

February 4, 1982



SECY-82-47

ADJUDICATORY ISSUE
(Affirmation)

For: The Commissioners

From: Leonard Bickwit, Jr.
General Counsel

Subject: REQUEST FOR DIRECTED CERTIFICATION
OF ASLB ORDER IN DIABLO CANYON
PROCEEDING

Purpose: To forward Governor Brown's request
for certification and to recommend
issuance of a Commission order denying
the request.

Discussion: On January 12, 1982, Governor Brown
requested the Commission to take direct
review of the Diablo Canyon Licensing
Board's December 23, 1981 decision
(Attachment 1) that the Board does not
have jurisdiction to consider any
"impacts on emergency planning of
earthquakes which cause or occur during
an accidental radiological release."
(Attachment 2). The Licensing Board's
ruling was based on the Commission's
December 8, 1981 order in the San Onofre
proceeding which held that the
Commission's "current regulations do not
require consideration of the impacts on
emergency planning of earthquakes which

CONTACT: Marian E. Moe, OGC
x41493

Information in this record was deleted
in accordance with the Freedom of Information
Act, exemptions 5
FOIA- 92-436

5/6

cause or occur during an accidental radiological release." 1/ The request for certification is an impermissible interlocutory appeal to the Commission and may simply be denied as such. We recommend that the Commission do so. 2/ The issue is discussed in more detail below.

The Diablo Canyon Board's December 23, 1981 order concluded that in view of the Commission's San Onofre decision no Licensing Board had "jurisdiction to consider impacts on emergency planning of earthquakes which cause or occur during an accidental radiological release." This ruling was reiterated in the Licensing Board's January 11, 1982 denial of Governor Brown's Request for Certification to the Commission.

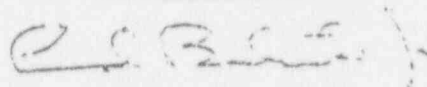
(Attachment 4) Based on this reading of San Onofre, the Board disallowed Governor Brown's broadly worded contention that "neither PG&E's onsite plan nor the County or State offsite preparedness plans address the complications arising from attempting

1/ The Commission also found that "... 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 pending generic consideration of the matter is not warranted." In the Matter of Southern California Edison, (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-81-33, December 8, 1981.

2/ The NRC staff has filed a response (Attachment 3) opposing the request on the grounds that it does not meet the test for taking up an interlocutory appeal.

Recommendation:

75



Leonard Bickwit, Jr.
General Counsel

Attachments:

1. Licensing Board's 12/23/81 Order
2. Request for Commission Certification, 1/12/82
3. Staff Opposition 1/20/82
4. Licensing Board's 1/11/82 Denial
5. Draft Order

Commissioners' comments or consent should be provided directly to the Office of the Secretary by c.o.b. Monday, February 22, 1982.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT February 12, 1982, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

This paper is tentatively scheduled for affirmation at an open meeting during the week of March 1, 1982. Please refer to the appropriate Weekly Commission Schedule, when published, for a specific date and time.

DISTRIBUTION

Commissioners
Commission Staff Offices
Secretariat

ATTACHMENT 1

relib

DOCKETED
USING

'81 DEC 28 A8:36

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before Administrative Judges:
John F. Wolf, Chairman
Glenn O. Bright
Dr. Jerry Kline

OFFICE OF SECRETARY
OF THE COMMISSION

SERVED DEC 28 1981

In the Matter of:
PACIFIC GAS AND ELECTRIC COMPANY
(Diablo Canyon Nuclear Power Plant,
Units 1 and 2)

Docket Nos. 50-275 OL
50-323 OL

December 23, 1981



MEMORANDUM AND ORDER

On Wednesday, December 16, 1981, a conference of counsel with the members of the Board was held in the Nuclear Regulatory Courtroom in the East West Towers Building, Bethesda, Maryland. Appearances were entered on behalf of the Applicant by Bruce Norton, Esq. and Philip Crane, Jr., Esq.; on behalf of the NRC Staff by William Olmstead, Esq.; on behalf of California Governor Brown, Lawrence Laupher, Esq. and Herbert H. Brown, Esq.; and on behalf of Joint Intervenors, Joel Reynolds, Esq.

