ADJUDICATORY ISSUE

(Notation Vote)

January 25, 1985 SECY-85-26

For: The Commissioners

From: Martin G. Malsch
Deputy General Counsel

Subject: REVIEW OF ALAB-775 AND ALAB-775A (IN THE MATTER OF PACIFIC GAS AND ELECTRIC COMPANY)

Facility: Diablo Canyon Nuclear Power Plant, (Unit 1 & 2)

B13

Recommendation:

Martin G. Malsch
Deputy General Counsel

Attachments:
1. ALAB-775
2. ALAB-775A
3. Petition for Review
4. PG&E Answer
5. NRC Staff Answer

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

June 28, 1984
(ALAB-775)

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, John R. Phillips and Eric Havian, 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.

Joseph Rutberg, Henry J. McGurren and Lawrence J. Chandler, for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

1. On March 20, 1984, we issued ALAB-763 containing our findings of fact and conclusions of law with respect to the adequacy of the applicant's current design quality assurance program and the sufficiency of its design verification efforts to establish the efficacy of the design

of the Diablo Canyon facility.[1] The operating license proceeding had been reopened on the motion of the joint intervenors,[2] and the trial of the issues involved consumed fifteen hearing days. In ALAB-763, we concluded that

> [t]he applicant's verification efforts provide adequate confidence that the Unit 1 safety-related structures, systems and components are designed to perform satisfactorily in service and that any significant design deficiencies in that facility resulting from defects in the applicant's design quality assurance program have been remedied. Accordingly, we conclude that there is reasonable assurance that the facility can be operated without endangering the health and safety of the public. As a result, the license authorization previously granted . . . remains in effect. . . .[3]

Previously in ALAB-756, issued December 19, 1983,[4] we detailed the reasons underlying our earlier order denying, after four days of hearing, the joint intervenors' motion to reopen the record on the issue of the asserted inadequacy of the applicant's construction quality assurance program.[5] In denying that motion, we found that the joint intervenors had

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[1] 19 NRC ___.

[2] In addition, the Governor of California filed a motion to reopen the record on the issue of the adequacy of the applicant's design quality assurance program and that motion was also granted.

[3] 19 NRC at ___ (slip opinion at 101).

[4] 18 NRC 1340.

[5] See Order of October 24, 1983 (unpublished).

failed to present new evidence of a significant safety issue.[6]

We now have before us two additional motions of the joint intervenors to reopen the record in the Diablo Canyon operating license proceeding. The first, filed February 14, 1984, again seeks to reopen on the issue of the adequacy of the applicant's design quality assurance program.[7] The second, filed February 22, 1984, seeks to reopen on the issues of the adequacy of the applicant's construction quality assurance program and the applicant's character and competence. Both motions are accompanied by the affidavits

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[6] ALAB-756, supra, 18 NRC at 1354-55.

[7] The joint intervenors' motion is phrased in the alternative. They first endeavor to augment the evidentiary hearing record of the reopened design quality assurance proceeding with the materials accompanying the motion. Alternatively, they seek to reopen the record for further hearing. The joint intervenors attempt to augment the hearing record based on a colloquy between applicant's counsel and us at the end of the evidentiary hearing concerning the formal closing of the record. See Tr. D-3246. They have misapprehended the import of those remarks. Our comment was intended to accommodate, as a matter of administrative convenience, such matters as a party's belated motion to admit an exhibit that had been marked for identification at trial but, through an oversight, had not been moved into evidence. We did not (and could not properly) provide for the wholesale augmentation of the evidentiary record now sought by the joint intervenors. Supplementing the record with the materials proffered by the joint intervenors would require, at a minimum, the consent of all parties. Accordingly, the motion to augment the record is denied and we shall treat the motion solely as one to reopen the record.

of several individuals currently working, or previously employed, at the Diablo Canyon facility. The affidavits and supplementary documentary exhibits fill hundreds of pages and set forth, by the joint intervenors' count, some 200 charges of purported inadequacies in the design, construction, or quality assurance practices at the plant. Further, the joint intervenors supplemented each reopening motion with additional material after the motions were filed.[8]

The applicant and the NRC staff filed lengthy responses opposing both reopening motions.[9] The responses contain numerous detailed affidavits and voluminous documentary materials addressing the allegations in the joint intervenors' filings. Thereafter, the joint intervenors

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[8] See Joint Intervenors' Supplement To February 14, 1984 Motion To Augment Or, In the Alternative, To Reopen The Record (March 1, 1984); Joint Intervenors' Supplement To February 22, 1984 Motion To Reopen The Record On The Issues Of Construction Quality Assurance And Licensee Character And Competence (March 3, 1984).

[9] See Pacific Gas And Electric Company's Answer In Opposition To Joint Intervenors' Motion To Augment Or, In The Alternative, To Reopen The Record (March 6, 1984); NRC Staff's Answer To Joint Intervenors' Motion To Augment Or, In The Alternative, To Reopen The Record (March 15, 1984); Pacific Gas And Electric Company's Answer In Opposition To Joint Intervenors' Motion To Reopen The Record On The Issue of Construction Quality Assurance And Licensee Character And Competence (March 19, 1984); NRC Staff's Answer To Joint Intervenors' Motion To Reopen The Record On Construction Quality Assurance And Licensee Character And Competence (April 11, 1984).

filed a reply to the applicant's response to the motion concerning design quality assurance,[10] and then filed a second supplement to that motion[11] to which both the applicant and the staff responded.[12] By order of May 23, 1984, we provided the joint intervenors with an opportunity to reply to the applicant's and the staff's final responses to both motions.[13] The order stated that any reply must be accompanied by the affidavits of qualified individuals and clearly establish, for the matters raised by the joint intervenors' filings, why the responses of the applicant and the staff are insufficient. It also indicated that the joint intervenors must demonstrate the significance to plant safety of their assertions as well as identify each remaining issue of disputed material fact with regard to

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[10] See Joint Intervenors' Reply To Answer Of Pacific Gas And Electric Company To Motion To Augment Or, In The Alternative, To Reopen The Record (March 15, 1984).

[11] See Joint Intervenors' Supplement To Motion To Augment Or, In The Alternative, To Reopen The Record (April 6, 1984).

[12] See Answer Of Pacific Gas And Electric Company To Joint Intervenors' Supplement To Motion To Augment Or, In The Alternative, To Reopen The Record (April 13, 1984); NRC Staff Response To Joint Intervenors' Supplement To Motion To Augment, Or In The Alternative, To Reopen The Record (April 25, 1984).

[13] See Order of May 23, 1984 (unpublished).

their charges. The joint intervenors filed their reply on June 12.

