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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Thomas S. Moore, Chairman  
Dr. John H. Buck  
Dr. W. Reed Johnson

DOCKETED  
USNRC

84 SEP 6 1984  
SEP (ALAB 082)

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

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

SERVED SEP 7 1984

Docket Nos. 50-275 OL  
50-323 OL

Joel R. Reynolds, Ethan P. Schulman, Eric Havian and John R. Phillips, Los Angeles, California, and David S. Fleischaker, Oklahoma City, Oklahoma, for the San Luis Obispo Mothers for Peace, et al., joint intervenors.

Robert Ohlback, Philip A. Crane, Jr., Richard F. Locke and Dan G. Lubbock, San Francisco, California, and Arthur C. Gehr, Bruce Norton and Thomas A. Scarduzio, Jr., Phoenix, Arizona, for Pacific Gas and Electric Company, applicant.

Lawrence J. Chandler for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

Opinion for the Board by Dr. Buck and Dr. Johnson:

On July 16, 1984, the joint intervenors filed with us a motion to reopen the Diablo Canyon proceeding on seismic issues.<sup>1</sup> The motion, accompanied by the affidavit of Dr.

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<sup>1</sup> Joint Intervenors' Motion to Reopen the Record on Seismic Issues.

James N. Brune,<sup>2</sup> is founded upon seismological information characterized by intervenors as newly acquired and of such significance as to put into question the seismic design of the Diablo Canyon plant. In short, our attention is directed to data obtained from the April 24, 1984 Morgan Hill (California) earthquake, the results of a research paper by J.K. Crouch, S.B. Bachman and J.T. Shay (1984) related to the nature of the Hosgri Fault, and a series of recent earthquakes along the Central California coast, that assertedly cast doubt upon the seismicity previously assigned in NRC proceedings to the Diablo Canyon region.<sup>3</sup>

The applicant and NRC staff oppose the motion to reopen.<sup>4</sup> Both parties first question whether this Board has jurisdiction to entertain such a motion, arguing that our earlier decision on seismic design matters, ALAB-644, 13 NRC 903 (1981), which the Commission declined to review,

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<sup>2</sup> Dr. Brune is Professor of Geophysics, Scripps Institution of Oceanography, University of California at San Diego. He has appeared in these proceedings previously as a witness for the joint intervenors and for Governor Brown of California. See ALAB-644, 13 NRC 903, 1013 (1981).

<sup>3</sup> Joint Intervenors' Motion to Reopen the Record on Seismic Issues (July 16, 1984) at 3-17, Attachment V.

<sup>4</sup> Answer of Pacific Gas and Electric Company in Opposition to Joint Intervenors' Motion to Reopen the Record on Seismic Issues (July 27, 1984); NRC Staff's Answer to Joint Intervenors' Motion to Reopen the Record on Seismic Issues (August 1, 1984).

represents final agency action on the subject. Alternatively, these parties treat the joint intervenors' motion on its merits and again conclude it should be denied. Because the joint intervenors had not addressed the jurisdiction question, we asked for their views on this matter. In an August 9, 1984 reply, joint intervenors take the position, inter alia, that agency action on this issue is not final, and that this Board does have jurisdiction to decide their motion.

As we discuss below, review of the parties' arguments, the procedural history of this case and our earlier decisions convinces us that we do not have jurisdiction to consider the intervenors' motion to reopen the record on seismic issues. The motion is therefore dismissed. This does not mean, however, that joint intervenors are without an avenue to pursue their concerns on the seismic design issue within this agency. Under the terms of 10 CFR 2.206, they may request the Director of Nuclear Reactor Regulation to institute a show-cause proceeding seeking to amend or revoke the Diablo Canyon operating license.<sup>5</sup>

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<sup>5</sup> We note that, at the request of the joint intervenors, the United States Court of Appeals for the District of Columbia Circuit, on August 17, 1984, stayed the Commission's August 10, 1984 order authorizing issuance of a full power license for Diablo Canyon. The stay will remain in effect pending court review. San Luis Obispo Mothers for Peace v. NRC, No. 84-1410 (D.C. Cir. Aug. 17, 1984).

