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

JOINT INTERVENORS' RESPONSE TO PACIFIC GAS AND ELECTRIC COMPANY AND NRC STAFF BRIEFS IN SUPPORT OF EXCEPTION TO AUGUST 31, 1982 INITIAL DECISION

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I. INTRODUCTION

In its August 31, 1982 Initial Decision, the Atomic Safety and Licensing Board ("Licensing Board") authorized issuance of a full power license for Diablo Canyon Nuclear Power Plant ("Diablo Canyon") upon the satisfaction of four conditions by the Director of Nuclear Reactor Regulation ("NRR"). Among those conditions was the requirement that the Director of NRR must secure Federal Emergency Management Agency ("FEMA") findings on the adequacy of the State of California Emergency Response Plan.[1/] Both Pacific Gas and Electric Company ("PGandE") and the

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1/ In the Matter of Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Initial Decision, at 217-18 (August 31, 1982).

NRC Staff ("Staff") have appealed that condition.

For the reasons stated in their own Brief in Support of Exceptions,[2/] Joint Intervenors oppose those appeals and urge this Appeal Board to reject the novel and legally unsupportable contentions of PGandE and the Staff. Their basic contention -- that no FEMA "finding" regarding the adequacy of the State of California Emergency Response Plan is required under the Commission's regulations -- cannot be reconciled with the explicit language of 10 C.F.R. § 50.47(a) mandating such a finding as the essential basis for an NRC decision on the overall state of emergency preparedness for a nuclear facility. Because no such finding has been issued in this proceeding, PGandE and the Staff have been compelled to argue, in effect, that the Commission's regulations do not mean what they say they mean in order to get Diablo Canyon licensed as soon as possible. Thus, the Staff urges this Board to find adequate what it calls a "constructive finding,"[3/] which in this case is simply a transparent euphemism for no finding at all regarding the adequacy of the State of California Emergency Response Plan.

Joint Intervenors submit that the desire for more expeditious licensing is a patently inadequate excuse for ignoring the Commission's duly promulgated regulatory standards. As explained in Joint Intervenors' November 8th Brief, the

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[2/] Joint Intervenors' Brief in Support of Exceptions, at 12-20 (November 8, 1982).

[3/] NRC Staff Brief, at 18.

Commission's emergency planning regulations are grounded on the recognition following the TMI accident that "adequate emergency preparedness is an essential aspect in the protection of the public health and safety."[4/] In order to ensure the existence of adequate preparedness, the Commission delegated to FEMA the responsibility for detailed review of offsite emergency plans. Not only must a finding be issued by FEMA directed specifically to the plans in question, such finding is to be treated solely as a rebuttable presumption on the question of adequacy.[5/] Thus, all parties must be given a meaningful opportunity to rebut the finding before a license is issued. No such opportunity has been provided. No finding regarding the state plan for Diablo Canyon has ever been issued.

In the interest of brevity, Joint Intervenors will not repeat here the arguments articulated at length in their November 8, 1982 Brief in Support of Exceptions. The Board is respectfully referred, however, to the discussion at Part III.A.1 of that brief, which relates specifically to the issue raised on appeal by PGandE and the Staff. In the discussion below, Joint Intervenors will respond only to the individual legal and factual contentions set forth in the briefs of PGandE and the Staff.

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4/ 45 Fed.Reg. 55,404.

5/ 10 C.F.R. § 50.47(a)(2).

II. ARGUMENT

10 C.F.R. § 50.47 OF THE COMMISSION'S REGULATIONS REQUIRE ISSUANCE BY FEMA OF SPECIFIC FINDINGS AND DETERMINATIONS REGARDING THE ADEQUACY OF BOTH STATE AND LOCAL EMERGENCY RESPONSE PLANS

In support of their challenge to the precondition imposed by the Licensing Board to full power licensing of Diablo Canyon, both PGandE and the Staff present essentially three legal arguments: (1) that FEMA's November 1981 Interim Finding regarding the San Luis Obispo County Plan constitutes FEMA findings and determinations sufficient under the regulations; ([illegible]e NRC Appropriation Authorization Act of 1980 es[illegible] licensing guidelines which obviate the need for a state plan which complies with the Commission's regulations; and (3) that requiring formal FEMA findings pursuant to 44 C.F.R. § 350 prior to licensing could lead to anomalous results.