2. Our earlier decision denying joint intervenors' motion to reopen the record on the issue of the adequacy of the applicant's construction quality assurance program reiterated the three-pronged standard the proponent of a reopening motion must satisfy:

> "[t]he motion must be both timely and addressed to a significant safety or environmental issue. Vermont Yankee Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973); . . . Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 and 2), ALAB-291, 2 NRC 404, 409 (1975). Beyond that, it must be established that 'a different result would have been reached initially had [the material submitted in support of the motion] been considered.' Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-227, 8 AEC 416, 418 (1974)."[14]

We previously have held that, for a reopening motion to be timely presented, the movant must show that the issue sought to be raised could not have been raised earlier.[15] In ALAB-756, we highlighted what constitutes a "significant safety issue" for motions predicated on asserted deficiencies in a construction quality assurance program. We stated there that

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[14] ALAB-756, supra, 18 NRC at 1344.

[15] Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973). See Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1764-65 (1982).

> perfection in plant construction and the facility quality assurance program is not a precondition for a license under either the Atomic Energy Act or the Commission's regulations. What is required instead is reasonable assurance that the plant, as built, can and will be operated without endangering the public health and safety. . . .
>
> . . . In order for new evidence to raise a "significant safety issue" for purposes of reopening the record, it must establish either that uncorrected. . . errors endanger safe plant operation, or that there has been a breakdown of the quality assurance program sufficient to raise legitimate doubt as to the plant's capability of being operated safely. . . .[16]

Although the focus of ALAB-756 was a motion to reopen on the issue of construction quality assurance, what we said there is equally applicable to reopening motions directed to the issue of design quality assurance.

Further, the Commission has emphasized in this very proceeding that the proponent of a reopening motion must present "'significant new evidence . . . that materially affects the decision,'" not "bare allegations or simple submission of new contentions."[17] At a minimum, therefore, the new material in support of a motion to reopen must be set forth with a degree of particularity in excess of the basis and specificity requirements contained in 10 CFR 2.714(b) for admissible contentions. Such supporting

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[16] ALAB-756, supra, 18 NRC at 1344 (citations omitted).

[17] CLI-81-5, 13 NRC 361, 362-63 (1981).

information must be more than mere allegations; it must be tantamount to evidence. And, if such evidence is to affect materially the previous decision (as required by the Commission), it must possess the attributes set forth in 10 CFR 2.743(c) defining admissible evidence for adjudicatory proceedings. Specifically, the new evidence supporting the motion must be "relevant, material, and reliable."[18]

The joint intervenors' new motions to reopen on the issues of the adequacy of the applicant's design and construction quality assurance programs, like their earlier motion denied in ALAB-756, fail to meet these standards. We

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[18] In other words, only facts raising a significant safety issue, not conjecture or speculation, can support a reopening motion. The facts must be relevant to the proposition they support, and probative of the safety issue presented. General statements are of no value. Similarly, although hearsay may be admissible in NRC proceedings, it must be shown to be reliable if it is to be considered as support for the motion.

Also embodied in the reliability requirement of 10 CFR 2.743(c) is the notion that evidence presented in affidavit form must be given by competent individuals with knowledge of the facts or experts in the disciplines appropriate to the issues raised. Because the competence (or even the existence) of unidentified individuals is impossible to determine, statements of anonymous persons -- so-called anonymous affidavits -- cannot be considered as evidence to support a motion. For adjudicatory proceedings, in camera filings and requests for protective orders are available in appropriate circumstances to protect the legitimate interests of a party or other person. This situation should be contrasted to the staff's responsibilities outside the adjudicatory arena where even anonymous charges receive attention. The staff has, in fact, investigated a vast number of such allegations with respect to Diablo Canyon.

have carefully examined each of the joint intervenors' charges with their supporting materials and the responses of the applicant and the staff. Our scrutiny of the motions leads us to conclude that the joint intervenors have failed to present new evidence of any significant safety issue that could have an effect on the outcome of the licensing proceeding.[19] Among other things, the movants have not presented evidence that establishes uncorrected design or construction errors that endanger safe plant operation. Nor have they demonstrated that there has been a breakdown of the applicant's quality assurance program that raises legitimate doubt that the facility can operate safely.[20]

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[19] The joint intervenors' reply to the applicant and staff responses filed pursuant to our May 23, 1984 order was accompanied by numerous supporting affidavits. Despite our instruction that the reply address why the responses of the applicant and staff are insufficient for "each matter raised . . . [or] asserted," the joint intervenors' reply "do[es] not individually address all of . . . the matters raised." Reply at 5. Further, in some instances, the reply raises entirely new issues. Although joint intervenors indicate that they had insufficient time to comply with our order, no request for an extension of time was filed. In any event, the joint intervenors concede that "few [of the noted] deficiencies will be demonstrably 'significant' if considered individually." Reply at 6. The movants are apparently content, therefore, to rely on the cumulative significance of the numerous purported deficiencies, none of which individually has been shown to be safety significant.

[20] For example, a number of the allegations focus on deficiencies in the methodology, practices, and quality assurance associated with the computer design of small bore (less than 2" diameter) pipe supports. The staff also found

(Footnote Continued)

Moreover, our searching review of the motions reveals nothing that causes us to question the continuing validity of the conclusions we reached in ALAB-756 and ALAB-763 -- conclusions that followed extensive evidentiary explorations of construction and design quality assurance at Diablo Canyon. For these reasons, the motion to reopen on the issue of the applicant's design quality assurance program is denied and, with the reservation noted in the footnote below, the motion to reopen on the issue of the applicant's construction quality assurance program is also denied.[21]

(Footnote Continued)
the number of errors occurring in this type of calculation to be higher than expected (NRC Staff's Answer To Joint Intervenors' Motion To Augment Or In the Alternative, To Reopen The Record (March 15, 1984), Knight Affidavit at 14). A staff imposed license condition required the applicant to redo all computer-based small bore pipe support calculations -- including additional physical effects not addressed in the original analyses. Transcript of May 9, 1984 Meeting between NRC staff and applicant at 15-23, 247. We note that the result of this program, with the reanalysis of all but 15 of 357 supports completed, shows that all of the supports meet design criteria, and no modifications are necessary. Letter from J. Schuyler to D. Eisenhut (June 11, 1984) (DCL-84-223), attachment at 1-5. Thus, errors in the small bore pipe support computer calculations, though numerous, have had no effect on the design adequacy of the supports.

