UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

1-12-71

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| In the Matter of | ) | |
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| PACIFIC GAS AND ELECTRIC COMPANY | ) | Docket No. 50-323 |
| | ) | |
| (Diablo Canyon Unit 2) | ) | |
| | ) | |

BRIEF OF PACIFIC GAS AND ELECTRIC COMPANY
IN OPPOSITION TO EXCEPTIONS FILED BY SCENIC
SHORELINE PRESERVATION CONFERENCE, INC.

Pacific Gas and Electric Company (PGandE) opposes the exceptions to the initial decision of the Atomic Safety and Licensing Board (Board) filed by Scenic Shoreline Preservation Conference, Inc. (Conference) for the reasons set forth below:

1. NEPA

In this paragraph Conference requests that the Atomic Energy Commission (Commission) "rescind" the construction permit issued to PGandE pending the outcome of certain litigation challenging regulations promulgated by the Commission in compliance with the National Environmental Policy Act of 1969 (NEPA) (83 Stat. 852). For a number of reasons, this request should be denied. In the first place Conference filed its pleading in compliance with 10 CFR 2.762, which establishes procedures for filing exceptions to initial decisions of Licensing Boards. Thus, the request is improper here since it is not an exception to the decision of the Board in this proceeding.

In the second place the regulations provide, among other things, that holders of construction permits (such as PGandE) issued without the Detailed Statement described in the new regulations having been prepared

> ". . . shall submit one hundred and fifty (150) copies . . . of an Environmental Report as soon as practicable."

This PGandE intends to do. In any event, these regulations are in full force and effect.

It is well settled that an administrative agency's regulations have the force of law as long as they remain in effect and are binding on the issuing agency as well as the public. The general rule is set forth in 2 Am. Jur. 2d Administrative Law § 309 (1962) as follows:

> "While an administrative agency may amend or rescind its rules and regulations and some may entertain an application for waiver, suspension, or exception to some types of rules, so long as the rule or regulation remains in force and without change the agency is as much bound by such rule as the public to whom it is directed. Such rule may not be ignored by the agency nor waived or suspended in a particular case. . ." (p. 138)

This is true regardless of whether the regulation is being challenged in Court or amendments are being considered by the issuing agency. For example, in Federal Communications Commission v. WJR, The Goodwill Station, Inc., 337 U.S. 265 (1949), the Intervenor sought to require the FCC to delay final action on a permit pending the outcome of the FCC's consideration of certain of its rules in

another FCC proceeding. The Court held that the Commission was under no duty to delay the permit because one has no vested right in the "suppositious eventualities" that an agency at some indeterminate time might modify its rules. (Id. at 271.)
In short, the Conference request to rescind PGandE's construction permit should be denied.

Various subparagraphs under paragraph 1 in part repeat arguments regarding NEPA which have already been presented to and rejected by the Board (Aug. Tr. 201-203, Initial Decision p. 27) and the Commission (Conference Pleadings dated July 13, 1970 and August 31, 1970, Commission ruling dated September 2, 1970 (35 F.R. 14477)). In particular much of the argument submitted by Conference on August 31, 1970 is repeated verbatim. Since the Commission has already passed upon the matter PGandE will limit its response primarily to the new matter contained in these paragraphs.

The cases cited by Conference on page 3 of its pleading are clearly distinguishable from the Diablo Canyon licensing proceeding. Those cases all involved "one-step" proceedings, so to speak, in that had the administrative action not been enjoined that would have been the end of the matter since the proposed construction would have taken place with no further action by the administrative agency. In this proceeding, however, PGandE must obtain an operating license prior to operating the unit, and ample time exists for PGandE to comply with NEPA prior to issuance of the operating license. Secondly, the Texas Committee and Wilderness

Society cases[1] involved preliminary injunctions issued pending the final determination of plaintiffs' applications for final injunctions. There is no indication how plaintiffs fared in their applications for final injunctions. Thirdly, the Zabel decision was based principally upon the Fish and Wildlife Coordination Act (Id. at p. 1457). Finally, in these cases little if any work had been done or money spent prior to the requested action and this clearly influenced the Court. For example, in the Texas Committee case (1 ER 1303) the Court noted as follows at pages 1303 and 1304:

> "Not one federal dollar has been expended toward this project, not one step of actual construction has been undertaken. The only thing that has occurred has been the processing of papers."
>
> "Since no money has been expended and since no construction has begun, the Court of Appeals may find that the FHA can comply with Sec. 102 [of NEPA]."

