

933

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

DOCKETED

74 SEP 19 11:40

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.

JOINT INTERVENORS'
PETITION FOR REVIEW
OF ALAB-782

Pursuant to 10 C.F.R. § 2.786, the SAN LUIS OBISPO MOTHERS FOR PEACE SCENIC SHORELINE PRESERVATION CONFERENCE, INC., ECOLOGY ACTION CLUB, SANDRA SILVER, GORDON SILVER, ELIZABETH APFELBERG, and JOHN FORSTER ("Joint Intervenors") hereby petition the Commission to review ALAB-782, issued by the Atomic Safety and Licensing Appeal Board ("Appeal Board") in the above-entitled proceeding on September 6, 1984. In that decision (attached as an exhibit hereto), the Appeal Board^{1/} dismissed for lack of jurisdiction the Joint Intervenors' Motion to Reopen the Record on Seismic Issues (July 16, 1984) to consider significant new information that directly contradicts the Appeal Board's decision in ALAB-644 approving the seismic design basis for the Diablo Canyon Nuclear Power Plant ("Diablo Canyon").

^{1/} ALAB-782 was issued by only two members of the panel. A separate opinion by the Board's chairman has not yet been issued.

DS03

The Appeal Board's decision in ALAB-782 is erroneous. In order to remedy the Board's error -- as outlined below -- the Joint Intervenors request the Commission to (1) grant review of ALAB-782 and (2) reverse the Appeal Board's decision set forth therein.^{2/}

I. COMMISSION REVIEW SHOULD BE EXERCISED

No issue is more fundamental in this proceeding and to confidence in the Diablo Canyon facility than seismic safety. No decision has been more vigorously contested than ALAB-644, which the Commission -- after 13 extensions of the review period -- declined to review by a vote of 2-2-1 in March 1982.

On July 16, 1984, the Joint Intervenors filed a motion to reopen based on a comprehensive expert affidavit and numerous recent seismic and geologic studies and data directly contradicting several critical findings underlying the Appeal Board's decision in ALAB-644. For example, recent studies indicate that both the nature of the Hosgri Fault and its location threaten significantly greater forces at the plant in the event of a major earthquake. Further, data from recent earthquakes indicate that the forces generated by earthquakes significantly smaller than the SSE for Diablo Canyon equal or exceed the maximum forces postulated for the SSE at Diablo Canyon. Finally, recent analyses by the USGS establish that, contrary to the Appeal Board's

^{2/} All matters of fact and law discussed herein were previously raised. See, e.g., Joint Intervenors' Motion to Reopen the Record on Seismic Issues (July 16, 1984); Joint Intervenors' Reply Regarding Jurisdiction of the Appeal Board to Consider Motion to Reopen the Record on Seismic Issues (August 9, 1984).

conclusion, Diablo Canyon is located in an area characterized by frequent earthquakes of M 5.0 on the Richter Scale or greater.

In ALAB-782, the Board considered none of this critical safety information. Instead, it disavowed jurisdiction and suggested that a 10 C.F.R. § 2.206 petition to the NRC Staff -- a party that has always dismissed the Joint Intervenors' seismic safety concerns and that is in part responsible for the plant's misrouting adjacent to the Hosgri Fault -- is an adequate avenue for review. The Joint Intervenors submit that the Appeal Board's decision is erroneous with regard to an important matter of law and hence that Commission review is essential in order to ensure that significant new safety information is not ignored.

II. THE APPEAL BOARD'S DECISION IS ERRONEOUS

In ALAB-782, the Appeal Board concluded that it is without jurisdiction to consider seismic issues because, in essence, ALAB-644 became final agency action when the Commission denied review in March 1982. Further, the Board concluded that no issues still before the Board have a sufficient nexus to the seismic issues to provide an independent basis for jurisdiction.

For several reasons, the Joint Intervenors disagree. First, while the authorities relied upon by the Board 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, 3 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, at the time the Motion to Reopen was filed, the full power licensing proceeding was still in progress, both before the Appeal Board and the Commission. Consequently, the Board's jurisdiction continued over all matters relevant to a full power licensing decision, including seismic safety. 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). Hence, it could not properly refuse to consider the merits of the Joint Intervenors' application.

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 still before the 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." In this proceeding, the Board was then 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 obviously be affected by the new evidence on seismic safety submitted by the Joint Intervenors in their recent Motion to Reopen. Thus, because those issues were still 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, the Appeal 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 the Appeal 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 submit that the Appeal Board has jurisdiction and that their Motion to Reopen should have been granted. Consequently, the Board's dismissal of the Joint Intervenors' motion should be reversed.

III. CONCLUSION

For the reasons stated herein, the Joint Intervenors request that this Petition for Review be granted and ALAB-782 be reversed.

