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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION '82 NOV 12 11:25

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, Units 1 and 2)	)	(Full Power Proceeding)

BRIEF OF GOVERNOR BROWN  
IN SUPPORT OF EXCEPTIONS

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November 8, 1982

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

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50-323 O.L.

BRIEF OF GOVERNOR BROWN  
IN SUPPORT OF EXCEPTIONS

This brief is in support of exceptions filed September 16, 1982, by Governor Edmund G. Brown Jr. on behalf of the State of California. Such exceptions are on appeal of the Licensing Board's August 31, 1982 Initial Decision which authorized issuance to Pacific Gas and Electric Company ("PG&E") of a full power operating license for the Diablo Canyon Nuclear Power Plant, subject to certain conditions.

Governor Brown contends that the Licensing Board's decision should be reversed and remanded in instances where the Board failed to act in accordance with the evidence or with legal requirements. Specifically, the Governor requests this Appeal Board to reverse and remand the Initial Decision on the following points:<sup>1/</sup>

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<sup>1/</sup> Governor Brown also supports the bases for reversal set forth in Joint Intervenors' Brief in Support of Exceptions.

1. The failure of the Licensing Board to take evidence on or to consider in any way the effects of an earthquake on emergency preparedness at Diablo Canyon.
2. The failure of the Licensing Board to give effect to the offsite emergency planning requirements of the State of California.
3. The failure of the Licensing Board to require FEMA's future "findings" on the State emergency plan to be brought before the Board and parties in the form of a "rebuttable presumption."
4. The failure of the Board to give weight to deficiencies in the San Luis Obispo County emergency plan and to withhold authorization of a full power operating license unless such deficiencies are corrected.

The following discussion addresses each of these points.

I. The Licensing Board Erred In Failing To Consider The Effects Of An Earthquake On Emergency Preparedness At Diablo Canyon.

By Memorandum and Order dated December 23, 1981, the Licensing Board ruled that it does not have jurisdiction "to consider impacts on emergency planning of earthquakes which cause or occur during an accidental radiological release." Memorandum and Order at p. 2. The Board concluded that its ruling was mandated by the Commission's December 8, 1981 decision in the San Onofre proceeding. See CLI-81-33. On January 12, 1982, the Governor requested the Commission to direct certification of the issue so that it could be resolved prior to commencement of the full power hearing. By Order issued March 5, 1982, the

Commission denied the request as an "impermissible interlocutory appeal under the Commission's Rules of Practice." The issue is thus ripe for decision before this Appeal Board.

The Governor submits that the Licensing Board erred in failing to consider the complications to emergency response caused by an earthquake which either initiates or occurs apart from a radiological emergency at Diablo Canyon. Without having considered such complications, the NRC cannot now find that there is adequate emergency preparedness at Diablo Canyon or that the onsite and offsite emergency plans are "capable of being implemented," as required by 10 C.F.R. §50.47.

For example, if an earthquake which did not harm the Diablo Canyon plant were nevertheless to impair roads or bridges along the primary or secondary evacuation routes or critical communication facilities, evacuation capabilities and emergency services relied upon in the onsite and offsite emergency plans would no longer exist. Such a situation would mean that the continued operation of Diablo Canyon would be inimical to the public health and safety, because the emergency plans which were approved by the NRC would no longer be "capable of being implemented." Therefore, the Licensing Board should have taken evidence on this issue of fact, determined the extent of the potential problems, and helped to fashion the technical and/or regulatory means to deal with them.

A different type of example of the complications of an earthquake on emergency preparedness involves an earthquake

which initiates a radiological accident at Diablo Canyon. This situation was introduced into this proceeding by the provisions of PG&E's own emergency plan. The plan provides that an initiating event for the plan is both an "earthquake greater than OBE levels" and one "greater than SSE levels." See PG&E Emergency Plan, Table 4.1-1, pp. 11 and 15. Since PG&E thus claims to have planned to respond to the effects of such earthquakes, the Licensing Board should have permitted the Governor to examine the adequacy of PG&E's planning, particularly since PG&E's own plan is in evidence. The effect of the Board's ruling was to deny Governor Brown the opportunity to confront evidence which has been introduced. Surely, the State whose resources would be called upon to provide offsite assistance in the event of an emergency covered by PG&E's emergency plan should be given the opportunity to address the adequacy of PG&E's planning efforts.