I. Impacts On Emergency Planning of Earthquakes.

The first question discussed was the effect of the Commission's holding in its San Onofre decision of December 8, 1981, CLI-81-33. There the Commission held that current regulations do not require considerations of impacts on emergency

DS02
3
1/1

planning of earthquakes which cause accidental radiological releases or which occur during such a release.

After the discussion the Board stated its conclusion 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.

II. Adequacy of FEMA's findings.

The NRC Staff contends that the memorandum of November 17, 1981 to Brian Grimes of NRC from Richard W. Krimm of FEMA contains the finding that FEMA has been providing in similar cases, which indicates the status of emergency planning at the site in question with regard to the planning standards in NUREG-0654. Under 50.47(a)(1) NRC must give a rebuttable presumption to this FEMA finding.

The NRC Staff also points out that the Memorandum of Understanding between NRC and FEMA requires FEMA to make the findings contained in the memorandum of November 17, 1981. It further stated that "the Commission has specifically, by adopting our emergency planning rules and referring to that Memorandum of Understanding its statement of considerations made it clear that it believes that that Memorandum of Understanding binds the NRC. If you refer to that Memorandum of Understanding it clearly indicates in these the procedure will be followed for FEMA to provide NRC findings with regard to NRC's duties under 50.47."

On the basis of established and approved procedure the Board will look to the Richard W. Krumm memorandum of November 17, 1981 as the FEMA finding needed to carry out 10 C.F.R. 50.47. It is subject to being amended in the event that FEMA discovers new operative facts in subsequent hearings or tests. No operating license shall issue until 10 C.F.R. 50.47 is fully complied with.

In view of the Board's decision, stated above, Joint Intervenor's request for certification to the Commission of a question about the use of a "FEMA agency finding" or a "FEMA Staff report" in carrying out 10 C.F.R. 50.47 is denied.

III. Applicants motion to compel production of documents and the state's claim of privilege.

Counsel for Governor Brown has been directed to submit in camera all documents as to which privilege or irrelevancy is claimed.

Counsel has stated that he will do so as soon as he is able. The Board's decision in this matter will await receipt of the documents in question.

IV. Joint Intervenors' Revised Contention on environmental qualification of safety-related equipment.

On August 4, 1981, the Board issued a Memorandum and Order in which we addressed, among others, Joint Intervenors' Contention 14, which was related to the environmental qualification of Class 1-E equipment. The contention had been submitted in Joint

Intervenors' Statement of Clarified Contentions dated June 30, 1981. The Board ruled as follows:

The Board, however, expects that Diablo Canyon will not be permitted to operate until the safety-related electrical equipment has been qualified in accordance with the mandates of various general design criteria, as required by regulation. Having said this, the Board does not see herein a litigable issue set forth. This part of the contention is therefore denied.

Joint Intervenors also contend that the Staff has failed to determine that environmental qualification of Class 1E electrical equipment for full-power operation is adequate, and that the Staff has not determined the adequacy of the radiation qualification of safety-related equipment. Joint Intervenors are quite correct in this assertion. The Staff has stated (SER, Supp. 13, p. 7-1; SER, Supp. 14, p. 3-8) that the Staff evaluation of these matters will be presented in a following SER supplement. The Board, therefore, will allow Joint Intervenors, if they so desire, to file a contention on these matters setting forth specific areas of inadequacy in the Staff's evaluation to be contained in a forthcoming SER supplement. The contention will be due fifteen days after service of the SER supplement.

Supplement No. 15 to the SER was issued on October 2, 1981, and the Joint Intervenors submitted their Revised Contention on Environmental Qualification on October 23, 1981.

The Board has carefully reviewed the revised contention. The Board had allowed the submission of the revised contention solely on the grounds that, as of that writing, there was no evaluation of the qualification of Class 1-E equipment presented in the SER or any of its supplements. We were concerned, therefore, that the SER would be a complete document which responded to the Commission Memorandum and Order, CLI-80-20, dated May 23, 1980, which required qualification of safety-related equipment as set forth in

NUREG-0588. The Joint Intervenors interpreted the Board's ruling as being much broader than the Board had intended, and has attempted to include arguments about the Staff's acceptance of the proposed qualification procedures. The Board had specifically ruled on such arguments in the first paragraph of our order, as set forth above. The only specific reference to a deficiency in SSER No. 15 made by Joint Intervenors was to lack of reference to Reg. Guide 1.97, Rev. 2, which reference is not required by NUREG-0588.

