

December 19, 1983

SECY-83-512



**ADJUDICATORY ISSUE**  
(Affirmation)

For: The Commissioners

From: Martin G. Malsch  
Deputy General Counsel

Subject: DIABLO CANYON STAY REQUEST

Purpose: To recommend disposition of Joint  
Intervenors' stay request.

Discussion: Still pending before the Commission is  
Joint Intervenors' October 31, 1983,  
request for a stay of fuel loading and  
pre-criticality testing at Diablo  
Canyon.<sup>1</sup> This motion was filed before  
both the Appeal Board and the Commission  
with the request that it be considered  
expeditiously by each. In CLI-83-27,  
the November 8, 1983 order reinstating  
the license to load fuel at Diablo  
Canyon, the Commission indicated its  
preference for the Appeal Board to give  
initial consideration to the stay  
request. Slip op. at 9. On the same  
day the Commission order was issued, the  
Appeal Board denied the stay from the  
bench. See Attachment 1, transcript of  
Appeal Board ruling. The Appeal Board  
did not issue a written opinion.  
Subsequently, in response to Joint  
Intervenors' request for an emergency  
stay, the D.C. Circuit also declined to  
stay fuel loading. Deukmejian v. NRC,  
and consolidated cases, D.C. Cir. Nos.

50-275 P  
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<sup>1</sup>Joint Intervenors' stay request was previously  
distributed to the Office of each Commissioner.

CONTACT:  
Rick Parrish, OGC  
634-3224

9501300256 940509  
PDR FOIA  
GILINSK92-436 PDR

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

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H/H/13

81-2034, 81-2035, 83-1073 (November 15, 1983). Attachment 2.

The Appeal Board applied the stay standards contained at 10 CFR 2.788, while the D.C. Circuit applied the comparable judicial standards derived from Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921 (D.C. Cir. 1958), which, incidentally, provided the basis for 10 CFR 2.788. In denying the stay requests, both the Appeal Board and the D.C. Circuit noted the lack of irreparable harm associated with fuel loading and pre-criticality testing. The Appeal Board also noted that Joint Intervenors had failed to show that they were likely to prevail on the merits or that a stay would not be contrary to the licensee's interests.

there is some question

67.  
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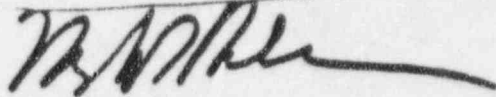
EX.  
5

In this case, we believe

do not believe

Thus, we

Recommendation:



Martin G. Malsch  
Deputy General Counsel

Attachments as stated

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<sup>2</sup>In denying the stay, the Appeal Board stated that Joint Intervenors had failed to show they were likely to prevail on the merits. However, this statement applied only to those issues decided in ALAB-728, the review of the low-power decision, not to quality assurance issues still pending in the reopened proceeding.

Commissioners' comments or consent should be provided directly to the Office of the Secretary by c.o.b. Friday, January 6, 1984.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Friday, December 30, 1983, 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 January 16, 1984. Please refer to the appropriate Weekly Commission Schedule, when published, for a specific date and time.

DISTRIBUTION:

Commissioners

OGC

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SECY

Rel.

ATTACHMENT 1

**ORIGINAL**

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

*Rel.*

In the matter of:

PACIFIC GAS & ELECTRIC COMPANY

(Diablo Canyon Nuclear Power Plant)

Docket No. 50-275 OL  
50-323 OL

Location: Avila Beach, Calif.

Pages: D-2300 - D-2386

Date: Tuesday, November 15, 1983

*TRP/ add LPDR  
of  
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EW-529*

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## P R O C E E D I N G S

JUDGE MOORE: Come to order, please.

The first matter this morning to turn to is the Joint Intervenors' Motion for a Stay.

The Joint Intervenors' Motion for a Stay of our May 18, 1983 decision affirming the Licensing Board's earlier authorization of fuel loading and low-power testing is denied. With respect to low-power authorization, however, the Motion is denied without prejudice. Therefore, the Joint Intervenors are free to file a new Stay Application when low-power operation is imminent.

Assuming arguendo that we still have jurisdiction to entertain a Stay Motion of our earlier affirmance of the Licensing Board's authorization for fuel load, we find that the Joint Intervenors' Application to stay the previous fuel load authorization does not meet the four-pronged standards for the grant of a stay set forth in 10 CFR Section 2.788 and applicable Commission precedents.

First, the Joint Intervenors have failed to make the requisite strong showing that they are likely to prevail on the merits. Indeed, we have already rejected the same arguments that Joint Intervenors present in their Stay Papers in our May 18, 1983 decision, and the Joint Intervenors have failed to demonstrate how our previous decision is in error.