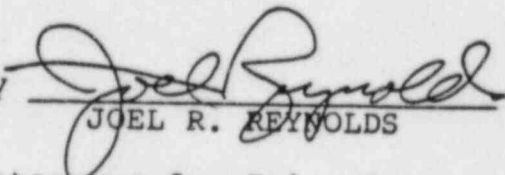
Dated: September 17, 1984

Respectfully submitted,

JOEL R. REYNOLDS, ESQ.
ETHAN P. SCHULMAN, ESQ.
ERIC HAVIAN, ESQ.
JOHN R. PHILLIPS, ESQ.
Center for Law in the
Public Interest
10951 W. Pico Boulevard
Los Angeles, CA 90064
(213)470-3000

DAVID S. FLEISCHAKER, ESQ.
P. O. Box 1178
Oklahoma City, OK 73101

By


JOEL R. REYNOLDS

Attorneys for Joint Intervenors

IN LUIS OBISPO MOTHERS FOR
PEACE
SCENIC SHORELINE PRESERVATION
CONFERENCE, INC.
ECOLOGY ACTION CLUB
SANDRA SILVER
GORDON SILVER
ELIZABETH APFELBERG
JOHN J. FORSTER

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

September 6, 1984

(ALAB-982) SEP -7 AIO:22

In the Matter of)

PACIFIC GAS AND ELECTRIC COMPANY)

(Diablo Canyon Nuclear Power)
Plant, Units 1 and 2))

OFFICE OF SECRETARY
DOCKETING SERVICE
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.¹ The motion, accompanied by the affidavit of Dr.

¹ Joint Intervenors' Motion to Reopen the Record on Seismic Issues.

~~8409070420~~

James N. Brune,² 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.³

The applicant and NRC staff oppose the motion to reopen.⁴ 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,

² 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).

³ Joint Intervenor's Motion to Reopen the Record on Seismic Issues (July 16, 1984) at 3-17, Attachment V.

⁴ Answer of Pacific Gas and Electric Company in Opposition to Joint Intervenor's Motion to Reopen the Record on Seismic Issues (July 27, 1984); NRC Staff's Answer to Joint Intervenor's 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.⁵

⁵ 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. LBP-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.⁶ The Commission declined to review ALAB-644, rendering it final on March 18, 1982.⁷

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

⁶ ALAB-644, supra, 13 NRC at 996.

⁷ 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

⁸ 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.⁹ 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.¹⁰ 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.


⁹ 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).

¹⁰ 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.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

RECEIVED
SEP 19 AM 11:40

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.

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of September, 1984, I have served copies of the foregoing JOINT INTERVENORS' PETITION FOR REVIEW OF ALAB-782, mailing them through the U.S. mails, first class, postage prepaid, to the attached list.

Christina Concepcion
CHRISTINA CONCEPCION

SERVICE LIST

Nunzio Palladino, Chairman
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Lando W. Zech, Jr., Commissioner
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Thomas Roberts, Commissioner
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Thomas S. Moore, Chairman
Atomic Safety & Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Dr. John H. Buck
Atomic Safety & Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Lawrence Chandler, Esq.
Office of the Executive Legal Director - BETH 042
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

David S. Fleischaker, Esq.
Post Office Box 1178
Oklahoma City, OK 73101

Bruce Norton, Esq.
Norton, Burke, Berry & French
P.O. Box 10569
Phoenix, AZ 85016

Malcolm H. Furbush, Esq.
Vice President & General Counsel
Philip A. Crane, Esq.
Pacific Gas and Electric Company
Post Office Box 7442
San Francisco, CA 94120

James Asselstine, Commissioner
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Frederick Bernthal, Commissioner
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Samuel J. Chilk, Secretary
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Dr. W. Reed Johnson
Atomic Safety & Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Docket and Service Branch
Office of the Secretary
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

John Van de Kamp, Attorney General
Andrea Sheridan Ordin, Chief Attorney General
Michael J. Strumwasser,
Special Counsel to the Attorney General
Office of the Attorney General
State of California
3580 Wilshire Boulevard, Suite 800
Los Angeles, CA 90010

Richard B. Hubbard
MHB Technical Associates
1723 Hamilton Avenue
Suite K
San Jose, CA 95125

Virginia and Gordon Bruno
Pecho Ranch
Post Office Box 6289
Los Osos, CA 93402

Sandra and Gordon Silver
1760 Alisal Street
San Luis Obispo, CA 93401

Carl Neiburger
Telegram Tribune
Post Office Box 112
San Luis Obispo, CA 93402

Tom Devine
Government Accountability Project
1901 Que Street, N.W.
Washington, D.C. 20009

Eric Havian, Esq.
Heller, Ehrman, White & McAuliffe
44 Montgomery Street., 31st Floor
San Francisco, CA 94133