The only reason given by the Licensing Board for not considering the earthquake preparedness issue was the Board's conclusion that it was foreclosed by the Commission's decision in the San Onofre proceeding. (See Memorandum and Order, December 23, 1981, at pp. 1-2.) In San Onofre, the Commission stated:

[T]he 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 release. 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. Accordingly, the licensing board is hereby directed not to pursue this issue in this proceeding.

The Governor submits that the Commission's ruling in San Onofre is not controlling here. First, as noted above, the effect of earthquakes on emergency planning is an integral part of PG&E's own emergency plan and preparedness. An earthquake is an "initiating event" in PG&E's plan, and it is thus a subject as much within the scope of this proceeding as any other element of the plan.

Second, the central issue of the Diablo Canyon proceeding concerns the effects of an earthquake on public health and safety. As this Board is aware, the Hosgri fault is less than three miles offshore of the Diablo Canyon site. Since the discovery of that fault in the early 1970's, attention has focused on whether the Diablo Canyon facility, admittedly sited by mistake near the Hosgri Fault, should nevertheless be permitted to operate. There is no difference whether the public health and safety effects of a Hosgri earthquake are on the physical Diablo Canyon plant or on evacuation routes. In either case, the impairment of a safety function of the plant or of a safety function of an evacuation route compromises public health and safety.

Third, by "Request For Clarification" filed October 13, 1981, the Governor requested the Commission to provide the Governor an opportunity to comment "if the Commission intends



to issue an order or take other action in the San Onofre proceeding that would affect or provide precedent for the scope or substance of the review of earthquake effects on emergency planning and preparedness at Diablo Canyon." (Request at p. 1.) The Commission did not provide such an opportunity to the Governor, thus suggesting that the Commission did not intend its San Onofre ruling to bind the Licensing Board in the Diablo Canyon proceeding. Accordingly, there is room for meaningful distinction between the two cases.

Finally, in San Onofre, the Commission indicated that the effect of earthquakes on emergency planning "appears sufficiently unlikely that consideration in individual licensing proceedings pending generic consideration of the matter is not warranted." (See CLI-81-33, December 8, 1981, at pp. 2-3.) In fact, no such "generic consideration," by rulemaking or any other public procedure, has been commenced. Accordingly, the exclusion of this issue from the Diablo Canyon proceeding is unlawful. See Natural Resources Defense Council v. N.R.C., 547 F.2d 633 (D.C. Cir. 1976), rev'd on other grounds sub. nom., Vermont Yankee Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978).

The Court of Appeals stated in N.R.D.C. v. N.R.C., supra, that "until an adequate generic proceeding is held" an issue such as the effects of earthquakes on emergency planning and preparedness must be considered in specific licensing cases where it is relevant. 547 F.2d at 641 n. 17. Even if the

Commission took steps to hold a generic proceeding, it is unlikely that the proceeding would be adequate to cover the issue. The effects of earthquakes on emergency planning is an issue limited to few nuclear plant sites, the most critical being Diablo Canyon. The result of a generic approach, therefore, would likely be to mandate the consideration of the issue in individual cases under guidelines for procedural fairness -- a situation no different from what it is today.

As a practical matter, the Licensing Board's failure to consider earthquake effects on emergency preparedness for Diablo Canyon was unreasonable, because the parties had been proceeding to prepare evidence on this very issue. For example, PG&E had commissioned the TERA Corporation to prepare a three-volume analysis entitled "Earthquake Emergency Planning at Diablo Canyon." That analysis was already in the hands of the parties when the Licensing Board ruled against litigation of the earthquake preparedness issue. Accordingly, the effect of the Licensing Board's ruling was to foreclose the opportunity to consider data which were available. The Licensing Board took this action without even reviewing those data to determine their importance to emergency preparedness at Diablo Canyon. These data still are available for on-the-record consideration if this Appeal Board reverses the Licensing Board's ruling.