Following hearings on the seismic redesign of Diablo Canyon to account for the earthquake potential of the Hosgri Fault, the Licensing Board found the plant to be adequately designed to withstand any earthquake that could reasonably be expected. I.BP-79-26, 10 NRC 453 (1979). While joint intervenors' appeal of that decision was before us, we granted their motion to reopen the record to receive evidence derived from the 1979 Imperial Valley Earthquake. Following a six-day hearing to consider this evidence, we issued a decision, ALAB-644, that covered matters raised both on the appeal of the Licensing Board's decision and in the reopened hearing. We found that the seismic design of the facility was adequate and affirmed the Licening Board's decision.<sup>6</sup> The Commission declined to review ALAB-644, rendering it final on March 18, 1982.<sup>7</sup>

Our earlier decisions make it abundantly clear that when a discrete issue has been decided by an appeal board and the Commission declines to review that decision, agency action is final with respect to the issue and our jurisdiction is terminated. This is the case even when other issues may still be before us. Our most recent

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<sup>6</sup> ALAB-644, supra, 13 NRC at 990.

<sup>7</sup> See letters from S.J. Chilk, NRC, to parties, dated March 18, 1982.

determination of this jurisdictional question appeared earlier this year:

Under settled principles of finality of adjudicatory action, once we have finally determined discrete issues in a proceeding, our jurisdiction is terminated with respect to those issues, absent a remand order by the Commission or a court issued during the course of its review of our decision. Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 NRC 704, 708-09 (1979); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-513, 8 NRC 694, 695 (1978). . . . It is clear that where, as here, the Commission declines to review our decision, a final agency determination has been made resulting in the termination of our jurisdiction.

To be sure, [unrelated] issues . . . are still before us. That we may yet be considering some issues in a proceeding, however, does not preserve our jurisdiction over issues previously determined.

Intervenors point out that we still have before us on appeal matters related to earthquakes. They argue that because there is a sufficient relationship (i.e., a reasonable nexus) between these issues and those forming the

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<sup>8</sup> Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-766, 19 NRC 981, 983 (1984) (footnotes omitted). The joint intervenors rely on the cited Seabrook decision, ALAB-513, for the proposition that if an issue has not as yet received court review, there has been no final agency action with respect to it. But it is clear that the reference to court review in Seabrook (8 NRC at 695) was to provide the reader with information as to the ultimate resolution of the question there. Seabrook should not be read to suggest that court review constitutes an element of agency action on an issue. See also Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1329-30 (1983).

basis of the instant motion to reopen, we do indeed still have jurisdiction to consider the motion.<sup>9</sup> We do not agree. The issues before us in the full power appeal are not related to the seismic design of the facility and are independent of the nature of a particular earthquake.<sup>10</sup> The motion, on the other hand, would have us explore again the detailed nature of the seismic design bases for the plant, and involves totally different considerations than the questions on appeal. It is clear that, with our decision on seismic design issues in ALAB-644 and the Commission's determination not to review that decision, the adjudication of that matter is final and we no longer have jurisdiction.

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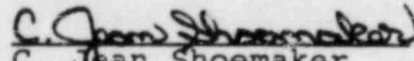
<sup>9</sup> See Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 NRC 704, 707 (1979) (where finality has attached to some but not all issues, appeal board jurisdiction to entertain new matters is dependent upon the existence of a "reasonable nexus" between those matters and the issues remaining before the board).

<sup>10</sup> In ALAB-781, 20 NRC \_\_\_\_, we have today decided exceptions raised by the joint intervenors and Governor Brown to the Licensing Board's final initial decision authorizing full power operation of Diablo Canyon (LBP-82-70, 16 NRC 756 (1982)). Two matters considered in those appeals pertain peripherally to the effects of earthquakes: the Board's failure to consider (1) earthquakes in emergency planning, and (2) the special circumstances of earthquake potential at Diablo Canyon as a basis for analyzing the environmental effects of Class 9 accidents. Clearly we considered these issues to be still before us in our analysis of the jurisdiction question.

The motion to reopen the record on seismic issues is dismissed.

It is so ORDERED.

FOR THE APPEAL BOARD

  
C. Jean Shoemaker  
Secretary to the  
Appeal Board

Because Dr. Buck's full retirement from the Appeal Panel becomes effective September 7, 1984, the majority opinion is being issued today without the separate opinion of Mr. Moore. That opinion will issue subsequently.