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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

March 7, 1985

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)	)	

MEMORANDUM AND ORDER

September 6, 1984
(ALAB-782)

Separate statement of Dr. Johnson:

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Separate statement of Dr. Johnson:

Mr. Moore's dissent prompts three brief observations. First, his view of the Commission's regulations and our governing precedent is novel, to say the least. He takes issue with the majority's holding 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." Mr. Moore argues that this reflects an erroneous notion of jurisdiction and final agency action, and is contrary to both Commission precedent and regulations.

The majority's holding in ALAB-782 is fully consistent with a long line of agency cases. While I would not presume to engage in a complex legal argument on what appears to be a rather fine point, I must say that I cannot find in the Marble Hill opinions relied on by the dissent any express articulation of the principle for which Mr. Moore now claims they stand. Indeed, ALAB-530 seems entirely consistent with the approach adopted by the majority here, and the most that can be said for ALAB-493 is that it is limited by the unique circumstances there present. See 8 NRC at 260. Nor does he point to any support for the reading of the regulations on which he relies. Various appeal boards before and since

ALAB-782 have considered this issue and none has expressed any difficulty with the "jurisdictional" approach followed by the majority.[1]

Second, during my tenure with the Appeal Panel, since 1974, I have never been aware of the internal procedure for overruling prior decisions described in the dissent at note 36. For about the past three years, however, we have consistently followed a practice under which drafts of opinions to be published are circulated to all Panel members and our professional staff in advance of their issuance. The purpose of this practice is to avoid potential inconsistencies between or among our decisions. The chairman of the Board that issued ALAB-766 in the Three Mile Island Restart case (on which the majority here relied and which Mr. Moore criticizes) advises me that no one interposed any substantive objection to that Board's disposition of the motion involved there. Similarly, apart from Mr. Moore, no Panel or staff member suggested that our approach in ALAB-782 was wrong. I must assume that the

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[1] See, e.g., Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-513, 8 NRC 694, 695-96 (1978); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1329-30 (1983); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-766, 19 NRC 981, 983 (1984); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-792, 20 NRC 1585, 1588-89 (1984), clarified, ALAB-797, 21 NRC 6 (1985).

other Panel members considered our decision (i.e., ALAB-782), as well as ALAB-766, to be consistent with governing precedent.

Third, it is not clear to me what problem Mr. Moore's dissent seeks to correct. Over the years there has evolved what appears to be a sensible and practical distribution of responsibility for reviewing matters raised anew.[2] Common sense and the realities of the NRC's unique administrative litigation structure (including the division of authority among the adjudicatory boards, the Commission and the NRC staff) -- more than the strict principles of jurisdiction

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[2] Because many months have passed since ALAB-782 was issued (i.e., on September 6, 1984), it is useful to review some of the events that preceded it. On July 27, 1984, in an unpublished order we unanimously referred to the Commission a request by Joint Intervenors to stay authorization of the full power operation of the plant. That request relied upon, among other things, the geological information included in Joint Intervenors' motion to reopen the record. Then on August 10, 1984, the Commission authorized a full power license for Diablo Canyon. CLI-84-13, 20 NRC 267 (1984). That order denied Joint Intervenors' stay request and addressed explicitly the same new geological information presented in the motion to reopen. In rejecting Joint Intervenors' arguments, the Commission relied to a great extent upon our earlier geological findings in ALAB-644. 20 NRC at 275-78.

Thus here, rather than the usual situation in which the Commission simply declines to review an Appeal Board decision, we have the case in which the Commission has affirmatively adopted the Appeal Board's findings. In these circumstances, it would appear to be disruptive in the extreme for the Board to announce its authority to relitigate these same issues.

that apply to the federal courts -- have governed our actions.[3] The Commission has not seen fit to alter that approach. Mr. Moore would now have the adjudicatory boards retain authority to pass on such matters until the ink has dried on the final adjudicatory decision in each proceeding. He offers no persuasive explanation why this new approach is necessary or desirable.

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[3] See, e.g., Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-726, 17 NRC 755 (1983). Cf. Union Electric Co. (Callaway Plant, Unit 1), ALAB-750A, 18 NRC 1218, 1219-20 (1983).