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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 29, 1984
(ALAB-776)

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

Byron S. Georgiou, Sacramento, California, and Herbert H. Brown and Lawrence Coe Lanpher, Washington, D.C., for Edmund G. Brown, Jr.,[1] (former) Governor of the State of California.

Malcolm H. Furbush, Robert Ohlbach, Philip A. Crane, Jr., and Richard F. Locke, San Francisco, California, and Arthur C. Gehr and Bruce Norton, Phoenix, Arizona, for Pacific Gas and Electric Company, applicant.

Bradley W. Jones, Donald F. Hassell and Sherwin E. Turk, for the Nuclear Regulatory Commission staff.

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[1] Since the briefing and oral argument of the issues decided in this opinion, George Deukmejian has assumed the office of Governor. Pursuant to Governor Deukmejian's request, he has been substituted for Governor Brown as the representative of the State of California. The Attorney General of the State of California is now representing Governor Deukmejian.

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DECISION

On August 31, 1982, the Licensing Board issued an initial decision[2] authorizing a full power operating license to Pacific Gas and Electric Company for the Diablo Canyon facility.[3] All parties to the operating license proceeding filed exceptions to the initial decision. In this decision, we deal with the appeals of the applicant and the NRC staff. In a subsequent decision, we will determine the appeals of the joint intervenors and the Governor of California.

I.

A. Among the issues litigated before the Licensing Board was the joint intervenors' contention challenging the adequacy of emergency response planning for the Diablo Canyon facility. Following an evidentiary hearing on this and other issues, the Board issued its decision[4] concluding,

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[2] LBP-82-70, 16 NRC 756.

[3] The most recent twists in the extended tale of the Diablo Canyon facility, including the authorization of the low power license, license suspension, and reopening of the proceeding, are recounted in ALAB-728, 17 NRC 777 (1983), and ALAB-763, 19 NRC ___ (March 20, 1984).

[4] The Board's initial decision consists of essentially two parts. The first is a lengthy "opinion" discussing the issues, the evidence, and the Board's resolution of the issues. LBP-82-70, supra, 16 NRC at 759-98. The second is an equally lengthy listing of "findings of fact" and "conclusions of law" largely repetitious of what the Board already stated in the first part of its decision. Id. at 798-855. Besides being exceedingly time consuming for both

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inter alia, that emergency plans and preparedness for Diablo Canyon complied with the Commission's regulations.[5] The Board further found that onsite and offsite emergency preparedness for Diablo Canyon provides "reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency" and concluded that the activities authorized by the license can be conducted without endangering the health and safety of the public.[6] The Board, however, also placed a number of conditions on its license authorization. In particular, it required that the staff "secure FEMA [Federal Emergency Management Agency] findings on the adequacy of the State [of California] Emergency Response Plan."[7]

After the issuance of LBP-82-70, the applicant sought clarification of the decision from the Licensing Board.[8] The applicant's motion pointed out that the decision included explicit conclusions of law regarding the adequacy

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the writers and the readers, this format holds the potential for creating internal inconsistencies within the four corners of the decision. To some extent that has occurred here.

[5] Id. at 797-98.

[6] Id. at 761, 854.

[7] Id. at 854.

[8] See Motion for Clarification of the Licensing Board's Initial Decision dated August 31, 1982 (September 24, 1982).

of onsite emergency response plans and preparedness[9] but that the Board had not made similar explicit conclusions of law exclusively concerning offsite plans and preparedness. In response to the applicant's motion, the Board stated that such conclusions of law were already implicit in its decision. Nevertheless, it added a specific conclusion regarding the adequacy of offsite plans and preparedness.[10]

Similarly, the staff, joined by the applicant, sought clarification from the Licensing Board of the condition on license authorization that the staff obtain FEMA findings on the adequacy of the state plan.[11] The staff's motion stressed that the hearing record already contained the necessary FEMA findings called for by the Commission's regulations concerning the adequacy of local and state emergency response plans and, therefore, nothing more was required. The Board rejected the staff's position in an order stating that

> [w]hile there is reasonable assurance on the record that the State plan is substantially completed, Section 50.47 explicitly requires FEMA findings of adequacy before an operating license

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[9] See LBP-82-70, supra, 16 NRC at 853.

[10] See Memorandum In Response to PG&E's Motion For Clarification Of The Licensing Board's Initial Decision Dated August 31, 1982 (October 26, 1982) (unpublished).

[11] See Motion For Clarification Of The Licensing Board's Initial Decision Dated August 31, 1982 (September 17, 1982).

