



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

PACIFIC GAS AND ELECTRIC COMPANY

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

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

NRC STAFF RESPONSE TO GOVERNOR BROWN'S
JANUARY 12, 1982 REQUEST FOR DIRECTED CERTIFICATION

William J. Olmstead
Deputy Chief Hearing Counsel

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I. INTRODUCTION

On January 12, 1982, Governor Brown filed with the Commission, a "Request for Directed Certification of ASLB Order Disclaiming Jurisdiction Over Effects of Earthquakes on Emergency Planning and for Expedited Consideration" (Request). Therein, the Governor seeks directed certification by the Commission of the Licensing Board's ruling that it lacked jurisdiction to consider in this proceeding the impacts on emergency planning of earthquakes which cause or occur during an accidental radiological release. Licensing Board's Memorandum and Order, December 23, 1981.^{1/} Briefly stated, Governor Brown argues that PG&E has itself placed this matter in controversy by reference to earthquakes in its emergency plan, that consideration of this issue is not foreclosed by the Commission's recent decision in the San Onofre proceeding, and that the issue sought to be raised is critical in the context of this proceeding.

^{1/} The Governor's Request erroneously makes reference to a Memorandum and Order dated December 28, 1981.

For the following reasons, the NRC Staff opposes the Governor's Request.

II. BACKGROUND

On December 8, 1981, the Commission in its Memorandum and Order in Southern California Edison Company (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-81-33, _____ NRC _____, determined that pending generic consideration of this matter, "the proximate occurrence of an accidental radiological release and an earthquake that could disrupt normal emergency planning appears sufficiently unlikely that consideration in individual licensing proceedings . . . is not warranted" (Slip op. at 2-3).

Thereafter, on December 23, 1981, the Atomic Safety and Licensing Board presiding in this proceeding issued a Memorandum and Order memorializing a conference of counsel and the Board held on December 16, 1981 at which discussion was had regarding, inter alia, the effect of the Commission's San Onofre Memorandum and Order. (Tr. 11,445-11,451). The Licensing Board concluded that "under the Commission's ruling no licensing board, including this one, has jurisdiction to consider impacts on emergency planning of earthquakes which cause or occur during an accidental radiological release." (Memorandum and Order at 2; see also Tr. 11,445-11,446 and 11,450, 11,451).

On January 6, 1982, Governor Brown filed a "Request for Certification of ASLB Order Disclaiming Jurisdiction Over Effects of Earthquakes on Emergency Planning and for Expedited Consideration," with the Licensing Board seeking, on the same bases as advanced in support of the instant

Request, certification of the Licensing Board's December 23rd ruling to the Appeal Board. This Request was denied by the Board on January 11, 1982. On January 12, 1982, the Governor filed the subject request with the Commission.^{2/}

III. DISCUSSION

A. The standards to be applied in determining whether an interlocutory appeal will be considered have been stated to be where the ruling either (1) threatened the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by later appeal, (2) affected the basic structure of the proceeding in a pervasive or unusual manner, or (3) presents a significant legal or policy question on which Commission guidance is needed. Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190 (1977), U.S. Nuclear Regulatory Commission Statement of Policy on Conduct of Licensing Proceedings, dated May 20, 1981, at p. 7); see also Houston Lighting & Power Company (Allens Creek Nuclear Generating Station, Unit No. 1), ALAB-635, 13 NRC 309 (1981). The instant request for certification fails to address these tests. Most significantly, moreover, the subject matter of the ruling regarding which the Governor seeks directed certification is one upon which the Commission has just recently spoken in

^{2/} Pursuant to 10 C.F.R. §§ 2.718(i), 2.730(f), and 2.785, this Request should have been filed with the Appeal Board as a request for referral, rather than with the Commission. Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), CLI-80-17, 11 NRC 678 (1980). The Governor makes no argument that exceptional circumstances warrant Commission involvement in this matter.

the context of the San Onofre proceeding. The action taken by the Licensing Board is wholly consistent with guidance already provided by the Commission and raises no new legal or policy question on which further guidance from the Commission, or for that matter, from the Appeal Board, is needed.

We turn now to a discussion of the several arguments advanced by the Governor.

B. The Governor first argues that consideration of this issue in this proceeding is appropriate in light of certain references in PG&E's own emergency plan to earthquakes. Simply stated, the Governor's reliance on such references is misplaced. Contrary to the Governor's assertion, the cited references to Table 4.1-1 do not purport to reflect planning for the complications of an earthquake. Rather, as the Governor more accurately notes, earthquakes are included in the emergency plan (in Table 4.1-1 at pp. 11 and 15) merely as "initiating events." In particular, the emergency plan provides that the occurrence of an earthquake greater than 0.2 g (i.e., greater than the Operating Basis Earthquake) requires initiation of an Alert (Id. at p. 11), and the occurrence of an earthquake greater than 0.75 g (i.e., greater than the Safe Shutdown Earthquake) requires initiation of a Site Area Emergency (Id. at p. 15), consistent with the guidance set forth in NUREG-0654, Appendix 1. In neither of the instances cited by the Governor is any planning provided for the complicating effects of these events on implementation of the emergency plan; these events are only

triggering levels. Accordingly, the bases referenced by the Governor are not supportive of his position.^{3/}