Each of these contentions is without merit.

1. FEMA's November 1981 Interim Finding Fails to Satisfy the Regulatory Requirement for FEMA Findings and De'erminations Regarding Off-Site Plans

Neither PGandE nor the Staff supply any authority in the Commission's regulations for the proposition that something less than full review and detailed findings by FEMA regarding the adequacy of both state and local plans is sufficient under

10 C.F.R. § 50.47(a). In fact, the regulations, which could hardly have been drafted with greater clarity, plainly belie that proposition:

> (a)(1) No operating license for a nuclear power reactor will be issued unless a finding is made by NRC that the state of onsite and offsite emergency preparedness provides reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.
>
> (2) The NRC will base its findings on a review of the Federal Emergency Management Agency (FEMA) findings and determinations as to whether State and local emergency plans are adequate and capable of being implemented, and on the NRC assessment as to whether the applicant's onsite emergency plans are adequate and capable of being implemented. In any NRC licensing proceeding, a FEMA finding will constitute a rebuttable presumption on a question of adequacy.

10 C.F.R. § 50.47(a) (emphasis added). Until such findings have been made by FEMA and all parties have been afforded an opportunity for rebuttal, the NRC is without legal or factual basis to issue an operating license.

That such was the Commission's intention is further demonstrated by the testimony last year of former NRC Chairman Hendrie and others before the Senate Subcommittee on Nuclear Regulation of the Committee on Environment and Public Works.[6/] In describing the regulatory reforms instituted in the aftermath of the TMI accident, Chairman Hendrie stated:

> After Three Mile Island, many recommendations relative to emergency preparedness were made by various groups. After considering these, NRC changed its emergency planning regulations and now

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6/ Radiological Emergency Planning and Preparedness, Hearing Before the Subcommittee on Nuclear Regulation of the Committee on Environment and Public Works, United States Senate, 97th Cong., 1st Sess. (April 27, 1981) (hereinafter cited as "Hearing Transcript").

> requires substantially more evidence that integrated utility, State and local government emergency plans are in place before NRC can grant a license to operate a plant. We have no statutory authority over these State and local jurisdictions and cannot force them to develop such plans, but we can and do make this a condition of licensing.
>
> In December 1979, FEMA was given lead responsibility to work with State and local governments in developing their emergency plans. It is the responsibility of FEMA to review the offsite capabilities and to present its findings to NRC. We must then consider these findings in determining whether a license should be granted.

Hearing Transcript, at 3 (emphasis added). Hendrie also described the principle aspects of the FEMA/NRC review process:

> During the review stage of State and local government emergency plans, [FEMA's] Regional Assistance Committee representatives have responsibility for reviewing specific parts of the plan in which their agency has expertise. . . . Following a Regional Assistance Committee review, the committee submits its findings to FEMA headquarters. If FEMA headquarters believes the plans are ready for approval, it lets us (NRC) know . . . and everybody gets a chance to comment.

Id. at 4 (emphasis added).[7/]

7/ As Joint Intervenors discussed in their November 8th Brief in Support of Exceptions, the "chance to comment" referred to by former Chairman Hendrie is a critical element of the regulatory scheme because FEMA's findings are only "rebuttable presumptions." 10 C.F.R. § 50.47(a)(2). The nature of this right to comment was described by Nuclear Regulation Subcommittee Chairman Simpson as follows during the Hendrie testimony:

> Your regulations indicate that the NRC finding concerning the adequacy of offsite emergency preparedness wil be based on a review of the FEMA findings and determinations. Those regulations also indicate that the FEMA finding constitutes a rebuttable presumption on the issue of adequacy. Evidentiary commentary.

Hearing Transcript, at 7 (emphasis added).

Indeed, when asked specifically by Senator Simpson whether FEMA must "first submit its findings to the NRC regarding the adequacy of State and local emergency plans before the NRC can make a finding under [§ 50.47(a)]," Chairman Hendrie replied in the affirmative:

> CHAIRMAN HENDRIE: Yes, sir. That finding has really two parts to it: the NRC's evaluation of the licensee's plan for onsite activities, and really of more interest, because I think most of those plans are pretty good, of more interest then is the FEMA evaluation of the offsite plan, whether there is a State plan in place, whether local authorities have reasonable sets of plans, and so on.

