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UNITED STATES OF AMERICA '84 OCT -4 A10:46

NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

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

Docket Nos. 50-275  
50-323

/ol

ANSWER OF  
PACIFIC GAS AND ELECTRIC COMPANY  
TO PETITION FOR REVIEW  
OF ALAB-781

I

INTRODUCTION

On September 17, 1984, the Joint Intervenors filed, pursuant to 10 CFR 2.786, a petition for review of ALAB-781, \_\_\_ NRC \_\_\_ (September 6, 1984). In that decision, the Atomic Safety and Licensing Appeal Board ("Appeal Board") affirmed the decision of the Atomic Safety Licensing Board ("Licensing Board") authorizing issuance of a full power license for the Diablo Canyon Nuclear Power Plant, Unit 1.

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For the reasons set forth below, Pacific Gas and Electric Company ("PGandE") respectfully submits the petition for review should be denied.

## II

### BACKGROUND

In January 1982, the Licensing Board held hearings on PGandE's application for a full power operating license for Diablo Canyon Nuclear Power Plant, Units 1 and 2. The issues litigated in that proceeding concerned: (1) the adequacy of emergency planning for Diablo Canyon and (2) the adequacy of the design, construction, and testing of the power operated relief valves (PORVs) at Diablo Canyon. On August 31, 1982, the Licensing Board issued its decision authorizing the Director of NRR to issue a full power license subject to certain conditions and the Commission's determination and order. 1/ Challenges by PGandE and the NRC Staff to certain of the Licensing Board's conditions were resolved by the Appeal Board in ALAB-776, 19 NRC \_\_\_\_ (June 29, 1984).

On September 6, 1984, the Appeal Board issued ALAB-781 affirming the Licensing Board's finding that the emergency response planning for Diablo Canyon was adequate. The Appeal Board also found that certain other exceptions taken by Joint Intervenors were either moot or had been resolved in other proceedings.

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1/ LBP-82-70, 16 NRC 756

### III

#### DISCUSSION

While recognizing that the Commission has the ultimate discretion to review any decision of its boards, a petition for Commission review is ordinarily not granted unless important safety, procedural, common defense, antitrust, or public policy issues are involved. 10 CFR § 2.785(b)(4). PGandE has reviewed the issues which have been raised and believes that when compared against the standards set forth in 10 CFR 2.786 they do not command the exercise of the Commission's discretion to grant the petition, i.e., important questions of fact, law, or policy are not presented.

Joint Intervenors have petitioned this Commission for review of ALAB-781. In doing so, they press the principle of exhaustion of administrative remedies to the limit. As is evident on review of the petition, they seek to relitigate that which has been already decided in the face of the legal doctrine of res judicata. The policy considerations which underlie this doctrine -- finality to litigation, prevention of needless litigation, avoidance of unnecessary burdens of time and expense -- are relevant to the administrative process. Painters Dist. Comn. No. 38, Etc. v. Edgewood Contracting Co., 416 F2d. 1081, 1084 (1969). Licensee submits that the Joint Intervenors have refused to accept the principle of finality and have made no

attempt to present valid grounds for review as required by 10 CFR 2.786.

A. Earthquake and Emergency Planning

1. The Joint Intervenors argue that the Appeal Board erred in stating that it did not have jurisdiction to once again consider the matter of the effects of earthquakes on emergency planning. Once the Commission has declined to review a decision of the Appeal Board a final agency determination has been made and the Appeal Board has no jurisdiction to reentertain an issue. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-766, 19 NRC 981-983 (1984). In ALAB-728, 17 NRC 777 (1983), the Appeal Board determined that specific consideration of the impacts of earthquakes on emergency planning was not required. In declining to review ALAB-728, this Commission reserved the issue of earthquakes on emergency planning for decision. However, this Commission then specifically declined to require consideration of the impacts on emergency planning of earthquakes which cause of occur during an accidental release in its decision CLI-84-12, 20 NRC \_\_\_\_\_, \_\_\_\_\_ (slip opinion at 1) (1984). Having done so, the decision of the Appeal Board was final as to the issue, and the Appeal Board had no jurisdiction to again consider the matter Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), supra, ALAB-766, NRC 981-983 (1984). The principle of res

judicata bars reconsideration and no review of the matter is warranted. Commissioner v. Sunnen, 333 U.S. 591, 597 (1948).

B. Class Nine Accidents

The issue before the Commission regarding Class 9 accidents is whether reconsideration in this case may be entertained.

In ALAB-728, the issue of Class-9 accidents was litigated before the Appeal Board and determined against Joint Intervenors. That decision became the law of the case and the principles of res judicata and collateral estoppel bar Joint Intervenors from again raising the same issue.