[21] We reserve ruling on one matter raised by the joint intervenors' reopening motion on the issue of construction quality assurance until we receive further information from the applicant. In its February 22, 1984 motion at page 12, the joint intervenors charge that the applicant improperly used, as studs for the containment liner, A307 hardware bolts with the heads removed. According to an affidavit accompanying the applicant's response, the use of such bolts was permissible. Pacific Gas And Electric Company's Answer
(Footnote Continued)

As previously indicated, the number of diverse allegations of purported deficiencies contained in the joint intervenors' motions is very large. Even discounting the substantial repetition in the two motions, the affidavits and other documentary materials proffered as new evidence in support of the movants' charges are extensive.[22] When the

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(Footnote Continued)
In Opposition To Joint Intervenors' Motion To Reopen The Record On The Issue of Construction Quality Assurance And Licensee Character And Competence, supra note 9, Attachment C at 12-13. As an exhibit to their June 12, 1984 reply, the joint intervenors have attached a May 31, 1984 Pullman Power Products "Interoffice Correspondence" memorandum dealing with this issue. That memorandum is addressed to "Distribution" from "H. Karner" and concerns the subject of "Acceptable Stud Materials For Carbon Steel Welding (Ref: DR 5891)." The memorandum states, inter alia, that "(A-307 bolts with the heads removed are NOT acceptable)," and is signed by Harold W. Karner, QA/QC Manager.

The applicant shall inform us by July 6, 1984 why, in the words of the Pullman memorandum, A-307 bolts with the heads removed are not acceptable. The applicant's explanation shall be accompanied by appropriate affidavits of qualified experts and shall address the movants' charge, the applicant's prior response to that charge, and the recent Pullman memorandum.

[22] Not only does some of the same material accompany both motions, there is substantial repetition within the supporting materials accompanying each of the joint intervenors' motions. Additionally, the material purportedly supporting each motion is lumped together in a manner that lacks essential organization. Further, some of this material consists of anonymous statements. See note 18, supra. The movants have also included in their filings considerable material that is irrelevant and immaterial to many of their claims. Thus, the unorganized nature of the supporting material, combined with the massive amount of irrelevant matter in movants' filings, has made our task of

(Footnote Continued)

applicant and staff responses and supporting materials are added to the joint intervenors' filings, the papers run well over a thousand pages. Individual treatment of each of the movants' varied charges -- matters that do not readily lend themselves to being grouped together -- would consume many pages but have no practical precedential value. Such a decision would add little of consequence to the already expansive administrative record of this proceeding.

3. The joint intervenors' second reopening motion (dated February 22, 1984) also seeks to reopen the record on the issue of the applicant's "demonstrated lack of corporate character and competence . . . to manage and operate the Diablo Canyon project."[23] In support of this portion of their motion, the joint intervenors recite a number of instances of purported applicant misconduct dating from 1967 to mid-1983. They claim that these historical examples

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(Footnote Continued)
analyzing joint intervenors' claims extremely time-consuming and difficult. Indeed, the very nature and manner of presentation of the joint intervenors' filings provide grounds for denying the motion. Rather than follow that course, we have painstakingly plowed through all of movants' papers. If we have missed some pertinent fact buried in the midst of their filings, the movants should not now be heard to complain: the movants failed to separate the wheat from the chaff and to present the material in an organized and persuasive manner.

[23] Joint Intervenors' Motion To Reopen The Record On The Issues Of Construction Quality Assurance And Licensee Character And Competence at 1.

demonstrate the applicant's deficient character and lack of competence to design, construct, and operate the facility.

To these historical examples, the joint intervenors add a lengthy list of alleged deficiencies in the applicant's design and construction quality assurance programs from their most recent motions to reopen the record. They argue that these new charges and supporting materials, combined with their previously recited historical evidence, in effect, create a pattern and practice of deficient character and incompetence on the part of the applicant that constitute significant new evidence to support reopening the record on this issue.

The joint intervenors' motion to reopen the record on the issue of the applicant's character and competence is denied. The movants' historical examples of alleged applicant misconduct are not timely presented. Moreover, the movants' new list of purported deficiencies fails to present evidence of a significant safety issue that could have an effect on the outcome of the proceeding.

The past incidents of alleged applicant misconduct relied upon by the joint intervenors occurred too long ago to be properly considered in a motion to reopen the record without a showing why this issue could not have been raised earlier. No such showing has even been attempted by the movants. Nor can the tardy presentation of these historical examples be saved by bootstrapping them to a series of more

recent charges. Indeed, all of the movants' examples are matters of public record and most of them have been used previously by the movants to support earlier reopening motions on other issues, or have been used already as evidence in the Diablo Canyon operating license proceeding.[24] Moreover, taken in proper context, none of these historical examples, singularly or in combination, establishes that the applicant's character and competence are insufficient to design, construct and operate the Diablo Canyon facility. Similarly, the joint intervenors' new charges of quality assurance program deficiencies do not establish that the applicant lacks the requisite character and competence to operate the plant. As we have already indicated, none of the new charges raises a significant safety issue.

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[24] Two of the major historical examples relied upon by the joint intervenors involve claims that the applicant failed to conduct adequate geological studies resulting in an improperly located Diablo Canyon facility, and the applicant's poor management practices and policies led to the alleged inadequate redesign of the facility. We note, however, that these items have been thoroughly aired in these proceedings. The early geologic studies are treated in LBP-79-26, 10 NRC 453 (1979) and ALAB-644, 13 NRC 903 (1981). Similarly, management's involvement in the seismic redesign of the Diablo Canyon facility following the discovery of the Hosgri fault is dealt with in ALAB-763, 19 NRC __ (March 20, 1984) (slip opinion at 87-89).

For the foregoing reasons, the joint intervenors' motions to reopen the record, with one reservation,[25] are denied.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

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[25] See note 21, supra.

ATTACHMENT 2

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

August 8, 1984

ALAB-775-A

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)	

ORDER

On June 28, 1984, we denied, with one exception, the joint intervenors' motion to reopen the record in the Diablo Canyon operating license proceeding on the issue of the adequacy of the applicant's construction quality assurance program. See ALAB-775, ___ NRC ___. We reserved ruling on the joint intervenors' allegations that the applicant improperly used A307 hardware bolts with the heads removed as studs for the containment liner and ordered the applicant to provide us with certain additional information on this matter. We have now received that information.

Having reviewed the joint intervenors' motion and supporting material, the applicant's and NRC staff's answers, and the applicant's most recent filing in response to our order, we deny the reopening motion with respect to this matter as well. The joint intervenors' allegation

concerning the studs used for the containment liner (singularly or in combination with the other charges raised in the reopening motion) does not present new evidence of a significant safety issue that could have an effect on the outcome of the licensing proceeding. The motion is therefore denied.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
PACIFIC GAS AND ELECTRIC COMPANY	)	Docket No.(s) 50-275OL
	)	50-323OL
(Diablo Canyon, Units 1 and 2)	)	
	)	
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document(s) upon each person designated on the official service list compiled by the Office of the Secretary of the Commission in this proceeding in accordance with the requirements of Section 2.712 of 10 CFR Part 2 - Rules of Practice, of the Nuclear Regulatory Commission's Rules and Regulations.