Id. at 11 (emphasis added). Because FEMA is the responsible agency with recognized expertise in the area of offsite planning, its issuance of findings regarding state and local plans is an essential precondition to licensing not only as a legal matter -- as prescribed by 10 C.F.R. § 50.47(a) -- but as a factual matter as well.[8/]

8/ There is apparently no dispute about FEMA's expertise in offsite planning and the value of its formal participation in the licensing process. As stated by FEMA Acting Director John McConnell:

> I would like to give my opinion, after not only 25 years of working in this business at the State and national levels but in being closely associated with NRC and the weak offsite preparedness efforts that were attempted to be promulgated before Three Mile Island; that there is no Federal agency, especially NRC, that is any more qualified or prepared to manage a situation like this in negotiating with states and local governments than is FEMA. It is a very appropriate role for FEMA.

[Footnote 8 continued]

The evidence is undisputed in this proceeding that no such findings and determinations have been made regarding the State of California Emergency Response Plan. Tr. 12,708-10 (FEMA representative Eldridge). Hence, the Licensing Board's conclusion that such findings and determinations must be issued prior to licensing is appropriate and consistent with the Commission's regulations.

The Staff's contention that FEMA's Interim Finding regarding the San Luis Obispo County Plan constitutes, in effect, a "constructive finding" with respect to the state plan would render virtually meaningless the regulatory requirement for FEMA findings. If adopted, it would sanction licensing without regard to the status of FEMA review solely on the basis of some generalized confidence that preparedness is adequate. One of the principle lessons of TMI was the complete insufficiency of such "confidence" as a basis for licensing.9/

[Footnote 8 continued]

Hearing Transcript, at 30 (emphasis added). Then-NRC Chairman Hendrie concurred:

> FEMA has the expertise out there. The [FEMA] regional committees have been sitting on these matters for a long time. It is an expertise which I would be very reluctant to see go out of the system.

Id. at 18.

9/ Report of the President's Commission on the Accident at Three Mile Island, "The Need for Change: The Legacy of TMI," at 38-39 (October 1979).

Moreover, the Staff's contention cannot be reconciled with the congressional testimony of Brian Grimes, Director of the NRC Division of Emergency Preparedness, regarding the NRC policy that FEMA's findings must be detailed and specific and must address each of the sixteen planning standards of 10 C.F.R. § 50.47(b):

> There are 16 standards in the new emergency preparedness regulation, 15 of which apply to both onsite and offsite emergency preparedness. We ask that FEMA give us a document which indicates that they or the regional offices have indeed addressed each of these and have identified deficiencies.

Hearing Transcript, at 7-8. No such comparison of the state plan with the Commission's planning standards, or with the NUREG-0654 criteria which implement those standards, was done in this case. Tr. 12,709 (Eldridge). Indeed, FEMA representative Eldridge testified at the hearing below that the November 1981 Interim Finding relied upon by PGandE and the Staff "is not the right place to look for a finding as to the state plan." Tr. 12,710.

Although the Staff indicates that so-called "interim findings" have been utilized in other proceedings, Staff Brief, at 10, it is notable that even FEMA has criticized the practice necessitated simply by the NRC's desire to "keep to its schedule." In written answers to questions from the Senate Subcommittee on Nuclear Regulation, FEMA noted that in each of the cases where the NRC had requested interim findings

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> the states had not completed meeting their requirements at the time of the NRC request. Hence, the FEMA review was of plans not yet complete enough for FEMA to certify the level of preparedness to the degree required to give its final approval. . . .[T]his additional effort detracted from FEMA's goal of having the States develop quality plans and preparedness measures in a timely manner.

Hearing Transcript, at 206 (emphasis added). By accepting the notion of "interim" or "constructive" findings urged by PGandE and the Staff, this Board would be validating a practice which is derived simply from a concern for scheduling -- rather than public health and safety -- and which FEMA itself considers detrimental to its efforts to develop quality state plans. The Commission's regulations supply no authority for such a result.