At Diablo Canyon, however, it is clear from the record that substantial amounts of work have already been performed. The detailed site exploration work is described in the Preliminary Safety Analysis Report and Applicant's Exhibit 1, the Partial Summary of Application. It is likewise clear that substantial amounts of engineering time have been invested in preparation of the application, which was filed with the Commission June 28, 1968, and the consultants' reports incorporated therein, as well as the various meetings held with the staff prior to the hearings and preparing answers to staff questions. (See p. 47 of Staff Safety Evaluation.) Finally, even before the

1 We were unable to locate Sierra Club v. Laird.

hearing was held a certain amount of construction work was being performed at the site in accordance with Commission regulations (Jan. Tr. 83, 84). In short, the cases cited are not controlling here.

Furthermore, the Federal District Courts do not agree as to the applicability of NEPA in situations similar to those cited by Conference. In Pennsylvania Environmental Council v. Bartlett, 1 ER 1271 (M. D. Pa. April 30, 1970) plaintiffs sought to enjoin defendants from proceeding further with the planned relocation of a state highway. All of the planning for the proposed route and the award of the contract for the work occurred prior to the effective date of NEPA. All that remained was the actual construction. The Court held that NEPA should not be applied retroactively.

> ". . . the use by Congress of the phrases 'to use all practicable means and resources' and 'to the fullest extent possible' in Sections 101 and 102 of the Act appears to indicate a moderate, flexible and pragmatic approach to the immediate application of the Act. These phrases are hardly of the type which would evidence a retroactive intent." (Id. at 1279.)

Similarly, in Brooks v. Volpe, 2 ER 1004 (W. D. Wash., September 25, 1970) plaintiffs sought a preliminary injunction to enjoin construction of a road. The administrative determination with respect to location of the highway was made in 1967. The Court held that NEPA should not be applied retroactively. Finally, in Investment Syndicates v. Richmond, 1 ER 1713 (D. C. Ore. October 27, 1970)

plaintiffs sought to enjoin construction of a power line. The money for the line was appropriated before the effective date of NEPA, but the contract was let, the right-of-way cleared, and construction of the line commenced after the effective date of NEPA. The Court held that NEPA was not applicable.

> ". . .The letting of the contract, clearing of the right-of-way and construction of the line itself, although occurring after January 1, 1970, are merely a small portion of the work required to complete the project. I cannot believe that Congress intended that the NEPA apply to 'major Federal actions' which had reached this stage of completion as of the date of enactment. It was not the intention of Congress to negate all of the work which had gone into this project, including design and planning costs, but to have it completed in an orderly manner. To hold that the NEPA does apply to this project would be to give the statute retrospective effec . See Brooks v. Volpe, supra. To order a work stoppage while a report is being prepared would cause a large increase in cost to the taxpayers and most likely would have little or no effect on the location or design of the line. I therefore hold that the NEPA is not applicable to the project.
>
> "If the NEPA were applicable in this situation I would have to balance the equities and consider the plaintiff's chances of obtaining a permanent injunction in order to determine whether a preliminary injunction should issue. If the injunction were granted construction would be held up and the government would incur great expense. It is more probable than not that the Council on Environmental Quality would conclude that BPA's environmentalists had made a thorough study and arrived at the right decisions. Construction would then proceed along the presently proposed route. The only result would be delay in making adequate and reliable electrical current available to the residents of southwestern Oregon. . . ."

This quote is particularly appropriate to the Diablo Canyon proceeding.

With regard to the time for preparation of the environmental statement, the notice setting this matter for hearing was issued November 17, 1969, well before NEPA went into effect or was even passed by either the Senate or the House of Representatives. Under AEC Rules of Practice the issues to be considered at a hearing are those outlined in the notice (10 CFR 2.104). The Commission's regulations governing its responsibilities for implementation of NEPA were published on April 2, 1970. However, by then the record in this proceeding was closed by order of the Board dated March 18, 1970, although the record was later reopened to take certain geological testimony.

To summarize, PGandE will comply with AEC regulations concerning NEPA. The construction permit issued to it in this proceeding contains the condition that PGandE will comply with standards and requirements for the protection of the environment "validly imposed" by Federal or State law. Finally, a number of Federal and State agencies have already reviewed PGandE's application (See the Staff Safety Evaluation pp. 52-92 for review by Federal agencies). All this provides ample support for the conclusion of the Board that there is no reason to delay PGandE's application (Initial Decision p. 25).