The principles of res judicata and collateral estoppel have long been applied in operating license proceedings. Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2) ALAB-182, 7 AEC 210, modified on other grounds CLI 74-12, 7 AEC 203 (1974). "Those who have contested an issue shall be bound by the result, the contest, and matters once tried shall be considered forever settled as between the parties." Commissioner v. Sunnen, supra, 333 U.S. 591, 597 (1948). Furthermore, a party who is given an opportunity to present his case before competent judicial authority must put forth his case in toto, rather than advance it piecemeal in multiple proceedings. Cromwell v. County of Sac. 94 U.S. 351, 358 (1877). The earlier adjudication is deemed to bar parties and those in

privity "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." (Emphasis added) Ibid at 352.

The fact that the Hosgri fault existed in the vicinity of the Diablo Canyon Nuclear Power Plant is not new evidence or materially changed circumstances. In fact, the plant underwent complete seismic reanalysis for the affect of that fault which was the subject of extensive hearings. Given such, the Hosgri fault does not constitute materially changed circumstances which would defeat the application of the bar of res judicata or collateral estoppel. 2/ Alabama Power Company (Joseph M. Farley Nuclear Plant Units 1 and 2) supra, 7 AEC 210, 219.

C. FEMA Findings on Off-site Plans

Licensee previously filed its response on July 27, 1984 to Joint Intervenors' Petition for Review of ALAB-776 regarding the adequacy of FEMA findings on offsite plans and

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2/ Joint Intervenors have attributed the Appeal Board's decision to an implied conclusion that the contention regarding "special circumstances" was insufficiently raised when in fact Joint Intervenors claimed they have raised it on numerous occasions. Either way they are barred by the application of the doctrine of res judicata. If Joint Intervenors mean that they raised the issue originally in the proceeding at or before the decision of the Appeals Board in ALAB-728, they most certainly are barred. If they first raised it after ALAB-728 was final, they still are barred because they could have raised the matter of special circumstance at the time of the hearing leading to that decision, which they did not.

incorporates such response by reference. FEMA has made interim findings that the state and local plans are adequate. Where reasonable assurance has been found by a Board that adequate protective measures can and will be taken in the event of a radiological emergency, interim FEMA findings are sufficient to satisfy the requirements of law Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3). ALAB-717, 17 NRC 346, 380 (1983). Cincinnati Gas and Electric Co. (Wm. H. Zimmer Nuclear Power Station, Unit No. 1) ALAB-727, 17 NRC 760, 775 (1983). Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-730, 17 NRC 1057, 1066 (1983). The issue as to the adequacy of interim FEMA findings was also previously determined against Joint Intervenors in ALAB-776 and is also barred under the principle of res judicata.

D. Emergency Planning Zones

Joint Intervenors have petitioned for review on the grounds that this Commission should adopt the zones established by the State of California for the purpose of determining whether a license should have been issued. They imply that section 274 of the Atomic Energy Act dictates acquiescence to state zones and argue that the Appeal Board's determination based on the fundamental constitutional principle of preemption is erroneous. Section 274 of the Atomic Energy Act does not require this Commission to defer to state regulation. To the contrary,

that section is emphatic that all authority for the regulation of nuclear power plants resides in the Commission and that authority may not be delegated. 42 U.S.C. § 2021(c).

Contrary to the proposition advanced by Joint Intervenors, the Appeal Board correctly refused to adopt the state emergency planning zones (EPZs). Even if the EPZs were adopted out of non-safety concerns, which it is difficult to argue they were, they would directly conflict with this Commission's exclusive authority over nuclear power plant construction and operation. The federal government has occupied the entire field of nuclear safety concerns regarding the construction and operation of nuclear powerplants. Pacific Gas and Electric Company v. State Energy Resources Conservation & Development Commission \_\_\_\_\_ U.S. \_\_\_\_\_, 103 S.Ct. 1713, 1726-27 (1983). Having done so, the test of preemption is whether "the matter on which the state asserts a right to act is in any way regulated by the federal government." Rice v. Santa Fe Elevator Corp. 331 U.S. 218, 236, 67 S.Ct. 1146, 1155, 91 LEd 1447 (1947). The utilization of state EPZs for these licensing proceedings clearly falls within the prohibited field.

Notwithstanding the above, even if the state EPZs were required to be utilized, the failure to do so was harmless error. As pointed out by the Appeal Board, the Licensing Board took evidence on the status of planning in



the state zones beyond the areas set forth in 10 CFR 50.47(c)(2) and found that beyond the federal zones there was reasonable assurance that the planning would be sufficient to permit appropriate integration prior to full power operation. Error in a Licensing Board finding that does not effect or impair the Board's ultimate conclusion is harmless and gives no cause for reversal. Public Service Electric and Gas Company et al (Salem Nuclear Generating Station, Unit 1) ALAB-650 14 NRC 43, 45 (1981).

E. Off-Site Emergency Planning

The Joint Intervenors have requested review of the Appeal Board affirmance of the Licensing Board's decision as to the adequacy of off-site emergency planning on little more than a statement to the effect that the Boards did not agree with their evidence.