Finally, the interpretation of the regulations urged by PGandE and the Staff would effectively remove FEMA from the NRC licensing process by permitting the NRC to issue a license without first receiving the requisite findings and determinations from FEMA and allowing interested parties an opportunity to rebut those findings. Not only is such an interpretation unsupported by the regulations themselves, it was proposed by the NRC in 1980 in the form of legislation, only to be rejected by the responsible congressional committee. As described by Senator Simpson during the April 27, 1981 congressional hearing, the proposed legislation provided that "FEMA's determinations regarding the sufficiency of State and local plans would not be subject to review in NRC proceedings." Hearing Transcript, at 8. Such legislation was never

approved; indeed, in 1981 even the NRC withdrew support for it "until some experience is gained with the current working arrangements" -- namely, specific FEMA findings and determinations regarding state and local plans, subject to rebuttal in NRC licensing proceedings prior to any decision on licensing. These "current working arrangements" have never been formally amended or repealed and hence must be utilized in this case.

In light of the unequivocal language of 10 C.F.R. § 50.47(a), the congressional testimony of responsible NRC officials regarding that language, the undisputed admission by the only FEMA witness appearing at the hearings below, and the rejection of proposed legislation which would have eliminated FEMA from the NRC licensing process, Joint Intervenors submit that the appeals of PGandE and the Staff herein must be rejected.

2. Public Law 96-295 Sets the Standards for Authorizing Appropriations, Not for Adequate Emergency Preparedness

PGandE relies heavily on the existence of Public Law 96-295, the Nuclear Regulatory Commission Appropriation Authorization Act of 1980 ("Appropriation Act") as support for the view that only one emergency plan, be it State or local, is necessary prior to a license authorization. See PGandE Brief, at 6-7. Not only has PGandE misinterpreted the meaning and

purpose of the Appropriation Act, but, in support of its contention, it once again invites this Board to ignore the plain meaning of the Commission's own regulations.

The Appropriation Act establishes general guidelines which the NRC must follow in order to receive its needed funding. It does not, however, prescribe the specific emergency preparedness standards which the NRC must apply in licensing of a nuclear power plant. Rather, the Appropriation Act states that the NRC shall establish by rule the requisite standards, requirements, and procedures which will enable the NRC to determine whether emergency preparedness is adequate to ensure protection of the public health and safety. See Public Law 96-295, § 109(b)(1).

Nor does the Act permit the NRC to issue an operating license in the absence of an adequate and effective state emergency plan where, as here, such a plan is explicitly required by the Commission's regulations. 10 C.F.R. § 50.47(a). As the Commission noted in the introduction to the revised Appendix E to 10 C.F.R. Part 50, the regulations as adopted establish "minimum requirements for emergency plans for use in attaining an acceptable state of emergency preparedness," 45 Fed. Reg. 55,411 (August 19, 1980). Moreover, the inclusion of mandatory regulatory requirements applicable particularly to state planning is consistent with the conference committee's explicit recognition in its report on the Appropriation Act that a workable state plan is an integral part of adequate

emergency preparedness:

> The conferees intend that ultimately every nuclear power plant will have applicable to it a state emergency response plan that provides reasonable assurance that the public health and safety will not be endangered in the event of an emergency at such plant requiring protective action.

H. Conf. Rep. No. 96-1070, 96th Cong., 2d Sess., reprinted in 1980 U.S. Code Cong. & Ad. News 2260, 2271.

PGandE's proposed interpretation of § 109 of the Appropriation Act is not new; indeed, according to Chairman Hendrie, it was discussed and rejected by the Commission when the regulations were being drafted. During the April 27, 1981 congressional hearing on radiological emergency planning and preparedness, Senator Simpson asked Chairman Hendrie what standards had been established to implement § 109. Hendrie responded that while he would have been pleased to have the statutory language -- "state or local plan" -- repeated in the Commission's regulations, he "was not able to carry a majority of my colleagues with that view." Hearing Transcript, at 11-12. Hence, the regulation was promulgated with the requirement that both state and local plans be prepared, reviewed, and approved prior to licensing.