In view of the clear relationship between earthquake effects -- on both the nuclear plant and the emergency response capabilities at Diablo Canyon -- and the public health and

safety in the surrounding communities, this Appeal Board should reverse the ruling of the Licensing Board and remand the issue for consideration on the record.

II. The Licensing Board Erred In Failing To Give Effect To The Emergency Planning Zone Requirements Of The State Of California.

California legislation, which requires the establishment of State emergency planning zones (Section 8610.5), mandates that the State identify areas likely to be affected by a nuclear power plant accident. In July 1980, the State Office of Emergency Services released a comprehensive study of consequences of serious accidents at all of California's nuclear power plants. See Gov. Brown Ex. 8; PG&E Ex. 80, p. I.5(1). Included therein were recommended site-specific emergency planning zones for each plant. These zones were published for comments by the public, utilities, and counties. Changes reflecting such comments were then made and the resulting emergency planning zones were adopted in order to ensure meaningful protection of the public affected by potential nuclear accidents.

The emergency planning zones developed for Diablo Canyon through the foregoing process resulted in the requirement that there be plume exposure planning for a Diablo Canyon emergency to a distance of about 25-30 miles to the southeast of the plant -- that is, to areas within the boundaries of Santa

Barbara County.<sup>2/</sup> In view of this State requirement, Santa Barbara County is in the process of developing an emergency plan.

The San Luis Obispo County plan itself recognizes the need for Santa Barbara County planning and the lack of such planning to date:

Santa Barbara County planning has not progressed to a detailed level at this time; the San Luis Obispo planning effort and Plan have identified the need for intergovernmental agreements which will be incorporated as they are achieved. PG&E Ex. 80, p. I.1(4), n.l.

Until emergency planning is complete and capable of being implemented in Santa Barbara County and integrated with the other offsite plans, the NRC cannot find that there is adequate emergency planning at Diablo Canyon.

The Licensing Board explicitly recognized that there is no emergency preparedness in Santa Barbara County. However, the Board concluded that it has "no authority to enforce State standards which exceed those required by the Federal government. This is for the State to do." (Initial Decision, p. 12.) While it is true that the State has independent authority to enforce its emergency planning zones, the State has chosen to participate

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<sup>2/</sup> See PG&E Ex. 80, p. I.1(4), I.2(1-2). The size of the plume exposure zone for Diablo Canyon resulted, *inter alia*, from the strong prevailing winds which blow toward the southeast a large percentage of the time. These winds, along with relatively stable air conditions, would result in rapid, long distance transport of radiation releases in the event of a serious Diablo Canyon accident. Gov. Brown Ex. 8.

in the NRC's proceeding and to have the legal effects of the State requirements embraced by the Federal decisionmaking authorities. This would seem an appropriate course, because it is necessary for the State plan, the local plans, and the PG&E plan to be integrated and capable of being implemented through coordinated responses. Under Section 274 of the Atomic Energy Act, pursuant to which the State is participating in this proceeding, there is an established regulatory framework for consideration of a State's concerns. There is no good reason why the Board should not have taken the opportunity to foster comity between California and the NRC on an issue of mutual importance and, indeed, dependence.

Moreover, contrary to the Board's characterization, California's planning zones are not "standards" which the State has asked the NRC to "enforce." The zones are instruments through which integrated emergency planning and response can be implemented. The California zones were rationally derived from consequence analyses demonstrating effects of possible accidents at Diablo Canyon. The zones take into account where such consequences would be experienced and the requirements for response -- some of which cross County boundaries and thus require integrated County response capabilities. Indeed, the San Luis Obispo plan itself references the Santa Barbara plan. PG&E Ex. 80, p. I.1(4).

Finally, the Board's failure to give effect to California's need for emergency planning in Santa Barbara County has the

practical effect of frustrating State law. While the Board has characterized the issue as one of "enforcing" State requirements, the Board has actually frustrated those requirements by neither (1) conditioning a Diablo Canyon license on completion and integration of Santa Barbara emergency preparedness (subject to review by the parties), or (2) deferring its decision until such preparedness is brought before the Board and parties for review.

