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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

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

Docket Nos. 50-275 O.L.
50-323 O.L.

ANSWER OF PACIFIC GAS AND ELECTRIC
COMPANY TO PETITION FOR REVIEW
OF ALAB-776 FILED BY
JOINT INTERVENORS

I

INTRODUCTION

On July 17, 1984, the Joint Intervenor filed, pursuant to 10 CFR 2.786, a petition for review of ALAB-776, _____ NRC _____ (June 29, 1984). In that decision the Atomic Safety and Licensing Appeal Board ("Appeal Board") vacated that position of the decision of the Atomic Safety and Licensing Board ("Licensing Board") which conditioned the full power license of Diablo Canyon Nuclear Power Plant, Unit 1, on the submission by the Federal Emergency Management Agency ("FEMA") to the NRC Director of Nuclear Reactor Regulation (NRR) of findings on the adequacy of the California Emergency Response Plan ("State Plan").

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For the reasons set forth below, Pacific Gas and Electric Company ("PGandE") respectfully submits the petition for review should be denied.

II

BACKGROUND

In January 1982 the Licensing Board held hearings on PGandE's application for a full power operating license for Diablo Canyon Nuclear Power Plant Units 1 and 2. One of the issues considered in those proceedings was the adequacy of emergency planning for Diablo Canyon. On August 31, 1982, the Licensing Board issued its decision authorizing the Director of NRR to issue a full power license subject not only to certain conditions imposed by the Licensing Board but also to the Commission's determination and order. 1/ All parties to the proceeding filed exceptions to various rulings of the Licensing Board in accordance with 10 CFR § 2.762(a).

On June 29, 1984, the Appeal Board issued a ruling on an exception taken by the NRC Staff and PGandE to the Licensing Board's condition that the Director of NRR secure FEMA findings on the adequacy of the State Plan prior to issuance of a full power license. 2/ In that Decision the

1/ LBP-82-70, 16 NRC 756.

2/ Certain other exceptions taken by PGandE and the NRC Staff were withdrawn after the Licensing Board issued memorandum decisions on September 24 and October 26, 1982 clarifying portions of its Initial Decision.

Appeal Board held 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 [a] full power operating license can be issued." 3/

III

DISCUSSION

While recognizing that the Commission has the ultimate discretion to review any decision of its boards, a petition for Commission review is ordinarily not granted unless important safety, procedural, common defense, antitrust, or public policy issues are involved. 10 CFR § 2.785(b)(4). PGandE has reviewed the issue which has been raised and believes that when compared against the standards set forth in 10 CFR 2.786 it does not command the exercise of the Commission's discretion to grant the petition, i.e., important questions of fact, law, or policy are not presented.

The Joint Intervenors contend that the Appeal Board has disregarded the explicit language of the Commission's emergency planning regulations by concluding that formal FEMA findings on the adequacy of the offsite emergency plans are not required before full power licensing. 4/ They contend that the language of 10 CFR

3/ ALAB-776, slip opinion at 7.

4/ Petition for Review, p. 1.

50.47(a) "is unmistakable in its terms" as requiring final FEMA findings. 5/

A careful scrutiny of the language clearly shows that there is no requirement for a formal [final] FEMA finding prior to full power licensing. Moreover, Joint Intervenors completely ignore the provisions of the "Memorandum of Understanding Between NRC and FEMA Relating to Radiological Emergency Planning and Preparedness" ("MOU") executed on November 4, 1980 (45 Fed. Reg. 82713-14

5/ 10 C.F.R. 50.47(a)(1) provides that:

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.

Section (a)(2) of 10 C.F.R. 50.47 goes on to state that:

The NRC will base its findings on a review of 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, and on the NRC assessment as to whether the applicant's onsite emergency plans are adequate and whether there is reasonable assurance that they can be implemented. A FEMA finding will primarily be based on a review of the plans. Any other information already available to FEMA may be considered in assessing whether there is reasonable assurance that the plans can be implemented. . .