Finally, PGandE's reliance upon 10 C.F.R. § 50.47(c) is misplaced. While PGandE may be correct that § 50.47(c) permits the Commission to overlook insignificant deficiencies in compliance with the sixteen planning standards set forth in § 50.47(b), subsection (c) does not authorize the Commission to overlook deficiencies in compliance with § 50.47(a), which requires FEMA findings as to both state and local plans.

Because subsection (c) by its own terms excuses only a "failure to meet the standards set forth in paragraph (b)" of § 50.47, it provides no basis for licensing in the absence of the FEMA findings and right to rebuttal mandated in subsection (a).

PGandE's reliance upon § 109 of the Appropriation Act must, therefore, be rejected.

3. FEMA's Internal Review Process is Irrelevant to the Application of the Commission's Regulations

The discussion by the Staff of the so-called "44 C.F.R. § 350" review process is irrelevant to this Board's application of the Commission's regulation requiring FEMA findings and determinations. FEMA's selection of an appropriate procedure to ensure adequate and thorough review of state and local plans is a matter for FEMA, not the NRC, to decide, and, once established, that procedure should be respected by the NRC. The Staff's inordinate concern for scheduling is an entirely inappropriate and unacceptable justification for ignoring an explicit NRC requirement that FEMA findings must precede any decision to license a nuclear facility. Notwithstanding the Staff's evident interest in licensing Diablo Canyon before FEMA has completed its review, 10 C.F.R. § 50.47(a) is unequivocal and its terms must be enforced.[10/]

10/ Even FEMA has recognized the detrimental effects which have resulted from NRC pressure on FEMA to issue its findings before the offsite plans are completed. See discussion supra at 9-10.

Apparently of foremost concern to the Staff is the possibility that a state might choose to obstruct the licensing process by failing to request a FEMA finding. Incredibly, the Staff contends that such is the case in this proceeding in light of FEMA representative Eldridge's testimony that California had not yet requested a FEMA review of its plan.

Joint Intervenors submit that there is no basis whatsoever for a claim that the State of California has been in any way dilatory or obstructionist in its preparation of an emergency plan. On the contrary, the record reflects that California, perhaps more so even than the NRC and FEMA, has demonstrated its concern for and interest in establishing a workable and effective emergency response capability. The state has cooperated fully with utility, county, and federal personnel, in emergency planning exercises, in plan preparation and review, and even in its willingness to provide testimony.[11/] Thus, the Staff's suggestion that the State of California may be purposely delaying the licensing process for Diablo Canyon by failing to request FEMA review is totally unfounded and serves only to impugn the integrity of the State of California and its responsible officials.

11/ As Joint Intervenors noted in their November 8th Brief, PGandE listed State OES Director Kearns as a witness prior to the hearing below. During the course of the hearing, however, PGandE voluntarily withdrew his name. See Joint Intervenors' Brief in Support of Exceptions, at 37 (November 8, 1982).

If no request for FEMA review has yet been made, the reason undoubtedly is that the plan is not yet completed. Under such circumstances, no operating license may be issued, and the Licensing Board's conditioning of licensing on FEMA review of the state plan is entirely appropriate. The appeals by PGandE and the Staff must, therefore, be rejected.

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III. CONCLUSION

For the reasons stated above and in their November 8, 1982 Brief in Support of Exceptions, Joint Intervenors respectfully request this Appeal Board (1) to reject the appeals of PGandE and the Staff, and (2) to grant the relief requested by Joint Intervenors in their November 8th Brief.

DATED: December 20, 1982

Respectfully submitted,

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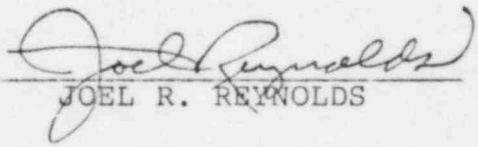
By 
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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December, 1982, I have served copies of the foregoing JOINT INTERVENORS' RESPONSE TO PACIFIC GAS AND ELECTRIC COMPANY AND NRC STAFF BRIEFS IN SUPPORT OF EXCEPTION TO AUGUST 31, 1982 INITIAL DECISION, mailing them through the U.S. mails, first class, postage prepaid.

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