

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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 RESPONSE TO (1) APPLICANT'S MOTION  
FOR RECONSIDERATION AND (2) GOVERNOR BROWN'S  
MOTION FOR DISMISSAL OF APPLICANT'S MOTION

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October 19, 1981

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INTRODUCTION AND BACKGROUND

On July 17, 1981, the Licensing Board issued a partial initial decision authorizing fuel loading and low power testing at the Diablo Canyon Nuclear Power Plant, Unit 1. Pursuant to 10 C.F.R. § 2.764, the Commission reviewed that decision and issued an order affirming the Licensing Board's decision on the low power license. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-22, 13 NRC \_\_\_\_ (September 21, 1981). In the September 21, 1981 Order, the Commission also directed the consideration of Contentions 10 and 12 from the low power proceeding in the reopened full power proceeding pending before the Licensing Board. On October 1, 1981, PG&E filed a motion for reconsideration with the Commission insofar as the September 21, 1981 Order directed the inclusion of Contentions 10 and 12 in the full power proceeding. On October 2, 1981, Governor Brown filed a motion for summary dismissal of the applicant's October 1, 1981 motion. Governor Brown appears to state correctly that motions to reconsider in these circumstances are not procedurally available under the Commission's

regulations. However, in the event the Commission wishes to exercise its inherent supervisory authority over such matters, the Staff believes Contentions 10 and 12 are not appropriate under the Commission's Revised Policy Statement.

#### DISCUSSION

Governor Brown bases his motion for dismissal on 10 C.F.R. § 2.786. The Commission's regulations provide at 10 C.F.R. § 2.786(b)(7) that "[p]etitions for reconsideration of Commission decisions upon review, or granting or denying review in whole or in part, will not be entertained." The Commission's Order which is addressed in the applicant's motion was the result of the Commission reviewing the Licensing Board's PID under 10 C.F.R. § 2.764. The Staff notes that the procedure for review in Section 2.764 was recently established and post-dates the adoption of the provision of Section 2.786 cited above.<sup>1/</sup> It is thus not entirely clear that the Commission intended for the Section 2.786 prohibition to apply to the Section 2.764 review. This is particularly true because, unlike the review which occurs following the normal appellate route, the parties did not have the opportunity to brief the issues before the Commission which were the subject of the September 21, 1981 Order. Nevertheless, the Staff believes that, as the regulations now stand, Section 2.786 would bar the consideration of the applicant's motion for reconsideration. To this extent Governor Brown's Motion for dismissal is correct.

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<sup>1/</sup> The requirements in 10 C.F.R. § 2.764 used in the Diablo Canyon proceeding became effective in May 1981. The last amendment of 10 C.F.R. § 2.786 occurred in November 1980.

Section 2.786 does not, however, limit the Commission's ability to reconsider its September 21, 1981 Order using its sua sponte authority under 10 C.F.R. § 2.786(a). The Commission may, therefore, choose to reconsider the September 21, 1981 Order on its own motion. For this reason, the Staff will address the substance of the applicant's motion.

The Staff believes that applicant correctly concludes that Contentions 10 and 12 from low power (which appeared as Contentions 6 and 8 in the full power proceeding) are inappropriate for litigation in the full power proceeding.<sup>2/</sup> Under the Commission's guidance provided in its April 1, 1981 Order in this proceeding, even contentions based on NUREG-0737 ("Clarification of TMI Action Plan Requirements," November 1980) and TMI must meet the late filing requirements of 10 C.F.R. § 2.714 and the requirements for reopening a closed record. (Pacific Gas & Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-81-5, 13 NRC, 361, 363-365 (1981)). 10 C.F.R. §2.714 provides that a late filed contention will not be accepted for litigation unless a balancing of five factors favors the acceptance of the contention. Those factors are: (1) good cause for late filing; (2) availability of other means to protect petitioner's interest; (3) petitioners' potential to contribute to the record; (4) extent to which petitioners' interest is represented by others; and (5) extent to which the contention will delay the proceeding.

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<sup>2/</sup> The Commission was using the contention numbers which appeared in the low power proceeding. Low power Contention 10 appeared as full power Contention 6. Low power Contention 12 appeared as full power Contention 8. The Staff has previously addressed the admissibility of these contentions in the NRC Staff "Response to Motion to Reopen" filed before the Licensing Board on April 13, 1981.

Items 3 and 4 above are relevant to admitting a petitioner who has filed late, but are not relevant to admitting a late filed contention where the proponent is already in the proceeding.

The standard for reopening a closed record is that the party proposing to reopen the record must demonstrate both significant new information and that the information is such as would have changed the initial result if it had been originally considered. (Id. at 362). Neither Contention 10 nor 12 are related to a previously admitted contention in the Diablo Canyon proceeding. In addition, the full power record was closed in February of 1979. These contentions, in order to be appropriate for litigation, must meet both of the standards described above. Neither contention meets those standards.

Contention 10 states:

Contention 10. The Staff recognizes that pressurizer heaters and associated controls are necessary to maintain natural circulation at hot stand-by conditions. Therefore, this equipment should be classified as "components important to safety" and required to meet all applicable safety-grade design criteria, including but not limited to diversity (GDC 22), seismic and environmental qualification (GDC 2 and 4), automatic initiation (GDC 20), separation and independence (GDC 3 and 22), quality assurance (GDC 1), adequate, reliable on-site power supplies (GDC 17) and the single failure criterion. The Applicant's proposal to connect two out of four of the heater groups to the present on-site emergency power supplies does not provide an equivalent or acceptable level of protection.