In consideration of the above, the Board finds no merit in Joint Intervenor's argument, and the Revised Contention is denied.

V. Discovery of prospective expert testimony.

At the conference Applicant served on the Board and Counsel depositions by Miguel A. Pulido and Sheldon C. Plotkin (Joint Intervenors proposed experts), together with a memorandum "Re: Denial of Discovery of Expert Opinion." Without any proof, save the depositions, Counsel for Applicant made an oral motion requesting "that the testimony of the Joint Intervenors and the Governor's expert witnesses be limited to those opinions that they were able to express at the time the time of their deposition or in their answers to interrogatories that have been filed to date and that they not be allowed to come up with new opinions based upon facts that they were unable to discover through the discovery process."

Counsel for the Governor and the Joint Intervenors contested the charge levied by Applicant's Counsel. The Joint Intervenors stated their willingness to cooperate with further discovery attempts in this area. The precise situation regarding the deposition of the Governor's experts was not made clear by Applicant's counsel.

The Chairman denied the motion for lack of probative evidence. However, it is not his purpose to limit discovery of expert testimony, nor to eliminate such testimony by imposing the sanctions sought by the Applicant. Accordingly, the Governor's Counsel and the Joint Intervenors' Counsel will serve, as soon as possible, and no later than January 9, 1981, the written testimony of its expert witnesses. The written testimony shall include the subject matter on which the expert is expected to testify and the substance of the facts and opinions to which the expert is expected to testify and summary of the grounds for each opinion. The qualifications of the witness as an expert shall be stated in detail. Each expert will, of course, be subject to voir dire by opposing counsel or the Board, if necessary.

The Board is well aware of the tight schedule of events that was agreed to by the parties and the extenuating circumstances faced by the Joint Intervenors. The situation calls for coordination and avoidance of mere technical positions regarding time.

VI. Specificity of Contention 1.

Contention 1 as restated by the Board reads:

PG&E and the combined onsite, state and local emergency response plans and preparedness do not comply with 10 C.F.R. 50.33(g); 50.47 and revised Appendix E to Part 50.

At the conference held December 16, 1981, NRC and PG&E counsel requested the Board to refine Contention 1 in order to make it more specific in the light of discovery which has now taken place. Joint Intervenors indicated that they were satisfied with the broad wording of Contention 1, but they reaffirmed that their specific concerns about emergency planning were set forth in their statement of clarified contentions which was filed with the Board June 30, 1981. Tr. 11530.

In its Memorandum and Order of August 9, 1981 the Board restated Joint Intervenors Contention 1 in its present form rather than admit approximately 3 pages of detailed concerns labeled (a) through (n) to be litigated in the full power proceeding. The Applicant and Staff are of course free to file motions for summary disposition on any of these concerns of Joint Intervenors for which they believe there is no genuine issue of material fact.

The Board concluded in the conference of counsel that it is without jurisdiction to consider issues related to the effects of earthquakes on emergency planning. Tr. 11446. Accordingly, Joint Intervenors issue (h) is outside the scope of the full power hearing and need not be addressed further.

The issues of emergency planning are inherently broad and complex and the Board expects the Staff and Applicant to address these issues at the hearing guided by the planning standards contained in 10 C.F.R. 50.47 and further explained in NUREG-0654. Information on the current status of Applicant's compliance should be presented for each standard.

With these clarifications the Board sees no need to further refine Contention 1.

VII. Agreements by Parties.

Counsel for Governor Brown stated they would be willing to produce state employees--but they would have to confer with them first--Applicant will furnish a list. It is assumed by the Board that Counsel for Applicant will produce employees of PG&E under the same conditions if Intervenors find need for them as witnesses.

Counsel for Applicant agreed, in response to Joint Intervenors' motion of November 6, 1981 to compel answers to interrogatories, that he would furnish Joint Intervenors with all the information that Applicant or its counsel or their agents or consultants have with respect to the so called EPRI program on valve testing.

