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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

DOCKETED
USNRC

'84 OCT 15 10:27

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

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Docket Nos. 50-275 OL
50-323 OL

NRC STAFF'S ANSWER TO JOINT
INTERVENORS' PETITION FOR REVIEW OF ALAB-781

William D. Paton
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October 12, 1984

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OFFICE OF SECRETARY
OF THE COMMISSION
WASHINGTON, D.C.

NRC STAFF'S ANSWER TO JOINT
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I. INTRODUCTION

On September 17, 1984, Joint Intervenors filed a petition for review of ALAB-781 (Petition) with the Nuclear Regulatory Commission, pursuant to 10 C.F.R. § 2.786. Joint Intervenors request that the Commission grant review of and reverse ALAB-781. For reasons which follow, the NRC Staff opposes the Petition.

II. BACKGROUND

In ALAB-781, the Appeal Board affirmed the Initial Decision of the Licensing Board ^{1/} insofar as it authorizes the issuance of a full power license for Diablo Canyon, Unit 1. In that decision, the Appeal Board concluded, inter alia: (A) that the issue of whether the impacts on emergency planning of earthquakes which cause or occur during an accidental release is no longer before the Appeal Board, (B) that there is no

^{1/} LBP-82-70, 16 NRC 756 (1982).

need to supplement the environmental impact statement to address the consequences of a Class 9 accident, (C) that there is no need to await the issuance by the Federal Emergency Management Agency (FEMA) of formal, "final" findings on the adequacy of State emergency response plans, (D) that full power authorization is not dependent upon a finding of compliance with the requirements of the Commission's emergency planning regulations in the larger, State-established emergency planning zones, and (E) that a predictive finding that "there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency" ^{2/} is adequate to support the issuance of a full power operating license, and that sociological and psychological profiles of the affected populations are not required. In the subject Petition, Joint Intervenors seek Commission review of each of the foregoing determinations.

III. DISCUSSION

Although the Commission has the ultimate discretion to review any decision of its subordinate boards, a petition for Commission review "will not ordinarily be granted" unless important safety, environmental, procedural, common defense, antitrust, or public policy issues are involved. 10 C.F.R. § 2.786(b)(4). When measured against the standards of 10 C.F.R. § 2.786, the matters asserted by Joint Intervenors in their Petition do not warrant the exercise of the Commission's discretion to

^{2/} 10 C.F.R. § 50.47(a)(1).

grant the Petition, i.e., important questions of fact, law, or policy in the context of the foregoing areas of concern are not presented.

10 C.F.R. § 2.786(b)(1). As discussed below, the Appeal Board's determinations in each of the areas on which review is sought reflect the straightforward application of long-settled policy, principles of law or determinations of fact well-founded on the record of this proceeding (which are in several instances, identical to previous determinations reached on identical issues in this proceeding) and thus do not raise important questions of fact, law or policy warranting Commission review.

A. Earthquakes and Emergency Planning

Joint Intervenors argue that the failure to permit the consideration of seismic effects on emergency response is a critical deficiency in emergency preparedness at the Diablo Canyon facility. They claim that in ALAB-781, the Appeal Board violated emergency planning regulations and the Joint Intervenors' right to a hearing when it concluded that the Licensing Board was without jurisdiction to consider the issue.

Joint Intervenors' position has previously been rejected by the Licensing Board, Memorandum and Order, December 23, 1981 (unpublished) and by the Appeal Board, ALAB-728, 17 NRC at 792-793 (1983) in the context of the low power proceeding. The Commission declined review of the Appeal Board's decision (ALAB-728) in CLI-83-32, 18 NRC 1309 (1983). ^{3/}

^{3/} It would appear that in any event, the doctrine of res judicata bars yet further consideration of this issue as well as the issue involving the need to consider Class 9 accidents discussed in Section B, infra. See Alabama Power Company, (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 NRC 210 (1974), modified on other grounds, CLI-74-12, 7 AEC 203 (1974).