As Joint Intervenors pointed out in their expansion of this contention in their motion to reopen, the requirement that pressurizer heaters be connected to on-site power supplies was identified in NUREG-0578 ("TMI Lessons Learned Task Force Status Report and Short Term Recommendation", July 1979) almost two years prior to their motion to reopen. (Joint Intervenors' Motion to Reopen, filed on March 24, 1981 at p. 27). In

addition, Joint Intervenors have not identified any changes in the referenced GDC requirements which would form the basis for this contention. The Joint Intervenors have explained no additional events with respect to this contention which would justify a delay of almost 2 years from the identification of the pressurizer heater item and their raising this issue. In addition, the admission of this contention can be expected to cause at least some delay in the completion of the reopened full power proceeding. Intervenors' interests have been adequately protected through their full participation in the original full power hearing. A balancing of the factors in 10 C.F.R. § 2.714, therefore, weighs against admitting this contention for the full power proceeding.

Joint Intervenors have also failed to meet the requirements for reopening the closed record to consider Contention 10. The Joint Intervenors have not identified any significant new information on this issue which would indicate that the initial result would be changed by considering the information. While the Commission has stated that if a contention is related to a NUREG-0737 item, NUREG-0737 can satisfy the significant new information part of the reopening standard, Joint Intervenors' contention is not related to the same safety concern as any NUREG-0737 item. (13 NRC at 365). Thus, Joint Intervenors must affirmatively demonstrate both significant new information on this issue and that the information would have changed the initial result if originally considered. Having failed to make this showing, this contention would not be appropriate for litigation in this proceeding.

It is noted that Joint Intervenors withdrew this contention in the full power proceeding. (Joint Intervenors' Statement of Clarified Contentions, filed with the Licensing Board on June 30, 1981 at p. 7). The Commission's Order directs the Board to consider this "contention". Of course, the Commission can direct consideration of issues whether or not raised by a party to a proceeding. Since the contention was withdrawn, however, it is not clear that any intervening party will choose to participate on it.

Contention 12 states:

Contention 12. Proper operation of power operated relief valves, associated block valves and the instruments and controls for these valves is essential to mitigate the consequences of accidents. In addition, their failure can cause or aggravate a LOCA. Therefore, these valves must be classified as components important to safety and required to meet all safety-grade design criteria.

Contention 12, as with Contention 10, is not related to any previously admitted contention. Contention 12 relates to an issue identified in NUREG-0578. Thus, Joint Intervenors have been on notice of the basis for this Contention for 2 years. Joint Intervenors provided no information to justify the 2 year delay in filing of Contention 12. A balancing of the factors in 10 C.F.R. § 2.714, therefore, also weighs against admitting Contention 12. Even if this contention is not deemed untimely, Joint Intervenors have not met the standards for reopening on this contention.

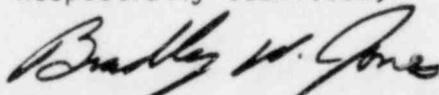
The contention addresses the classification of the relief and block valves as safety or non-safety grade. The safety concern, which the NUREG-0737 item on these valves focuses on, is not the classification, but the testing of these valves. The Joint Intervenors, therefore, are not focusing on the same safety concern as the NUREG guidance. Under the

Commission's guidance they may not, under these circumstances, rely on NUREG-0737 as the significant new information required to meet the standard for reopening a closed record. (13 NRC at 365). Joint Intervenors have not presented significant new information on the classification of these valves. In addition, neither the contention nor the elaboration on that contention in Joint Intervenors' motion to reopen, establishes that any information on this issue exists which would be such as would have changed the initial result if originally considered. Having failed to meet either the standards for late filing of contentions or the standards for reopening a closed record, this contention is not appropriate for litigation in the Diablo Canyon proceeding.

CONCLUSION

For the reasons discussed above, the Staff does not believe that under 10 C.F.R. § 2.786(a) the applicant is entitled to file its motion for reconsideration of the Commission's September 21, 1981 Order in this proceeding. To this extent, Governor Brown's Motion to dismiss is correct as a procedural matter. Should the Commission wish to exercise its inherent supervisory authority to reconsider this matter, however, the contentions should be excluded for failing to meet either the requirements for late filing of contentions or the requirements for reopening a closed record.

Respectfully submitted,



Bradley W. Jones  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 19th day of October, 1981.

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CERTIFICATE OF SERVICE

I hereby certify that copies of NRC STAFF RESPONSE TO (1) APPLICANT'S MOTION FOR RECONSIDERATION AND (2) GOVERNOR BROWN'S MOTION FOR DISMISSAL OF APPLICANT'S MOTION 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 19th day of October, 1981.

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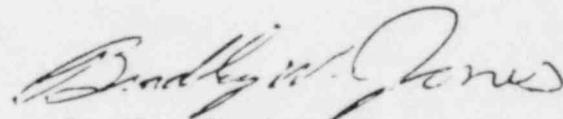
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