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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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 RESPONSE TO APPEAL BOARD'S ORDER OF SEPTEMBER 10, 1984

Lawrence J. Chandler
Special Litigation Counsel

September 28, 1984

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I. BACKGROUND

In its decision in ALAB-763, 19 NRC 571 (1984), this Atomic Safety and Licensing Appeal Board expressly refrained from ruling upon any of the pending issues relating to the verification of Unit 2 design. Specifically, the Appeal Board stated that:

> Although the applicant presented evidence to establish that it verified the design of both Diablo Canyon Units 1 and 2, we make no findings with respect to Unit 2. The two units are nearly identical from a design standpoint, but the applicant's verification efforts for Unit 2 differ from those for Unit 1. Significantly, the IDVP had no direct involvement in the Unit 2 verification program. Rather, the applicant has established an internal review organization for Unit 2 to evaluate deficiencies identified for Unit 1 and, if appropriate, to correct these deficiencies as they appear in Unit 2. The Unit 2 verification is still ongoing and has not been finally reviewed by the staff. Nor has the staff issued a safety evaluation report supplement on the Unit 2 verification. In the circumstances, we believe it is most appropriate to sever the question of the Unit 2 design verification from the proceeding and decide at this time only the issues related to Unit 1. 19 NRC at 582.

By Order dated September 10, 1984, the Appeal Board ordered that the parties provide their views on how it should now proceed with respect to Diablo Canyon Unit 2. In particular, the Appeal Board directed the parties (1) to address whether further hearings are necessary, and if so,

(2) to identify which of the issues previously decided cannot be resolved with respect to Unit 2 on the basis of the existing record, explain why the evidence of record is insufficient and to propose a hearing schedule. In addition, the Staff was asked to advise the Appeal Board of the schedule for issuance of an SER supplement on Unit 2 design verification. Order at 1-2.

II. DISCUSSION

Prior to the issuance of ALAB-763, it appears to have been the undisputed understanding of the parties that the issues admitted by the Appeal Board[1/] in connection with the reopened hearing on design verification included consideration of Diablo Canyon Unit 2, at least in part. Accordingly, to the extent that the parties offered evidence in support of their respective views, explicit presentations were made addressing those issues having implications for Unit 2. This is true, in particular, for issues 1(e), 2(d) and 5 which are the only admitted issues which expressly referenced Unit 2. The remaining issues are silent as to their applicability to one or both of the Units. Presumably, to the extent that any party wished to pursue examination on concerns in relation to one or the other Unit in particular as opposed to a general examination on the issue, it would have done so; our review of the record discloses that the parties indeed conducted such examination in a number of instances and that their efforts to do so were not inhibited by any ruling of this

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1/ See ALAB-763, Appendix A, 19 NRC at 621-625.

Board. It is thus fair to assume that upon completion of the hearing, all parties had probed their concerns as might relate to Unit 2 in particular, to the full extent they deemed necessary. In fact, the proposed findings of fact and conclusions of law filed by the parties addressed Unit 2, presumably, again, to the extent believed warranted.

In regard to issue 1(e), it is already a matter of record that the IDVP was established to address concerns in the context of Unit 1 and had no direct role in verification efforts regarding Unit 2.[2/] This issue, therefore, is irrelevant in regard to any findings which may be necessary with respect to Unit 2 and can be resolved on the basis of the existing record with no need for a further hearing. The verification activities being conducted under PG&E's ITP and related efforts as well as the rationale for undertaking a different approach to Unit 2 verification raised by issue 2(d), are a matter of record[3/] as well and, therefore, this issue, too, can be resolved without a further hearing. But, significantly, both the Governor and Joint Intervenors have waived this issue by failing to file proposed findings of fact on it. ALAB-763, 19 NRC at 577 and n. 19. Consequently, the Appeal Board need not, in this circumstance, make any findings on this issue. Similarly, evidence regarding the procedures in place for verifying the "as-built" design of Diablo Canyon, issue 5, is

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2/ See Testimony of Pacific Gas and Electric Company [PG&E] Panel No. 1 Addressing Contentions 1, 2 and 5 at 28-32, ff. Tr. D-224; also, Tr. D-384-388, D-393-394; NRC Staff Testimony of James P. Knight, Hartmut E. Schierling and Jared S. Wermiel on Governor Deukmejian's and Joint Intervenors' Contentions 1a, 1b, 1c, 1d and 1e at 24-25, ff. TR. D-2649; see also Tr. D-2770-2777.

3/ Testimony of PG&E Panel No. 1, supra, n.2 and NRC Staff Testimony . . . on . . . Contentions 2a, 2b, 2c and 2d at 8-9, ff. Tr. D-2649.

a part of the record[4/] and any necessary findings on the adequacy of the procedures can be drawn therefrom. Indeed, the Staff, in its Proposed Findings of Fact and Conclusions of Law, filed on January 4, 1984, has already proposed appropriate findings on each of the foregoing, amply supported by the record. See "Proposed Findings of Fact and Conclusions of Law of the NRC Staff," at 23-26, 52-55.

