UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Thomas S. Moore, Chairman
Dr. John H. Buck
Dr. W. Reed Johnson

June 28, 1984
(ALAB-775)

In the Matter of	)	
PACIFIC GAS AND ELECTRIC COMPANY	)	Docket Nos. 50-275 OL 50-323 OL
(Diablo Canyon Nuclear Power Plant, Units 1 and 2)	)	

Joel R. Reynolds, John R. Phillips and Eric Havian, Los Angeles, California, and David S. Fleischaker, Oklahoma City, Oklahoma, for the San Luis Obispo Mothers for Peace, et al., joint intervenors.

Robert Ohlback, Philip A. Crane, Jr., Richard F. Locke and Dan G. Lubbock, San Francisco, California, and Arthur C. Gehr, Bruce Norton and Thomas A. Scarduzio, Jr., Phoenix, Arizona, for Pacific Gas and Electric Company, applicant.

Joseph Rutberg, Henry J. McGurren and Lawrence J. Chandler, for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

1. On March 20, 1984, we issued ALAB-763 containing our findings of fact and conclusions of law with respect to the adequacy of the applicant's current design quality assurance program and the sufficiency of its design verification efforts to establish the efficacy of the design

of the Diablo Canyon facility.[1] The operating license proceeding had been reopened on the motion of the joint intervenors,[2] and the trial of the issues involved consumed fifteen hearing days. In ALAB-763, we concluded that

> [t]he applicant's verification efforts provide adequate confidence that the Unit 1 safety-related structures, systems and components are designed to perform satisfactorily in service and that any significant design deficiencies in that facility resulting from defects in the applicant's design quality assurance program have been remedied. Accordingly, we conclude that there is reasonable assurance that the facility can be operated without endangering the health and safety of the public. As a result, the license authorization previously granted . . . remains in effect. . . .[3]

Previously in ALAB-756, issued December 19, 1983,[4] we detailed the reasons underlying our earlier order denying, after four days of hearing, the joint intervenors' motion to reopen the record on the issue of the asserted inadequacy of the applicant's construction quality assurance program.[5] In denying that motion, we found that the joint intervenors had

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[1] 19 NRC ___.

[2] In addition, the Governor of California filed a motion to reopen the record on the issue of the adequacy of the applicant's design quality assurance program and that motion was also granted.

[3] 19 NRC at ___ (slip opinion at 101).

[4] 18 NRC 1340.

[5] See Order of October 24, 1983 (unpublished).

failed to present new evidence of a significant safety issue.[6]

We now have before us two additional motions of the joint intervenors to reopen the record in the Diablo Canyon operating license proceeding. The first, filed February 14, 1984, again seeks to reopen on the issue of the adequacy of the applicant's design quality assurance program.[7] The second, filed February 22, 1984, seeks to reopen on the issues of the adequacy of the applicant's construction quality assurance program and the applicant's character and competence. Both motions are accompanied by the affidavits

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[6] ALAB-756, supra, 18 NRC at 1354-55.

[7] The joint intervenors' motion is phrased in the alternative. They first endeavor to augment the evidentiary hearing record of the reopened design quality assurance proceeding with the materials accompanying the motion. Alternatively, they seek to reopen the record for further hearing. The joint intervenors attempt to augment the hearing record based on a colloquy between applicant's counsel and us at the end of the evidentiary hearing concerning the formal closing of the record. See Tr. D-3246. They have misapprehended the import of those remarks. Our comment was intended to accommodate, as a matter of administrative convenience, such matters as a party's belated motion to admit an exhibit that had been marked for identification at trial but, through an oversight, had not been moved into evidence. We did not (and could not properly) provide for the wholesale augmentation of the evidentiary record now sought by the joint intervenors. Supplementing the record with the materials proffered by the joint intervenors would require, at a minimum, the consent of all parties. Accordingly, the motion to augment the record is denied and we shall treat the motion solely as one to reopen the record.

of several individuals currently working, or previously employed, at the Diablo Canyon facility. The affidavits and supplementary documentary exhibits fill hundreds of pages and set forth, by the joint intervenors' count, some 200 charges of purported inadequacies in the design, construction, or quality assurance practices at the plant. Further, the joint intervenors supplemented each reopening motion with additional material after the motions were filed.[8]

The applicant and the NRC staff filed lengthy responses opposing both reopening motions.[9] The responses contain numerous detailed affidavits and voluminous documentary materials addressing the allegations in the joint intervenors' filings. Thereafter, the joint intervenors

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[8] See Joint Intervenors' Supplement To February 14, 1984 Motion To Augment Or, In the Alternative, To Reopen The Record (March 1, 1984); Joint Intervenors' Supplement To February 22, 1984 Motion To Reopen The Record On The Issues Of Construction Quality Assurance And Licensee Character And Competence (March 3, 1984).

