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July 10, 1987

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S ANSWER TO SIERRA CLUB'S MOTION TO ADMIT A CONTENTION REGARDING GENERIC ISSUE 82 AND TO DIRECT PREPARATION OF AN EIS

I. INTRODUCTION

On June 29, 1987, the Sierra Club filed a written motion requesting that the Atomic Safety and Licensing Board admit a new contention and direct the preparation of an environmental impact statement (EIS) regarding the possibility of zircaloy cladding fires in the spent fuel pools at the Diablo Canyon Nuclear Power Plant. (Motion)

For reasons which follow, the NRC staff opposes the motion and urges that it be denied.

II. BACKGROUND

On March 27, 1987, the Staff issued a Board Notification, BN 87-05, transmitting to the Commission, as a matter of possibly substantial public, press or Congressional interest, a draft report prepared by the Brookhaven National Laboratory (BNL) entitled "Beyond Design-Basis Accidents in Spent Fuel Pools (Generic Issue 82)." Sierra Club Ex. 1, for identification only (Draft report or draft BNL report). The Staff's

preliminary assessment of the draft report and its relation to ongoing proceedings was presented in the Board Notification. Copies of the Board Notification were transmitted to the Board and parties to this proceeding. 1/

On June 16, 1987, the first day of the hearing in the captioned proceeding, the Sierra Club orally moved for the admission of a new contention regarding the possibility of zircaloy cladding fires in the Diablo Canyon spent fuel pools and asked that the Board direct the preparation of an EIS on this matter. Tr. 142-149. Sierra Club argued that the basis for the admission of such new contention was information contained in the draft report. Id. The Sierra Club's motion was opposed by both the Licensee and Staff. Tr. 150-156, 156-160, respectively. Nonetheless, without ruling on the oral motion, the Board permitted the Sierra Club to file a written motion regarding this matter. Tr. 291, 630.

III. DISCUSSION

A. The Standards For Admission Of A Late-filed Contention Have Not Been Met

The Sierra Club maintains that its proposed contention is properly admissible as a new late-filed contention. 2/ In addition, it suggests that

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1/ Sierra Club contends that, although the Board Notification was received, the referenced BNL draft report was not attached to the Board Notification and was not obtained until approximately June 9, 1987. See, Affidavit of Dr. Richard B. Ferguson, dated June 25, 1987, and Declaration of Edwin F. Lowry, dated June 29, 1987, attached to the Sierra Club motion.

2/ The Sierra Club concedes that ". . . none of the Sierra Club's contentions which have been admitted by the Board relate directly to Generic Issue 82 . . . ." Motion at 4.

the proposed contention is indirectly related to admitted Contention I(B)7 dealing with alternatives, Contention I(B)5, which, although not separately admitted, was subsumed by admitted Contention II(A), and Contention I(A)3 (sic.; in light of the language quoted in the Motion, the Staff believes that the Sierra Club intended to refer to Contention I(B)3), which was rejected for lack of adequate basis which the draft BNL report now provides. Motion at 5. Viewed in either light, the contention should be rejected.

Both lated-filed contentions and amendments to admitted contentions must be supported by a demonstration that the factors set forth in 10 C.F.R. § 2.714(a)(1) warrant admission. 10 C.F.R. § 2.714(a)(3); see, Texas Utilities Electric Company, et al. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, __ NRC __ (June 30, 1987, slip op. at 13). These factors include:

(i) Good cause, if any, for failure to file on time.

(ii) The availability of other means whereby the petitioner's interest will be protected.

(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

(iv) The extent to which the petitioner's interest will be represented by existing parties.

(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

10 C.F.R. § 2.714(a)(1). The first of the above factors, good cause, has long been recognized as the most significant. Id. at 18; see also, Commonwealth Edison Company (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986). In regard to this factor, the Sierra Club argues that it could not have sought to raise this matter ear-

lier because the Board Notification upon which it relied "contains a false and misleading statement that 'the draft report does not pertain directly to currently ongoing licensing efforts for spent fuel pool expansion amendment requests by utilities, including hearing'" and, as noted above, a copy of the draft report was not appended to the copy of the Board Notification which the Sierra Club received. Motion at 2-3. Neither of these arguments is of any moment in the context of the Motion.

