ADJUDICATORY ISSUE

(Notation Vote)

January 25, 1985 SECY-85-27

For: The Commissioners

From: Martin G. Malsch
Deputy General Counsel

Subject: REVIEW OF ALAB-782 (IN THE MATTER OF PACIFIC GAS AND ELECTRIC COMPANY)

Facility: Diablo Canyon Nuclear Power Plant, Units 1 and 2

B/4

Recommendation:

Martin G. Malsch
Deputy General Counsel

Attachments:
1) ALAB-782
2) Petition for Review
3) PG&E Opposition to Petition for Review
4) NRC Staff Opposition to Petition for Review

Commissioners' comments or consent should be provided directly to the Office of the Secretary by c.o.b. Friday, February 8, 1985.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Friday, February 1, 1985, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

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ATTACHMENT 1

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

'84 SEP -7 P10:22

September 6, 1984
(ALAB-782)

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)	)	

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.

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,

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[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 Intervenors' 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 Intervenors' Motion to Reopen the Record on Seismic Issues (July 27, 1984); NRC Staff's Answer to Joint Intervenors' 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]

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[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

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[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.[8]

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

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[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.

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[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.

ATTACHMENT 2

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

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.

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

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[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 missiting 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, 8 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 Assocation 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,

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ATTACHMENT 3

UNITED STATES OF AMERICA

'84 OCT -4 A10:47

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)	)	

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

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 matters.

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.

Respectfully submitted,

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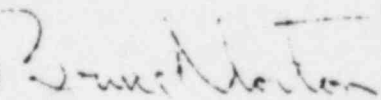
By 
Bruce Norton

DATED: October 2, 1984.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
PACIFIC GAS AND ELECTRIC COMPANY	)	Docket No. 50-275
	)	Docket No. 50-323
Diablo Canyon Nuclear Power Plant, Units 1 and 2	)	
	)	

CERTIFICATE OF SERVICE

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Date: October 2, 1984

Philip A. Crane, Jr.

ATTACHMENT 4

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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 ANSWER TO JOINT INTERVENORS' PETITION FOR REVIEW OF ALAB-782

Henry J. McGurren
Counsel for NRC Staff

October 12, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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 ANSWER TO JOINT INTERVENORS' PETITION FOR REVIEW OF ALAB-782

I. INTRODUCTION

On September 17, 1984 Joint Intervenors filed a Petition for Review of ALAB-782 with the Nuclear Regulatory Commission, pursuant to 10 C.F.R. § 2.786. The Joint Intervenors request the Commission to grant review of and reverse ALAB-782. For the reasons set forth below, the NRC staff opposes Commission review of ALAB-782.

II. BACKGROUND

On September 27, 1979, the Licensing Board issued a Partial Initial Decision concluding that the seismic design basis of the Diablo Canyon plant (including the determination of the Safe Shutdown Earthquake and maximum vibratory ground motion) has been properly determined so as to assure that the facility will be able to withstand any earthquake that can reasonably be expected to affect the facility. LBP-79-26, 10 NRC 453 (1979). The Joint Intervenors timely filed an appeal to that decision. While the matter was pending before the Appeal Board, on October 15, 1979 an earthquake estimated at magnitude 6.5 to 6.9 (Richter) struck

California's Imperial Valley. ALAB-644, 13 NRC 903, 912 (1981). The Appeal Board granted Joint Intervenors' subsequent motion to reopen the record to receive new evidence on this earthquake. ALAB-598, 11 NRC 876, 887 (1980). Following a six-day hearing the Appeal Board issued ALAB-644 holding the seismic design of the Diablo Canyon facility adequate and affirming the Licensing Board's decision. ALAB-644, supra, at 996. The Commission declined to review ALAB-644, rendering it final on March 18, 1982. 1/

On July 16, 1984, the Joint Intervenors filed with the Appeal Board another motion to reopen the Diablo Canyon proceeding on seismic design issues based on new studies and information. 2/ The Appeal Board dismissed the motion stating that, with its decision on seismic issues in ALAB-644 and the Commission's determination not to review that decision, the adjudication of that matter is final and it no longer has jurisdiction. ALAB-782, 20 NRC ___, slip op. at 6 and 7 (September 6, 1984). Asserting that the Appeal Board's dismissal "is erroneous with regard to an important matter of law," the Joint Intervenors' Petition for Review followed.

III. DISCUSSION

Pursuant to 10 C.F.R. § 2.786(b)(4)(i), a petition for review of matters of law or policy will not ordinarily be granted "unless it appears that the case involves an important matter that could significantly

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1/ CLI-82-12A, 15 NRC A-1 (published at 16 NRC 7 (1982)).