Dated at Washington, D.C. this

8th day of Aug 1984.

Penny J. Drewing

Office of the Secretary of the Commission

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
PACIFIC GAS AND ELECTRIC COMPANY) Docket No.(s) 50-275OL
) 50-323OL
(Diablo Canyon, Units 1 and 2))
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ATTACHMENT 3

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

'84 JUL 20 A11:15

In the Matter of	)	
PACIFIC GAS ANL 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-775

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-775, issued by the Atomic Safety and Licensing Appeal Board ("Appeal Board") in the above-entitled proceeding on June 28, 1984. In that decision (attached as an exhibit hereto), the Appeal Board denied the following motions by the Joint Intervenors in this proceeding:

(1) Motion to Augment or, in the Alternative, to Reopen the Record on the Issue of Design Quality Assurance; and

(2) Motion to Reopen the Record on the Issues of Construction Quality Assurance and Licensee Character and Competence.

Briefly stated, the Board concluded, without even attempting to address the specific evidence on which the motions were based,

that the "joint intervenors have failed to present new evidence of any significant safety issue that could have an effect on the outcome of the licensing proceedings." ALAB-775, at 9, 13.

In so doing, the Appeal Board has once again refused to acknowledge extensive evidence of a continuing quality assurance breakdown at Diablo Canyon, evidence documented through numerous sworn affidavits from plant workers and hundreds of pages of supporting documentation. In order to remedy the Appeal Board's error -- as outlined below -- the Joint Intervenors request the Commission to (1) grant review of ALAB-775 and (2) reverse the Appeal Board's denial of the subject motions to reopen the record.[1/]

I. COMMISSION REVIEW SHOULD BE EXERCISED

ALAB-775 is the most recent in a series of decisions by the Appeal Board in this proceeding misapplying the Commission's standards regarding the issue of quality assurance. See also ALAB-756, ALAB-763, and Joint Intervenors' petitions for review of those decisions. Once again, the Appeal Board has rejected, virtually without analysis, significant evidence of pervasive

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1/ All matters of law and fact discussed herein were previously raised. See, e.g.,

A. Motion to Augment (Design) (February 14, 1984)
   (1) March 1, 1984 Supplement
   (2) March 15, 1984 Reply
   (3) April 6, 1984 Supplement
   (4) June 11, 1984 Reply

B. Motion to Reopen (Construction and Character and Competence) (February 22, 1984)
   (1) March 3, 1984 Supplement
   (2) June 11, 1984 Reply

programmatic quality assurance deficiencies, and it has done so simply by ignoring that evidence and adopting wholesale the contrary assurances by PGandE and the NRC Staff. Such an approach makes a mockery of the well-established Vermont Yankee standards for review of a motion to reopen, and it subverts the adjudicatory hearing process by substituting a standard that cannot be met even where, as here, there is general agreement that the Commission's quality assurance requirements have not been met.

The Appeal Board's decision in ALAB-775 does not even purport to address the evidence submitted in support of the motions. As such, it is erroneous with respect to important questions of law and fact, and it necessitates Commission review in order to preserve the Commission's own standards long enacted to protect the health and safety of the public.

II. THE APPEAL BOARD'S DECISION IS ERRONEOUS

A. Standard of Review

As it did in ALAB-756, the Appeal Board once again misapplied the NRC standards for review of a motion to reopen the record. In Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523-525 (1973), the Appeal Board set forth the precise test to be applied to a timely motion to reopen raising a significant safety issue:

> The Board must . . . consider whether one or more of the issues requires the receipt of further evidence for its resolution. If not, there is obviously no need to reopen the record for an additional evidentiary hearing. As is always the case, such a hearing need not be held unless there is a triable issue of fact.

> In other words, to justify the granting of a motion to reopen the moving papers must be strong enough, in the light of any opposing filings, to avoid summary disposition. Thus, even though a matter is timely raised and involves significant safety considerations, no reopening of the evidentiary hearing will be required if the affidavits submitted in response to the motion demonstrate that there is no genuine unresolved issue of fact, i.e., if the undisputed facts establish that the apparently significant safety issue does not exist, has been resolved, or for some other reason will have no effect upon the outcome of the licensing proceeding. (Footnotes omitted.) (Emphasis added.)

In ALAB-775, however, the Appeal Board disregarded the foregoing guidelines and simply resolved all factual issues against the Joint Intervenors and in favor of the NRC Staff and PGandE. Both the design and construction motions were based on hundreds of allegations of deficient practices at Diablo Canyon, allegations supported by sworn affidavits and, to some extent, by the NRC Staff's own investigative findings. (See decision infra at 6-9.) Nonetheless, without the opportunity for hearing required by Vermont Yankee, the Board accepted the contrary assertions and analyses submitted by PGandE and the Staff in opposition to the motions and concluded that no significant new evidence had been presented by the Joint Intervenors. In so doing, the Board erred, and, therefore, its decision in ALAB-775 must be reversed.

B. Failure to Address Competent Evidence

After setting forth the standards applicable to a motion to reopen the record -- notably omitting the foregoing Vermont Yankee analysis -- the Board summarily concluded that the Joint Intervenors failed to meet them. With the exception of a single

footnote regarding small bore piping practices,[2] the Board failed to address any of the extensive evidence supporting the motions, instead asserting only that:

> the movants have not presented evidence that establishes uncorrected design or construction errors that endanger safe plant operation. Nor have they demonstrated that there has been a breakdown of the applicant's quality assurance program that raises legitimate doubt that the facility can operate safely. Moreover, our searching review of the motions reveals nothing that causes us to question the continuing validity of the conclusions we reached in ALAB-756 and ALAB-763 -- conclusions that followed extensive evidentiary explorations of construction and design quality assurance at Diablo Canyon.

ALAB-775, at 9-10 (footnote omitted).[3] As if to excuse its failure to confront the evidence, the Board then noted that "the papers run well over a thousand pages," and hence

> [i]ndividual treatment of each of the movants' varied charges -- matters that do not readily lend themselves to being grouped together --

---

[2] Notably, the Board purported to resolve any material factual disputes concerning the numerous small bore piping issues by citing a letter from PGandE to the NRC asserting that, despite conceded error, no modifications were necessary. ALAB-775, at 9-10 n.20. Not only does this ignore obvious disputes regarding the extent of the QA errors, adequacy of the review and corrective action, appropriateness of the methodology, and generic implications of the deficiencies, but it ignores also the fact now well known to the Commission that the NRC inspector principally responsible for the review -- Isa Yin -- has quit the review team because he felt the errors were so significant and the review so inadequate that to remain part of the review team would compromise his integrity. To conclude that no factual dispute exists justifying a hearing on this significant safety issue makes a mockery of the administrative process.