The second argument advanced by the Governor is that by declining to provide him with an opportunity to comment to the Commission during its consideration of the matter in the context of the San Onofre proceeding, the Commission did not intend its decision therein to bind the Board in Diablo Canyon. Indeed, the Governor states, the Commission's decision in San Onofre "leaves room for the Commission to make a finding that the circumstances of Diablo Canyon require consideration of earthquake consequences on emergency preparedness." (Request at 2). The mere fact that the Commission did not grant discretionary leave to a non-party to the San Onofre proceeding to offer comment does not permit the inference the Governor would have us draw, particularly in light of the Commission's clear statement of the generic nature of its determination (see quoted language supra at p. 2). Furthermore, the very essence of the Commission's decision is its determination that consideration of this matter is not required by the existing Commission regulations: "the Commission has decided that its current regulations do not require consideration of the impacts on emergency planning of earthquakes which cause or occur during an accidental radiological

^{3/} With respect to the TERA report referred to by the Governor (Request at 3), the Staff would note that it was prepared for PG&E in response to a request by the Staff dated December 16, 1980. The Staff, at that time, had requested information for all nuclear facilities in California and Oregon regarding the complicating effects of earthquakes and volcanic activity, respectively, on emergency preparedness, as part of an effort to consider this matter prior to the Commission's San Onofre decision. The existence of such report has no bearing on the propriety of considering the issue the Governor seeks to litigate.

release." (Slip op. at 1). The regulations to which the Commission made reference are, of course, equally applicable to all proceedings and facilities. The Commission further stated that:

Whether or not emergency planning requirements should be amended to include these considerations is a question to be addressed on a generic, as opposed to case-by-case basis.

* * * * *

The Commission will consider on a generic basis whether regulations should be changed to address the potential impacts of a severe earthquake on emergency planning.^{4/}

(Slip Op. at 1-2). The Commission's conclusion simply leaves no room for the Governor's arguments that it was not intended to be universally applied.

Furthermore, to the extent that the Governor is suggesting that there are factors peculiar to Diablo Canyon which "leaves room . . . to require consideration of earthquake consequences on emergency preparedness" (Request at 2), he has failed to articulate any such factor. In light of the San Onofre decision, the Governor's proposal to consider this matter amounts to a challenge to the Commission's regulations which imposes on him a burden of demonstrating that special circumstances exist warranting waiver or exception from a rule or regulation. 10 C.F.R. § 2.758. The Governor has not even addressed let alone satisfied this burden.

The final argument presented by Governor Brown does not, in fact, relate in any way to the jurisdictional question which the Governor has

^{4/} The discussion in the Commission's San Onofre decision is generally couched in terms of "severe earthquakes" (see Memorandum and Order at 2). However, the breadth of the conclusion applies to "consideration of the impacts on emergency preparedness of earthquakes which cause or occur during an accidental radiological release" (Id., at 1) irrespective of their size.

requested be certified to the Commission. The Governor presents several factual arguments which he believes make it imperative that the effects of earthquakes on emergency plans be considered. There is no factual or legal basis, nor is any suggested by Governor Brown, for such arguments creating jurisdiction in the Licensing Board or otherwise warranting the Commission's intercession at this juncture. See Susquehanna at 679, supra, fn. 2. Furthermore, the factual matters raised by the Governor are substantively no different than those before the Commission in San Onofre. As the Commission specifically noted in determining that the consideration of the effects of earthquakes on emergency plans was not warranted in individual proceedings, the occurrence of an accidental radiological release and an earthquake that could disrupt normal emergency planning are unlikely (Id. at 2). The Governor has not presented any factual or legal basis for departing from this conclusion (see 10 C.F.R. § 2.758).

IV. CONCLUSION

The Commission's December 8, 1981 decision in San Onofre removes from the jurisdiction of the Licensing Board the question of the effects on emergency plans of earthquakes occurring simultaneously with a radiological emergency. That decision is clearly meant to apply to all the Commission's licensing proceedings. Governor Brown has not presented any basis in law or fact for finding that the San Onofre decision does not apply to the Diablo Canyon proceeding. There is, therefore, no basis for reversing the Licensing Board's conclusion that it did not have jurisdiction to consider

the effects of earthquakes on the Diablo Canyon emergency plan and the Governor's Request for Directed Certification should be denied.

Respectfully submitted,

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Dated at Bethesda, Maryland
this 20th day of January, 1982

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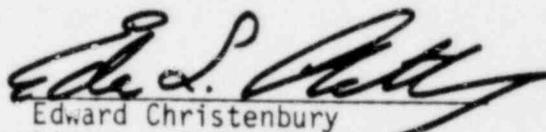
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