The suggestion that the Board Notification was "false and misleading" is simply incorrect. The Sierra Club's selective characterization of the Board Notification ignores the reasonable and adequate articulation of the subject matter and conclusions of the draft report as they relate to the potential for beyond design-basis accidents in spent fuel pools as a result of the catastrophic failure of the pool as a consequence of seismic events and cask drops. There is no issue in this proceeding which is related to the possibility of pool failure. Contention I(B)7, the only admitted contention which the Sierra Club points to, raises only the adequacy of the environmental consideration given to two specifically identified alternatives to the Licensee's rerack proposal and does not contemplate the unbounded consideration of environmental impacts and alternatives that the Sierra Club suggests.

Contention I(B)5, which was not admitted, was rejected by the Board because it is subsumed by Contention II(A)3. Memorandum and Order of June 27, 1986, LPP-86-21, 23 NRC 849, 863 (1986). Admitted Contention II(A)3 is concerned only with the possibility that during the postulated Hosgri earthquake, there would be collisions between the racks and pool walls which might cause "significant permanent deformation and

other damage to the racks." Id. at 864-865. Its relationship to rejected Contention I(B)5, which deals with welds, materials and structural elements, thus is evident but has nothing to do with pool failure as addressed in the draft BNL report.

And rejected Contention I(B)3, while referring to the possible loss of pool cooling capacity, in fact was intended to focus on the free standing nature of the new high density racks - it was suggested that because of the rack design, the racks could collide during a seismic event causing damage to the pool. See, Transcript of Prehearing Conference of May 13, 1986 at 85, 89. The rejected contention had nothing to do with pool failure directly induced by a seismic event which then might have an effect on the spent fuel, as discussed in the draft BNL report.

In view of the very clear language of the admitted contentions, the Staff's statement in its Board Notification regarding the absence of any connection between the report and an admitted contention was wholly accurate. Furthermore, the draft report has no bearing on either of the rejected contentions which might otherwise warrant their reconsideration.

The Sierra Club's argument that the fact that it did not receive a copy of the draft report together with the Board Notification provides good cause for its failure to timely seek to file a new contention, likewise is not compelling. 3/ Irrespective of whether the draft report was appended to the Board Notification, the language of the Board Notification

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3/ Although it is unable to confirm this, it is the Staff's understanding that it was intended that the draft report be appended to the Board Notification and that it was in fact appended as the language of the Board Notification suggests.

itself (which the Sierra Club acknowledges it received by early April; Declaration of Edwin F. Lowry at 1) was more than adequate in identifying the nature, content and conclusions of the draft report, and sufficient, at a minimum, to have caused anyone reading it and desiring more to request a copy of the draft report itself. To suggest that, if read in its entirety, the Board Notification would have lulled a party situated as the Sierra Club, in opposition to the rerack proposal, into the placid acceptance of the Staff's preliminary views strains credulity. That the Sierra Club apparently was content to sit and wait better than two months before acting on this information does not constitute good cause.

With respect to the second factor of 10 C.F.R. § 2.714(a)(1), the availability of other means to protect its interest, the Sierra Club briefly asserts that the only means available are to bring the matter before the Board in this proceeding. Motion at 3-4. The Staff does not agree. It is no novel notion that, while all public health and safety and environmental matters relevant to a particular licensing action must be resolved before a licensing action is taken, in an amendment proceeding such as this, only those matters placed in controversy need be decided by the presiding Board. See, 10 C.F.R. § 2.760a. Those matters which are not in controversy are to be decided by the Staff. See, Southern California Edison Co., et al. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-680, 16 NRC 127, 143 (1982). The issues raised by the draft BNL report are no different. Particularly in light of the Sierra Club's failure to show good cause, its burden with respect to the other factors regarding late-filings is greater. Compare, Comanche Peak, supra, slip op. at 18 ("once the intervenors satisfactorily explained the lateness of

their contention, a much lesser showing on the other four factors is required in order for them to prevail.") And, in regard to this factor the Sierra Club has failed to establish why any interest it might have in this issue requires litigation as opposed to resolution by the Staff outside the formal adjudicatory process. It is notable, with respect to this factor, that the Sierra Club has not made the requisite showing regarding the third factor, discussed below, from which one might possibly discern such need to protect its interest in this manner.

The third factor, contribution to the development of a sound record, likewise, does not weigh in the Sierra Club's favor, consisting of essentially nothing more than the assertion that it is the only intervenor in this proceeding, has conducted itself responsibly and "can only further the development of a sound record on the safety of the proposed action." Motion at 4. As the Commission has ruled, however, more than this is required.