[3] The adequacy of the so-called "extensive evidentiary explorations of construction and design quality assurance at Diablo Canyon" is, in and of itself, a matter of unresolved controversy. See Joint Intervenors' petitions for review of ALAB-756 and ALAB-763.

> would consume many pages but have no practical precedential value. Such a decision would add little of consequence to the already expansive administrative record of this proceeding.

Id. at 12.

The Board's failure to address the evidence on the record constitutes an abuse of discretion and effectively precludes meaningful appellate scrutiny of its asserted "searching review" and ultimate decision. As such, the Board has violated the fundamental requirement of administrative law that an agency must provide an explanation of its reasons in rejecting competent evidence on an issue of critical importance to safety, such as quality assurance. See, e.g., In the Matter of Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, CCH Nuc.Reg.Rptr. ¶ 30,216 (1977); In the Matter of Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-104, 6 AEC 1179 n.2 (1973); see also Greater Boston Television Corp. v. F.C.C., 444 F.2d 841, 851 (D.C.Cir. 1970), cert. denied, 403 U.S. 923, 91 S.Ct. 2229 (1971); Environmental Defense Fund v. Ruckleshaus, 439 F.2d 584, 596-98 (D.C.Cir. 1971). Accordingly, ALAB-775 must be reversed.

C. Lack of Substantial Evidence

Although the Board's failure to address the evidence renders difficult any substantial evidence analysis on appeal of its decision, the evidence submitted by the Joint Intervenors in support of both the design and construction quality assurance motions was clearly sufficient to meet the threshold for reopening of the record and to preclude a finding of "reasonable assurance

that any and all serious [design or] construction infirmities have been detected or rectified." Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-__, at 8-9 (1984). As a result, "legitimate uncertainty remain[s]" regarding whether Diablo Canyon has been properly designed and constructed, and, accordingly, no license may be issued. Id.[4/]

1. Design. On February 14, 1984, the Joint Intervenors filed a motion to augment or reopen the record on the issue of design quality assurance. The motion was based primarily on two affidavits of former Diablo Canyon engineer Charles Stokes and recently revealed confirmation of his allegations by the NRC Staff's own investigation and the U.S. Department of Labor. Among the deficiencies documented were inadequate procedures, lack of document control, inadequate training of engineers, inadequate corrective action, use of questionable engineering practices to approve failed pipe supports, destruction of calculations showing failure of equipment, undocumented modifications, inadequate design drawings, poorly controlled field modifications, retaliation against engineers who questioned poor design practices, and

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4/ Significantly, this is not a situation in which allegations are made without documentation or support. To the contrary, each matter raised is documented through sworn affidavits from workers as well as through exhibits in support of the affidavits. The affiants are past and present workers at Diablo Canyon whose knowledge and experience are first hand and whose technical understanding of the requirements and deficient practices is comparable to that of PGandE and NRC technical personnel. In addition, much of the support for the design motion comes from the NRC Staff, whose principal inspector, Isa Yin, substantiated virtually all of the allegations by former Diablo Canyon engineer Charles Stokes. That the Board apparently concluded none of this deserved mention in ALAB-775 suggests strongly that the Board's decision is unsound.

an effectively uncontrolled "Quick Fix" program for making design changes in the field. The motion was further supplemented on March 3, 1984 at the direction of the Board to include the transcript of a meeting between Mr. Stokes and the NRC Staff comprised of further related allegations; and on April 6, 1984 to include NRC Inspector Isa Yin's draft Inspection Report confirming some 47 categories of QA/QC deficiencies. Replies incorporating reply affidavits to PGandE and NRC Staff responses were filed on March 15 and June 11, 1984.

2. Construction. On February 22, 1984, the Joint Intervenors filed a motion to reopen the record on the issue of construction quality assurance. This 65-page motion was based on over 1000 pages of sworn affidavits and documentation from past and present Diablo Canyon workers, alleging pervasive deficiencies in welding, NDE, hydrostatic testing, vendor quality assurance practices, painting, training, inspection acceptance criteria, disclosure of QA violations, corrective action procedures, records, and independence of quality assurance from production. In particular, the evidence -- including an affidavit from Pullman Power Product's own internal auditor -- demonstrated that the wide-spread deficiencies in QA/QC practices found in 1977 by Nuclear Services Corporation ("NSC") in its audit of Pullman continue uncorrected even today. The motion was supplemented on March 3, 1984 by further affidavits confirming this evidence and by a reply incorporating further responding affidavits on June 11, 1984.

3. ALAB-775. On June 28, 1984, the Appeal Board rejected the foregoing evidence in its entirety with little more

that a conclusory assertion that the reopening standards had not been met. Its failure to apply the relevant standards to the specific evidence submitted in support of the motions renders its action arbitrary and capricious and without substantial basis; accordingly, ALAB-775 must be reversed.

III. CONCLUSION

For the reasons stated herein, the Joint Intervenors request that this Petition for Review be granted and ALAB-775 be reversed.

Dated: July 17, 1984

Respectfully submitted,

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

'84 JUL 20 A11:15

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)	)	

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of July, 1984, I have served copies of the foregoing JOINT INTERVENORS' PETITION FOR REVIEW OF ALAB-775, mailing them through the U.S. mails, first class, postage prepaid, to the attached list.

Christina Concepcion

CHRISTINA CONCEPCION

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ATTACHMENT 4

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

'84 JUL 30 A11:59

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)	)	

ANSWER OF
PACIFIC GAS AND ELECTRIC COMPANY TO
JOINT INTERVENORS'
PETITION FOR REVIEW OF ALAB-775

I

INTRODUCTION

Pursuant to 10 CFR 2.786(b)(3), Pacific Gas and Electric Company (PGandE) files this Answer to assist the Commission in its deliberations regarding Joint Intervenors' Petition for Review of ALAB-775.

On October 24, 1983, the Appeal Board denied an earlier Motion to Reopen the Record on Construction Quality Assurance (CQA). The Appeal Board's opinion (ALAB-756) was issued December 19, 1983.

On February 14, 1984, the Joint Intervenors filed a Motion to Augment or in the Alternative, to Reopen the

Record on Design Quality Assurance (DQA). At the time the motion was filed, the Appeal Board had under consideration the Proposed Findings of Fact and Conclusions of Law of the parties in the reopened DQA Hearings, ALAB-763. On March 20, 1984, the Appeals Board decided ALAB-763. On April 8, 1984, the Joint Intervenors filed supplements to their Motion to Augment or Reopen on DQA.

On February 22, 1984, the Joint Intervenors filed a Motion to Augment or in the Alternative to Reopen the Record on Construction Quality Assurance and Licensee Character and Competence. On March 3, 1984, the Motion to Augment or to Reopen on CQA was supplemented by the Joint Intervenors.

