UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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)	)	

ANSWER OF
PACIFIC GAS AND ELECTRIC COMPANY TO
JOINT INTERVENORS'
PETITION FOR REVIEW OF ALAB-775

I

INTRODUCTION

Pursuant to 10 CFR 2.786(b)(3), Pacific Gas and Electric Company (PGandE) files this Answer to assist the Commission in its deliberations regarding Joint Intervenors' Petition for Review of ALAB-775.

On October 24, 1983, the Appeal Board denied an earlier Motion to Reopen the Record on Construction Quality Assurance (CQA). The Appeal Board's opinion (ALAB-756) was issued December 19, 1983.

On February 14, 1984, the Joint Intervenors filed a Motion to Augment or in the Alternative, to Reopen the

Record on Design Quality Assurance (DQA). At the time the motion was filed, the Appeal Board had under consideration the Proposed Findings of Fact and Conclusions of Law of the parties in the reopened DQA Hearings, ALAB-763. On March 20, 1984, the Appeals Board decided ALAB-763. On April 8, 1984, the Joint Intervenors filed supplements to their Motion to Augment or Reopen on DQA.

On February 22, 1984, the Joint Intervenors filed a Motion to Augment or in the Alternative to Reopen the Record on Construction Quality Assurance and Licensee Character and Competence. On March 3, 1984, the Motion to Augment or to Reopen on CQA was supplemented by the Joint Intervenors.

On March 6, 1984, PGandE answered in opposition to the Motion to Reopen on DQA, and on March 19, 1984, PGandE answered in opposition to the Motion to Reopen on CQA and Character and Competence.

By Order dated May 23, 1984, the Appeals Board, sua sponte, provided the Joint Intervenors the opportunity to file a Reply to the final responses of PGandE and the Staff to both Motions and supplements. The order required that the Reply be accompanied by affidavits which clearly established significance to plant safety of each item raised by the Joint Intervenors and stated why the responses of PGandE and Staff were insufficient.

On June 11, 1984, Joint Intervenors filed their Reply. The Reply failed to meet the requirements of the Board Order as it did not establish significance to plant safety of any items raised by the multitudinous allegations proffered by Joint Intervenors.

On June 28, 1984, the Appeal Board issued its Decision (ALAB-775) denying both motions of the Joint Intervenors.

The Joint Intervenors filed a Petition for Review of the Appeal Board's Decision ALAB-775 on July 17, 1984.

II

ARGUMENT

1. The Appeal Board Acted Correctly.

The proponents of a motion to reopen the record in a licensing proceeding carry "a heavy burden." Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978). Contrary to the position taken by the Joint Intervenors, Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520 (1973), alone, is not the "precise test" to be applied to a motion to reopen. The test to be applied to a motion to reopen is the tripartite test found in Wolf Creek, supra. Metropolitan Edison Company (Three Mile Island Station, Unit No. 1) ALAB-738, 18 NRC 177, 180 (1983). To satisfy the Wolf Creek test,

> "[t]he motion must be both timely presented and addressed to a significant safety or environmental issue. Vermont Yankee Nuclear 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).

However, even assuming that Vermont Yankee, alone, constitutes the standard for a motion to reopen, the Joint Intervenors failed to satisfy that standard.

> . . . First, as we have indicated earlier (see ALAB-124, RAI-73-5 at 364-65), the board must consider: (1) the timeliness of the motion, i.e., whether the issues sought to be presented could have been raised at an earlier stage, such as prior to the close of the hearing;[12] and (2) the significance or gravity of those issues. A Board need not grant a motion to reopen which raises matters which, even though timely presented, are not of "major significance to plant safety" (ALAB-124, RAI-75-5 at 365). By the same token, however, a matter may be of such gravity that the motion to reopen should be granted notwithstanting that it might have been presented earlier (ALAB-124, RAI-75-5 at 635, fn. 10; see also ALAB-126, RAI-73-6 at 394).
>
> If these questions are resolved in the movant's favor, the Board must then proceed to consider whether one or more of the issues requires the receipt of further evidence for its resolution. If not, there is obviously no need to reopen the record for an additional evidentiary hearing. As is always the

> case, such a hearing need not be held unless there is a triable issue of fact. (Vermont Yankee Nuclear Power Corp. (Vermont Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973).

Under the Vermont Yankee standard, Joint Intervenors are not entitled to prevail on their motion to reopen without a threshhold showing of the significance to plant safety of the items they raised. Since no such showing was made, or even attempted, the motions to reopen were properly denied.

In order for new evidence to constitute a significant safety issue for a motion to reopen predicated on alleged deficiencies in the Licensee's quality assurance program, the evidence must establish either that uncorrected construction 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. See, Union Electric Co. (Callaway Plant, Unit 1 ALAB-740, 18 NRC 343, 346 (1983); Pacific Gas and Electric Company (Diablo Canyon Units 1 and 2) ALAB-756, 18 NRC 1340, ___ (1983).

