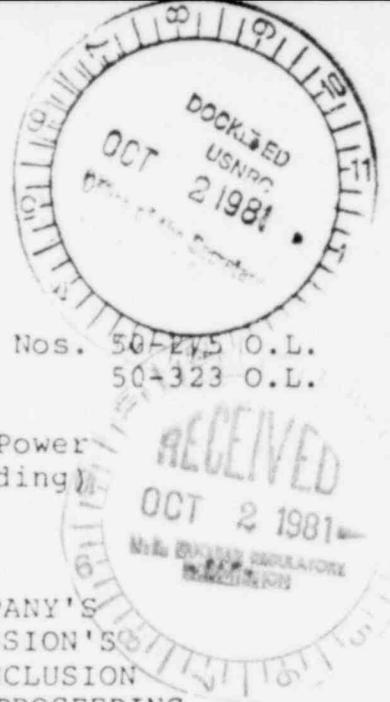


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
PACIFIC GAS AND ELECTRIC COMPANY) Docket Nos. 50-245 O.L.
(Diablo Canyon Nuclear Power) 50-323 O.L.
Plant, Unit Nos. 1 and 2) (Full Power
) Proceeding)



APPLICANT PACIFIC GAS AND ELECTRIC COMPANY'S
MOTION FOR RECONSIDERATION OF THE COMMISSION'S
SEPTEMBER 21, 1981 ORDER AS IT DIRECTS INCLUSION
OF CONTENTIONS 10 AND 12 IN THE FULL POWER PROCEEDING

Applicant PACIFIC GAS AND ELECTRIC COMPANY hereby moves the Nuclear Regulatory Commission ("Commission") to reconsider its Memorandum and Order of September 21, 1981 ("September 21 Order") insofar as it directs the Atomic Safety and Licensing Board ("ASLB") to include contentions 10 and 12 in the full power proceeding on Applicant's application for an operating license for Diablo Canyon Nuclear Power Plant ("Diablo Canyon"). Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-22, ___ NRC ___ (September 21, 1981). This motion is made on the ground that the inclusion of contentions 10 and 12 is directly contrary to Commission procedure and policy. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361 (1981) ("April 1, 1981 Order").

On September 21, 1981, this Commission, pursuant to 10 C.F.R. §2.764(f), allowed the ASLB's July 17, 1981 decision^{1/}

DSO3
5
1/1

^{1/} Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-78-19, 14 NRC ___ (July 17, 1981).

authorizing issuance of a fuel loading and low power testing license for Diablo Canyon to become effective pending resolution of the administrative appeal of that decision.^{2/} In that Order, this Commission also directed the ASLB to include two contentions (10 and 12) in the full power proceeding "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 full-power proceeding."^{3/} Other than to state that these two contentions (as well as all other rejected contentions) "hold little significance, from the standpoint of health and safety, for low-power operation," the Order does not explain the basis on which it directed admission of contentions 10 and 12.

Commissioner Gilinsky, in his separate concurring opinion, stated his view of why admission of the two contentions was proper. According to Commissioner Gilinsky:

In particular, the Board rejected Joint Intervenor contentions 10, 12 and 20 on the grounds that they bore an insufficient connection with any requirements of NUREG-0737. In its Order of April 1, 1981, the Commission stated that 'if a party comes forward on a timely basis with significant new TMI-related evidence indicating that an NRC safety regulation would be violated by plant operation, we believe that the record should be reopened notwithstanding that the noncompliance item is not discussed in NUREG-0737 and 0694' (CLI-81-5). The three contentions allege that various General Design Criteria are not satisfied. This, in essence, constitutes a challenge to compliance with the regulations.

^{2/}September 21 Order, slip op. at 1-2.

^{3/}Id. at 2-3.

The contentions should have been admitted pursuant to the above-cited Commission guidance without regard to their relationship to NUREG-0737. (September 21 Order, slip op., Commissioner Gilinsky's Separate Opinion at 1, p. 1.)

Commissioner Ahearne disagreed, concluding that he, at least, would defer to the ASLB's decision on the disputed contentions "[a]bsent convincing arguments to the contrary" which he had not seen. Mr. Ahearne believed that the Joint Intervenors had failed to meet the "heavy burden" imposed on them.^{4/} Applicant strongly believes that Commissioner Ahearne has properly interpreted the pertinent Commission procedure and policy, particularly the April 1, 1981 Order.