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

affect the environment, the public health and safety, or the common defense and security, constitutes an important antitrust question, involves an important procedural issue, or otherwise raises important questions of public policy." The Staff has considered the issues raised by the Joint Intervenors and believes that when measured against the standards set forth in section 2.786, they do not warrant the exercise of the Commission's discretion to grant the petition, i.e. an important question of law or policy in regard to the foregoing areas of concern has not been presented. 10 C.F.R. § 2.786(b)(1).

As is discussed more fully below in the responses to each of the Joint Intervenors' arguments, the Staff submits that the Appeal Board's determination to dismiss Joint Intervenors' motion to reopen was made on straightforward and well-established jurisdictional principles, correctly applied, and thus does not raise an important question of law or policy warranting Commission review.

1. The Joint Intervenors, relying on a reference in Seabrook [3/] argue that, by virtue of an appeal filed in the U.S. Court of Appeals by

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3/ Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-513, 8 NRC 694, 695 (1978). The Appeal Board in Seabrook provided the reader with the following background and ultimate resolution regarding the issue which was the subject of the motion to reopen (at 695):

> We are constrained to dismiss the motion for lack of jurisdiction to grant the relief sought therein. The financial qualifications issue was determined favorably to the applicants in the Licensing Board's 1976 initial decision authorizing the issuance of construction permits for the Seabrook facility. LBP-76-26, 3 NRC 857, 867-68, 916-17. Our decision was in turn affirmed first

(FOOTNOTE CONTINUED ON NEXT PAGE)

the Governor of California from the Commission's decision not to review ALAB-644, finality has yet not attached to this agency's action on seismic issues. 4/ Petition at 3. We cannot agree. As the Appeal Board observed in rejecting this same argument (in ALAB-782), the reference to the appellate review in the Seabrook decision was "to provide the reader with information as to the ultimate resolution of the question there. . . [and] should not be read to suggest that court review constitutes an element of agency action on an issue" for purposes of administrative finality. See ALAB-782, supra, slip op. at 5 n.8.

The case law is clear that once the Commission determines that it is not going to review a decision, matters specifically addressed in that decision become administratively final and agency jurisdiction terminates, subject, of course, to remand by a reviewing court. 5/ As the

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(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

> by the Commission and then by the Court of Appeals for the First Circuit. No petition for certiorari having been filed in the Supreme Court within the prescribed period for doing so, finality has now attached to the resolution of the question in this proceeding. Accordingly, we have no authority to reopen it.

4/ If, as Joint Intervenors appear to presume, the Governor's appeal to the Court of Appeals is proper, finality must have attached else the appeal should be dismissed on grounds of a failure to exhaust administrative remedies. See Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission, 680 F.2d 810, 815 (D.C. Cir. 1982).

5/ See Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 NRC 704, 708 (1979).

Appeal Board stated in the Three Mile Island decision [6]: "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." [7]

2. Joint Intervenors also rely on the North Anna decision [8] and 10 C.F.R. § 2.717 to argue that the Appeal Board's jurisdiction over seismic issues in this proceeding was not "wholly" terminated when the Joint Intervenors filed their motion to reopen (on July 16, 1984); they note that the full power proceeding was still in progress when their motion was filed. Consequently, they argue that the Board's jurisdiction continues over all matters relevant to a full power license including seismic safety. Petition at 4.

This argument overlooks a fundamental aspect of the rule of administrative finality, i.e., that a board's jurisdiction may have terminated on all but certain discrete issues. It is true, as the Joint Intervenors point out in the excerpt from the North Anna decision, that "once an appeal board has wholly terminated its review of an initial decision . . . its jurisdiction comes to an end." See North Anna ALAB-551, supra, at 708. It is also true that 10 C.F.R. § 2.717 sets

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6/ Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-766, 19 NRC 981, (1984). See also Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1329-30 (1983).

7/ Three Mile Island, ALAB-766, supra at 983.

8/ ALAB-551, supra.

forth when a presiding officer's jurisdiction over an entire proceeding will terminate. The North Anna decision tells us, however, that "finality" can attach to some but not all of the issues in a case. North Anna, ALAB-551, supra, at 707. Accordingly, while a board's jurisdiction may not be "wholly" terminated it may be terminated on some of the issues. This was the case here with respect to seismic design considerations when the Joint Intervenors filed their motion. Even though the full power proceeding was still in progress when the Joint Intervenors filed their motion, when the Commission declined to review ALAB-644 (in 1982) the matter of seismic design of the Diablo Canyon facility became final and terminated the Appeal Board's jurisdiction on that issue.