[9] See Pacific Gas And Electric Company's Answer In Opposition To Joint Intervenors' Motion To Augment Or, In The Alternative, To Reopen The Record (March 6, 1984); NRC Staff's Answer To Joint Intervenors' Motion To Augment Or, In The Alternative, To Reopen The Record (March 15, 1984); Pacific Gas And Electric Company's Answer In Opposition To Joint Intervenors' Motion To Reopen The Record On The Issue of Construction Quality Assurance And Licensee Character And Competence (March 19, 1984); NRC Staff's Answer To Joint Intervenors' Motion To Reopen The Record On Construction Quality Assurance And Licensee Character And Competence (April 11, 1984).

filed a reply to the applicant's response to the motion concerning design quality assurance,[10] and then filed a second supplement to that motion[11] to which both the applicant and the staff responded.[12] By order of May 23, 1984, we provided the joint intervenors with an opportunity to reply to the applicant's and the staff's final responses to both motions.[13] The order stated that any reply must be accompanied by the affidavits of qualified individuals and clearly establish, for the matters raised by the joint intervenors' filings, why the responses of the applicant and the staff are insufficient. It also indicated that the joint intervenors must demonstrate the significance to plant safety of their assertions as well as identify each remaining issue of disputed material fact with regard to

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[10] See Joint Intervenors' Reply To Answer Of Pacific Gas And Electric Company To Motion To Augment Or, In The Alternative, To Reopen The Record (March 15, 1984).

[11] See Joint Intervenors' Supplement To Motion To Augment Or, In The Alternative, To Reopen The Record (April 6, 1984).

[12] See Answer Of Pacific Gas And Electric Company To Joint Intervenors' Supplement To Motion To Augment Or, In The Alternative, To Reopen The Record (April 23, 1984); NRC Staff Response To Joint Intervenors' Supplement To Motion To Augment, Or In The Alternative, To Reopen The Record (April 25, 1984).

[13] See Order of May 23, 1984 (unpublished).

their charges. The joint intervenors filed their reply on June 12.

2. Our earlier decision denying joint intervenors' motion to reopen the record on the issue of the adequacy of the applicant's construction quality assurance program reiterated the three-pronged standard the proponent of a reopening motion must satisfy:

> "[t]he motion must be both timely and addressed to a significant safety or environmental issue. Vermont Yankee Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973); . . . Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 and 2), ALAB-291, 2 NRC 404, 409 (1975). Beyond that, it must be established that 'a different result would have been reached initially had [the material submitted in support of the motion] been considered.' Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-227, 8 AEC 416, 418 (1974)."[14]

We previously have held that, for a reopening motion to be timely presented, the movant must show that the issue sought to be raised could not have been raised earlier.[15] In ALAB-756, we highlighted what constitutes a "significant safety issue" for motions predicated on asserted deficiencies in a construction quality assurance program. We stated there that

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[14] ALAB-756, supra, 18 NRC at 1344.

[15] Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973). See Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1764-65 (1982).

> perfection in plant construction and the facility quality assurance program is not a precondition for a license under either the Atomic Energy Act or the Commission's regulations. What is required instead is reasonable assurance that the plant, as built, can and will be operated without endangering the public health and safety. . . .
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> . . . In order for new evidence to raise a "significant safety issue" for purposes of reopening the record, it must establish either that uncorrected. . . errors endanger safe plant operation, or that there has been a breakdown of the quality assurance program sufficient to raise legitimate doubt as to the plant's capability of being operated safely. . . .[16]

Although the focus of ALAB-756 was a motion to reopen on the issue of construction quality assurance, what we said there is equally applicable to reopening motions directed to the issue of design quality assurance.

Further, the Commission has emphasized in this very proceeding that the proponent of a reopening motion must present "'significant new evidence . . . that materially affects the decision,'" not "bare allegations or simple submission of new contentions."[17] At a minimum, therefore, the new material in support of a motion to reopen must be set forth with a degree of particularity in excess of the basis and specificity requirements contained in 10 CFR 2.714(b) for admissible contentions. Such supporting

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[16] ALAB-756, supra, 18 NRC at 1344 (citations omitted).

[17] CLI-81-5, 13 NRC 361, 362-63 (1981).

information must be more than mere allegations; it must be tantamount to evidence. And, if such evidence is to affect materially the previous decision (as required by the Commission), it must possess the attributes set forth in 10 CFR 2.743(c) defining admissible evidence for adjudicatory proceedings. Specifically, the new evidence supporting the motion must be "relevant, material, and reliable."[18]

The joint intervenors' new motions to reopen on the issues of the adequacy of the applicant's design and construction quality assurance programs, like their earlier motion denied in ALAB-756, fail to meet these standards. We

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[18] In other words, only facts raising a significant safety issue, not conjecture or speculation, can support a reopening motion. The facts must be relevant to the proposition they support, and probative of the safety issue presented. General statements are of no value. Similarly, although hearsay may be admissible in NRC proceedings, it must be shown to be reliable if it is to be considered as support for the motion.

