEPA for operation at a lower power.

In sum, as demonstrated above, there are no errors in the Board's resolution of these issues which would justify a finding that the Governor is likely to prevail on the merits of his arguments on appeal. The factor discussed above, therefore, weighs against the granting of Governor Brown's request for a stay.

Harm to PG&E

Another factor to be considered under Section 2.788 in determining whether the granting of a stay is appropriate, is what harm will be suffered by the other parties. Governor Brown alleges that there would be no harm to PG&E from the delay in performing the low power test program. This is based on Governor Brown's projection as to when the

full power license can be expected. (Governor Brown's Motion at 10). There are several flaws in the Governor's position.

Governor Brown's projection of the expected date for issuance of the full power license is based on the Licensing Board hearing not commencing until December 1981. The Staff believes that the hearing may commence earlier. Even assuming a hearing in December, the matter may be decided by the Board earlier than alleged by Governor Brown. Although Governor Brown alleges that the presently filed appeals will be fully briefed by early October, the Staff's brief is not due until the last half of October. Governor Brown's affiant states that low power testing may take 90 days. (Governor Brown's attachment 1 at 13). Thus, a delay while the Appeal Board considers Governor Brown's appeal of the PID on low power testing could potentially delay the start of full power operation, since a decision by the Appeal Board, even if it comes within 30 days of the last pleading being filed, could result in full power authorization being approved in February prior to completion of the low power test program. PG&E will be sufficiently harmed by the delay caused by the proposed stay that this factor must be deemed as weighing against the granting of the requested stay.

Public Interest

The third factor to consider in determining whether to grant a request for a stay is where the public interest lies. Governor Brown and Joint Intervenors have had the opportunity to present their positions through competent counsel in the hearings held before the Licensing Board. In view of the fact that Joint Intervenors and Governor Brown have not added any new information to that already presented to the Licensing Board, there is nothing to indicate that the public interest favors allowing them to repeat the same positions again. There is no

basis for determining that the public interest requires that licensing be delayed while they again present the same arguments to the Appeal Board. On the other hand, each year the Congress, by the passage of authorizing and appropriation legislation, has reaffirmed the national policy expressed in the Atomic Energy Act of 1954, as amended, that the utilization of atomic energy is in the public interest. Having a safe and completed nuclear power plant unnecessarily continue to stand idle is not compatible with that national policy. Thus, it is clear that the public interest factor provides no support at all for the imposition of a stay.

Irreparable Injury to Governor Brown

Governor Brown alleges irreparable injury will occur to the Governor's interests if the low power testing program is allowed to proceed while he pursued an appeal of the PID. (Governor Brown's Motion at 6). However, as has been demonstrated above, the likelihood of their succeeding on the merits is so remote as to leave little chance of their suffering any irreparable harm. Testing programs under low power testing authorizations are, of course, always of limited duration. If this factor were alone enough to justify a stay, it would result in an effectively automatic stay being issued in every low power test authorization proceeding if any party files an appeal. If the Commission intended for there to be an automatic stay provision, it could so provide, but it has not done so. In fact, in adopting 10 C.F.R. § 2.764, which addresses when a low power decision will become effective, the Commission noted in subsection 2.764(f)(2)(vi) that the stay provisions of 10 C.F.R. 2.788 continue to apply to the Licensing Board's decisions. It is, therefore, clear that a party must show actual injury to its

interests to prevail on this factor. The Toledo Edison Company (Davis-Besse Nuclear Power Station, Units 1, 2 and 3) ALAB-385 5 NRC 621, 628 (1977). Joint Intervenors have failed to make such a showing.

In any event, the Appeal Board in its September 14, 1981 Memorandum and Order in this proceeding pointed out that if it has not rendered a decision on the stay requests prior to mid-October (the earliest date by which the Appeal Board assumed criticality could be achieved) the Applicant is to provide at least three full business days advance notification of its intent to achieve criticality. 2/ At that time, the Appeal Board would decide whether an interim stay is warranted. This effectively negates any conceivable harm to Joint Intervenors from occuring prior to the Licensing Board's ruling on their motions.