2. WQIA

As its second point Conference requests the Commission to rescind the construction permit until PGandE and the Board have

complied with the Water Quality Improvement Act of 1970 (WQIA). Again, this request is not properly a part of this pleading, which is supposed to be concerned with exceptions to the decision of the Board. In any event, § 21 (b)(8) of WQIA provides that any application for a license or permit pending or issued within one year of the enactment of WQIA does not require certification for one year following the issuance of such license or permit. Since PGandE's application was pending when WQIA was enacted (April 3, 1970) and its permit was issued within one year of enactment PGandE has until December 9, 1971 to obtain the required certification.

3. Procedural Matters

As a third point Conference urges the Commission to revoke the Board's initial decision and schedule further hearings because of certain alleged procedural deficiencies. These are dealt with seriatim.

A. Radiation Standards

Conference objects to the Board's ruling sustaining an objection to a question asked of a PGandE witness concerning testimony given before a Congressional committee on radiation standards. The ruling clearly was correct on a number of grounds, principally that the question involved matters irrelevant to the Diablo proceeding. The Commission has held (In the Matter of Baltimore Gas and Electric Company, Docket Nos. 50-317, 50-318, 2 CCH Atomic Energy Law Reporter P. 11,578.02) that its licensing regulations, which of course include radiation standards, are not

subject to amendment by licensing boards in individual adjudicatory proceedings. The Commission's opinion goes on to state that a regulation may be challenged in a licensing proceeding on certain limited grounds. However, these grounds were not alleged by Conference so the Board's ruling was clearly proper and in line with Commission policy.

The subject came up again in connection with the testimony of Mr. Ian I. McMillan, an intervenor opposing the Plant. Contrary to the statement of Conference in its exceptions that Mr. McMillan was merely presenting a statement of evidence he proposed to develop, Mr. McMillan was offering sworn testimony (Jan. Tr. 170, 178). Clearly the proposed testimony was irrelevant and hearsay and thus objectionable on the grounds set forth in the transcript (Jan. Tr. 179 - 182).

The matter again arose when Conference attempted to have a witness summarize the "salient points" in the report before the Congressional committee concerning radiation standards (Jan. Tr. 221). Again, this clearly was hearsay and the objection well taken (Jan. Tr. 224). In any event the witness was finally permitted to answer a question as to his opinion concerning the adequacy of present AEC standards, to which objection was properly sustained because the witness stated in beginning his answer that he did not know what the AEC standards were (Jan. Tr. 225). It is difficult to quarrel with this ruling of the Board.

Conference then quotes from the Board's decision regarding

failure of Conference to produce evidence and complains that the Board deprived Conference of the opportunity to do so. However, although the rules of evidence in administrative proceedings perhaps are not as strictly applied as in court proceedings, the general rules of evidence nevertheless are applicable, and under the Commission's rules and the Administrative Procedure Act, only "relevant, material, and reliable evidence" is admissible (10 CFR 2.743(c), 5 U.S.C.A. § 556). It was up to Conference to furnish competent evidence to support its position, and the rulings of the Board on the material offered by Conference were correct.

Conference asks for the same opportunity

> ". . . to present evidentiary material as the Applicant and other parties." (p.7.)

The fact is Conference had the opportunity and did present some evidence through its witnesses. However, it has no right to present incompetent evidence. The reports included in PGandE's application were submitted under oath and were admitted into the record without objection (Jan. Tr. 92, 93). Had there been some indication prior to the hearing that the presence of one or more of the authors of these reports was necessary, PGandE would have made them available, as it did at the August hearing (Aug. Tr. 101, 125). As it was PGandE had available at the hearing certain consultants because of questions asked by the Board.

In short, Conference had the same opportunity to introduce evidence that PGandE or any other party had. That it failed to make use of this opportunity is not the fault of the Board or PGandE.

B. Presentation of Evidence and Cross Examination

At page 8 of its exceptions Conference repeats a number of arguments it has made previously. Its main request has generally been for more time, and its other complaints are related to this basic request. PGandE contends that Conference has had ample time to prepare its case, and PGandE should not be made to suffer, through further delays, because Conference has failed to take advantage of the opportunities afforded it.

The amount of time available to Conference is indicated by the following brief summary of past events. Conference and Mr. Eissler (by proxy) appeared at the prehearing conference for the Diablo Canyon Unit 1 hearings, which was held in San Luis Obispo on February 6, 1968, and Conference was permitted to intervene in opposition to the proposed project (Diablo Canyon Unit 1 (Docket 50-275) Tr. 13, 74, 113, 118). At the hearing Conference's representative (not Mr. Eissler) made the following statement:

> ". . . we do not in fact intend to withdraw our case, and we will be obstructionist and balky, as hardheaded as necessary to delay this just as long as possible." (Diablo 1 Tr. 190.)

PGandE submits that this accurately portrays the role Conference seeks to play in this proceeding.