> may issue. The record does not contain such findings. The Board has concluded that the interim findings of FEMA do not meet that requirement.[12]

B. Both the applicant and the staff have appealed the Licensing Board's imposition of this condition. They first argue, in effect, that there is only one internally consistent interpretation of those portions of the Board's initial decision dealing with the adequacy of the State of California Emergency Response Plan and the Board's subsequent order rejecting the staff's motion for clarification: i.e., the "findings" that the Board states the staff must obtain from FEMA can mean only FEMA's "final" or "formal" findings -- so-called Part 350 findings -- which are made by that agency after it has conducted its formal review of local and state offsite plans pursuant to the procedures set forth in FEMA's regulations, 44 CFR Part 350. The applicant and the staff argue that such final FEMA findings are not required by the Commission's regulations, 10 CFR 50.47, and that interim FEMA findings are sufficient.[13] Further, they assert that the Board's

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[12] LBP-82-85, 16 NRC 1187, 1187-88 (1982). The Board went on to state that "[t]he fact is that testimony in the record shows that a FEMA review was to take place in July of this year, subsequent to the hearing." Id. at 1188.

[13] See Brief of Pacific Gas and Electric Company In Support Of Exception To Initial Decision of August 31, 1982 (Footnote Continued)

condition is violative of the procedures for litigating the adequacy of offsite emergency response plans adopted by the Commission in a Memorandum of Understanding with FEMA.[14]

On the other hand, the joint intervenors and the Governor assert that the language of the Commission's regulations must be given a more literal interpretation. They argue that the regulations proscribe the authorization of any license until (1) the complete state and local offsite emergency response plans have been submitted to FEMA, (2) the FEMA review process has been completed and FEMA has issued its final, formal findings on the adequacy of the offsite plans and (3) the parties to any licensing proceeding have been given a meaningful opportunity to rebut the final FEMA findings. Thus, they assert that, although the Licensing Board was correct in conditioning its license authorization upon the issuance of FEMA findings, no license can issue until the parties are given an opportunity to rebut the final FEMA findings on the adequacy of the state emergency response plan.[15]

(Footnote Continued)
(November 8, 1982) at 2-4; NRC Staff Brief In Support Of Exception To Initial Decision (November 12, 1982) at 5-13.

[14] See p. 9, infra.

[15] See Joint Intervenors' Response To Pacific Gas And Electric Company And NRC Staff Briefs In Support Of Exception To August 31, 1982 Initial Decision (December 20,
(Footnote Continued)

II.

From the arguments of the applicant and the staff, as well as those of the joint intervenors and the Governor, it appears all agree that the Licensing Board was referring to final FEMA findings in conditioning its license authorization on the staff's first obtaining FEMA "findings" on the adequacy of the State of California Emergency Response Plan. The applicant and the staff are correct that this interpretation of the Board's condition is internally consistent with those portions of the initial decision concerning the state response plan and the Board's statements rejecting the staff's motion for clarification of that condition.[16] They are also correct that the Commission's regulations do not require the staff to obtain from FEMA final findings of the adequacy of state offsite response plans before the full power operating license can issue.

(Footnote Continued)
1982) at 4-11; Joint Intervenors' Brief In Support Of Exceptions (November 8, 1982) at 11-20; Brief Of Governor [of California] In Reply To PG&E And NRC Staff Briefs In Support Of Exceptions (December 20, 1982) at 1-5.

[16] We note, however, that there is no interpretation of this condition that can be completely squared with all portions of the Board's initial decision and its statements rejecting the staff's motion seeking clarification of the condition.

In three recent cases, we have rejected the same interpretation of the Commission's regulations now urged upon us by the joint intervenors and the Governor. Those cases are controlling here. In Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 380 (1983), we reviewed the emergency planning regulations and concluded that "the Commission expects licensing decisions on emergency preparedness to be made on the basis of the best available current information, and not deferred to await FEMA's last word on the matter." Next, in Cincinnati Gas & Electric Co. (Wm. H. Zimmer Nuclear Power Station, Unit No. 1), ALAB-727, 17 NRC 760, 775 (1983), we held that 10 CFR 50.47(a)(2) "does not require deferment of any hearing on state and local government emergency response plans to await FEMA's issuance of final findings on those plans. Rather, what that Section contemplates is a licensing decision based on the best available current information on emergency preparedness." Finally, we relied upon these two decisions in Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-730, 17 NRC 1057, 1066 (1983), stating that "it is plain from the Commission's regulatory requirements that offsite plans need not be complete, nor finally evaluated by FEMA prior to conclusion of the adjudicatory process."

