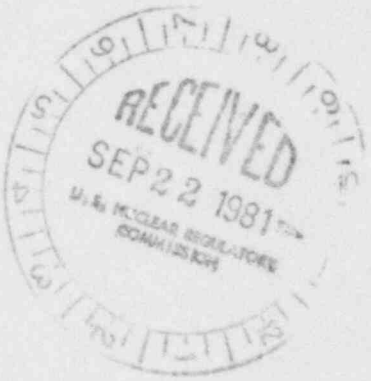
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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 JOINT INTERVENORS' REQUEST FOR A STAY

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September 21, 1981

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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 10, 1981 Joint Intervenors 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 one of the factors 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). A balancing of the four factors does not favor granting Joint Intervenors' requested stay. Joint Intervenors have failed to meet their 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

a. Joint Intervenors' Right to be Heard - Joint Intervenors' first basis for alleging they will be successful on the merits is that the Licensing Board, due to its application of the Commission's policy statement on admission of TMI-related contentions, violated the Joint Intervenors' right to a hearing. (Joint Intervenors' Motion at 5). This argument is specious. Joint Intervenors have, in fact, had a thorough and lengthy hearing on this application. In addition, the record was reopened to further consider TMI-related low power contentions. The opportunity for hearing which Section 189(a) of AEA of 1954 as amended (Act) affords does not mean that the litigation thereunder is unlimited.

A party does not have a "right" to litigate in the 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. That Board gave them generous treatment in setting the issues for hearing. As far as the consideration of contentions is concerned, Section 189(a) of the Act does not require anything more.

Joint Intervenors maintain that the Licensing Board erred in rejecting certain contentions because, in effect, NUREG-0737 was elevated to the status of a rule without complying with the public notice and comment requirements of the Administrative Procedure Act. (Joint Intervenors' Motion at 5). 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.

The Commission provided guidance to the Board in this case. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361 (1981). The Commission indicated that the legal standards for reopening the record and for late filed contentions fully applied to parties seeking to litigate the TMI-related issues presented by NUREG-0737. Relating contentions to NUREG-0737 does not alone satisfy those requirements. (13 NRC at 364). By stating that contentions directly related to NUREG-0737 would meet these requirements and be admissible, the Licensing Board gave Joint Intervenors more favorable treatment than the Commission guidance required. The Licensing Board, rather then applying NUREG-0737 as a substantive regulation, was

only determining whether the contentions met the reopening and late filing requirements. 1/

b. The Licensing Board's Interpretation of the Emergency Planning Regulations - Second, Joint Intervenors take issue with the Licensing Board's interpretation of the emergency planning requirements in its PID on low power operation of the Diablo Canyon Nuclear Facility. 2/ (Joint Intervenors' Motion at 6). Joint Intervenors argue that the plant cannot be licensed for fuel load and low power testing without complete compliance with the provisions of 10 C.F.R. § 50.47(b). Joint Intervenors have already thoroughly briefed this issue 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 Joint Intervenors misinterpret the Licensing Board's ruling when they allege that the Board, on the basis of SECY 81-188, determined that the Commission's emergency planning regulations need not be

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1/ For a more detailed statement of the Staff's position, see the "Staff Response to August 14, 1981 Motion of Joint Intervenors" filed before the Commission on September 3, 1981 at pp. 10-11.

2/ Joint Intervenors seem to believe that every one of the reviewing criteria in NUREG-0654 must be met in order to meet the sixteen planning standards. (Joint Intervenors' Motion at 7). In fact, the criteria in NUREG-0654 are meant to serve as an aid to reviewers in determining the adequacy of the emergency plan. The NUREG specifically notes that inadequacies in one area do not automatically result in a reviewer being unable to find an adequate state of emergency preparedness. (NUREG-0654 at I.F. p. 24). Thus, Joint Intervenors' apparent belief that failure to meet the NUREG-0654 criteria is equivalent to failing to meet the 16 Standards in § 50.47(b) is in error.