The parties agreed that they would supply to the Board their preferred order of litigation of the contentions:

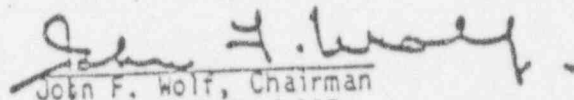
On this th day of December, 1981 it is

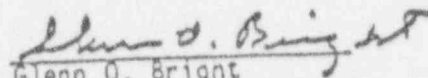
ORDERED

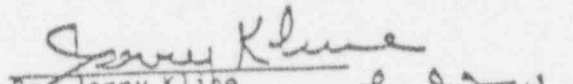
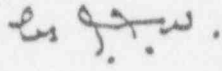
1. That the motion of the Joint Intervenors to include their revised contention on environmental qualification of safety related equipment is denied.

2. That the FEMA finding contained in Krim's Memorandum of November 17, 1981 is adequate and may be used by NRC as a rebuttable presumption.

THE ATOMIC SAFETY AND
LICENSING BOARD


John F. Wolf, Chairman
ADMINISTRATIVE JUDGE


Glenn O. Bright
ADMINISTRATIVE JUDGE


Dr. Jerry Kline
ADMINISTRATIVE JUDGE 

Issued and Entered this
23rd day of December 1981.

ATTACHMENT 2

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

relea
2

BEFORE THE COMMISSION

'82 JUN 12 2:43P

_____)	
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.

REQUEST FOR DIRECTED CERTIFICATION OF ASLB ORDER
DISCLAIMING JURISDICTION OVER EFFECTS OF
EARTHQUAKES ON EMERGENCY PLANNING AND FOR
EXPEDITED CONSIDERATION

By Memorandum and Order dated December 28, 1981 ("Order"), 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." Order at 2. The Board concluded that this ruling was mandated by the Commission's December 8, 1981 decision in the San Onofre proceeding. See CLI-81-33.*

Governor Brown requests that the Commission direct certification of the Licensing Board's decision and take cognizance of the important issue raised thereby for the following reasons:

1. The complicating effects of an earthquake on emergency planning have been introduced as a factual issue in this proceeding by the provisions of PG&E's own Emergency Plan. Thus, PG&E's Emergency Plan itself provides that an initiating event for the Emergency Plan is both an earthquake "greater than OBE levels" and an earthquake "greater than SSE levels." See PG&E Emergency Plan Table 4.1-1, pp. 11 and 15. Since PG&E claims to have planned

*/ By Order of January 11, 1981, which was read by ASLB's secretary to the Governor's counsel, the Board did not certify the subject issue to the Commission.

the potentially serious complications of an earthquake on nearby faults, including the proximate Hosgri fault, the Governor should be permitted to examine the adequacy of PG&E's planning and the accuracy of PG&E's claims. Surely, the Commission's December 8 Order in San Onofre should not be construed so as to dissuade, or indeed prevent, PG&E from planning and preparing for the very earthquake events that PG&E has made "initiating events" for its Emergency Plan. And, surely the Commission could not have intended the State whose resources would be required during a radiological emergency to be barred from participating on this crucial issue.

2. On October 13, 1981, Governor Brown requested the Commission to provide the Governor with an opportunity to comment if the Commission intended its ruling in San Onofre to have precedential effect on the Diablo Canyon proceeding. See Attachment. The Commission did not provide such opportunity to the Governor, thus suggesting that the Commission did not intend its San Onofre ruling to bind the Board in Diablo Canyon. Instead, the Commission's action 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.

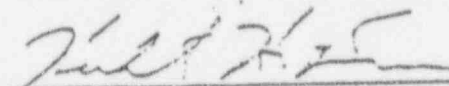
3. The central issue in the Diablo Canyon proceeding has been and remains the expected effects of a major earthquake on the nearby Hosgri fault, which PG&E overlooked in siting the Diablo Canyon plant. Obvious potential effects of such an earthquake would be on roads, bridges, and other elements of the public infrastructure that are crucial to evacuation and other protective actions in the event of a radiological emergency. For example, if a critical bridge along

an evacuation route from the Diablo Canyon plant were seriously damaged by an earthquake, the evacuation route itself would be rendered unusable. Assuming the loss of such an evacuation route, would the Commission still want the plant to operate? The answer would presumably be no, because the evacuation route which supported licensing of the plant would no longer exist, and the public health and safety standard thus could not be met. Unless the Licensing Board's December 23 Order is reversed by the Commission, this critical issue will be precluded from the hearing.