Pursuant to the Commission's regulations, no full power operating license can issue unless the agency finds that

there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.[17] With respect to the adequacy of offsite emergency capabilities, the agency must "base its finding on a review of the Federal Emergency Management Agency (FEMA) findings and determinations as to whether State and local emergency plans are adequate and whether there is reasonable assurance that they can be implemented."[18] In turn, any FEMA finding "will primarily be based on a review of the plans" but may also include "[a]ny other information already available to FEMA." In any Commission licensing proceeding, a FEMA finding constitutes "a rebuttable presumption" of adequacy and ability to implement.[19]

In order to coordinate offsite emergency planning, the Commission and FEMA entered into a Memorandum of Understanding defining the respective responsibilities of the two agencies.[20] Under that agreement, FEMA has responsibility for formally reviewing, pursuant to FEMA's rules and regulations, state and local emergency response

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[17] 10 CFR 50.47(a)(1).

[18] 10 CFR 50.47(a)(2).

[19] Id.

[20] See 45 Fed. Reg. 82,713 (1980).

plans and making final findings whether such plans are adequate and capable of being implemented.[21] But, as we stated in San Onofre, supra, the Memorandum also

> recognizes the distinct possibility that a final FEMA finding may not always be available in a timeframe compatible with the schedule of Commission licensing proceedings. It therefore provides that FEMA will offer its preliminary views on the state of offsite emergency preparedness 'based upon plans currently available to FEMA.' 45 Fed. Reg. at 82,714 (emphasis added). The Memorandum states further that to support its findings and determinations, 'FEMA will make expert witnesses available before . . . NRC hearing boards and administrative law judges.' Ibid. The clear import of the Memorandum is that FEMA will provide Commission licensing proceedings, through FEMA witnesses, the benefit of its most current evaluation of State and local emergency planning.[22]

Thus, in San Onofre and again in Zimmer we concluded that the Commission's regulations do not require final FEMA findings on the adequacy of offsite emergency plans and preparedness. Rather, preliminary FEMA reviews and interim findings presented by FEMA witnesses at licensing hearings

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[21] To fulfill this responsibility, FEMA adopted the procedures set forth in 44 CFR Part 350. Among other things, those regulations deal with the procedures for requesting FEMA review and the FEMA formal review process culminating in final administrative approval of state and local plans. See 44 CFR 350.7-.12. Although at the time of the Licensing Board hearing on the Diablo Canyon emergency response plans, the FEMA regulations were only proposed rules, see 45 Fed. Reg. 42,341 (1980), FEMA was nevertheless following them. See Eldridge fol. Tr. 12,688 at 4.

[22] 17 NRC at 379-80.

are sufficient as long as such information permits the Licensing Board to conclude that offsite emergency preparedness provides "reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency."[23]

At the time of the hearing before the Licensing Board on emergency preparedness, FEMA had not conducted a final review of the local emergency response plans or the State of California plan. Nor had FEMA issued its final findings on the adequacy of those plans. Thus, the Licensing Board admitted into evidence, inter alia, the state and local

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[23] 10 CFR 50.47(a)(1). See San Onfore, supra, 17 NRC at 380 n.57; Zimmer, supra, 17 NRC at 775 n.20. See also Fermi, supra, 17 NRC at 1066-67.

In addition to relying upon the NRC-FEMA Memorandum of Understanding in interpreting the Commission's emergency response regulations, both San Onofre and Zimmer also relied upon a recent amendment to 10 CFR 50.47(a)(2) to support the view that final FEMA findings were not necessary. The amendment added a last sentence to the section providing that the holding of emergency preparedness exercises is not required for any initial licensing decision. See 47 Fed. Reg. 30,232, 30,236 (1982). This new provision was invalidated in Union of Concerned Scientists v. United States Nuclear Regulatory Commission, No. 82-2053 (D.C. Cir. May 25, 1984) on the ground that it denies the right to a hearing on a material licensing factor in contravention of Section 189(a)(1) of the Atomic Energy Act, 42 U.S.C. § 2239(a)(1). Of course, in this proceeding, an emergency preparedness exercise was conducted in advance of the hearing and the exercise results formed a part of FEMA's findings. Therefore, this Court of Appeals decision does not alter the settled interpretation of the Commission's regulations that final FEMA findings are not necessary for license authorization.

plans,[24] as well as FEMA's interim findings produced pursuant to the NRC-FEMA Memorandum of Understanding,[25] and the testimony of John Eldridge, a FEMA emergency management specialist and project representative for the Diablo Canyon plant.[26] On the basis of this evidence, the Board found

> 1) that the State plan as its pertains to Diablo Canyon is complete except for a few SOP's [standard operating procedures], 2) that a systematic process of development and review between the State and FEMA has occurred, 3) that FEMA is aware of and keeps abreast of current developments in the plan and will review it when it is complete, and 4) that there are no obstacles to completion of the plan.[27]

As previously indicated, the Board then found that offsite emergency preparedness for Diablo Canyon provides reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency,[28] and that

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[24] See Applicant Ex. 73, Appendix C; Applicant Ex. 80.