On March 6, 1984, PGandE answered in opposition to the Motion to Reopen on DQA, and on March 19, 1984, PGandE answered in opposition to the Motion to Reopen on CQA and Character and Competence.

By Order dated May 23, 1984, the Appeals Board, sua sponte, provided the Joint Intervenors the opportunity to file a Reply to the final responses of PGandE and the Staff to both Motions and supplements. The order required that the Reply be accompanied by affidavits which clearly established significance to plant safety of each item raised by the Joint Intervenors and stated why the responses of PGandE and Staff were insufficient.

On June 11, 1984, Joint Intervenors filed their Reply. The Reply failed to meet the requirements of the Board Order as it did not establish significance to plant safety of any items raised by the multitudinous allegations proffered by Joint Intervenors.

On June 28, 1984, the Appeal Board issued its Decision (ALAB-775) denying both motions of the Joint Intervenors.

The Joint Intervenors filed a Petition for Review of the Appeal Board's Decision ALAB-775 on July 17, 1984.

II

ARGUMENT

1. The Appeal Board Acted Correctly.

The proponents of a motion to reopen the record in a licensing proceeding carry "a heavy burden." Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978). Contrary to the position taken by the Joint Intervenors, Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520 (1973), alone, is not the "precise test" to be applied to a motion to reopen. The test to be applied to a motion to reopen is the tripartite test found in Wolf Creek, supra. Metropolitan Edison Company (Three Mile Island Station, Unit No. 1) ALAB-738, 18 NRC 177, 180 (1983). To satisfy the Wolf Creek test,

> "[t]he motion must be both timely presented and addressed to a significant safety or environmental issue. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973); . . . Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 and 2), ALAB-291, 2 NRC 404, 409 (1975). Beyond that, it must be established that 'a different result would have been reached initially had [the material submitted in support of the motion] been considered.' Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-227, 8 AEC 416, 418 (1974).

However, even assuming that Vermont Yankee, alone, constitutes the standard for a motion to reopen, the Joint Intervenors failed to satisfy that standard.

> . . . First, as we have indicated earlier (see ALAB-124, RAI-73-5 at 364-65), the board must consider: (1) the timeliness of the motion, i.e., whether the issues sought to be presented could have been raised at an earlier stage, such as prior to the close of the hearing;[12] and (2) the significance or gravity of those issues. A Board need not grant a motion to reopen which raises matters which, even though timely presented, are not of "major significance to plant safety" (ALAB-124, RAI-75-5 at 365). By the same token, however, a matter may be of such gravity that the motion to reopen should be granted notwithstanting that it might have been presented earlier (ALAB-124, RAI-75-5 at 635, fn. 10; see also ALAB-126, RAI-73-6 at 394).
>
> If these questions are resolved in the movant's favor, the Board must then proceed to consider whether one or more of the issues requires the receipt of further evidence for its resolution. If not, there is obviously no need to reopen the record for an additional evidentiary hearing. As is always the

> case, such a hearing need not be held unless there is a triable issue of fact. (Vermont Yankee Nuclear Power Corp. (Vermont Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973).

Under the Vermont Yankee standard, Joint Intervenors are not entitled to prevail on their motion to reopen without a threshhold showing of the significance to plant safety of the items they raised. Since no such showing was made, or even attempted, the motions to reopen were properly denied.

In order for new evidence to constitute a significant safety issue for a motion to reopen predicated on alleged deficiencies in the Licensee's quality assurance program, the evidence must establish either that uncorrected construction errors endanger safe plant operation, or that there has been a breakdown of the quality assurance program sufficient to raise legitimate doubt as to the plant's capability of being operated safely. See, Union Electric Co. (Callaway Plant, Unit 1 ALAB-740, 18 NRC 343, 346 (1983); Pacific Gas and Electric Company (Diablo Canyon Units 1 and 2) ALAB-756, 18 NRC 1340, ___ (1983).

If the moving party cannot establish the safety significance of the new evidence, there is no purpose to reopening the record for a further hearing. Vermont Yankee, 6 AEC 520, 523. Where the evidence submitted in response to a motion to reopen demonstrates that a significant safety issue does not exist or has been resolved, and the evidence remains unrebutted by the moving party, the moving party has

failed to meet the heavy burden necessary to reopen a closed record. See, South Carolina Electric and Gas Co., et al. (Virgil C. Summer Nuclear Station, Unit 1), LBP-82-84, 16 NRC 1183, 1185 (1982); Vermont Yankee, 6 AEC 520, 523.

In this case, the Board gave the Joint Intervenors ample opportunity to demonstrate the safety significance of their new evidence. Ordinarily a moving party has no right to file a Reply to a Response to a Motion. 10 CFR § 2.730(c). However, the Board permitted the Joint Intervenors to file a Reply, provided it was accompanied by affidavits of qualified individuals that clearly establish why the detailed item by item sworn responses of PGandE and NRC Staff were insufficient and demonstrating the safety significance of Joint Intervenors' assertions. The Reply filed by the Joint Intervenors failed to comply with the Board's directions. While Joint Intervenors presented historical evidence of design and construction discrepancies that were resolved through the operation of the quality assurance program, their Reply failed to demonstrate the safety significance of a single deficiency. By their own admission, and as noted by the Appeal Board, "few deficiencies will be demonstrably 'significant' if considered individually." (Joint Intervenors' Reply dated June 11, 1984, at 6.) Joint Intervenors did not even bother to point out which of the "few deficiencies (were) demonstrably significant."

As a second and subordinate issue, Joint Intervenors claim that the Appeal Board failed to specify reasons for its determination that Joint Intervenors affidavits failed to show required safety significance. Contrary to the position of the Joint Intervenors, the Board need only particularize its reasons for its denial when it is addressing a party's proposed contentions and findings arising out of a hearing. Where no hearing is required to be conducted the Board need not particularize its reasons, for example, as to the lack of safety significance for each and every allegation raised by Joint Intervenors. 5 U.S.C. 557(a) and (c).

Even if the rule were to apply as urged by Joint Intervenors, there should be no requirement for the Board to make specific findings or particularize its reasons inasmuch as Joint Intervenors failed even to try to meet their burden under Vermont Yankee to show safety significance after Applicant and Staff filed their extensive responses to the motions to reopen. Where Joint Intervenors failed to meet preliminary procedural requirements for commencement of a process, substantive requirements should not even come into play. Having failed to particularize their claims regarding safety significance, they should not be allowed to demand a particularized response from the Appeal Board. Nevertheless, even applying the rule suggested by Joint Intervenors, the Appeal Board satisfied its requirements.