As observed by the Appeal Board in ALAB-781, "[N]ormally, our resolution of this issue in ALAB-728 would be the law of the case and preclude any further consideration of the same issue on appeals from the Licensing Board's initial decision." Slip op. at 5. However, the Commission on its own has interceded on this issue. ^{4/} On August 10, 1984, the Commission ruled on the precise issues here, concluding (1) that NRC regulations do not require consideration of the impacts on emergency planning of earthquakes which cause or occur during an accidental release and (2) that there are no special circumstances requiring consideration of earthquakes at Diablo Canyon. ^{5/} Moreover, the Commission has recently expressed again this same position on the issues here in the context of its response to Joint Intervenors' Petition for Review filed in the U.S. Court of Appeals for the District of Columbia Circuit. ^{6/}

The Appeal Board's determination is wholly in accordance with the Commission's position on this very matter (which thus constitutes the law of the case) and Joint Intervenors' Petition does not present any new matter which would raise an important question of fact, law or policy requiring yet further consideration by the Commission.

^{4/} CLI-84-4, 19 NRC 937 (1984).

^{5/} CLI-84-12, 20 NRC ____ (August 10, 1984).

^{6/} San Luis Obispo Mothers for Peace, et al. v. NRC No. 84-1410. See, Brief for Respondents, September 1984, at 40-46. The matters currently before the Court of Appeals relate to agency actions concerning full power as well as low power. Nos. 81-2035, 83-1073 and 84-1042.

B . Class 9 Accident Analysis

Joint Intervenors argue that the Commission improperly limited its "Statement of Interim Policy; Nuclear Power Plant Accident Considerations Under the National Environmental Policy Act of 1969," 45 Fed. Reg. 40,101, which prescribes the consideration to be given Class 9 accidents, to prospective application absent "special circumstances" and that, in any event, it violated even that policy by failing to find that such "special circumstances" exist with respect to Diablo Canyon. (Petition at 4-5).

Joint Intervenors' position on this issue has been rejected by the Licensing Board, LBP-81-17, 13 NRC 1122 (1981) and the Appeal Board, ALAB-728, 17 NRC 777, 795-796 (1983) in the context of the low power proceeding. As noted earlier, review of ALAB-728 was declined by the Commission, CLI-83-32, 18 NRC 1309 (1983). The Commission has recently reiterated its position on this matter supporting the correctness of its action regarding both matters asserted by Joint Intervenors in the context of its response to Joint Intervenors' Petition for Review filed in the U.S. Court of Appeals for the District of Columbia Circuit. ^{7/}

The Appeal Board's determination is wholly in accordance with the Commission's previously stated views on this very issue and Joint Intervenors' Petition does not present any new matter which would raise an important question of fact, law or policy requiring yet further consideration by the Commission.

^{7/} See n.4. supra; Brief for Respondents, September 1984, at 24-31.

C. FEMA Findings On Off-Site Plans

Joint intervenors' entire position regarding the propriety of the findings of the Federal Emergency Management Agency is as follows:

FEMA Findings on Off-Site Plans (ALAB-781, at 13-14). This issue has previously been briefed -- and is currently pending before the Commission -- in Joint Intervenors' petition for Review of ALAB-776 (July 17, 1984).

In ALAB-781 the Appeal Board reiterated its earlier determination in ALAB-776, that (1) formal, "final" findings by the Federal Emergency Management Agency (FEMA) pursuant to 44 C.F.R. Part 350 on the adequacy of state emergency response plans for Diablo Canyon are not required in order to establish compliance with 10 C.F.R. § 50.47 and (2) the Licensing Board's finding that overall the state of offsite emergency planning is adequate, is supported by the record. On July 17, 1984, Joint Intervenors petitioned for review of that decision. Responses to the Petition for Review of ALAB-776 have been filed by both the Staff and PG&E and the matter is thus already pending before the Commission.