If the moving party cannot establish the safety significance of the new evidence, there is no purpose to reopening the record for a further hearing. Vermont Yankee, 6 AEC 520, 523. Where the evidence submitted in response to a motion to reopen demonstrates that a significant safety issue does not exist or has been resolved, and the evidence remains unrebutted by the moving party, the moving party has

failed to meet the heavy burden necessary to reopen a closed record. See, South Carolina Electric and Gas Co., et al. (Virgil C. Summer Nuclear Station, Unit 1), LBP-82-84, 16 NRC 1183, 1185 (1982); Vermont Yankee, 6 AEC 520, 523.

In this case, the Board gave the Joint Intervenors ample opportunity to demonstrate the safety significance of their new evidence. Ordinarily a moving party has no right to file a Reply to a Response to a Motion. 10 CFR § 2.730(c). However, the Board permitted the Joint Intervenors to file a Reply, provided it was accompanied by affidavits of qualified individuals that clearly establish why the detailed item by item sworn responses of PGandE and NRC Staff were insufficient and demonstrating the safety significance of Joint Intervenors' assertions. The Reply filed by the Joint Intervenors failed to comply with the Board's directions. While Joint Intervenors presented historical evidence of design and construction discrepancies that were resolved through the operation of the quality assurance program, their Reply failed to demonstrate the safety significance of a single deficiency. By their own admission, and as noted by the Appeal Board, "few deficiencies will be demonstrably 'significant' if considered individually." (Joint Intervenors' Reply dated June 11, 1984, at 6.) Joint Intervenors did not even bother to point out which of the "few deficiencies (were) demonstrably significant."

As a second and subordinate issue, Joint Intervenors claim that the Appeal Board failed to specify reasons for its determination that Joint Intervenors affidavits failed to show required safety significance. Contrary to the position of the Joint Intervenors, the Board need only particularize its reasons for its denial when it is addressing a party's proposed contentions and findings arising out of a hearing. Where no hearing is required to be conducted the Board need not particularize its reasons, for example, as to the lack of safety significance for each and every allegation raised by Joint Intervenors. 5 U.S.C. 557(a) and (c).

Even if the rule were to apply as urged by Joint Intervenors, there should be no requirement for the Board to make specific findings or particularize its reasons inasmuch as Joint Intervenors failed even to try to meet their burden under Vermont Yankee to show safety significance after Applicant and Staff filed their extensive responses to the motions to reopen. Where Joint Intervenors failed to meet preliminary procedural requirements for commencement of a process, substantive requirements should not even come into play. Having failed to particularize their claims regarding safety significance, they should not be allowed to demand a particularized response from the Appeal Board. Nevertheless, even applying the rule suggested by Joint Intervenors, the Appeal Board satisfied its requirements.

What is required is that a Board "articulate in reasonable detail the basis for those determinations." Northern States Power Company (Prairie Island Nuclear generating plant, Units 1 and 2) ALAB-104, 6 AEC 179 (1973). The Board clearly set forth its reasons for denying the motions on pages 9 and 10 of its order. As pointed out in Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 40:

> [A] decision need not refer individually to every proposed finding; "it meets the requirements of the Administrative Procedure Act and the Commission's Rules of Practice if it sufficiently informs a party of the disposition of its contentions." (Citations omitted).

While contentions are not here involved, the Board clearly indicated why Joint Intervenors failed to meet the requirements of Vermont Yankee. The "path" of its reasoning can readily be discerned. WAIT Radio v. FCC, 418 F.2d 1153, 1156 (D.C. Cir. 1969).

As a final basis for the petition for review, Joint Intervenors assert that because they claim that QA deficiencies exist or existed, a license may not be issued. Citing Commonwealth Edison Co. (Bryon Nuclear Power Station, Units 1 and 2), ALAB-770 ____ NRC ____ (1984).

The Byron case is distinguishable from the instant proceeding. In Byron, the proceeding was remanded for a hearing upon the adequacy of a reinspection program which was initiated after significant quality assurance

deficiencies were found. In this case, hearings on design quality assurance and construction quality assurance have already been held. (ALAB-763 and ALAB-756, respectively) In ALAB 763, the adequacy of Applicant's verification program which was established pursuant to this Commission's order was extensively reviewed. Any "cloud" that previously may have existed over the adequacy of quality assurance and the ability of the plant to operate without endangering public health and safety was removed by such hearings.

As a final matter, Joint Intervenors claim that the Appeals Board "disregarded" the anonymous affidavits which it submitted with their Reply. That is not so. As can be seen in the Order, the Appeal Board reviewed the anonymous affidavits as it did all other affidavits submitted by Joint Intervenors.

CONCLUSION

Joint Intervenors have failed to meet the burden placed upon them by Vermont Yankee and its successors. They failed to respond to even the additional opportunity afforded them by the Board to demonstrate the safety significance of the allegations they raised. They should not be heard to complain now. To grant a motion to reopen given the record in this proceeding, would forever invite repeated attack and delay upon the administrative process of

this Commission. A party's day in court, once had, does not continue forever.

Respectfully submitted,

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