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 REPLY TO SUPPLEMENTAL BRIEF OF GOVERNOR BROWN AND JOINT INTERVENORS' BRIEF IN RESPONSE TO SEPTEMBER 2, 1982 ORDER

Bradley W. Jones
Counsel for NRC Staff

October 1, 1982

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 REPLY TO SUPPLEMENTAL BRIEF OF GOVERNOR BROWN AND JOINT INTERVENORS' BRIEF IN RESPONSE TO SEPTEMBER 2, 1982 ORDER

I. Introduction

On September 2, 1982 the Appeal Board issued an Order which directed the parties to the Diablo Canyon proceeding to address whether the issuance of the Initial Decision authorizing full power operation on August 31, 1982 had rendered moot any of the issues in the appeals of the July 17, 1981 Partial Initial Decision authorizing low power (low power decision) which are pending before the Appeal Board. On September 24, 1982, in response to the Appeal Board's Order, as modified by its Order of September 13, 1982, the Staff filed "NRC Staff Reply to Appeal Board's September 2, 1982 Order" (Staff Reply); the Joint Intervenors filed "Joint Intervenors' Brief in Reply to September 2 Order" (J.I. Brief); Governor Brown filed "Supplemental Brief of Governor Brown pursuant to Board Order of September 2, 1982" (Supplemental Brief); and Pacific Gas and Electric Company filed "Brief of Pacific Gas and Electric Company Re Mootness of Low Power Contentions". The parties, pursuant to the Appeal Board's September 2, 1982 Order, have been provided the opportunity to

reply to the above filings. The Staff has reviewed the above documents and determined that no reply is necessary to PG&E's filing, but that several positions in Governor Brown's Supplemental Brief and Joint Intervenors' Reply Brief require further discussion.[1/]

II. Discussion

A. Response to Governor Brown's Supplemental Brief

Governor Brown has identified the Licensing Board's finding that adequate emergency preparedness exists to authorize low power operation of Diablo Canyon as the only area in which the mootness question would seem germane. (Supplemental Brief at 1). However, Governor Brown asserts that, because he has an appeal pending before the United States Court of Appeals on the low power decision, the issues before the Appeal Board cannot be mooted. (Supplemental Brief at 2).

The Staff disagrees that the Governor's filing of an appeal of the Licensing Board's findings with the United States Court of Appeals bears on the question of whether issues pending before this Appeal Board have been mooted by subsequent Commission action or the full power initial decision. Governor Brown's position is that, because the low power decision still can have effect for purposes of sustaining a license authorizing low power operation, no issues can be mooted. This position indicates a misunderstanding of when an issue can be rendered moot. An issue or action is generally considered moot when intervening events have rendered

---

1/ As to those matters raised in the September 24, 1982 filings not addressed herein, the Staff believes that its position as to those matters is fully set forth in the Staff Reply.

the resolution of the issue essentially academic. Powell v. McCormack, 395 U.S. 486, 496 (1969). A determination of which issues in the Governor's appeal to the Appeal Board have been rendered academic is not related to whether or not the decision still has effect. If, for example, subsequent events (particularly the clarifying amendment of 10 C.F.R. § 50.47 with respect to low power emergency preparedness requirements) have made it clear that the Licensing Board need not rely on low risk during low power operation to justify allowing low power operation in the presence of offsite emergency planning deficiencies, it would be purely an academic exercise to litigate whether the Board could rely on low risk if it needed to.

The fact that litigating particular issues is academic, however, does not mean that the low power decision has become ineffective or that its bases have been undermined. The amendments to the emergency planning regulations simply confirm the appropriateness of the Licensing Board's holdings on emergency planning in its Partial Initial Decision. The Licensing Board made a determination that there was low risk at low power which made deficiencies in offsite planning insignificant. (Partial Initial Decision, 14 NRC 107, 138-139 (1981)). In view of the amendments to the emergency planning regulations that determination need no longer be litigated. The Supreme Court has stated that the fact that some issues have been mooted does not affect the justiciability of issues not mooted. (Id. at 497.) As the Staff discussed in detail in its reply to the Appeal Board's inquiry, some issues in the Governor's appeal have been rendered moot and some have not. The inquiry made by the Appeal Board is simply a request to define which issues have become academic and which have not. The Staff Reply to the Appeal Board's inquiry attempts to assist in that determination.

