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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
PACIFIC GAS AND ELECTRIC COMPANY	)	Docket Nos. 50-275 50-323
(Diablo Canyon Nuclear Power Plant, Units 1 and 2)	)	

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ANSWER OF
PACIFIC GAS AND ELECTRIC COMPANY
TO PETITION FOR REVIEW
OF ALAB-782

I

INTRODUCTION

On September 27, 1979, the Atomic Safety and Licensing Board ("Licensing Board") issued its Partial Initial Decision finding that the Diablo Canyon Nuclear Power Plant is adequately designed to withstand any earthquake that can reasonably be expected. In the matter of Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant Units 1 and 2) LBP-79-26, 10 NRC 453 (1979). On October 15, 1979, a large earthquake struck California's

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Imperial Valley located some 250 miles southeast of the Diablo Canyon site. The joint intervenors 1/ had already appealed LBP-79-26 to the Atomic Safety and Licensing Appeal Board ("Appeal Board") when the data from the Imperial Valley 1979 earthquake became available in early 1980.

After the appeal had been briefed but before it was decided, the joint intervenors moved the Appeal Board to reopen the record to take new evidence relating to the Imperial Valley earthquake. The Appeal Board granted joint intervenors' request and reopened the record to receive the new evidence. The reopened hearing was held in San Luis Obispo, California, beginning October 26, 1980, and consumed six trial days. After hearing the new evidence, the Appeal Board denied the exceptions to the Licensing Board's partial initial decision and, inter alia, affirmed the Licensing Board's partial initial decision with respect to the issue of the seismic potential of the Diablo Canyon site. In the matter of Pacific Gas and Electric Company (Diablo Canyon, Units 1 and 2, ALAB-644, 13 NRC 903 (1981).

On March 18, 1982, the Nuclear Regulatory Commission ("Commission") declined to review ALAB-644, thereby constituting final agency action.

1/ Joint intervenors are the San Luis Obispo Mothers for Peace; the Scenic Shoreline Preservation Conference; the Ecology Action Club; Sandra A. Silver; Gordon Silver; John J. Forster and Elizabeth Apfelberg.

On May 17, 1982, a Petition for Review to the Court of Appeals of ALAB-644 was filed by the Governor entitled Edmund G. Brown, Jr., Governor of the State of California v. Nuclear Regulatory Commission and the United States of America, No. 82-1549. The joint intervenors did not join in the Petition for Review filed by the Governor.

On July 14, 1984, with No. 82-1549 pending before the D.C. Court of Appeals, joint intervenors filed yet another motion to reopen with the Appeal Board on the question of the seismic potential of the Diablo Canyon site. On September 7, 1984, the Appeal Board dismissed the motion to reopen on the grounds that the Appeal Board lacked jurisdiction to entertain the merits of the motion. (ALAB-782) On September 17, 1984, the joint intervenors filed the instant Petition for Review of ALAB-782.

II

ARGUMENT

1. The Commission's Decision Not to Review ALAB-644 Constitutes Final Agency Action.

The joint intervenors argue that although the jurisdiction of the Commission's hearing boards ceases after final agency action, since the appeal of ALAB-644 is pending before the Court of Appeals, the Commission's actions are not final. This position is incorrect.

The joint intervenors rely upon Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2),

ALAB-513, 8 NRC 694, 695 (1978) to support their position that a pending appeal precludes finality from attaching. Although the language in ALAB-513 seems to support this conclusion this language has been qualified by the Appeal Board.

In Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-766, 19 NRC 981, 983 (1984), the Appeal Board held:

> "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 determiniation 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." (footnotes omitted)

See also; Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1329-30 (1983); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2) ALAB-530, 9 NRC 261, 262 (1979).

As noted by the Appeal Board in its decision below, the Seabrook decision cannot be read to suggest that court review constitutes an element of agency action on an issue. Slip opinion, at 5, fn. 8. The reason for this is quite simple; appellate court review is not available until a final order of an agency has issued. See 28 U.S.C. § 2342(4); 42 U.S.C. § 2230(b). As pointed out by the court of appeals in Resources Defense Council, Inc. v. Nuclear Regulatory Commission, 680 F.2d 810, 815 (D.C. Cir. 1982):

> "Our jurisdiction to review the NRC actions, however, is limited. Section 189(b) of the Atomic Energy Act of 1954, 42 U.S.C. § 2239(b) (1976), provides only for judicial review of "(a)ny final order" entered by the NRC in any proceeding "for the granting, suspending, revoking, or amending of any license . . . ." Id. § 2239(a). Under the corresponding jurisdictional provision, 28 U.S.C. § 2342(4) (1976), the court of appeals has exclusive jurisdiction to review "all final orders of the Atomic Energy Commission (now the Nuclear Regulatory Commission) made reviewable by section 2239 of title 42 . . . ." Consequently, even if the parties agree that the issues raised are properly before the court, these review provisions mandate a jurisdictional inquiry into the finality of the agency actions being challenged. Citizens for a Safe Environment v. Atomic Energy Commission, 489 F.2d 1018, 1020 (3d. Cir. 1974) (fn. omitted).