[25] See Attachment 2 to Applicant's Panel #1 Testimony, fol. Tr. 11782 (FEMA Region IX Evaluation and Status Report on State and Local Emergency Preparedness Around the Diablo Canyon Nuclear Power Plant, November 2, 1981). See also Attachment 1 (FEMA Evaluation Findings, Diablo Canyon Nuclear Power Plant, Offsite Emergency Response Plans Exercise, August 19, 1981).

[26] Eldridge fol. Tr. 12688. Counsel for the joint intervenors and the Governor each cross-examined Mr. Eldridge and also had the opportunity to present their own evidence on the local and state plans.

[27] LBP-82-70, supra, 16 NRC at 766-67 (footnote omitted). See also id. at 802.

[28] Id. at 761; Memorandum In Response to PG&E's Motion
(Footnote Continued)

emergency plans and preparedness for the facility complied with the Commission's regulations.[29] Even though the Board made these findings, it nevertheless imposed the condition at issue.

Our review of the record confirms that the Board's reasonable assurance finding on the adequacy of offsite emergency response is supported by the record and that the interim FEMA findings on the state plan, presented through the expert testimony of Mr. Eldridge, fully satisfy the requirements of the Commission's regulations. The Board, therefore, erred in attaching the condition to its license authorization requiring further, final FEMA findings.

As the Board correctly noted, at the time of the hearing the state plan was in effect[30] although some ten percent of the plan's standard operating procedures were

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(Footnote Continued)
for Clarification of the Licensing Board's Initial Decision Dated August 31, 1982 (October 26, 1982) (unpublished).

[29] LBP-82-70, supra, 16 NRC at 797-98.

[30] In California, there is one state plan applicable to all nuclear facilities. See Applicant Ex. 73, Appendix C at 3. Because at the time of the hearing there were other licensed nuclear power plants in California, the basic state plan already was in effect. Indeed, in 1981 FEMA had found this plan adequate for offsite emergency response for the San Onofre Nuclear Generating Station, Units 2 and 3. See San Onofre, supra, 17 NRC at 378.

still incomplete.[31] The Board recognized that in California the emergency response function is split between the state and county: the county has the basic responsibility for the protection of life and property in the plume exposure pathway, while the state's response involves the ingestion pathway as well as recovery and reentry. Unlike the county's duties, the state's responsibilities do not require immediate action because they do not deal with imminent life threatening situations. The state is concerned with such things as the long-term flow of contaminated food through the ingestion pathway.[32]

Because the state plan was substantially complete and under it no immediate state response was necessary, Mr. Eldridge testified that the state could respond adequately, with assistance from the Department of Energy and Environmental Protection Agency in any areas where state planning was not yet complete.[33] Although the written report setting forth the interim FEMA findings that was introduced into evidence did not refer explicitly to the

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[31] LBP-82-70, supra, 16 NRC at 802. See also id. at 766.

[32] Applicant Ex. 73, Appendix C at 24-28.

[33] Eldridge fol. Tr. 12,688 at 4-5; Tr. 12,708-10.

state plan because of the primacy of the county plan,[34] Mr. Eldridge's testimony on the sufficiency of the state plan constitutes FEMA's finding on this subject. Additionally, this finding of adequacy meets the requirements of the Commission's regulations. Final FEMA findings are not required and the Board's condition that the staff secure additional findings from FEMA is vacated.[35]

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[34] Tr. 12,744-45.

[35] One other interpretation of the Board's license condition is possible. Instead of securing final FEMA findings, the Board may have intended that the staff simply obtain from FEMA a written conclusion on the adequacy of the state plan akin to the one FEMA produced on the county plan. In that event, the Board's condition elevates form over substance and is unnecessary. Testimony by a FEMA expert on the adequacy of the state plan is all that is required under the Commission's emergency response regulations.

We note that in the staff's response to our April 10, 1984 order inquiring whether the applicant and staff appeals of this condition were now moot, the staff attached an April 2, 1984 FEMA memorandum on the current status of offsite emergency planning at Diablo Canyon. That document, like Mr. Eldridge's earlier testimony at the hearing, concluded that the state plan (which is now in a later revision but still has not undergone "final" FEMA review) would be adequate, if needed. See Memorandum for Edward L. Jordan, NRC, from Richard W. Krimm, FEMA (April 2, 1984), attached to NRC Staff Response To The Appeal Board's Order of April 10, 1984 (April 18, 1984).

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board