D. Emergency Planning Zones

In ALAB-781 the Appeal Board described the NRC's and the State of California's regulatory schemes with respect to emergency planning zones (EPZs). As relevant to the present Petition, the Appeal Board noted and agreed with the Licensing Board's ruling that it had no authority to enforce State standards which exceed those required by federal regulations. The Appeal Board correctly held that "the wholesale enlargement of the Commission prescribed EPZs by the State cannot preclude a licens-

ing decision based on the requirements of the NRC regulations." ^{8/} See San Onofre Southern California Edison Co. et al. (San Onofre Nuclear Generating Station, Units 2 and 3), LPB-82-39, 15 NRC 1163, 1181 (1982), affirmed, ALAB-717, 17 NRC 346 (1983), where the Licensing Board correctly held that for licensing purposes NRC regulations preclude imposition of EPZs substantially different from those prescribed by the NRC and that a party seeking to impose a substantial departure from Commission prescribed EPZs should seek an exception to the rule pursuant to 10 C.F.R. § 2.758. Notably, in this proceeding, as in San Onofre, no party resorted to the provisions of 10 C.F.R. § 2.758.

The Appeal Board properly held that Joint Intervenors' argument that the Licensing Board should have deferred to the state zones as a matter of federal-state comity "simply misses the point". Citing Section 274.c. of the Atomic Energy Act, the Appeal Board observed that the Commission must retain the nondelegable authority and responsibility with respect to regulation of the construction and operation of any production or utilization facility which would include such matters as the determination of the EPZ. Thus, while Section 274 indeed contemplates federal-state cooperation in certain areas, the establishment of the EPZ is not one. Other than restating their already rejected argument, noted above, Joint Intervenors have failed to establish that the Appeal Board's appropriate application of Section 274.c. of the Act presents an issue warranting Commission review.

^{8/} ALAB-781, Slip op. p. 18.

E. Offsite Emergency Planning

Joint Intervenors claim that the Appeal Board erred "because they ignore the record and sanction the Licensing Board's virtually complete disregard of the testimony offered by the Joint Intervenors or the Governor on the issues [of public education and information, communications and the failure to consider sociological and psychological factors]. See Joint Intervenors' Brief in Support of Exceptions, at 36-47 (November 8, 1982)." Joint Intervenors sweeping assertion disregards 10 C.F.R. § 2.786(b)(iii) which requires a concise statement of why in the petitioners' view the decision or action is erroneous. Joint Intervenors merely refer generally to pages 36-47 of their brief in support of exceptions to the August 1982 Initial Decision. Such general reference to eleven pages in their brief in support of exceptions to the Licensing Board's Initial Decision to support their position that the Appeal Board erred does not provide the Commission with the required concise statement of why the Appeal Board decision is erroneous, nor does it in any way establish the existence of an important question of fact, law or policy requiring intervention by the Commission. In any event, for the reasons discussed by the Appeal Board in ALAB-781, the adequacy of offsite preparedness is amply supported by the record.

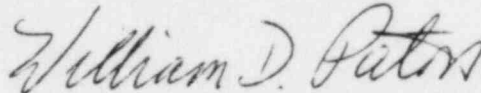
Joint Intervenors also interpose a very limited and general objection to reliance on predictive findings in the area of emergency planning, claiming that "it establishes the dangerous principle that mere expectation of compliance is sufficient for purposes of a facility operating license." The Appeal Board, after discussing the Commission's 1982 amendment to the regulations which clarified that predictive findings

with regard to emergency planning are appropriate, ALAB-781, Slip op. p. 26, acted in accordance with that amendment and Joint Intervenors point to no specific error in the Appeal Board's application of this principle which might warrant Commission review.

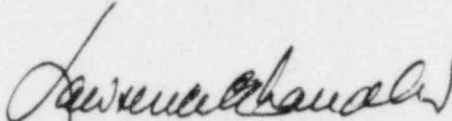
IV. CONCLUSION

For the foregoing reasons, Joint Intervenors' Petition for Review of ALAB-781 fails to establish the existence of any important issue of fact, law or policy warranting Commission review and, therefore, should be denied.

Respectfully submitted,



William D. Paton
Counsel for NRC Staff



Lawrence J. Chandler
Special Litigation Counsel

Dated at Bethesda, Maryland
this 12th day of October, 1984

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER TO JOINT INTERVENORS' PETITION FOR REVIEW OF ALAB-781" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, this 12th day of October 1984:

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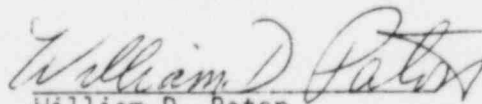
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