UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



BEFORE THE COMMISSION

| | | |
|---|---|---|
| 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) | ) | |

---

NRC STAFF'S ANSWER TO JOINT
INTERVENORS' PETITION FOR REVIEW OF ALAB-775

---

Lawrence J. Chandler
Special Litigation Counsel

August 1, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION



| | | |
|---|---|---|
| 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) | ) | |

---

# NRC STAFF'S ANSWER TO JOINT INTERVENORS' PETITION FOR REVIEW OF ALAB-775

---

Lawrence J. Chandler
Special Litigation Counsel

August 1, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION



| | | |
|---|---|---|
| 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) | ) | |

NRC STAFF'S ANSWER TO JOINT
INTERVENORS' PETITION FOR REVIEW OF ALAB-775

## I. INTRODUCTION

On July 17, 1984, Joint Intervenors filed a Petition for Review of ALAB-775, pursuant to 10 C.F.R. § 2.786. In this Memorandum and Order, issued on June 28, 1984, the Atomic Safety and Licensing Appeal Board (Appeal Board) denied Joint Intervenors' Motion to Augment, or, in the Alternative, to Reopen the Record on the Issue of Design Quality Assurance, and their Motion to Reopen the Record on the Issues of Construction Quality Assurance and Licensee Character and Competence.

For reasons discussed below, the NRC staff (Staff) opposes the Petition and urges that it be denied.

## II. BACKGROUND

As relevant to the subject Petition, on February 14, 1984, Joint Intervenors filed a Motion to Augment, or, in the Alternative, to Reopen the Record on the Issue of Design Quality Assurance. This motion, as supplemented, was founded principally on affidavits of Mr. Charles Stokes and Mr. John Cooper,[1/] former project employees, and on statements made by

---

1/ Joint Intervenors appear, in their Petition, to abandon reliance on Mr. Cooper's assertions.

Mr. Isa Yin, an NRC Region III inspector assigned to review certain of the voluminous allegations concerning Diablo Canyon. See Petition, at 2, n.1 and at 7-8. Extensive replies were filed by both the Licensee and Staff. See ALAB-775, slip op. at 4, n. 9.[2/]

On February 22, 1984, Joint Intervenors filed a Motion to Reopen the Record on the Issues of Construction Quality Assurance and Licensee Character and Competence. This motion, as supplemented, was based on a number of affidavits executed by present and former employees (some anonymous). Again, extensive replies were filed by the Licensee and Staff.[3/]

Upon consideration of the foregoing motions and replies, the Appeal Board, on June 28, 1984, issued ALAB-775. Therein, the Appeal Board concluded that, in spite of the volume of Joint Intervenors' submittals, they had failed to satisfy the standards for reopening the record and thus denied each motion.

Joint Intervenor's Petition followed.

## 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, 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,

---

2/ In ALAB-763, the Appeal Board's decision on the reopened design quality assurance issues, the Appeal Board expressly retained jurisdiction over this motion. Slip opinion, March 20, 1984, at 102-103. Petitions for Review of ALAB-763 are currently pending before the Commission.

3/ Id. As noted by the Staff, the allegations on which this motion is based are essentially identical to those filed in support of Government Accountability Project petition filed pursuant to 10 C.F.R. § 2.206. See Staff's Answer at 2-3.

the matters asserted by Joint Intervenors in their Petition do not warrant the exercise of the Commission's discretion to grant the Petition, i.e., important questions of fact, law, or policy are not presented. 10 C.F.R. § 2.786(b)(1).

As in the past,[4/] the Joint Intervenors misconstrue both the applicable standard for reopening the record and the Appeal Board's disposition of the "evidence" submitted in support of their motions to reopen.

A. Standards for Reopening

Joint Intervenors contend that, based upon the Appeal Board's decision in Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523-525 (1973), the sole standard to be applied to a motion to reopen is whether the papers submitted are sufficient to withstand summary disposition. (Petition at 3-4). In so casting the standard, Joint Intervenors ignore the long-recognized factors relevant to a motion to reopen set forth in Vermont Yankee, supra, and its progeny. Those factors require consideration of (1) the timeliness of the motion, (2) the significance of the information on which the motion is based in terms of the safe operation of the facility, (Id.), as well as (3) the effect of such information on the outcome of the proceeding, that is, might consideration of the "evidence" affect the decision below. Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978). Only if the foregoing are resolved in the movant's

---

4/ See, Joint Intervenors' Petition for Review of ALAB-756 dated January 9, 1984, pending before the Commission.

favor does one then proceed to determine whether the "evidence" submitted in support of the motion is sufficient to overcome summary disposition, thereby presenting a triable issue. Vermont Yankee, supra, at 523.