What is required is that a Board "articulate in reasonable detail the basis for those determinations." Northern States Power Company (Prairie Island Nuclear generating plant, Units 1 and 2) ALAB-104, 6 AEC 179 (1973). The Board clearly set forth its reasons for denying the motions on pages 9 and 10 of its order. As pointed out in Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 40:

> [A] decision need not refer individually to every proposed finding; "it meets the requirements of the Administrative Procedure Act and the Commission's Rules of Practice if it sufficiently informs a party of the disposition of its contentions." (Citations omitted).

While contentions are not here involved, the Board clearly indicated why Joint Intervenors failed to meet the requirements of Vermont Yankee. The "path" of its reasoning can readily be discerned. WAIT Radio v. FCC, 418 F.2d 1153, 1156 (D.C. Cir. 1969).

As a final basis for the petition for review, Joint Intervenors assert that because they claim that QA deficiencies exist or existed, a license may not be issued. Citing Commonwealth Edison Co. (Bryon Nuclear Power Station, Units 1 and 2), ALAB-770 ____ NRC ____ (1984).

The Byron case is distinguishable from the instant proceeding. In Byron, the proceeding was remanded for a hearing upon the adequacy of a reinspection program which was initiated after significant quality assurance

deficiencies were found. In this case, hearings on design quality assurance and construction quality assurance have already been held. (ALAB-763 and ALAB-756, respectively) In ALAB 763, the adequacy of Applicant's verification program which was established pursuant to this Commission's order was extensively reviewed. Any "cloud" that previously may have existed over the adequacy of quality assurance and the ability of the plant to operate without endangering public health and safety was removed by such hearings.

As a final matter, Joint Intervenors claim that the Appeals Board "disregarded" the anonymous affidavits which it submitted with their Reply. That is not so. As can be seen in the Order, the Appeal Board reviewed the anonymous affidavits as it did all other affidavits submitted by Joint Intervenors.

CONCLUSION

Joint Intervenors have failed to meet the burden placed upon them by Vermont Yankee and its successors. They failed to respond to even the additional opportunity afforded them by the Board to demonstrate the safety significance of the allegations they raised. They should not be heard to complain now. To grant a motion to reopen given the record in this proceeding, would forever invite repeated attack and delay upon the administrative process of

this Commission. A party's day in court, once had, does not continue forever.

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DATED: July 27, 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	)	
	)	

'84 JUL 30 A11:58

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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Date: July 27, 1984

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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 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-775

Lawrence J. Chandler
Special Litigation Counsel

August 1, 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-775

I. INTRODUCTION

On July 17, 1984, Joint Intervenors filed a Petition for Review of ALAB-775, pursuant to 10 C.F.R. § 2.786. In this Memorandum and Order, issued on June 28, 1984, the Atomic Safety and Licensing Appeal Board (Appeal Board) denied Joint Intervenors' Motion to Augment, or, in the Alternative, to Reopen the Record on the Issue of Design Quality Assurance, and their Motion to Reopen the Record on the Issues of Construction Quality Assurance and Licensee Character and Competence.

For reasons discussed below, the NRC staff (Staff) opposes the Petition and urges that it be denied.

II. BACKGROUND

As relevant to the subject Petition, on February 14, 1984, Joint Intervenors filed a Motion to Augment, or, in the Alternative, to Reopen the Record on the Issue of Design Quality Assurance. This motion, as supplemented, was founded principally on affidavits of Mr. Charles Stokes and Mr. John Cooper,[1/] former project employees, and on statements made by

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1/ Joint Intervenors appear, in their Petition, to abandon reliance on Mr. Cooper's assertions.

Mr. Isa Yin, an NRC Region III inspector assigned to review certain of the voluminous allegations concerning Diablo Canyon. See Petition, at 2, n.1 and at 7-8. Extensive replies were filed by both the Licensee and Staff. See ALAB-775, slip op. at 4, n. 9.[2/]

On February 22, 1984, Joint Intervenors filed a Motion to Reopen the Record on the Issues of Construction Quality Assurance and Licensee Character and Competence. This motion, as supplemented, was based on a number of affidavits executed by present and former employees (some anonymous). Again, extensive replies were filed by the Licensee and Staff.[3/]

Upon consideration of the foregoing motions and replies, the Appeal Board, on June 28, 1984, issued ALAB-775. Therein, the Appeal Board concluded that, in spite of the volume of Joint Intervenors' submittals, they had failed to satisfy the standards for reopening the record and thus denied each motion.

Joint Intervenor's Petition followed.

III. DISCUSSION

Although the Commission has the ultimate discretion to review any decision of its subordinate boards, a petition for Commission review "will not ordinarily be granted" unless important safety, procedural, common defense, antitrust, or public policy issues are involved. 10 C.F.R. § 2.786(b)(4). When measured against the standards of 10 C.F.R. § 2.786,

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2/ In ALAB-763, the Appeal Board's decision on the reopened design quality assurance issues, the Appeal Board expressly retained jurisdiction over this motion. Slip opinion, March 20, 1984, at 102-103. Petitions for Review of ALAB-763 are currently pending before the Commission.

3/ Id. As noted by the Staff, the allegations on which this motion is based are essentially identical to those filed in support of Government Accountability Project petition filed pursuant to 10 C.F.R. § 2.206. See Staff's Answer at 2-3.

the matters asserted by Joint Intervenors in their Petition do not warrant the exercise of the Commission's discretion to grant the Petition, i.e., important questions of fact, law, or policy are not presented. 10 C.F.R. § 2.786(b)(1).

As in the past,[4/] the Joint Intervenors misconstrue both the applicable standard for reopening the record and the Appeal Board's disposition of the "evidence" submitted in support of their motions to reopen.

A. Standards for Reopening

Joint Intervenors contend that, based upon the Appeal Board's decision in Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523-525 (1973), the sole standard to be applied to a motion to reopen is whether the papers submitted are sufficient to withstand summary disposition. (Petition at 3-4). In so casting the standard, Joint Intervenors ignore the long-recognized factors relevant to a motion to reopen set forth in Vermont Yankee, supra, and its progeny. Those factors require consideration of (1) the timeliness of the motion, (2) the significance of the information on which the motion is based in terms of the safe operation of the facility, (Id.), as well as (3) the effect of such information on the outcome of the proceeding, that is, might consideration of the "evidence" affect the decision below. Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978). Only if the foregoing are resolved in the movant's

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4/ See, Joint Intervenors' Petition for Review of ALAB-756 dated January 9, 1984, pending before the Commission.

favor does one then proceed to determine whether the "evidence" submitted in support of the motion is sufficient to overcome summary disposition, thereby presenting a triable issue. Vermont Yankee, supra, at 523.

