

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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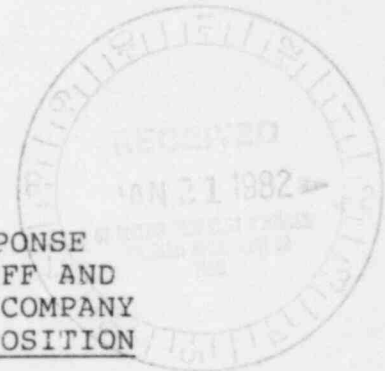
In the Matter of)

PACIFIC GAS AND ELECTRIC COMPANY)

(Diablo Canyon Nuclear Power)
Plant, Units 1 and 2)

) Docket Nos. 50-275 O.L.
) 50-323 O.L.
)

JOINT INTERVENOR'S RESPONSE
IN OPPOSITION TO NRC STAFF AND
PACIFIC GAS AND ELECTRIC COMPANY
MOTIONS FOR SUMMARY DISPOSITION



The SAN LUIS OBISPO MOTHERS FOR PEACE, SCENIC SHORELINE PRESERVATION CONFERENCE, INC., ECOLOGY ACTION CLUB, SANDRA SILVER, GORDON SILVER, ELEZABETH APFELBERG, and JOHN J. FORSTER ("Joint Intervenors") hereby respond to the motions for summary disposition filed in this proceeding by the NRC Staff ("Staff") and by Pacific Gas and Electric Company ("PGandE") on December 21, 1981. Both parties, through their respective motions, seek issuance of an order by the Atomic Safety and Licensing Board ("licensing board") denying as a matter of law Joint Intervenors' contentions 10 and 12 in the reopened full power proceeding.

Joint Intervenors oppose the motions on a number of grounds. First, PGandE's motion must be summarily denied because it fails to comply with the essential requirements of

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10 C.F.R. § 2.749. Subsection (a) of that section, which governs motions for summary disposition, requires that there be annexed to the motion a "separate, short and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard." No such statement is annexed to PGandE's motion for summary disposition. Therefore, under the principles established in In the Matter of Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), Docket No. 50-564A, CCH Nucl.Reg.Rep. ¶ 30,211 (1977), discussed infra at Point I, PGandE's motion must be denied.

Second, both the Staff and PGandE have failed to meet their burden of proof under summary disposition rules analogous to Rule 56 of the Federal Rules of Civil Procedure. In other words, they have failed to demonstrate that, viewing the record and supporting documentation in the light most favorable to the party opposing the motion, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. As is apparent from the discussion infra at Point II, there are significant issues of material fact yet to be resolved with respect to both of the contentions in question.

Accordingly, for the reasons stated herein, in the attached testimony, and in Joint Intervenors' Statement of Material Facts to Be Heard, Joint Intervenors submit that the NRC Staff and PGandE motions for summary disposition must be denied in their entirety.

I.

PGandE'S MOTION IS PROCEDURALLY
DEFECTIVE AND MUST BE SUMMARILY
DENIED

The Commission's regulations regarding summary disposition are set forth at 10 C.F.R. § 2.749. Subsection (a) of that section provides as follows:

(a) Any party to a proceeding may, at least forty-five (45) days before the time fixed for the hearing, move, with or without supporting affidavits, for a decision by the presiding officer in that party's favor as to all or any part of the matters involved in the proceeding. There shall be annexed to the motion a separate, short and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard. Any other party may serve an answer opposing the motion, with or without affidavits, within twenty (20) days after service of the motion. There shall be annexed to such answer a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be heard. All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party. (Emphasis added.)

PGandE has failed to comply with the explicit requirement that "a separate, short and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard" be annexed to its motion for summary disposition. More so even than supporting affidavits, which may or may not be included as part of the motion, this statement of undisputed facts is an essential element of a legally sufficient summary disposition motion.

That this is no mere procedural technicality is evident from In the Matter of Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit No. 1), No. 50-564A, CCH Nucl.Reg.Rep. ¶ 30,211 (1977), where, as here, PGandE submitted a summary disposition motion but omitted the requisite concise statement of undisputed facts. In ruling that PGandE's motion must be denied, the Atomic Safety and Licensing Board explained the significance of PGandE's omission:

Subsection (a) clearly requires that "There shall be annexed to the motion a separate, short and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard." PGandE has failed to file this required statement of material facts. Such a requirement is not merely a procedural technicality, but it is of substantive significance. This statement is necessary in order to impose upon other parties a duty to file a statement of material facts as to which it is contended there exists a genuine issue to be heard, under penalty of having uncontroverted material facts deemed to be admitted. It is necessary for the Board to have this information in a readily available form in order to evaluate the merits of a motion for summary disposition.

Id. at 28,102 (emphasis added).

PGandE has once again filed a motion for summary disposition without attaching a statement of undisputed facts. Such disregard of Commission regulations and administrative precedent should not be sanctioned by the licensing board in this proceeding. Because PGandE's motion for summary disposition of Joint Intervenors' contentions 10 and 12 fails to satisfy the minimum procedural requirements essential to

such a motion, it is fatally defective and should be summarily denied.

II.