> Our case law establishes both the importance of this third factor in the evaluation of late-filed contentions and the necessity of the moving party to demonstrate that it has special expertise on the subject which it seeks to raise. Grand Gulf, supra, 16 NRC at 1730. The Appeal Board has said: "When a petitioner addresses this criterion it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony." Id. Braidwood, supra, 23 NRC at 246. 4/

4/ The recent Appeal Board decision in Comanche Peak, supra, is inapposite. In Comanche Peak, the Appeal Board distinguished the situation in Braidwood, noting that the Licensing Board appropriately credited the contribution of intervenors' counsel, as opposed to the possible contribution of witnesses or other technical expertise, in light of the non-technical nature of the issue involved, good cause for a construction permit extension. See, Comanche Peak, slip op. at 19-25. By contrast, the issue the Sierra Club here seeks to raise is highly technical in nature.

The Sierra Club has failed to provide any of the foregoing information regarding the particulars of its possible contribution in its Motion and thus has not satisfied this factor.

With respect to those matters in controversy, the fourth factor, the extent to which the Sierra Club's interest will be represented by another party, weighs in its favor.

The fifth factor, whether the admission of a late-filed contention would broaden the issues or delay the proceeding, it appears evident that such would be the case. Notwithstanding the Sierra Club's protestations, Motion at 4-7, there simply is no issue admitted in this proceeding which is related to the new contention proposed. Litigation of such wholly new issue would thus broaden the issues and would cause delay as a result of the likely discovery requests and additional hearing time that would be required. That the contention belatedly being proposed may be viewed by the Sierra Club to be significant is not a matter properly considered in the context of this factor, but rather in connection with the third factor. Braidwood, supra, 23 NRC at 248. But, as discussed above, the Sierra Club's demonstration on the third factor is deficient.

In sum, the Sierra Club has failed to demonstrate that a balancing of the five factors set forth in 10 C.F.R. § 2.714(a)(1) warrants the admission of its late-filed contention. 5/

5/ Ancillary to its request for the admission of a new contention, the Sierra Club urges that the Board direct that an EIS be prepared to consider the matters addressed in the draft BNL report. Motion at 1. Irrespective of its citation to numerous regulations of the

(FOOTNOTE CONTINUED ON NEXT PAGE)

B. The Proposed Contention Fails To Present A Litigable Issue

In addition to its failure to satisfy the requirements for a late-filed contention, the specific contention proposed, which, in the overall context of the Motion, is environmental in nature, [6/] fails to present a litigable issue. It is beyond question that the matters raised in the draft BNL report are generic in nature. [7/] Accordingly, it is incumbent on the Sierra Club to establish the nexus of that draft report to the Diablo Canyon facility and the proposed amendment application. Cleveland Electric Illuminating Company, et al., (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-15, 15 NRC 555, 558-559 (1982). It has failed to do so, resting, instead, merely on its simplistic characterization of generic conclusions of the draft report.

The draft BNL report analyzes, for two older, surrogate plants, a complex chain of events leading to the castastrophic failure of the spent fuel pool, the resultant initiation of combustion of the zircaloy fuel cladding and the eventual release of radioactivity into the environment. This chain starts with an analysis of the probability of a seismic event exceeding the design basis of the facility sufficiently to cause the loss of the spent fuel pool's structural integrity. It then considers the fragility of the spent fuel pool, that is, the probability that the structure can

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6/ E.g.: "The proposed action significantly increases the consequences of loss of cooling accidents . . . ." Motion at 1. "The licensee and NRC Staff have failed to consider alternatives . . . which might mitigate the hazards related to cladding fires." Motion at 5. See also argument on page 6 of Motion.

7/ As the Sierra Club acknowledges, ". . . the problem of cladding fires is not unique to Diablo Canyon . . . ." Motion at 6.

survive the seismic event. The draft report goes on to assess, for various rack configurations, the likelihood and timing of possible combustion of the cladding, assuming the total loss of pool coolant resulting from the loss of pool integrity. Next, the draft report discusses estimates of radiological releases, and, finally, the consequences of such releases. Throughout the report, there are a number of significant caveats regarding its direct and literal application to other specific facilities.