The Diablo Canyon full-power hearing record is closed, and has been closed since before the TMI accident. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-81-5, 13 NRC 226, 227 (1981) ("Prehearing Conference Order"). The closed status of the Diablo Canyon record is important in light of the Commission's April 1, 1981 Order. In that Order, the Commission undertook to provide additional guidance, "consistent with its Revised Statement of Policy, CLI-80-42, 12 NRC 854 (1980) . . . on litigation of [TMI] accident related issues in licensing proceedings."^{5/}

^{4/}September 21 Order, slip. op., Additional Views of Commissioner Ahearne at 4-5.

^{5/}April 1, 1981 Order, 13 NRC at 362.

In the April 1, 1981 Order, this Commission said that:

As we stated in the Revised Policy Statement, where the evidentiary record on safety issues has been closed, the record should not be reopened on TMI-related issues relating to either low or full power absent a showing, by the moving party, of 'significant new evidence not included in the record, that materially affects the decision.' This is in accord with longstanding Commission practice. E.g. Kansas Gas & Electric Co., et al. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978). We emphasize that bare allegations or simple submission of new contentions is not sufficient. Only significant new evidence requires reopening. (13 NRC at 362-363.) (Emphasis added.)

No effort has ever been made by any party to show "significant new evidence not included in the record, that materially affects the decision" in these proceedings as respects contentions 10 and 12 (or contention 20).

With respect to NUREG-0737 safety requirements, the Order provided that, although a party may challenge the sufficiency of a NUREG-0737 requirement, such permission does not allow a party to argue the need for safety measures not contained in NUREG-0737.^{6/} The April 1, 1981 Order emphasized that even as to challenges to the sufficiency of a NUREG-0737 requirement, the party must still meet the requirements both for late-filed contentions and for reopening closed hearing records.^{7/}

When a party seeks to litigate a purportedly TMI-related issue (or indeed any issue, whether TMI-related or not) unrelated to

^{6/}13 NRC at 363-64.

^{7/}13 NRC at 364-64.

a NUREG-0737 requirement, there are two routes available.^{8/}

(1) If the contention argues that there is insufficient protection to the public despite compliance with all NRC regulations litigation of the contention is not permitted, but a party may use the procedures of 10 C.F.R. §2.758 to bring the matter to the attention of the Commission (13 NRC at 364); and

(2) If the contention argues that there is non-compliance with NRC regulations, a party may litigate such a contention only if he carries the burden of reopening the closed hearing record, i.e., a showing of "significant new evidence not included in the record, that materially affects the decision." Id. at 363.

Commissioner Gilinsky's comments suggest that his Commission viewed contentions 10 and 12 as unrelated to a NUREG-0737 safety requirement (as the ASLB so found, Prehearing Conference Order, 13 NRC at 240-41), but that they should nonetheless be admitted because they argued noncompliance with NRC regulations. Thus, under the April 1, 1981 Order, these two contentions could be

^{8/}The Commission, Appeal Boards and Licensing Boards may of course exercise their sua sponte authority under 10 C.F.R. §2.760(a) to insert issues or contentions in a proceeding. It seems obvious however that the Commission did not exercise that authority in this instance. Section 2.760(a) requires a determination "that a serious safety, environmental, or common defense and security matter exists." In exercising its sua sponte authority and making such a determination, the Commission must set forth the requisite findings and state the reasons for raising the issues. Texas Utilities Generating Company (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-24, _____ NRC _____ (September 22, 1981). In the instance case no full power issues related to contentions 10 and 12 are even before the Commission and no required findings under §2.760(a) were made in the September 21, 1981 Order.

admitted only if Joint Intervenors had met the requirements for late-filed contentions and for reopening closed hearing records.

Although Joint Intervenors have moved to reopen the full power record,^{9/} this motion did not even attempt to satisfy the requirements for reopening closed hearing records. Indeed, their argument on contentions 6 and 8 (contentions 10 and 12 in the low power proceeding) was identical to the argument on those two contentions they made at the prehearing conference held January 28-29, 1981 concerning low power contentions,^{10/} With respect to the low power contentions, the ASLB stated:

The Board notes that neither the Governor nor the Joint Intervenors sought to establish good cause for admitting new contentions or reopening the record on old contentions aside from their reliance on NUREG-0737. (13 NRC at 236.)