Governor Brown would apparently have the Appeal Board litigate whether low power operation can be authorized if certain alleged offsite emergency planning deficiencies exist, even if subsequent actions have clearly resolved the necessity of addressing those deficiencies. Such a position, in effect, requests that the Appeal Board blind itself to subsequent developments which affect the issues before it and can serve no purpose but to cause the Appeal Board to participate in unproductive, time-consuming actions. The Staff continues to believe the positions advanced in the Staff Reply appropriately avoid such unproductive and time-consuming actions.[2/]

B. Response to Joint Intervenors' Brief

Joint Intervenors, in their Reply Brief, take the position that the full power Initial Decision does not moot their appeal. (J.I. Brief at 1 and 8). The Staff has not taken the position that Joint Intervenors' appeal has been mooted. Rather the Staff Reply identifies specific issues within Joint Intervenors appeal which have been mooted. (Staff Reply at 7-14). Joint Intervenors' appeal would still be litigated as to issues not mooted. Additional points in Joint Intervenors' Reply Brief are discussed below.

2/ As the Staff noted in its reply to the Appeal Board's September 2, 1982 Order (Staff Reply at 15, n.9), however, even those issues which are not technically "mooted" need not necessarily be decided in an entirely separate proceeding. For reasons of efficiency and to avoid duplication of effort it may be appropriate to consolidate remaining low power and full power issues for litigation. Governor Brown has also noted the possibility of considering low power and full power appeal issues in tandem. (Supplemental Brief at 3).

Joint Intervenors argue that, because questions have been raised regarding the qualification of relief and safety valves in the context of the design verification program, the low power issue which addressed the testing of those valves cannot be considered mooted. (J.I. Brief at 4). Joint Intervenors appear to be mixing up issues they would like to litigate[3/] with the issue which the Licensing Board did admit for litigation at the low power phase of the proceeding. The issue before the Licensing Board was whether testing of valves, as directed in NUREG-0737, Section II.D.1, need be completed prior to low power testing. (LBP-81-21, 14 NRC 107, 139 (1981)). It is this limited issue in the low power decision which should be the focus of the inquiry into mootness requested by the Appeal Board. As the Staff noted in its reply to the Appeal Board (Staff Reply at 14), and as Joint Intervenors apparently recognize (J.I.Brief at 4), the factual basis for Joint Intervenors' appeal on this issue is apparently eliminated and the only remaining action wth respect to the testing of the valves in question would appear to be documentation of results to the NRC's satisfaction.

The only other point in Joint Intervernors' Reply Brief which requires comment beyond that contained in the Staff's September 24, 1982 reply to the Appeal Board, relates to emergency planning. Joint Intervenors point to their exceptions in the area of emergency planning with respect to the Licensing Board's Full Power Initial Decision as

---

3/ Joint Intervenors have submitted motions to reopen the record as a result of the design verification program, which are presently being held in abeyance by this Board and the Licensing Board pending the Commission's decision on related questions certified to the Commission by the Appeal Board. Memorandum and Certification to Commission, ALAB-681, ____ NRC ____ (July 16, 1982).

preventing a finding of adequate emergency planning for low power. (J.I. Brief at 6). The Joint Intervenors' discussion misdirects the inquiry. The issue is not whether Joint Intervenors believe deficiencies exist as raised in their exceptions to the Initial Decision authorizing full power operation. Those alleged deficiencies can be resolved in the course of the appeal of that decision. The basic question is whether the specific issues (which related to offsite emergency planning), on appeal from the low power decision, have been mooted. As detailed in the Staff Reply, if the analysis focuses on that question (which is the subject of the Appeal Board's inquiry), it is evident that the low power emergency planning issues, raised by Joint Intervenors on appeal, have been mooted. (Staff Reply at 10-13).