Particularly, in cases arising from actions of this Commission where partial initial decisions are routinely issued, any rule that would consider appellate review by a court as agency action would preclude any appellate review

of a Commission order until the entire licensing proceeding is completed. Such a rule is not contemplated by the Commission's licensing process.

2. The Pendency of the Full Power Proceeding Does Not Provide a Jurisdictional Basis to Consider the Motion to Reopen.

In an effort to cloud the issues before this Commission, the joint intervenors have attempted to create an additional basis for finding jurisdiction. Relying on In the Matter of Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2) ALAB-551, 9 NRC 704 (1979), joint intervenors argue that an Appeal Board must wholly terminate its review of an initial proceeding for its jurisdiction to come to an end. Their reliance is misplaced. Rather than supporting the joint intervenors position, ALAB-551 clearly holds that finality can attach to some but not all of the issues in a licensing proceeding and thereby deprive an Appeal Board of jurisdiction to consider the issues to which finality has attached. In fact, where finality has attached to some, but not all issues, jurisdiction of an appeal board to entertain new matters is dependent upon a reasonable nexus between those new matters and the matters pending before the Board. Therefore, the fact that some matters are still pending before an Appeal Board is not determinative of the Board's jurisdiction to entertain new mat[illegible].

3. The Appeal Board Correctly Concluded that No Reasonable Nexus Exists Between the Issues Remaining Before the Board and Those Raised By the Motion to Reopen.

The joint intervenors are correct 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." However, joint intervenors are incorrect in applying the rule to the facts of this case.

The issues raised by the motion to reopen are specifically related to the seismic design of the facility and the nature of a particular earthquake. The issues remaining before the Appeal Board at the time of filing the motion to reopen related to a consideration of earthquakes in emergency planning and the question of special circumstances of earthquake potential at Diablo Canyon as a basis for analyzing the environmental effects of Class 9 accidents. Although each is related to earthquakes, neither address nor deal with the seismic design of the facility or the nature of a potential Hosgri earthquake.

Nor have the joint intervenors made a showing as to the existence of a reasonable nexus. In fact, the only showing made by the Intervenors is that the term "earthquake" is used in each issue. Clearly no reasonble nexus has been established to permit the Appeal Board to accept jurisdiction of the new issues.

4. Familiarity with the Issues Does Not Provide a Basis for Jurisdiction in this Case.

The final argument put forth by the joint intervenors is based on the notion that familiarity with the issues can somehow support a finding of jurisdiction. In support of this position they cite a footnote from Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-726, 17 NRC 755 (1983). In ALAB-726, the board was faced with the novel question of which adjudicatory body had jurisdiction to rule on a motion to reopen filed at the same time as or after the issuance of an initial decision but before an appeal had been taken. 17 NRC at 757. The Appeal Board held that jurisdiction still resided with the Licensing Board. As stated by the Appeal Board:

> Given the absence of any clear administrative guidance on the matter, common sense and the realities of litigation dictate this result. As Judge Cole correctly points out in his dissenting statement, until exceptions are filed, the Licensing Board, by virtue of its extensive involvement with the case, is obviously better suited to rule in the first instance on the merits of a motion to reopen a record that provides the factual predicate for its own initial decision. But more importantly, until exceptions are filed, there is literally no appeal to invoke our jurisdiction (see generally 10 CFR §§ 2.762(a), 2.785) and, necessarily, we have no familiarity with the case. (In this sense, an appeal board is in the same posture as a court of appeals during the time between issuance of a trial court judgment or final agency order and the filing of the appeal or

> petition for review.) The Licensing Board correctly points out that NRC appeal boards have broader powers than most appellate bodies: we review initial decisions sua sponte (see note 5, supra), and in exceptional circumstances we can take evidence and make our own factual determinations. But neither of these powers enhances our knowledge of a proceeding before it reaches our docket or operates to give us jurisdiction over an initial decision immediately upon its issuance. 17 NRC at 758. (Emphasis added.)

Although the concept of familiarity was discussed by the Appeal Board, it is abundantly clear that the basis for finding jurisdiction was that an appeal had not been filed and not that the Licensing Board was more familiar with the issue. Thus, this holding lends little support to joint intervenors' attempt at creating jurisdiction where none exists.

III

CONCLUSION

Since the petition does not raise, collectively or individually, any matters sufficient to grant review under the Commission's regulations, it must be denied.

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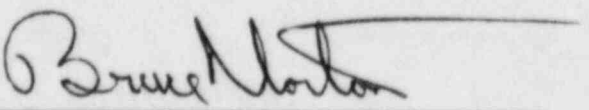
By 
Bruce Norton

DATED: October 2, 1984.

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	)	

CERTIFICATE OF SERVICE

The foregoing document(s) of Pacific Gas and Electric Company has (have) been served today on the following by deposit in the United States mail, properly stamped and addressed:

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