Having concluded that Joint intervenors failed to meet the applicable threshold standards for reopening (Vermont Yankee; Wolf Creek), ALAB-775, slip op. at 8-10, it was not necessary, as Joint Intervenors imply (Petition at 3-7, 8-9), for the Appeal Board to give discrete consideration to each one:

> . . . while it is useful from an analytical standpoint to keep separate the factors to be considered on a motion to reopen, it will not always be possible, in passing upon the motion, to give them separate consideration. The questions of whether the matter sought to be raised is significant and whether it presents a triable issue may often be intertwined, and can be so treated . . .

Vermont Yankee, supra, at 524.

The Appeal Board's resolution of the motions to reopen from the standpoint of the law fully comports with the Commission's traditional standards and thus raises no important question of law warranting Commission review.

B. Disposition of the "Evidence"

Joint Intervenors complain that the Appeal Board's decision fails to address the voluminous "evidence" presended in the respective motions, instead stating merely a conclusion that Joint Intervenors failed to meet the standards for reopening. Petition at 4-7, 8-9.

In criticizing the Appeal Board for its allegedly summary treatment of the so-called "evidence," Joint Intervenors have chosen to ignore both the applicable caselaw and the extensive factual information filed by the Licensee and Staff in rebuttal. The Appeal Board succinctly stated the former as follows:

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 that

> 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 . . . .
>
> . . . 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 C.F.R. § 2.714(b) for admissible contentions. Such supporting 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 C.F.R. § 2.743(c) defining admissible evidence for adjudicatory proceedings. Specifically, the new evidence supporting the motion must be "relevant, material, and reliable." 18/

---

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

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

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 C.F.R. 2.743(c) is the motion 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 issue 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 of 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.

ALAB-775, slip op. 6-8.

With respect to the latter, the record developed before the Appeal Board in connection with the motions includes extensive responses submitted by both the Staff and PG&E, each supported by affidavits executed by appropriate expert individuals countering the allegations contained in the motions and supporting documents. In essence, these replies established that the allegations do not raise matters of significance in terms of the safe operation of the facility or otherwise demonstrate a breakdown of the quality assurance program sufficient to raise doubt as to the plant's ability to be safely operated. Nevertheless, as a matter of discretion, the Appeal Board gave Joint Intervenors still another chance to establish their position. In an Order issued on May 23, 1984, the Appeal Board provided Joint Intervenors an opportunity to respond to the answers to their motions to further identify what matters of material fact continue to exist and the significance to plant safety of such matters. See Order, May 23, 1984, unpublished, at 2, 4). Joint Intervenors, in their reply of June 12, 1984 chose not to substantively deal with these issues; Joint

Intervenors have not established that, either individually or collectively, the allegations submitted in support of their Motions present a significant issue in terms of the safe operation of the plant, Vermont Yankee, supra., that might affect the earlier decision, Wolf Creek, supra. (See ALAB-775, slip op. at 9, n. 19). To lay at the doorstep of the Appeal Board, the obligation to then individually address each of the myriad allegations, an undertaking the Joint Intervenors themselves were unwilling and/or unable to accomplish, flies in the face of credibility; simply put, it is the Joint Intervenors who have failed to sustain their burden, not the Appeal Board.

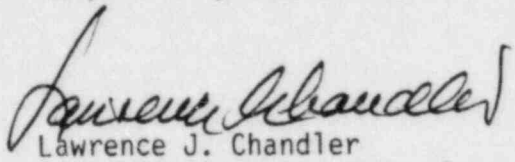
Similarly, Joint Intervenors' argument that the Appeal Board erred by failing to provide an explanation for its rejection of allegedly competent evidence (Petition at 6), is unfounded. Indeed, in its totality, ALAB-775 is clear in explaining the rejection of information - in some instances, it simply was not possible to determine whether the "evidence" was competent (see slip op. at 8, n.18), in other instances, irrespective of whether the "evidence" may be competent, because of the form of its presentation, it was not possible for the Appeal Board to do that which the Joint Intervenors, who had the burden, did not do, namely, establish the significance and affect of the "evidence" (see slip op. at 8-12, in particular footnotes 19, 20, 22). Thus, contrary to Joint Intervenors' complaint, the Appeal Board properly addressed the "evidence" submitted and articulated the basis for rejecting it, consistent with Commission regulations and caselaw.

In brief, Joint Intervenors have failed to present any important question of fact or policy raised by ALAB-775 warranting Commission review.

## IV. CONCLUSION

For the foregoing reasons, Joint Intervenors' Petition for Review of ALAB-775 fails to establish the existence of any important issue of fact, law or policy warranting Commission review and, therefore, should be denied.

Respectfully submitted,



Lawrence J. Chandler
Special Litigation Counsel

Dated at Bethesda, Maryland
this 1st day of August, 1984