CONCLUSION

For the reasons stated above, the Staff urges the Appeal Board to deny Governor Brown's request for a stay.

Respectfully submitted,

William J. Olmstead
Deputy Chief Hearing Counsel

Bradley W. Jones
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 21st day of September, 1981.

2/ In an Order approving the low power testing authorization issued by the Commission today, the Commission has required PG&E to give 14 days notice to the Commission if the plant does critical sooner than 62 days after fuel loading commences.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of NRC STAFF RESPONSE TO GOVERNOR BROWN'S MOTION FOR A STAY 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 21st day of September, 1981.

*Dr. John H. Buck
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Dr. W. Reed Johnson
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Mr. Thomas S. Moore, Member
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Administrative Judge John F. Wolf
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Elizabeth Apfelberg
1415 Cozadero
San Luis Obispo, California 93401

Mr. Glenn O. Bright
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

Dr. Jerry Kline
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

Philip A. Crane, Jr., Esq.
Pacific Gas and Electric Company
P.O. Box 7442
San Francisco, California 94106

Mr. Frederick Eissler
Scenic Shoreline Preservation
Conference, Inc.
4623 More Mesa Drive
Santa Barbara, California 93105

Mrs. Raye Fleming
1920 Mattie Road
Shell Bech, California 93449

Richard E. Blankenburg, Co-publisher
Wayne A. Soroyan, News Reporter
South County Publishing Company
P.O. Box 460
Arroyo Grande, California 93420

Marjorie Nordlinger
Office of General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Gordon Silver
1760 Alisal Street
San Luis Obispo, California 93401

John R. Phillips, Esq.
Simon Klevansky, Esq.
Margaret Blodgett, Esq.
Marion P. Johnston, Esq.
Joel Reynolds, Esq.
Center for Law in the Public Interest
10203 Santa Monica Boulevard
Los Angeles, California 90067

Arthur C. Gehr, Esq.
Snell & Wilmer
3100 Valley Center
Phoenix, Arizona 95073

Paul C. Valentine, Esq.
321 Lytton Avenue
Palo Alto, California 94302

Byron S. Georgiou
Legal Affairs Secretary
Governor's Office
State Capitol
Sacramento, California 95814

Bruce Norton, Esq.
3216 North 3rd Street
Suite 202
Phoenix, Arizona 85102

David S. Fleischaker, Esq.
P.O. Box 1178
Oklahoma City, Oklahoma 73101

Richard B. Hubbard
MHB Technical Associates
1723 Hamilton Avenue - Suite K
San Jose, California 95125

John Marrs
Managing Editor
San Luis Obispo County
Telegram-Tribune
1321 Johnson Avenue
P. O. Box 112
San Luis Obispo, California 93406

Andrew Baldwin, Esq.
124 Spear Street
San Francisco, California 94105

Herbert H. Brown
Hill, Christopher & Phillips. P.C.
1900 M. Street, N.W.
Washington, D.C. 20036

Harry M. Willis
Seymour & Willis
601 California St., Suite 2100
San Francisco, California 94108

Janice E. Kerr, Esq.
Lawrence Q. Carcia, Esq.
350 McAllister Street
San Francisco, California 94102

Mr. James O. Schuyler
Nuclear Projects Engineer
Pacific Gas and Electric Company
77 Beale Street
San Francisco, California 94106

Mrs. Sandra A. Silver
1760 Alisal Street
San Luis Obispo, California 93401

*Atomic Safety and Licensing Board
Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Atomic Safety and Licensing Appeal
Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Secretary
U.S. Nuclear Regulatory Commission
ATTN: Chief, Docketing & Service Br.
Washington, D.C. 20555

Mark Gottlieb
California Energy Commission
MS-18
1111 Howe Avenue
Sacramento, California 95825

William J. Olmstead
Assistant Chief Hearing Counsel