Significantly, the Board found that California's choice of emergency planning zones is a "reasonable exercise of its responsibility under 10 C.F.R. 50.47 to establish emergency plans." (Finding 20, p. 96.)<sup>3/</sup> Moreover, the Board found, "The California EPZ's are sufficiently different from the Federally defined zones (10 C.F.R. 50.47(c)(2)) that some confusion as to enforcement of the remainder of 10 C.F.R. 50.47 requirements could arise." (Finding 21, p. 97). Given this potential "confusion," there was no basis for the Board to conclude that the offsite and onsite emergency plans can be integrated or that they are capable of being implemented.

The Board's invocation of a so-called "minimum requirement standard" (Finding 22, p. 97) to approve emergency preparedness at Diablo Canyon is erroneous. Even assuming arguendo that such a minimum standard is appropriate here, there is no basis

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<sup>3/</sup> The State's responsibility for emergency planning is not mandated by the Code of Federal Regulations as might be inferred from the Board's statement, but by the State's own inherent obligation to protect the public health and welfare.

to find integrated offsite and onsite emergency planning and preparedness. By any standard -- minimum or otherwise -- a lack of integration of onsite and offsite planning necessarily translates into no emergency preparedness.

Accordingly, this Appeal Board should reverse and remand to the Licensing Board for further consideration the issues of offsite planning in the State's emergency planning zones and of integration of all offsite planning with onsite planning.

III. The Licensing Board Erred In Failing To Require FEMA's Future "Findings" On The State Emergency Plan To Be Brought Before The Board And Parties As A "Rebuttable Presumption."

10 C.F.R. §50.47(a)(2) provides that an operating license for Diablo Canyon may not be issued by the NRC unless FEMA makes findings and determinations as to whether the "State and local emergency plans are adequate and capable of being implemented." The NRC's regulations further provide that "a FEMA finding will constitute a rebuttable presumption on questions of adequacy and implementation capability." 10 C.F.R. §50.47(a)(2) (emphasis supplied). Thus, for the NRC to issue an operating license for Diablo Canyon, the NRC must, among other things: (1) receive FEMA findings on the adequacy of the State of California emergency plan and whether it can be implemented; and (2) provide the parties to this proceeding an opportunity to rebut the FEMA findings. An opportunity for the State of California to review and consider the FEMA's findings is critical, because the State needs a factual determination that its plan can be integrated with the local

plans to produce an effective and coordinated emergency response.

The Licensing Board correctly found that FEMA had not issued its findings on the State of California emergency plan. (Finding 23, p. 97). Accordingly, the Board determined that a FEMA finding "should be completed prior to the granting of an operating license." (Initial Decision, p. 20). However, the Board concluded: "The Director of Nuclear Reactor Regulation must secure FEMA findings on the adequacy of the State Emergency Response Plan." (Initial Decision, p. 21).

It is in this conclusion -- directing the NRC Staff to "secure" FEMA's finding -- that the Board erred. By law, FEMA's finding is a "rebuttable presumption." Thus, the parties to the proceeding have a right to review and, if appropriate, to rebut the FEMA finding. The Board has overlooked this point. Since no FEMA finding existed for the State plan, the Board was obligated to hold the record open until a finding was issued and then to provide parties an opportunity to address the rebuttable presumption contained therein. Certainly, no operating license could correctly be authorized when a crucial element in evaluation of preparedness -- the FEMA finding on the State plan -- did not even exist.

There is a second reason that the Board erred in directing the Staff to secure the FEMA finding. In a contested proceeding such as Diablo Canyon, the Staff is a party equal to the others. Fact-finding remains the Board's obligation. Therefore, with



respect to the adequacy of the State plan, PG&E, the Staff, Joint Intervenors, and the State are entitled to an equal opportunity on the record to review and, if appropriate, to rebut the FEMA finding. The Staff is not entitled to a favored position among the parties.

The Licensing Board compounded its error by concluding, "the Staff should assure itself, based on FEMA findings on the adequacy of the State Plan, that planning for Santa Barbara County has been considered and integrated into the overall State-local emergency response capability." (Initial Decision, p. 21). Again, it was improper for the Board to delegate to the Staff -- as adversarial party in this proceeding -- fact-finding as to the adequacy of the State plan or as to the integration of the still non-existent Santa Barbara plan with the other local plans and the State plan. Those are issues for which hearings should be held. Each of the parties to this proceeding, not just the Staff, has a right "to assure itself" of the adequacy and integration of the Santa Barbara plan, the other local plans, and the State plan.