As early as January 22, 1968, Conference, through Mr. Eissler, advised the Commission that it intended to intervene in the Diablo Canyon Unit 2 proceedings (Dec. Tr. 18). The notice of hearing in this proceeding was published November 17, 1969 and Conference, through Mr. Eissler, filed a Petition For Intervention dated November 26, 1969. The petition recites that Conference participated in the hearings before the California Public Utilities Commission for Diablo 1. These hearings were held in San Luis Obispo in 1967 and lasted for twenty days. The petition contains a number of allegations and states that Conference

> ". . . may wish to present rebuttal testimony." (p. 4.)

Conference appeared at the prehearing conference on December 5, 1969 and announced it would present witnesses at the hearing (Dec. Tr. 15).

Conference appeared at the hearing on January 13 and 14, 1970, conducted some cross-examination and introduced some evidence. No limits were placed upon the number of witnesses Conference could offer or the amount of admissible evidence Conference could introduce. Nor was there any indication the hearings would end in two days. The hearings did end in two days because Conference had no more evidence to introduce.

"CHAIRMAN GLEASON: Mr. McMillan, are you finished with your presentation?

"MR. MC MILLAN: That will complete my testimony, with one final appeal. . . .

. . .

"CHAIRMAN GLEASON: Are you finished with your case, Mr. Eissler?

"MR. EISSLER: I would like to make a statement, too.

. . .

"CHAIRMAN GLEASON: . . . Do you have more testimony that you wish to present?

"MR. EISSLER: I have a statement or testimony; I'm not exactly sure which here." (Jan Tr. 199, 230.)

Mr. Eissler thereupon made his closing statement, thus in effect ending his participation in the matter, and did not attend the next day's hearings (Jan. Tr. 231). Thus, he waived his right to cross examine and attempt to rebutt the evidence introduced at that time, which included the testimony of Dr. Goldman and Dr. Salo, both of whom were available on the stand.

Conference introduced only one witness the second day of the hearing (Jan. Tr. 368), and conducted no cross-examination. Repeatedly, the chairman asked if there were any cross-examination and received no response (Jan. Tr. 422, 426, 427), and after PGandE submitted its rebuttal evidence stated as follows:

"CHAIRMAN GLEASON: . . . Does that conclude your rebuttal evidence, Mr. Crane?

"MR. CRANE: Yes, sir.

"CHAIRMAN GLEASON: Do any of the parties have any rebuttal evidence to put in at this point?

"MR. MC MILLAN: May I ask one question?

"CHAIRMAN GLEASON: Yes, sir.

[Question concerning Humboldt Bay asked and answered.]

"MR. MC MILLAN: Thank you.

. . .

"CHAIRMAN GLEASON: All right, gentlemen, that concludes the rebuttal evidence I presume. We go into the closing matters of the hearing. Do you have any summary statements that you want to make at this time?"

. . .

"CHAIRMAN GLEASON: Mr. McMillan, do you have a closing statement that you would like to make? It's not necessary that you do, but if you have one, why this is the time.

"MR. MC MILLAN: No statement. (Jan. Tr. 427, 428, 433.)

To repeat, the hearing ended because there was no further evidence offered for consideration. If Conference intended to submit evidence or conduct cross-examination it was incumbent upon Conference to be present at the time and place designated by the Commission to do this. Conference's failure to take advantage of the opportunity afforded constitutes a waiver of the opportunity, and Conference should not be permitted to prolong further these proceedings to accomplish matters it should have accomplished at the hearing. The

cases supporting this principle are well-summarized in this quotation from 2 Am. Jur. 2d pp. 212, 213:

> "The cases recognize that the right to a hearing or the right to particular elements of a fair trial may be waived. One may not claim that he was not accorded a hearing or an opportunity to be heard on facts which merely show that he did not avail himself of the opportunities afforded for a hearing."

At the close, the hearing was recessed for three weeks. PGandE and a Conference witness were given one week within which to submit written answers to questions asked by the Board. An additional week was allotted for responses from the parties, and a final week was allowed for the Board's evaluation (Jan. Tr. 436). PGandE submitted its response within the prescribed time. Conference's witness did not submit his response until March 9, 1970, about five weeks late. At that, the submission was faulty for the reasons outlined in PGandE's reply dated March 13, 1970.