While Joint Intervenors claim that the off-site plans are inadequate, those plans nonetheless have become the official plans of the state and local government. Section 8610.5 of the Government Code of the State of California, of which this Commission may take official notice, provides in part that, "Neither the state plan nor any local plan shall become effective or be implemented until approved by the Office of Emergency Services of this state or the Federal Emergency Management Agency." (Emphasis added). Since interim findings of FEMA have been made with respect to both state and local off-site plans,

the plans, even under state law, have become effective. In addition, the local plan has been approved by the Office of Emergency Services as required by state law, the record of which may be officially noticed by this Commission. (Attachment A). See Milwaukee Mechanics Insurance Co. v. Oliver (C.CA 5th) 139 F.2d 405, 407 (1944); U.S. v. Manufacturers Hanover Trust Co. (DC NY) 229 F.Supp. 544, 545 (1964). Federal Rules of Evidence Rule 210 (b)(2).

While Joint Intervenors may not be satisfied with the extent of off-site planning, it is clear that the federal and state agencies with the responsibility for review and approval are satisfied and that no grounds for review exist.

#### CONCLUSION

Licensee respectfully submits that the petition raises no new matters or points of law which would justify that this Commission review the decision of the Appeal Board

in ALAB-781. Accordingly, it is requested that the petition be denied.

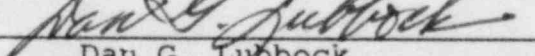
Respectfully submitted,

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By   
Dan G. Lubbock

DATED: October 2, 1984.

## OFFICE OF EMERGENCY SERVICES

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September 10, 1984

Jerry Diefenderfer, Chairman  
Board of Supervisors  
County of San Luis Obispo  
County Government Center, Room 370  
San Luis Obispo, CA 93408

Dear Chairman Diefenderfer:

Pursuant to Senate Bill 1473, The State Office of Emergency Services has reviewed the San Luis Obispo County Nuclear Power Plant Emergency Response Plan and Procedures dated January, 1984 (Rev. 2).

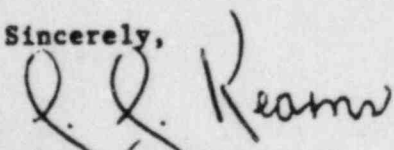
Planning criteria identified in NUREG-0654, FEMA Rep. 1, "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants" have been adopted in California and were used as the basis for the review.

Although not all planning criteria have been met, it is the opinion of this office that the plan and procedures, in total, are adequate to protect public health and safety. Unmet planning criteria are identified as an attachment. This office expects these items to be resolved in the annual plan update.

This finding of adequacy constitutes acceptance of the plan as required in SB 1473. It is now considered operational and replaces all prior plans and drafts.

Please contact me or the staff of the Nuclear Power Plant Planning Section if you have questions relating to this issue.

Sincerely,

  
WILLIAM M. MEDIGOVICH  
Director

Att.



ATTACHMENT A

SAN LUIS OBISPO COUNTY PLAN  
(January 1984)

Items to be Resolved in Annual Update

NUREG Criteria

- E.5. Procedures for notifying the public of a fast-moving accident are unclear. The watch commander has the responsibility to follow the recommendation of the plant, but must he first get authorization from the ESD or designate? The autonomy of the watch commander must be clearly stated.
- E.5. Plan should be amended to reflect use of aircraft for alerting at Montana de Oro State Park.
- G.2. State regulations require dissemination of public education materials in the Public Education Zone. Evidence of dissemination of these materials was not provided.
- G.3.c. The plan identifies several roles for the Rumor Control Center: rumor control, receiving calls requesting transportation assistance, placing random calls to determine the completeness of evacuation, and receiving personal data on evacuees from the Red Cross. This is too much responsibility and may result in someone not receiving evacuation assistance. These responsibilities should be split up and assigned elsewhere.
- G. Public Information in general. Although procedures exist to assure authorized, coordinated public information, during the exercises, the method of receiving authorization has taken too long. This must be streamlined.
- J.10.d. Plan states city fire departments will assist in evacuation of institutions. Fire department procedures do not identify how this will be done or what resources are to be used.

NUREG Criteria

- J.10.f. The state is presently amending the KI policy. If SLO adopts the new policy, the plan will have to be amended accordingly.
- K.3.a. SOP 5, Page 9 refers to emergency worker kits to be purchased. Are those kits in place?
- K.5.b. Plan gives county engineer role of decontaminating equipment. County engineer procedure does not mention the method or resources to be used for this.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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

Docket No. 50-275  
Docket No. 50-323

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:

Judge John F. Wolf  
Chairman  
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US Nuclear Regulatory Commission  
Washington DC 20555

Judge Glenn O. Bright  
Atomic Safety and Licensing Board  
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US Nuclear Regulatory Commission  
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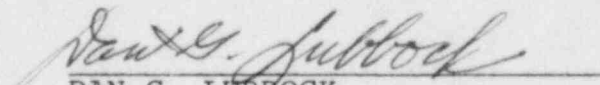
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DAN G. LUBBOCK

Date: October 2, 1984