Having concluded that Joint intervenors failed to meet the applicable threshold standards for reopening (Vermont Yankee; Wolf Creek), ALAB-775, slip op. at 8-10, it was not necessary, as Joint Intervenors imply (Petition at 3-7, 8-9), for the Appeal Board to give discrete consideration to each one:

> . . . while it is useful from an analytical standpoint to keep separate the factors to be considered on a motion to reopen, it will not always be possible, in passing upon the motion, to give them separate consideration. The questions of whether the matter sought to be raised is significant and whether it presents a triable issue may often be intertwined, and can be so treated . . .

Vermont Yankee, supra, at 524.

The Appeal Board's resolution of the motions to reopen from the standpoint of the law fully comports with the Commission's traditional standards and thus raises no important question of law warranting Commission review.

B. Disposition of the "Evidence"

Joint Intervenors complain that the Appeal Board's decision fails to address the voluminous "evidence" presended in the respective motions, instead stating merely a conclusion that Joint Intervenors failed to meet the standards for reopening. Petition at 4-7, 8-9.

In criticizing the Appeal Board for its allegedly summary treatment of the so-called "evidence," Joint Intervenors have chosen to ignore both the applicable caselaw and the extensive factual information filed by the Licensee and Staff in rebuttal. The Appeal Board succinctly stated the former as follows:

In ALAB-756, we highlighted what constitutes a "significant safety issue" for motions predicated on asserted deficiencies in a construction quality assurance program. We stated that

> perfection in plant construction and the facility quality assurance program is not a precondition for a license under either the Atomic Energy Act or the Commission's regulations. What is required instead is reasonable assurance that the plant, as built, can and will be operated without endangering the public health and safety . . . .
>
> . . . In order for new evidence to raise a "significant safety issue" for purposes of reopening the record, it must establish either that uncorrected. . . errors endanger safe plant operation, or that there has been a breakdown of the quality assurance program sufficient to raise legitimate doubt as to the plant's capability of being operated safely. . . . 16/

Although the focus of ALAB-756 was a motion to reopen on the issue of construction quality assurance, what we said there is equally applicable to reopening motions directed to the issue of design quality assurance.

Further, the Commission has emphasized in this very proceeding that the proponent of a reopening motion must present "'significant new evidence . . . that materially affects the decision," not "bare allegations or simple submission of new contentions. 17/ At a minimum, therefore, the new material in support of a motion to reopen must be set forth with a degree of particularity in excess of the basis and specificity requirements contained in 10 C.F.R. § 2.714(b) for admissible contentions. Such supporting information must be more than mere allegations; it must be tantamount to evidence. And, if such evidence is to affect materially the previous decision (as required by the Commission), it must possess the attributes set forth in 10 C.F.R. § 2.743(c) defining admissible evidence for adjudicatory proceedings. Specifically, the new evidence supporting the motion must be "relevant, material, and reliable." 18/

16/ ALAB-756, supra, 18 NRC at 1344 (citations omitted).

17/ CLI-81-5, 13 NRC 361, 362-63 (1981).

18/ In other words, only facts raising a significant safety issue, not conjecture or speculation, can support a reopening motion. The facts must be relevant to the proposition they support, and probative of the safety issue presented. General

> statements are of no value. Similarly, although hearsay may be admissible in NRC proceedings, it must be shown to be reliable if it is to be considered as support for the motion.
>
> Also embodied in the reliability requirement of 10 C.F.R. 2.743(c) is the motion that evidence presented in affidavit form must be given by competent individuals with knowledge of the facts or experts in the disciplines appropriate to the issue raised. Because the competence (or even the existence) of unidentified individuals is impossible to determine, statements of anonymous persons -- so-called anonymous affidavits -- cannot be considered as evidence to support a motion. For adjudicatory proceedings, in camera filings and requests for protective orders are available in appropriate circumstances to protect the legitimate interests of a party of other person. This situation should be contrasted to the staff's responsibilities outside the adjudicatory arena where even anonymous charges receive attention. The staff has, in fact, investigated a vast number of such allegations with respect to Diablo Canyon.

ALAB-775, slip op. 6-8.

With respect to the latter, the record developed before the Appeal Board in connection with the motions includes extensive responses submitted by both the Staff and PG&E, each supported by affidavits executed by appropriate expert individuals countering the allegations contained in the motions and supporting documents. In essence, these replies established that the allegations do not raise matters of significance in terms of the safe operation of the facility or otherwise demonstrate a breakdown of the quality assurance program sufficient to raise doubt as to the plant's ability to be safely operated. Nevertheless, as a matter of discretion, the Appeal Board gave Joint Intervenors still another chance to establish their position. In an Order issued on May 23, 1984, the Appeal Board provided Joint Intervenors an opportunity to respond to the answers to their motions to further identify what matters of material fact continue to exist and the significance to plant safety of such matters. See Order, May 23, 1984, unpublished, at 2, 4). Joint Intervenors, in their reply of June 12, 1984 chose not to substantively deal with these issues; Joint

Intervenors have not established that, either individually or collectively, the allegations submitted in support of their Motions present a significant issue in terms of the safe operation of the plant, Vermont Yankee, supra., that might affect the earlier decision, Wolf Creek, supra. (See ALAB-775, slip op. at 9, n. 19). To lay at the doorstep of the Appeal Board, the obligation to then individually address each of the myriad allegations, an undertaking the Joint Intervenors themselves were unwilling and/or unable to accomplish, flies in the face of credibility; simply put, it is the Joint Intervenors who have failed to sustain their burden, not the Appeal Board.

Similarly, Joint Intervenors' argument that the Appeal Board erred by failing to provide an explanation for its rejection of allegedly competent evidence (Petition at 6), is unfounded. Indeed, in its totality, ALAB-775 is clear in explaining the rejection of information - in some instances, it simply was not possible to determine whether the "evidence" was competent (see slip op. at 8, n.18), in other instances, irrespective of whether the "evidence" may be competent, because of the form of its presentation, it was not possible for the Appeal Board to do that which the Joint Intervenors, who had the burden, did not do, namely, establish the significance and affect of the "evidence" (see slip op. at 8-12, in particular footnotes 19, 20, 22). Thus, contrary to Joint Intervenors' complaint, the Appeal Board properly addressed the "evidence" submitted and articulated the basis for rejecting it, consistent with Commission regulations and caselaw.

In brief, Joint Intervenors have failed to present any important question of fact or policy raised by ALAB-775 warranting Commission review.

IV. CONCLUSION

For the foregoing reasons, Joint Intervenors' Petition for Review of ALAB-775 fails to establish the existence of any important issue of fact, law or policy warranting Commission review and, therefore, should be denied.

Respectfully submitted,

Lawrence J. Chandler
Special Litigation Counsel

Dated at Bethesda, Maryland
this 1st day of August, 1984