Early in February Conference sent a telegram to the Board containing some vague allegations regarding new evidence. Clearly, this telegram did not contain sufficient information to reopen the hearings. Such a reopening is an extraordinary remedy which must be supported by a clear and convincing statement of the new evidence and its relevance. Furthermore, rehearings and reopening of hearings before administrative bodies are addressed to their own discretion, and only a showing of the clearest abuse of direction could sustain an exception to the rule (Northeast Broadcasting, Inc. v. F.C.C., 400 F. 2d 749 (D.C. Cir. 1968); Seaboard Coast Line Railroad Company

v. United States, 283 F. Supp. 866 (E. D. Va. 1968)). There has been no such abuse of discretion in this proceeding and the rulings of the Board should not be disturbed.

C. Notice of August 7, 1970 Hearing

On April 5, 1970 Conference filed a pleading containing allegations as to new evidence and requesting that the hearings be reopened. When a part of Conference's request was granted by the Board in an order issued July 15, 1970, about 2-1/2 months after Conference filed its pleading alleging the new evidence, Conference in a letter protested the short notice. The order reopening the hearing was issued July 15, 1970, about three weeks before the date set for the reopened hearing. This gave Conference ample time to prepare, particularly in view of the fact that presumably Conference had its evidence on the matters covered in the reopened hearing as far back as April 5. At least it so alleged. In short, the notice provided was more than adequate.

Conference states (p. 13) that more evidence

> ". . . is essential in the record to support conclusions on seismological and other factors."

Yet at the reopened hearing Conference's witness, when asked what he would offer if the hearing were continued replied

> "I have nothing further, at this time. I think I made my position clear that . . . further work is necessary." (Aug. Tr. 199.)

The 30 day notice requirement in 10 CFR 2.104 referred to by Conference (p. 13) applies to the original notice published for

facility applications and not to reopened hearings.

D. Lack of Prompt Action by the Board

The fact that this proceeding has been protracted is undeniable. However, this has worked to Conference's advantage rather than PGandE's, and the time could and should have been used by Conference to prepare its case.

E. PGandE Late Filed Data

Conference alleges that it did not receive a copy of PGandE's post-hearing material until April. As indicated in a previous pleading by PGandE, the affidavit of service attached to the material indicates a copy was mailed to Conference. It also indicates a copy was mailed to Mr. Ian I. McMillan, who appeared on behalf of Conference (Dec. Tr. 4, 6).

In any event that portion of the late-filed material referred to in Conference's exceptions (p. 14) was discussed in testimony from PGandE's witnesses Ernest O. Salo and Morton I. Goldman on January 14. As previously explained Conference by its absence waived its right to cross examine this material. Further, much of it simply explains the revised Table 2-8 which was a part of PGandE's Partial Summary of Application and in evidence at the hearing (Jan. Tr. 119, 120-A). Finally, nothing in this material alters the conclusions stated on the record that the impact of the plant on abalone in the area will not result in any hazard to man (Jan. Tr. 352-355). Thus, to permit cross-examination at this late date would accomplish nothing.

4. Seismology and Geology

The Board concludes that the seismic design for the unit is sufficiently conservative to accommodate

> ". . . the uncertainties associated with these geologic and seismic questions and considerations raised by Conference." (p. 22.)

PGandE agrees with this conclusion and submits it is amply supported by the evidence in this proceeding. Furthermore, PGandE submits that the evidence introduced on this point by its expert consultants and the staff's supports a finding that the offshore faults trend northwest to southeast. No evidence was introduced that an offshore fault trending northeast to southwest does exist. It was only postulated for discussion by arbitrarily joining a number of offshore epicenters (Aug. Tr. 189). Finally, the so-called "evidence" quoted by Conference at pages 16 and 17 of its exceptions is not in the record and should be ignored.

With regard to Conference's offer of "new evidence" PGandE again cites page 199 of the August transcript in which Conference's witness indicates he has nothing more to offer.

5. 10 CFR 100

There was no dispute in the record on the applicability of 10 CFR 100 to adults. The questions Conference raises are appropriate for a rule-making proceeding rather than a licensing proceeding and need not be made a part of this record. As stated by the Board (p. 17) there are technical alternatives available to assure compliance with Commission regulations.

## 6. Evacuation Plans

Conference repeats its request that PGandE furnish an evacuation plan. The simple answer to Conference's contention is that current Commission regulations do not require submission of such a plan at this stage of the proceeding (10 CFR 50.34).

## 7. Conclusion

PGandE submits that the decision of the Board is supported by the evidence. The record is procedurally sound. The difficulties referred to by Conference arose exclusively from Conference's failure to present its case at the hearings held on January 13 and 14, 1970, when it had the opportunity to do so. All parties to a proceeding have the duty to present their evidence and conduct their cross-examination in a timely fashion. Conference, having had "its day in court," and then some, is bound by the decision of the Board, which should be affirmed.

Respectfully submitted,

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