Accordingly, this Appeal Board should reverse and remand the issue to the Licensing Board with the direction that the Licensing Board await FEMA's finding and then bring it before the Board for review and, if appropriate, rebuttal by any of the parties.

IV. The Licensing Board Erred In Failing To Find That Deficiencies In The San Luis Obispo County Plan Prevent A Finding Of Adequate Local Emergency Preparedness.

The Licensing Board identified various deficiencies wherein onsite and offsite preparedness failed to satisfy parts of the 16 planning standards of 10 C.F.R. §50.47(b). In some instances, the Board found the deficiencies to be insufficient to deny PG&E an operating license: e.g., inability of PG&E to augment its onsite emergency personnel in accordance with Section 50.47(b)(2) and the guidance of Nureg-0654. In other instances, the Board required the Staff to "assure itself" that the deficiencies are corrected: e.g., reliability of radio communications. This constitutes additional error by the Licensing Board, again leaving to the Staff, an adversarial party in this proceeding, the responsibility to make requisite findings of fact. In the various instances of identified deficiencies, the Board should have defined the deficiencies; required that they be corrected; required that the corrections be presented to the Board for review by the Board and parties; and, withheld approval of the operating license until such time that the Board receives evidence necessary to make the required findings of fact that the standards of Section 50.47(b) are satisfied or that the Section 50.47(c)(1) exception applies.

A significant example of the Board's erroneous approach was in its "Suggestions for Further Action," where the Board "recommends . . . that the problem of potential role conflict in an emergency be addressed in instructions to emergency workers." (Initial Decision, p. 7). In making that recommendation, the

Board simply begged the question. Indeed, the role conflict issue arises precisely because emergency workers might disobey instructions to report for work.

The Licensing Board failed to grant the Governor's request, based on the testimony of Dr. Erickson, that a survey be done to develop the facts necessary to deal with the role conflict problem. Although the Board "accepted[ed] that role conflict is one of the problems that could arise during an emergency," it did "not accept that the problem is of such dimension as to render the emergency plan unimplementable." (Finding 41, p. 103). Again, the Board begged the question. Since the Board did not order the survey proposed by Dr. Erickson, the "dimension" of the role conflict problem at Diablo Canyon cannot be known. The problem may or may not be severe. The fact is that neither the Board nor parties now know.

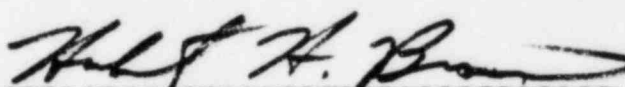
Similarly, the Board rejected the proposal of Dr. Johnson that a social survey be performed to determine the implications to emergency preparedness of certain community traits and preferences at Diablo Canyon. These data would be particularly useful in developing public education programs, public notification systems, and protective action guidelines. Even though no social survey was performed, the Licensing Board concluded that "sociological information relevant to designing a public information system has been taken into account in the San Luis Obispo County Emergency Plan." (Finding 188, p. 151).

Dr. Johnson's proposal for a social survey was to enable the onsite and offsite emergency planners to obtain data that could enhance the planning process and contribute to effective emergency preparedness. Instead of seizing this opportunity to foster such effective preparedness, the Licensing Board in this instance, just as in the others, chose to follow the dictates of its "minimum requirements standard." The Governor submits that the goal of public health and safety calls for a level of more active involvement by the Federal decisionmakers.

Accordingly, this Appeal Board should reverse and remand the Licensing Board's decision to approve offsite emergency planning until deficiencies in the San Luis Obispo County emergency plan are corrected and the necessary surveys are performed and brought before the Board and parties for review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "BRIEF OF GOVERNOR BROWN IN SUPPORT OF EXCEPTIONS" have been served to the following by U.S. Mail, first class, this 8th day of November, 1982.

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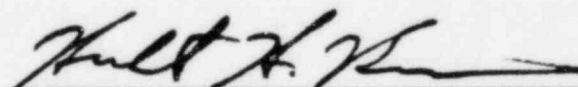
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