In conclusion, the Applicant fails to perceive how contentions 10 and 12 can be admitted in the pending proceedings without directly violating the Commission's express policy as set forth in its April 1, 1981 order and preceding policy statement. It is therefore respectfully requested that this Commission reconsider

^{9/}Joint Intervenors' Motion To Reopen (March 24, 1981).

^{10/}Compare Joint Intervenors' Motion to Reopen at 26-32 with Prehearing Conference Transcript at 240-58.

its September 21, 1981 Order and delete contentions 10 and 12 from these proceedings.

Respectfully submitted,

MALCOLM H. FURBUSH
PHILIP A. CRANE, JR.
Pacific Gas and Electric Company
77 Beale Street
San Francisco, California 94106
(415)781-4211

ARTHUR C. GEHR
Snell & Wilmer
3100 Valley Center
Phoenix, Arizona 85073
(602)257-7288

BRUCE NORTON
Norton, Burke, Berry & French, P.C.
3216 N. Third Street
Suite 300
Phoenix, Arizona 85012
(602)264-0033

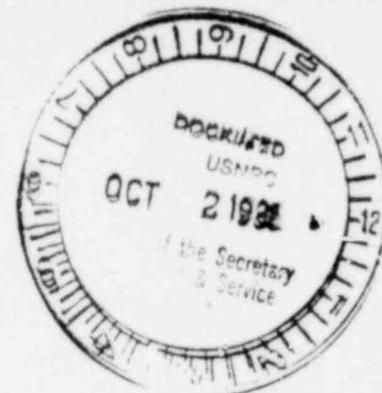
Attorneys for
Pacific Gas and Electric Company

By 
Bruce Norton

DATED: October 1, 1981.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION



In the Matter of)
)
PACIFIC GAS AND ELECTRIC COMPANY) Docket Nos. 50-275 O.L.
) 50-323 O.L.
)
(Diablo Canyon Nuclear Power)
Plant, Units No. 1 and 2))

CERTIFICATE OF SERVICE

I hereby certify that copies of "APPLICANT PACIFIC GAS AND ELECTRIC COMPANY'S MOTION FOR RECONSIDERATION OF THE COMMISSION'S SEPTEMBER 21, 1981 ORDER AS IT DIRECTS INCLUSION OF CONTENTIONS 10 AND 12 IN THE FULL POWER PROCEEDING", dated October 1, 1981, have been served on the following by delivery to U.S. Postal Service, postage prepaid, this 1st day of October, 1981.

Nunzio J. Palladino, Chairman
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Commissioner Thomas M. Roberts
Commissioner Victor Gilinsky
Commissioner Peter A. Bradford
Commissioner John F. Ahearne
U.S. Nuclear Regulatory Comm'n
Washington, D.C. 20555

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

Gordon Silver
1760 Alisal Street
San Luis Obispo, CA 93401

William J. Olmstead, Esq.
Executive Legal Director's Office
Nuclear Regulatory Commission
Washington, D.C. 20555

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

The Hon. John F. Wolf, Chairman
The Hon. Glenn O. Bright
The Hon. Jerry R. Kline
Atomic Safety and Licensing Board
Mail Drop East West 450
U. S. Nuclear Regulatory Comm'n
Washington, D.C. 20555

Harry W. Willis, Esq.
601 California Street
Suite 2100
San Francisco, CA 94108

Mrs. Elizabeth Apfelberg
c/o Nancy Culver
182 Luneta Drive
San Luis Obispo, CA 93401

John R. Phillips, Esq.
Center for Law in the
Public Interest
10203 Santa Monica Blvd.
Los Angeles, CA 90067

Mr. Frederick Eissler
Scenic Shoreline Preservation
Conference, Inc.
4624 More Mesa Drive
Santa Barbara, CA 93105

Mrs. Raye Fleming
1920 Mattie Road
Shell Beach, CA 93449

Atomic Safety & Licensing Board
Panel
U. S. Nuclear Regulatory Comm'n
Washington, D.C. 20555

Docketing and Service Section
Office of the Secretary
U. S. Nuclear Regulatory Comm'n
Washington, D.C. 20555

Janice E. Kerr
350 McAllister Street
San Francisco, CA 94102

Carl Neiburger
P. O. Box 112
San Luis Obispo, CA 93402

J. Anthony Kline, Esq.
Legal Affairs Secretary to
the Governor
State of California
State Capitol Building
Sacramento, CA 95814