(December 16, 1980)). 6/ The clear import of this MOU, when read in conjunction with the language of 10 CFR § 50.47, is that formal, final FEMA findings are not necessary for the NRC licensing process. Rather, the NRC regulatory scheme contemplates the use of interim FEMA findings in NRC licensing proceedings "based upon plans currently available to FEMA or furnished to FEMA by the NRC". (45 Fed. Reg. 82714). This provision has been incorporated into the final FEMA regulations dealing with the review and approval of state and local radiological emergency plans. 44 CFR § 350.3(f).

As the Appeal Board noted in its decision, three recent decisions have considered this very issue and concluded that formal (final) FEMA findings are not required

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6/ This MOU provides in pertinent part that:

[n]otwithstanding the procedures which may be set forth in 44 CFR 350 for requesting and reaching a FEMA administrative approval of State and local plans, findings and determinations on the current status of emergency preparedness around particular sites may be requested by the NRC through the NRC/FEMA Steering Committee and provided by FEMA for use as needed in the NRC licensing process. These findings and determinations may be based upon plans currently available to FEMA or furnished to FEMA by the NRC. (45 Fed. Reg. 82714).

for NRC licensing decisions. 7/ These decisions all interpreted the regulations to mean that ". . . licensing decisions on emergency preparedness [are] to be made on the basis of the best available current information and not deferred to await FEMA's last word on the matter." Southern California Edison, supra, 17 NRC 346 at 380. As

the Appeal Board further observed:

"[P]reliminary FEMA reviews and interim findings presented by FEMA witnesses at licensing hearings are sufficient as long as such information permits the Licensing Board to conclude that offsite emergency preparedness provides 'reasonable assurance that adequate protection measures can and will be taken in the event of a radiological emergency.'" (footnote omitted). (Slip. Opinion at 10-11).

In the instant case, FEMA's interim findings on the status and adequacy of state and local offsite emergency planning were presented to the Licensing Board through the testimony of John Eldridge. 8/ Furthermore, the Licensing Board found that offsite emergency planning provides reasonable assurance that adequate protective measures can and will be taken in the event of a radiological event and

7/ Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 380 (1983); Cincinnati Gas and Electric Co. (Wm. H. Zimmer Nuclear Power Station, Unit No. 1), ALAB-727, 17 NRC 760, 775 (1983); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-730, 17 NRC 1057, 1066 (1983).

8/ Eldridge Testimony fol. TR. 12688.

that emergency plans and preparedness for the facility complied with the Commission's regulations. 9/

The Appeal Board in reviewing this state of the record correctly concluded that the interim FEMA findings fully satisfied the requirements of the Commission's regulations; hence, the Licensing Board's condition requiring further, final FEMA findings was erroneous. 10/ In reaching this conclusion, the Appeal Board noted, as did the Licensing Board, that in California the emergency response function is split between the state and county. The County has the basic responsibility for protection of life and property in the plume exposure pathway, while the State has basic responsibility for only the ingestion pathway as well as recovery and security. 11/ Thus, the state's basic emergency responsibilities do not require immediate action as contrasted with the county's primary emergency response role. 12/

9/ LBP-82-70, supra, 16 NRC at 761, 797-98; ALAB-776, slip op. at 12-13.

10/ ALAB-776. Slip op. at 13.

11/ Id at 14.

12/ The Appeal Board noted (footnote 35) that the state plan still has not undergone "final" FEMA review but is in a later revision as of April 1984. This later State Plan revision has been reviewed recently by FEMA and an interim finding confirming the adequacy of the State Plan was sent from FEMA to NRC on July 11, 1984.

CONCLUSION

For the reasons set forth above, the Petition of Joint Intervenors has failed to establish an important question of fact, law, or policy and, accordingly, should be denied.

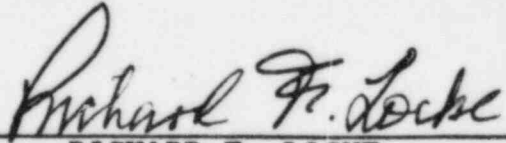
Respectfully submitted,

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