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).

c. Low Risk as it Affects Emergency Planning - Joint Intervenors allege that the Licensing Board's use of low risk as a factor justifying less than full compliance with 10 C.F.R. § 50.47(b) was improper. (Joint Intervenors' Motion at 7). 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 provisions of 10 C.F.R. § 50.47(c) have been met. Rather then a challenge to the regulations, as alleged by Joint Intervenors, the Board applied Section 50.47(c) and ruled that it places no restrictions on the reasons which may be used 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 acted in accordance with the regulations in making its determination regarding the adequacy of the emergency plan. 3/

d. Consideration of Earthquakes - Another issue raised by Joint Intervenors in support of their motion is that the NRC Staff and PG&E did not give adequate consideration 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 issuance of 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).

e. NEPA - The final issue raised by Joint Intervenors is that a separate environmental impact appraisal was not prepared for the low power testing program. (Joint Intervenors' Motion at 10). This position was previously presented to the Board and addressed by the Staff ("NRC

3/ For a more detailed statement of the Staff's position, see the "Staff Reponse to August 14, 1981 Motion of Joint Intervenors" filed before the Commission on September 3, 1981 at pp. 7-8.

Staff Response to Gov. Brown's Motion to Stay Proceeding" filed on December 23, 1980). The EIS prepared to cover operation of the Diablo Canyon Facility up to full power necessarily includes operation of the plant at 5% power. (See, 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, Joint Intervenors fail to cite any legal authority for the proposition that the full power EIS is inadequate to encompass lesser included authorizations.

Joint Intervenors also argue that the Board should have required an analysis of class nine accidents in the EIS. This argument was addressed in some detail by the Staff. ("NRC Staff Response to Licensing Board's Order for Supplemental Positions of PG&E's Motion for Lower Power Testing" filed on September 25, 1980). Consideration of class nine accidents is not appropriate under the Commission's June 13, 1980 policy statement. The Joint Intervenors have not presented the special circumstances required under the Commission's policy statement to justify considering class nine accidents when an FES has already been issued. 4/

f. Conclusion - In sum, none of the positions presented in their motion for a stay presents an issue on which the Joint Intervenors are likely to succeed. This factor, therefore, weighs against granting Joint Intervenors' request for a stay of the Licensing Board's PID.

4/ "Nuclear Power Plant Accident Consideration Under the National Environmental Policy Act of 1969." 45 Fed Reg. 40101 (1980) For a more detailed discussion of the application of the policy statement to the Diablo Canyon facility, see the "NRC Staff Response to Licensing Board's Order for Supplemental Positions on PG&E's Motion for Low Power Testing" at p. 14 (September 25, 1980).

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. Joint Intervenors allege that there would be no harm to PG&E from the delay in performing the low power test program. (Joint Intervenors' Motion at 14). Even Joint Intervenors' own affiant concedes that the test program could take as long as 90 days. (Attachment to Joint Intervenors' Motion at 9). Considering that the last pleading in the appeal before the Appeal Board is not due to be filed until October 19, 1981, such a delay could easily result in the low power testing program not being complete by the time the full power license can be expected to issue in February.

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 Joint Intervenors

Joint Intervenors allege irreparable injury will occur to their interests if the low power testing program is allowed to proceed while they pursue an appeal of the PID. (Joint Intervenors' 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. Joint Intervenors essentially base this allegation on the fact that their contentions will be mooted, and if they are correct, any harm to them would already have taken place. 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. 5/ At that time, the Appeal Board would decide whether an interim stay is warranted. This effectively prevents any conceivable harm to Joint Intervenors from occuring prior to the Licensing Board's ruling on their motions.

CONCLUSION

10 C.F.R. § 2.788(e) states the four factors which are to be considered in determining whether a stay is appropriate. As demonstrated above none of the four factors favor granting of the stay request. The likelihood of Joint Intervenors succeeding on the merits is remote. Thus, balancing the four factors requires that the Appeal Board deny Joint Intervenors' request for a stay of the Licensing Board's PID authorizing low power testing at the Diablo Canyon Nuclear Plant.

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.

5/ 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 goes critical sooner than 62 days after fuel loading commences.

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CERTIFICATE OF SERVICE

I hereby certify that copies of NRC STAFF RESPONSE TO JOINT INTERVENORS' REQUEST 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.

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