The proposed contention, on the other hand, casually assumes the applicability of the draft report to the Diablo Canyon spent fuel pools without consideration of the critical factors underlying BNL's analysis. The Sierra Club simply asserts that the racks to be used at Diablo Canyon are "like those identified in the Brookhaven report." Motion at 2. It does not assert that, beyond the similarity of the racks, the Diablo Canyon spent fuel pools are in any way structurally equivalent to the "pool" structure analyzed in the draft BNL report such that the draft report has any direct and substantive applicability to the Diablo Canyon facility. For example, in assessing the seismic fragility of pool structure, the draft report notes that,

> Fragility curves specifically for spent fuel pools have never been developed. It is necessary therefore, to rely on fragility assessments for other structures which appear to be of similar construction to spent fuel storage pools. It must be recognized that this procedure introduces an additional element of uncertainty in the final risk estimates -- an uncertainty that is difficult to quantify. Another source of uncertainty is the degree to which the stainless steel lining of a pool would enhance the seismic strength capacity (i.e. reduce the fragility). Conceivably, the reinforced concrete structure of the pool could crack without loss of ntegrity of the pool lining.

Draft report, Sec. 2.2.1.3 at 2-9. In fact, with respect of the first uncertainty noted above, the draft report utilized the fragility curve

developed for the Oyster Creek (a BWR) reactor building and the fragility of the Zion plant (a PWR) auxiliary building shear walls. Id. As pointed out in the draft report itself, "the uncertainty in this estimate [of risk] is large (greater than a factor of 10) and plant specific features may change the results considerably." Draft report, Abstract at iii. In light of the foregoing, the Sierra Club's Motion is too superficial to establish a nexus to Diablo Canyon and thus is insufficient to justify the admission of the proposed contention. 8/

8/ If on the other hand, the contention being proposed is viewed as seeking to raise a safety issue, guidance may be found in a Commission ruling in the framework of the hydrogen control rule, 10 C.F.R. § 50.44, in the immediate post-TMI-2 accident period. In connection with a motion filed in the Three Mile Island Unit 1 Restart proceeding requesting the admission of a contention involving consideration of hydrogen generation in excess of the limits provided by the foregoing regulation, the Commission, in response to a certified question, ruled that,

> quite apart from 10 CFR 50.44, hydrogen gas control could properly be litigated in this proceeding under 10 CFR Part 100. Under Part 100, hydrogen control measures beyond those required by 10 CFR 50.44 would be required if it is determined that there is a credible loss of coolant accident scenario entailing hydrogen generation, hydrogen combustion, containment breach or leaking, and offsite radiation doses in excess of Part 100 guideline values.

Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-80-16, 11 NRC 674, 675 (1980); emphasis added. The burden of establishing the credibility of such scenario rests upon the proponent of such a contention. See, Duke Power Company (William B. McGuire Nuclear Station, Units 1 and 2), LBP-81-13, 13 NRC 652, 660 (1981).

In the present case, the controlling regulation, 10 C.F.R. Part 50, Appendix A, General Design Criterion 61, requires that a spent fuel pool "be designed to assure adequate safety under normal and postulated accident conditions." The proposed contention, relying as it

(FOOTNOTE CONTINUED ON NEXT PAGE)

IV. CONCLUSION

For the foregoing reasons the Staff opposes the Sierra Club's motions to admit a new contention and for the preparation of an EIS, and urges that it be denied.

Respectfully submitted,

Lawrence J. Chandler
Special Litigation Counsel

Dated at Bethesda, Maryland
this 10th day of July, 1987

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

does on a document which, by its very title (not to mention its content), presents an assessment of beyond-design-basis events, may be viewed not as seeking to challenge compliance with the foregoing regulation but rather as suggesting that more than required by that regulation is called for. That is, it contends that the Diablo Canyon spent fuel pools need be designed to accommodate an occurrence beyond "postulated accident conditions." Such a challenge could be mounted either by invocation of the provisions of 10 C.F.R. § 2.758, a course the Sierra Club has not chosen, or, by contending that, as with hydrogen control matters as raised in the context of the TMI-1 Restart proceeding, more is required, not by virtue of the specifically applicable regulation, but rather because an accident of the type hypothesized would result in releases exceeding the guideline values of 10 C.F.R. Part 100.

But the predicate for the admission of such contention is the establishment, by the Sierra Club, of a "credible" scenario, the consequences of which would be radiological releases in excess of the guideline values of Part 100. The credibility of the scenario hypothesized in the draft BNL report in the context of the proposed Diablo Canyon rerack amendment, or for that matter, it applicablity to any particular facility, is, however, explicitly discounted by the draft report itself through its numerous caveats. See discussion above at 11-12. Thus, simple reliance on the document for that propositon, as obviously was all that was done by the Sierra Club in its Motion, is insufficient to provide the requisite basis for its proposed contention.

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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 SIERRA CLUB'S MOTION TO ADMIT A CONTENTION REGARDING GENERIC ISSUE 82 AND TO DIRECT PREPARATION OF AN EIS" 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 10th day of July, 1987:

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