Also embodied in the reliability requirement of 10 CFR 2.743(c) is the notion that evidence presented in affidavit form must be given by competent individuals with knowledge of the facts or experts in the disciplines appropriate to the issues raised. Because the competence (or even the existence) of unidentified individuals is impossible to determine, statements of anonymous persons -- so-called anonymous affidavits -- cannot be considered as evidence to support a motion. For adjudicatory proceedings, in camera filings and requests for protective orders are available in appropriate circumstances to protect the legitimate interests of a party or other person. This situation should be contrasted to the staff's responsibilities outside the adjudicatory arena where even anonymous charges receive attention. The staff has, in fact, investigated a vast number of such allegations with respect to Diablo Canyon.

have carefully examined each of the joint intervenors' charges with their supporting materials and the responses of the applicant and the staff. Our scrutiny of the motions leads us to conclude that the joint intervenors have failed to present new evidence of any significant safety issue that could have an effect on the outcome of the licensing proceeding.[19] Among other things, the movants have not presented evidence that establishes uncorrected design or construction errors that endanger safe plant operation. Nor have they demonstrated that there has been a breakdown of the applicant's quality assurance program that raises legitimate doubt that the facility can operate safely.[20]

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[19] The joint intervenors' reply to the applicant and staff responses filed pursuant to our May 23, 1984 order was accompanied by numerous supporting affidavits. Despite our instruction that the reply address why the responses of the applicant and staff are insufficient for "each matter raised . . . [or] asserted," the joint intervenors' reply "do[es] not individually address all of . . . the matters raised." Reply at 5. Further, in some instances, the reply raises entirely new issues. Although joint intervenors indicate that they had insufficient time to comply with our order, no request for an extension of time was filed. In any event, the joint intervenors concede that "few [of the noted] deficiencies will be demonstrably 'significant' if considered individually." Reply at 6. The movants are apparently content, therefore, to rely on the cumulative significance of the numerous purported deficiencies, none of which individually has been shown to be safety significant.

[20] For example, a number of the allegations focus on deficiencies in the methodology, practices, and quality assurance associated with the computer design of small bore (less than 2" diameter) pipe supports. The staff also found (Footnote Continued)

Moreover, our searching review of the motions reveals nothing that causes us to question the continuing validity of the conclusions we reached in ALAB-756 and ALAB-763 -- conclusions that followed extensive evidentiary explorations of construction and design quality assurance at Diablo Canyon. For these reasons, the motion to reopen on the issue of the applicant's design quality assurance program is denied and, with the reservation noted in the footnote below, the motion to reopen on the issue of the applicant's construction quality assurance program is also denied.[21]

(Footnote Continued)
the number of errors occurring in this type of calculation to be higher than expected (NRC Staff's Answer To Joint Intervenors' Motion To Augment Or In the Alternative, To Reopen The Record (March 15, 1984), Knight Affidavit at 14). A staff imposed license condition required the applicant to redo all computer-based small bore pipe support calculations -- including additional physical effects not addressed in the original analyses. Transcript of May 9, 1984 Meeting between NRC staff and applicant at 15-23, 247. We note that the result of this program, with the reanalysis of all but 15 of 357 supports completed, shows that all of the supports meet design criteria, and no modifications are necessary. Letter from J. Schuyler to D. Eisenhut (June 11, 1984) (DCL-84-223), attachment at 1-5. Thus, errors in the small bore pipe support computer calculations, though numerous, have had no effect on the design adequacy of the supports.

[21] We reserve ruling on one matter raised by the joint intervenors' reopening motion on the issue of construction quality assurance until we receive further information from the applicant. In its February 22, 1984 motion at page 12, the joint intervenors charge that the applicant improperly used, as studs for the containment liner, A307 hardware bolts with the heads removed. According to an affidavit accompanying the applicant's response, the use of such bolts was permissible. Pacific Gas And Electric Company's Answer
(Footnote Continued)

As previously indicated, the number of diverse allegations of purported deficiencies contained in the joint intervenors' motions is very large. Even discounting the substantial repetition in the two motions, the affidavits and other documentary materials proffered as new evidence in support of the movants' charges are extensive.[22] When the

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(Footnote Continued)
In Opposition To Joint Intervenors' Motion To Reopen The Record On The Issue of Construction Quality Assurance And Licensee Character And Competence, supra note 9, Attachment C at 12-13. As an exhibit to their June 12, 1984 reply, the joint intervenors have attached a May 31, 1984 Pullman Power Products "Interoffice Correspondence" memorandum dealing with this issue. That memorandum is addressed to "Distribution" from "H. Karner" and concerns the subject of "Acceptable Stud Materials For Carbon Steel Welding (Ref: DR 5891)." The memorandum states, inter alia, that "(A-307 bolts with the heads removed are NOT acceptable)," and is signed by Harold W. Karner, QA/QC Manager.