Because the hearing is scheduled for January 19, the Governor requests expedited consideration of this matter. If the Commission were to rule for the Governor, the January 19 hearing date could still be met, because all parties to the proceeding have received the TERA report commissioned by PG&E to analyze the effects of earthquakes on emergency planning and necessary discovery has already been completed.

Respectfully submitted,

Byron S. Georgiou
Legal Affairs Secretary
Governor Brown's Office
State of California



Herbert H. Brown
Lawrence Coe Lanpher
KIRKPATRICK, LOCKHART,
HILL, CHRISTOPHER & PHILLIPS
1900 M Street, N. W.
Washington, D. C. 20036

Counsel for Governor Edmund G. Brown Jr.
of the State of California

January 12, 1982

ATTACHMENT 3

release 3

DOCKETED
USNRC

'82 JAN 21 11:16

ora

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

BEFORE THE COMMISSION

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.

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

William J. Olmstead
Deputy Chief Hearing Counsel

January 20, 1982

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)

}
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

January 20, 1982

01/20/82

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)

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

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

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,

William J. Olmstead
William J. Olmstead
Deputy Chief Hearing Counsel

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

ATTACHMENT 4

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
SUBC

release

Before Administrative Judges:
John F. Wolf, Chairman
Glenn O. Bright
Dr. Jerry Kline

'82 JAN 12 AM 11:04

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

SERVED JAN 12 1982

Docket Nos. 50-275 OL
50-323 OL

January 11, 1982

In the Matter of:

PACIFIC GAS AND ELECTRIC COMPANY
(Diablo Canyon Nuclear Power Plant,
Units 1 and 2)

MEMORANDUM AND ORDER

Counsel for Governor Brown of California have filed a "Request for Certification of ASLB Order Disclaiming Jurisdiction Over Effects of Earthquakes on Emergency Planning and Expedited Consideration." The request was dated January 6, 1982. It was in response to the Board's Order dated December 23, 1982 in which it was held, inter alia, that based on the Commission's ruling in the San Onofre matter (CLI-81-33) the Board has no jurisdiction "to consider impacts on emergency planning of earthquakes which cause or occur during an accidental radiological release."

Under the rules of practice, the presiding officer may "certify questions to the Commission for its determination either in his discretion or on direction of the Commission" (10 CFR § 2.178).

The rules also provide that when in the presiding officer's judgment a prompt decision is necessary "to prevent detriment to the public interest or unusual delay or expense, the presiding officer may refer the matter to the Commission."

Here, the circumstances are such, namely; that the plant will not be completed until the second half of 1982, and therefore a prompt decision now is not necessary.

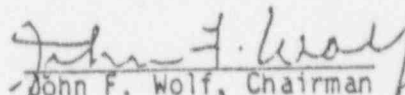
It is clear that a decision in regular course by the Commission in response to an appeal from the Board's final initial decision, when issued, will not be a detriment to the public nor will it cause unusual delay or expense. A resurrection of the "earthquake" issue at this juncture would undoubtedly require that the hearing beginning on January 19, 1982 be delayed (Cf 100 FR 2.730 (g)). More compelling is the fact that the San Onofre ruling, in the Board's judgment, is unambiguous and the Board's original decision, which rests on it, was therefore correct.

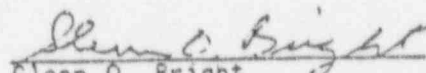
Accordingly, it is

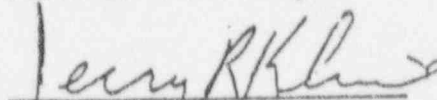
ORDERED

that the Request for certification is denied.

FOR THE ATOMIC SAFETY AND
AND LICENSING BOARD


John F. Wolf, Chairman
Administrative Judge


Glenn O. Bright
Administrative Judge


Jerry Kline
Administrative Judge

Issued and entered at Bethesda, MD
this 11th day of December 1982.

ATTACHMENT 5