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1 Second, the Joint Intervenors have not  
2 established in their Stay Application that they will be  
3 irreparably injured by fuel load. We note no injury,  
4 much less irreparable injury will flow from fuel load alone.

5 Third, the Joint Intervenors have not  
6 convincingly shown that the grant of a stay will not harm  
7 other parties to the proceeding. We disagree with the Joint  
8 Intervenors' unsupported assertions that the grant of a  
9 stay for fuel load will not delay the Applicant's testing  
10 program to its detriment.

11 Finally, even assuming the Joint Intervenors have  
12 met the fourth public interest factor of the stay criteria  
13 outlined in the Commission's regulations, this factor  
14 standing alone is insufficient to warrant the grant of a  
15 stay.

16 Accordingly, the Joint Intervenors' Motion for  
17 a Stay is denied.

18 Are there any objections to Governor's Exhibits  
19 Nos. 45 and 46?

20 MR. NORTON: No objections.

21 JUDGE MOORE: Governor's Exhibits Nos. 45 and  
22 46 are admitted.

23 (The documents previously  
24 marked Governor's Exhibits  
25 Nos. 45 and 46 for Identification  
were received in evidence.)

Rel.

ATTACHMENT 2

United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2034

September Term, 1983

George Deukmejian,  
Governor of the State of California,  
Petitioner

United States Court of Appeals  
for the District of Columbia Circuit

v.

Nuclear Regulatory Commission and  
United States of America,  
Respondents

FILED NOV 15 1983

GEORGE A. FISHER  
CLERK

Pacific Gas and Electric Co.,  
Intervenor

And Consolidated Case Nos. 81-2035 and 83-1073

Before: Wright, Edwards and Ginsburg, Circuit Judges

ORDER

Upon consideration of petitioners' emergency motion for stay pending appeal, of respondent's and intervenor's responses, and of petitioners' reply, it is

ORDERED by the Court that the motion for stay is denied.\* See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977); Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921 (D.C. Cir. 1958). Petitioners have failed to demonstrate that they will be irreparably harmed by the Nuclear Regulatory Commission's (NRC) decision to permit Pacific Gas and Electric Company (PG&E) to load fuel and conduct precriticality testing at the Diablo Canyon Nuclear Power Plant.

Petitioners' claimed irreparable harm flows from respondent's alleged violations of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 et seq., and petitioners' concerns that bureaucratic momentum will reduce the likelihood that the NRC will give sufficient consideration to their claims when the NRC determines whether it should authorize low- and full-power operation of the Diablo Canyon Nuclear Power Plant. Petitioners also claim that because the challenged acts will be completed before this court can fully consider their challenge on the merits, they will be deprived of their right to appeal the NRC's decision to lift the suspension of PG&E's license to permit fuel

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2034, et al.

-2-

September Term, 1983

loading and precriticality testing. Petitioners do not claim that the fuel loading or precriticality testing will themselves have any adverse effect on safety or on the environment.

With regard to the claimed NEPA violations, we note that the NRC has not yet ruled on petitioners' contentions that the original environmental impact statement should be supplemented to assess the effects of a class nine accident. See In the Matter of Pacific Gas and Electric Co., Memorandum and Order, CI-F-83-27, slip op. at 9 (November 8, 1983). It thus appears that the NEPA issue is not ripe for review, there being no final agency order on that issue. See 42 U.S.C. § 2239; 28 U.S.C. § 2342(4). We also note that the NRC has represented that the petitioners will be afforded an opportunity to raise issues material to reinstating a license authorizing criticality and low-power testing before the Appeal Board, see In the Matter of Pacific Gas and Electric Co., supra, slip op. at 7, and that the record has been reopened to consider other issues raised by petitioners, see id. at 6-7. It appears, therefore, that the NRC is prepared to consider petitioners' claims before lifting the license suspension to permit low-power testing, and that petitioners' fears of bureaucratic inertia are premature. Finally, both respondent and intervenor have indicated that the fuel loading process is reversible, so that petitioners' challenge will not be moot before this court can consider their challenge on the merits.

Although we find that petitioners' failure to adequately demonstrate that they will be irreparably harmed by the NRC's decision to permit fuel loading and precriticality testing at Diablo Canyon Nuclear Power Plant precludes staying the NRC's order, we stress that this determination in no way affects petitioners' rights to pursue their claims before the NRC or before this court should the claimed harm become imminent.

Per Curiam

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\*Circuit Judge Wright would grant the stay.

ATTACHMENT 3