The applicant shall inform us by July 6, 1984 why, in the words of the Pullman memorandum, A-307 bolts with the heads removed are not acceptable. The applicant's explanation shall be accompanied by appropriate affidavits of qualified experts and shall address the movants' charge, the applicant's prior response to that charge, and the recent Pullman memorandum.

[22] Not only does some of the same material accompany both motions, there is substantial repetition within the supporting materials accompanying each of the joint intervenors' motions. Additionally, the material purportedly supporting each motion is lumped together in a manner that lacks essential organization. Further, some of this material consists of anonymous statements. See note 18, supra. The movants have also included in their filings considerable material that is irrelevant and immaterial to many of their claims. Thus, the unorganized nature of the supporting material, combined with the massive amount of irrelevant matter in movants' filings, has made our task of

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applicant and staff responses and supporting materials are added to the joint intervenors' filings, the papers run well over a thousand pages. Individual treatment of each of the movants' varied charges -- matters that do not readily lend themselves to being grouped together -- would consume many pages but have no practical precedential value. Such a decision would add little of consequence to the already expansive administrative record of this proceeding.

3. The joint intervenors' second reopening motion (dated February 22, 1984) also seeks to reopen the record on the issue of the applicant's "demonstrated lack of corporate character and competence . . . to manage and operate the Diablo Canyon project."[23] In support of this portion of their motion, the joint intervenors recite a number of instances of purported applicant misconduct dating from 1967 to mid-1983. They claim that these historical examples

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(Footnote Continued)
analyzing joint intervenors' claims extremely time-consuming and difficult. Indeed, the very nature and manner of presentation of the joint intervenors' filings provide grounds for denying the motion. Rather than follow that course, we have painstakingly plowed through all of movants' papers. If we have missed some pertinent fact buried in the midst of their filings, the movants should not now be heard to complain: the movants failed to separate the wheat from the chaff and to present the material in an organized and persuasive manner.

[23] Joint Intervenors' Motion To Reopen The Record On The Issues Of Construction Quality Assurance And Licensee Character And Competence at 1.

demonstrate the applicant's deficient character and lack of competence to design, construct, and operate the facility.

To these historical examples, the joint intervenors add a lengthy list of alleged deficiencies in the applicant's design and construction quality assurance programs from their most recent motions to reopen the record. They argue that these new charges and supporting materials, combined with their previously recited historical evidence, in effect, create a pattern and practice of deficient character and incompetence on the part of the applicant that constitute significant new evidence to support reopening the record on this issue.

The joint intervenors' motion to reopen the record on the issue of the applicant's character and competence is denied. The movants' historical examples of alleged applicant misconduct are not timely presented. Moreover, the movants' new list of purported deficiencies fails to present evidence of a significant safety issue that could have an effect on the outcome of the proceeding.

The past incidents of alleged applicant misconduct relied upon by the joint intervenors occurred too long ago to be properly considered in a motion to reopen the record without a showing why this issue could not have been raised earlier. No such showing has even been attempted by the movants. Nor can the tardy presentation of these historical examples be saved by bootstrapping them to a series of more

recent charges. Indeed, all of the movants' examples are matters of public record and most of them have been used previously by the movants to support earlier reopening motions on other issues, or have been used already as evidence in the Diablo Canyon operating license proceeding.[24] Moreover, taken in proper context, none of these historical examples, singularly or in combination, establishes that the applicant's character and competence are insufficient to design, construct and operate the Diablo Canyon facility. Similarly, the joint intervenors' new charges of quality assurance program deficiencies do not establish that the applicant lacks the requisite character and competence to operate the plant. As we have already indicated, none of the new charges raises a significant safety issue.

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[24] Two of the major historical examples relied upon by the joint intervenors involve claims that the applicant failed to conduct adequate geological studies resulting in an improperly located Diablo Canyon facility, and the applicant's poor management practices and policies led to the alleged inadequate redesign of the facility. We note, however, that these items have been thoroughly aired in these proceedings. The early geologic studies are treated in LBP-79-26, 10 NRC 453 (1979) and ALAB-644, 13 NRC 903 (1981). Similarly, management's involvement in the seismic redesign of the Diablo Canyon facility following the discovery of the Hosgri fault is dealt with in ALAB-763, 19 NRC __ (March 20, 1984) (slip opinion at 87-89).

For the foregoing reasons, the joint intervenors' motions to reopen the record, with one reservation,[25] are denied.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

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[25] See note 21, supra.