THE NRC STAFF AND PGandE HAVE FAILED TO SATISFY THEIR BURDEN OF PROOF AND, ACCORDINGLY, THEIR MOTIONS FOR SUMMARY DISPOSITION MUST BE DENIED

A. Applicable Standard

The principles governing summary disposition or summary judgment are well settled.^{1/} Such a motion may be granted only where the licensing board finds that, viewing the record and affidavits supporting and opposing the motion in the light most favorable to the party or parties opposing the motion, the moving party has demonstrated that there is no genuine issue of any material fact and that the moving party is entitled to judgment as a matter of law. In the Matter of Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-74-36 7 AEC 877, 879-79 (1974); In the Matter of Tennessee Valley Authority (Browns Ferry Nuclear Plan, Units 1, 2, and 3), LBP-73-29, 6 AEC 682, 688 (1973); see also J. Moore, 6 Federal Practice ¶ 56.15[3] (2nd ed. 1966); Poller v. Columbia Broadcasting System, 368 U.S. 464, 467, 82 S.Ct. 487, 488 (1962) Sartor v. Arkansas National Gas Corp., 321 U.S.

^{1/} Motions for summary disposition are analogous to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. In the Matter of Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 217 (1974); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-74-37, 7 AEC 877, 878-879 (1974).

620, 627 64 S.Ct. 724, 728 (1944). Thus, the burden of proof is upon the moving party, and the opposing parties need not show that they will prevail on the merits, but only that there are genuine issues to be tried. See Poller v. Columbia Broadcasting System, 368 U.S. at 473; American Manufacturers Mutual Insurance Co. v. American Broadcasting - Paramount Theaters, Inc., 388 F.2d 272, 280 (2d Cir. 1967).

For the reasons stated herein, Joint Intervenors submit that both the Staff and PGandE have failed to meet their burden of proof and, accordingly, that their motions for summary disposition must be denied.

B. Contention 10 -- Classification of Pressurizer Heaters

The essence of this contention is that the pressurizer heaters and their associated controls should be classified as "components important to safety" and designed, manufactured, and constructed consistent with that classification. It is based on the experience at Three Mile Island where the inoperability of the reactor coolant pumps and the low pressure decay heat removal systems demonstrated graphically the importance to safety of the ability to remove heat from the reactor through natural circulation and required associated systems.

As is set forth in the attached testimony of nuclear consultants Dale G. Bridenbaugh and Gregory C. Minor (filed in this proceeding on behalf of Governor Edmund G. Brown, Jr.), the pressurizer heater system is the normal and preferred

system for this heat removal function. Indeed, in PGandE's Diablo Canyon emergency operating procedures which include the pressurizer heaters, no alternative pressure control methods are specified. For the plant operators, therefore, to follow a different, infrequently used, and unspecified procedure under stressful conditions would be difficult at best and would pose a risk to safe plant operation which cannot be justified in view of the importance of maintaining pressure control. Only if the pressurizer heater system is designed consistent with safety-grade design criteria can it be relied upon under accident conditions.

As the attached testimony describes at length, the demonstrated role of the pressurizer heaters in performing this and other safety functions warrants their classification as safety-grade and their design to the standards applicable to that classification. Accordingly, Joint Intervenors respectfully request this board to deny both PGandE's and the Staff's motions for summary disposition of contention 10.

C. Contention 12 -- Valve Classification and Testing

This contention focusses on the failure of PGandE to classify Diablo Canyon power operated relief valves ("PORVs"), associated block valves, and their instruments and controls as safety-grade and to design, manufacture, and construct them consistent with that classification. In addition, the contention challenges PGandE's failure to conduct adequate

testing (and to supply the requisite plant specific correlation and analyses) of those valves to verify their capabilities under normal, transient, and accident conditions. Once again, this contention arises out of the experience at TMI, specifically, the failure of the PORV to close upon demand.

The attached testimony of nuclear consultants Bridenbaugh and Minor details the principal safety functions of the PORVs and block valves. Contrary to both PGandE's and the Staff's allegation, the fact that Diablo Canyon has more such valves than some other plants does not assure reliable operation under all operating conditions in view of the fact, conceded by PGandE, that at least one of the PORVs is not classified and designed as important to safety. Consequently, the possibility of valve failure which could lead to a loss of coolant accident cannot be discounted. Further, the lack of clarity in PGandE's use of the terms "important to safety," "safety-grade," and "safety-related" makes it difficult to know precisely which general design criteria the remaining valves comply with at Diablo Canyon. These uncertainties can be eliminated and the reliability of valve operation assured only if the concerns stated in contention 12 have been met.

Finally, the failure of PGandE to complete block valve testing and the delays in preparation of plant-specific analyses for the EPRI relief valve testing program preclude a conclusion as a matter of law by this board that the valves have been adequately qualified.

Accordingly, Joint Intervenors respectfully request this board to deny both PGandE's and the Staff's motions for summary disposition of contention 12.

III.

CONCLUSION

The foregoing discussion and the attached testimony and statement of material facts in dispute referenced herein demonstrate the existence of genuine issues of material fact with respect to Joint Intervenors' contentions 10 and 12.

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PGandE and the NRC Staff have, therefore, failed to carry their burden of proof and their respective motions for summary disposition must be denied.

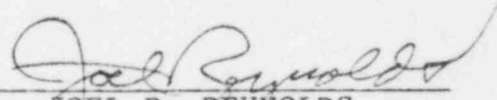
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Respectfully submitted,

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