III. Conclusion

As discussed above, the Staff does not believe Joint Intervenors and Governor Brown have presented valid arguments for the position that no issues have become moot in their low power appeals. The Staff continues to support the position, advanced in the Staff's September 24, 1982 filing, that the emergency planning issues and the admissibility of certain proposed low power contentions, raised in Governor Brown's and Joint Intervenors' low power appeals, have been mooted.

Respectfully submitted,

Bradley W. Jones

Bradley W. Jones
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 1st day of October, 1982.

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)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF REPLY TO SUPPLEMENTAL BRIEF OF GOVERNOR BROWN AND JOINT INTERVENORS' BRIEF IN RESPONSE TO SEPTEMBER 2, 1982 ORDER" 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 1st day of October, 1982:

Dr. John H. Buck
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

Dr. W. Reed Johnson
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

Mr. Thomas S. Moore, Member
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

John F. Wolf, Esq.
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

Mr. Glenn O. Bright
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

Elizabeth Apfelberg
1415 Cozadero
San Luis Obispo, CA 93401

Dr. Jerry Kline
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

Philip A. Crane, Jr., Esq.
Pacific Gas and Electric Company
P.O. Box 7442
San Francisco, CA 94120

Mr. Frederick Eissler
Scenic Shoreline Preservation Conference, Inc.
4623 More Mesa Drive
Santa Barbara, CA 93105

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

Richard E. Blankenburg, Co-publisher
Wayne A. Soroyan, News Reporter
South County Publishing Company
P.O. Box 460
Arroyo Grande, CA 93420

Byron S. Georgiou
Legal Affairs Secretary
Governor's Office
State Capitol
Sacramento, CA 95814

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

Joel R. Reynolds, Esq.
John R. Phillips, Esq.
Center for Law in the Public Interest
10951 West Pico Boulevard
Third Floor
Los Angeles, CA 90064

Arthur C. Gehr, Esq.
Snell & Wilmer
3100 Valley Center
Phoenix, Arizona 85073

Paul C. Valentine, Esq.
321 Lytton Avenue
Palo Alto, CA 94302

Bruce Norton, Esq.
3216 North 3rd Street
Suite 202
Phoenix, Arizona 85012

David S. Fleischaker, Esq.
P.O. Box 1178
Oklahoma City, Oklahoma 73101

Richard B. Hubbard
MHB Technical Associates
1723 Hamilton Avenue - Suite K
San Jose, CA 95125

John Marrs, Managing Editor
San Luis Obispo County
Telegram-Tribune
1321 Johnson Avenue
P. O. Box 112
San Luis Obispo, CA 93406

Herbert H. Brown
Kirkpatrick, Lockhart, Hill,
Christopher & Phillips
1900 M Street, N.W.
Washington, DC 20036

Harry M. Willis
Seymour & Willis
601 California St., Suite 2100
San Francisco, CA 94108

Janice E. Kerr, Esq.
Lawrence Q. Garcia, Esq.
350 McAllister Street
San Francisco, CA 94102

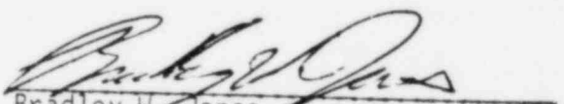
Mr. James O. Schuyler
Nuclear Projects Engineer
Pacific Gas and Electric Company
77 Beale Street
San Francisco, CA 94106

Mark Gottlieb
California Energy Commission
MS-18
1111 Howe Avenue
Sacramento, CA 95825

Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

Docketing and Service Section
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *



Bradley W. Jones
Counsel for NRC Staff