

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY & LICENSING APPEAL BOARD

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NRC

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

Docket Nos. 50-274 O.L.
50-323 O.L.

OFFICE OF SECRETARY
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JOINT INTERVENORS' REPLY REGARDING
JURISDICTION OF THE APPEAL BOARD TO
CONSIDER MOTION TO REOPEN THE
RECORD ON SEISMIC ISSUES

Pursuant to the Appeal Board's August 1, 1984 Order, the Joint Intervenors' hereby reply regarding the jurisdiction of this Board to review their July 16, 1984 Motion to Reopen the Record on Seismic Issues. In their responses, PGandE and the NRC Staff contend that this Board is without jurisdiction to consider the motion in light of its prior decision in ALAB-644 and the Commission's subsequent refusal to review that decision. In so contending, the NRC Staff and PGandE rely on Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-530, 9 NRC 261, 262 (1979), Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-513, 8 NRC 694, 695 (1978), and Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2) ALAB-551, 9 NRC 704, 707-09 (1979).

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For several reasons, the Joint Intervenors disagree. First, while these authorities indicate that the jurisdiction of the Commission's hearing boards ceases after final agency action, no such finality exists under the circumstances of this case. In order for finality to attach to an agency decision, no appeal can be pending. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), (Seabrook Station, Units 1 and 2), ALAB-513, 8 NRC 694, 695 (1978). In the instant case, such an appeal is pending, filed by the Governor of California directly from the Commission's decision not to review ALAB-644. This appeal has not been dismissed and, accordingly, jurisdiction over seismic issues continues to rest with the Board.

Second, although the Joint Intervenors have not pursued the seismic issues directly in the context of the low power operating license appeal, such issues may be included in appeal of the Commission's imminent full power licensing decision. In the meantime -- and at the time the Motion to Reopen was filed -- the full power licensing proceeding has continued, both before this Board and the Commission. Until the full power license is issued, the proceeding is not final and, consequently, this Board's jurisdiction continues. See Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 NRC 704, 708 (1979) (once an appeal board has wholly terminated its review of an initial proceeding its jurisdiction comes to an end) (emphasis supplied); see also 10 C.F.R. § 2.717 ("[t]he presiding officer's jurisdiction in each proceeding will terminate upon the expiration of the period within which the Commission may direct that the record be certified to it for final decision . . .")

(emphasis supplied).

Third, even if finality were found to exist as to the seismic issues, the new information submitted by the Joint Intervenors bears such a close nexus to issues currently before this Board that the asserted jurisdictional bar is inapplicable. In Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), 9 NRC at 707, the Board found that "[w]here . . . finality has attached to some but not all issues, appeal board jurisdiction to entertain new matters is dependent upon the existence of a "reasonable nexus" between those matters and the issues remaining before the board." This Board is currently reviewing two issues directly related to seismic safety: (1) seismic impacts on emergency preparedness, and (2) special circumstances -- e.g., the presence of an active earthquake fault adjacent to the Diablo Canyon site -- justifying consideration of a Class Nine accident under NEPA. The resolution of either or both of these issues could be affected by the new evidence on seismic effects submitted by the Joint Intervenors in their recent Motion to Reopen. Thus, while these issues are pending, the required "reasonable nexus" exists and the Board has jurisdiction to consider the motion. Cf. In the Matter of Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), ALAB-766, CCH Nuclear Regulation Reports ¶ 30, 849 (April 2, 1984) (no nexus between issue of adequacy of emergency planning pamphlet and issues related to management capability); Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-513, 8 NRC 694 (1978) (no nexus between issues of

financial qualifications of applicants and siting).

Finally, this Board's familiarity with the issues is relevant to a determination of the jurisdictional issue. In Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-726, 17 NRC 755 (1983), the Appeal Board was confronted with the question of whether it had jurisdiction over a motion to reopen. In resolving this issue, the Board turned to principles of "common sense and the realities of litigation" to arrive at the result that it was the licensing board that should decide the issue. The Appeal Board found:

The significance of familiarity with the case in ruling on a motion to reopen cannot be overstated. For one thing, it means that the motion will likely be ruled upon more quickly. Further, one of the criteria determining the disposition of such motions is whether a different result might have been reached if the new materials had been considered previously. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 876, 879 (1980). Generally, the initial decisionmaker is in the best position to determine if that is the case.

In the instant case, the Appeal Board clearly has the greatest familiarity with the seismic issues, and, consequently, its assertion of jurisdiction is proper. Particularly in light of the importance of the new information to protection of the public health and safety, review by this Board is fully consistent with the NRC's obligation to reopen the record to consider significant new information. See e.g., Hudson River Fisherman's Association v. Federal Power Commission, 498 F.2d 827, 832-33 (2d Cir. 1974);

Brennan v. Occupational Safety and Health Review Commission, 492 F.2d 1027, 1031-32 (2d Cir. 1974); WMOZ, Inc. v. Federal Communications Commission, 120 U.S. App. D.C. 103, 344 F.2d 197 (1965); see also Michigan Consolidated Gas Co. v. Federal Power Commission, 283 F.2d 204, 226 (D.C.Cir.), cert. denied, 364 U.S. 913, 81 S.Ct. 276 (1960).


Accordingly, the Joint Intervenors respectfully submit that this Board has jurisdiction and that their Motion to Reopen should be granted.

Dated: August 9, 1984

Respectfully submitted,

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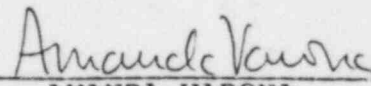
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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of August, 1984, I have served copies of the foregoing JOINT INTERVENORS' REPLY REGARDING JURISDICTION OF THE APPEAL BOARD TO CONSIDER MOTION TO REOPEN THE RECORD ON SEISMIC ISSUES, mailing them through the U.S. mails, first class, postage prepaid, to the attached list.



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