3. The Joint Intervenors' third argument, that there is a "close nexus" between the new information submitted by the Joint Intervenors and the issues remaining before the Appeal Board when their motion was filed, also falls short. Petition at 4. They have failed to show the existence of the necessary relationship between the issues before the Appeal Board in the full power appeal and their new information on the seismic design of the facility. As the Appeal Board stated in North Anna:

> Where, as 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. 9/

It is true, as the Appeal Board noted, that it had before it at the time the Motion was filed two issues that in some way involve the effects of earthquakes: the Licensing Board's failure to consider (1) the ef-

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9/ ALAB-551, supra, at 707.

fects upon emergency planning of a major earthquake, and (2) the alleged special circumstances of earthquake potential at Diablo Canyon as a basis for analyzing the environmental effects of Class 9 accidents. 10/ However, as the Appeal Board correctly notes, these issues "are not related to the seismic design of the facility". 11/ The Joint Intervenors' motion, on the other hand, by its very terms does directly concern the seismic design of the facility. 12/ Accordingly, the necessary "reasonable nexus" does not exist between the information submitted in the Joint Intervenors' motion and the issues that remained before the Appeal Board when the motion was filed.

4. Finally, citing the Limerick decision 13/ the Joint Intervenors note that the Appeal Board's familiarity with the issues is a factor in determining the Appeal Board's jurisdiction. Petition at 5. The facts of the Limerick case are not at all similar to the facts in the instant case. In Limerick the equivalent to a motion to reopen was filed on the same day that the Licensing Board issued its partial initial decision. 14/ Accordingly, the question raised was which of the boards

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10/ See ALAB-782, 20 NRC ___, slip op. at 6, n.10 (September 6, 1984).

11/ Id. at 6 (emphasis supplied).

12/ Id.; see Joint Intervenors' Motion to Reopen the Record on Seismic Issues, dated July 16, 1984, at 1 and 2.

13/ Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-726, 17 NRC 755 (1983).

14/ Id. at 757.

(Licensing Board or Appeal Board), each possibly having jurisdiction, should initially assert that jurisdiction to consider the motion. The question of finality as is present in this proceeding simply did not arise in the Limerick proceeding at all. The Appeal Board in Limerick held that until exceptions have been filed or where no exceptions have been filed within the time allowed and the Appeal Board has neither completed its sua sponte review nor extended the time for doing so, jurisdiction to rule on a motion to reopen lies with the Licensing Board. 15/ Relying on common sense in "the absence of any clear administrative guidance" 16/ the Appeal Board , in Limerick, stated that the Licensing Board, due to its involvement in the case would be better suited to rule on the motion. 17/ But, as noted above, the facts in the instant case are not at all similar. Here the Commission has declined review of ALAB-644 which thus became final and unlike the situation in Limerick, there is here clear "administrative guidance" - when the Commission declines to review an Appeal Board decision, a final agency determination has been made resulting in termination of jurisdiction. 18/ Accordingly, the Appeal Board here was simply without jurisdiction to entertain the motion to reopen on seismic issues regardless of its familiarity with the matters involved. In this circumstance, familiarity with the issues is an irrelevant consideration.

15/ Id.

16/ Id. at 758.

17/ Id.

18/ Three Mile Island, ALAB-766, supra at 983.

IV. CONCLUSION

For the reasons stated above, Joint Intervenors' Petition for Review of ALAB-782 fails to establish the existence of any important issue of law or policy warranting Commission review and, therefore, should be denied. 19/

Respectfully submitted,

Henry J. McGurren
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 12th day of October, 1984

19/ In any event, notwithstanding the jurisdictional bar resulting from the rule of finality, Joint Intervenors did not satisfy the traditional standards applicable to reopening the record. As reflected in the "NRC Staff's Answer to Joint Intervenors' Motion to Reopen the Record on Seismic Issues", the Staff had considered this new information in light of the standards for reopening a record and concluded that the Joint Intervenors have not demonstrated that the new information is significant or would affect the Appeal Board's decision in ALAB-644. See NRC Staff's Answer to Joint Intervenors' Motion to Reopen the Record on Seismic Issues, dated August 1, 1984, with the attached Joint Affidavit of Robert L. Rothman, Richard B. McMullen, Leon Reiter and Stephan J. Brocoum. See also CLI-84-13, 20 NRC ___, slip op. at 14-19 (August 10, 1984), where the Commission denied Joint Intervenors' request for a stay based on seismic issues.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER TO JOINT INTERVENORS' PETITION FOR REVIEW OF ALAB-782" 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, this 12th day of October 1984:

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