At most, then, what remains with respect to the foregoing issues is a confirmation that PG&E's program in fact has been adequately implemented so as to verify the design of Unit 2. While the then-ongoing nature of PG&E's Unit 2 verification efforts and resultant lack of staff review thereof appear to have prompted the Appeal Board's action regarding Unit 2, the remaining confirmation is appropriately left to the Staff in the discharge of its regulatory functions.

> As a general proposition, issues should be dealt with in the hearings and not left over for later (and possibly more informal) resolution. See this Commission's decision Wisconsin Electric Power Co. (Point Beach Unit 2), RAI-73-1, p.6. In some instances, however, this unresolved matter is such that Boards are nevertheless able to make the findings requisite to issuance of the license.8/ But the mechanism of post-hearing resolution must not be employed to obviate the basic findings prerequisite to an operating license - including a reasonable assurance that the facility can be operated without endangering the health and safety of the public. 10 C.F.R. 50.57. In short, the "post-hearing" approach should be employed sparingly and only in clear cases. In doubtful cases, the matter should be resolved in an adversary framework prior to issuance of licenses... Consolidated Edison Company of New York, Inc. (Indian Point Station, Unit No. 2), CLI-74-23, 7 AEC 947, 951-952 (1974; footnote omitted).

4/ Testimony of PG&E Panel No. 1, supra, n.2 and NRC Staff Testimony of Philip J. Morrill on . . . Contentions 5 and 8 at 2-4, ff. Tr. D-2906 (to the extent that PG&E's testimony establishes the commonality of the "as-builting" procedures for both Units and the Staff's inspection efforts covered both Units.

The instant proceeding is clearly one in which application of the "post-hearing" approach," leaving verification of implementation to the Staff, is justified. The "basic findings prequisite to an operating license" can readily be made by the Appeal Board based on the evidence of record establishing the fundamental adequacy of the Unit 2 verification program which has already been tested by the adjudicatory process in the reopened hearing. Left to discharge by the Staff is simply the confirmation that that program has verified compliance with the facility's established licensing criteria which similarly have been tested (or were not challenged) in earlier hearings. Such objective efforts, conducted against pre-established criteria, "falls squarely within the NRC staff's technical expertise," c.f., Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1451 (D.C. Cir. 1984),[5/] and is thus properly viewed as a determination based on inspection and/or testing which is outside the hearing mandate of Section 189(a) of the Atomic Energy Act, 42 U.S.C. § 2239(a).[6/]

5/ Holding that, unlike objective determinations to be made in accordance with preestablished criteria on matters within the Commission's expertise, evaluation of emergency planning exercises is a material issue involving external expertise and input which cannot be excluded from the formal hearing process.

6/ Unlike the situation in Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), ALAB-770, 19 NRC ___, (May 7, 1984) no "cloud" has ever been shown to overhang the adequacy of design QA at Unit 2 so as to render improper the Staff's independent discharge of this task outside the hearing arena. See, slip op. at 21-22.

Additionally, the Appeal Board reminded the parties, in its Order of September 10, 1984 of

> the principle that in NRC licensing proceedings it is often permissible to litigate "applicant's present plans for future regulatory compliance." ALAB-653, attached to CLI-82-19, 16 NRC 53 (1982). Our determination, therefore, need not necessarily await completion of every facet of the verification program. See Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 380 n.57 (1983). C.f., Union of Concerned Scientists v. United States Nuclear Regulatory Commission, 735 F.2d 1437 (D.C. Cir. 1984).

Order at 2, n.2.[7/] Thus, no hearing on these confirmatory efforts is required and the Appeal Board need not await the completion of the Staff's inspections or the issuance of a supplement to the SER before resolving these issues.

Of the remaining issues, only the following continued to be in controversy following the hearing: 3(f)(iii), (iv), (v), (o), (q), (r); 4(i)(1), (l), (t); 6; 7; 8; and 9. ALAB-763, 19 NRC 577, n.21. As noted previously, with respect to each of these issues, all parties have already had a full opportunity to pursue their concerns in regard to Unit 2 including ample opportunity for discovery, presentation of direct testimony and the conduct of cross-examination, and the filing of findings of fact and conclusions of law, to the extent these matters are required to be resolved through the formal adjudicatory process. No party should now be heard to request yet a further hearing on these matters.

7/ Indeed, in recognition of this principle, the Staff, in its proposed findings of fact and conclusions of law proposed just such a determination. See, "Proposed Findings of Fact and Conclusion of Law of the NRC Staff," January 4, 1984, at 68-69.

In view of the foregoing, the Staff does not believe that there is a need for any further hearing in connection with Unit 2. The outstanding confirmation that Unit 2 design verification efforts have in fact been adequately accomplished can be left for Staff inspection in the normal course of events.

With respect to issuance of an SER supplement addressing, among other things, confirmation of the Unit 2 design verification effort, the Staff currently anticipates its publication sometime in December 1984. This date is based on the state of Unit 2 readiness and its availability for the necessary staff inspections. This schedule should not, for the reasons discussed above, detain the Appeal Board from now resolving any remaining issues regarding Unit 2.

Respectfully submitted,

Lawrence J. Chandler
Special Litigation Counsel

Dated at Bethesda, Maryland
this 28th day of September, 1984

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO APPEAL BOARD'S ORDER OF SEPTEMBER 10, 1984" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, or as indicated by a double asterisk by use of express mail service, this 28th day of September, 1984:

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