UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

JOINT INTERVENORS'
PETITION FOR REVIEW OF ALAB-728

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 J. FORSTER ("Joint Intervenors") hereby petition the Commission to review ALAB-728, issued on May 18, 1983.[1/] In that decision, the Atomic Safety and Licensing Appeal Board ("Appeal Board") affirmed (1) the authorization of fuel loading and low power testing at Diablo Canyon Nuclear Power Plant ("Diablo Canyon") and (2) the denial of TMI-related contentions submitted by the Joint Intervenors in opposition to Pacific Gas and Electric Company's ("PG&E") full power licensing. The Joint Intervenors request the Commission to (1) grant review of the issues identified in this petition; (2) establish a schedule for briefing of the issues presented; and (3) reverse the decision of the Appeal Board with respect to those issues.

I. Summary of ALAB-728

In ALAB-728, the Appeal Board affirmed two decisions of the Atomic Safety and Licensing Board ("Licensing Board"): first, its July 17, 1981 Partial Initial Decision authorizing issuance of a low power license (LBP-81-21, 14 NRC

1/ ALAB-728 was served on the parties by mail on May 19, 1983.

107 (1981)) and, second, its August 4, 1981 Memorandum and Order rejecting certain TMI-related contentions submitted by the Joint Intervenors in opposition to PGandE's application for a full power license (LBP-81-27, 14 NRC 325 (1981)). The principal issues raised on appeal concerned (1) the propriety of the denial of TMI-related contentions filed in the low and full power proceedings, (2) the failure of the NRC to require an environmental impact statement or an environmental assessment for Diablo Canyon which considers (a) the impacts of a Class Nine accident at the facility and (b) the impacts of low power licensing and operation, and (3) the adequacy of emergency preparedness at Diablo Canyon.

II. All Matters of Fact and Law Discussed Here Were Previously Raised

All matters of fact and law raised in this Petition were previously raised before the Appeal Board either on the record or in documents filed with the Board, including principally Joint Intervenors' Exceptions to the Licensing Board's July 17, 1981 Partial Initial Decision (August 3, 1981); Joint Intervenors' Brief in Support of Exceptions (September 2, 1981); Joint Intervenors' Request for Directed Certification (October 8, 1981); Joint Intervenors' Brief in Response to September 2 Order (September 23, 1982); and Joint Intervenors' Reply to Briefs Re Mootness (September 30, 1982).

III. Commission Review Should Be Exercised

Commission review is appropriate and necessary in this case in order to remedy the manifest error of the Appeal Board in its disposition of a number of significant legal and policy questions of first impression in the context of a fully contested licensing proceeding after the Three Mile Island ("TMI") accident. These questions arise out of the Appeal Board's application of the

Commission's guidance for the litigation of TMI-related matters,[2] the various NUREGs outlining supplemental TMI-related licensing requirements,[3] the Commission's Statement of Interim Policy regarding Class Nine accident analysis under the National Environmental Policy Act ("NEPA"),[4] and the Commission's revised emergency planning regulations. These issues concern matters of important public policy which may significantly affect the public health and safety and the environment. As such, they fall clearly within the Commission's own regulatory criteria for the granting of a petition for review. 10 C.F.R. § 2.786.

In ALAB-728, the Appeal Board rejected each of the Joint Intervenors' contentions on appeal, in the context both of the full and low power proceedings. In so doing, it has not only ignored the unique circumstances of the Diablo Canyon proceeding, but has rendered virtually meaningless the reforms instituted by the Commission in the aftermath of the TMI accident. We submit that the Appeal Board's decision was erroneous and have outlined in the following section those issues which merit the Commission's review.

IV. The Appeal Board's Decision is Erroneous

A. Low Power Contentions

Following PGandE's application for a low power license, the Joint

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2/ Statement of Policy: Further Commission Guidance for Power Reactor Operating License, 45 Fed. Reg. 41738 (June 16, 1980) ("Statement of Policy"); Revised Statement of Policy: Further Commission Guidance for Power Reactor Operating LIcense, CLI-80-42, 45 Fed. Reg. 85236 (December 18, 1980) ("Revised Statement of Policy"); In the Matter of Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361 (1981) ("April 1 Order").

3/ NUREG-0660, "TMI Action Plan"; NUREG-0694 "TMI-Related Requirements for New Operating Licenses"; NUREG-0737, "Clarification of TMI Action Plan Requirements."

4/ Statement of Interim Policy, "Nuclear Plant Accident Considerations Under the National Environmental Policy ACt of 1969," 45 Fed. Reg. 40,101 (June 13, 1980) ("Statement of Interim Policy").

Intervenors timely filed a number of TMI-related safety contentions in opposition to the application. In disregard of the Commission's guidance permitting litigation of such issues, the Licensing Board rejected the majority of those contentions.[5/] The Appeal Board did not even bother discussing the lower board's erroneous reasoning, ruling instead that any error was harmless because neither the Joint Intervenors nor the Governor had even addressed the standards for reopening the record and late-filing of contentions. ALAB-728, at 36-39.

The Appeal Board's assumption that the standards were never addressed is simply contrary to fact. Although the Joint Intervenors do not concede that such standards were applicable to the rejected contentions, the Board has ignored the fact that the Joint Intervenors explicitly addressed the standards repeatedly in various pleadings filed with the Licensing Board in the low power proceeding, including, for example, Joint Intervenors' Notice of Objections to February 13, 1981 Order of the Licensing Board (February 18, 1981); Joint Intervenors Response to NRC Staff's February 23, 1981 Request for Directed Certification and Pacific Gas and Electric Company's February 26, 1981 Request for Directed Certification (March 26, 1981); and Joint Intervenors' Response in Opposition to NRC Staff's and Pacific Gas and Electric Company's Motion for Reconsideration. In addition, at the prehearing conference held in January 1981, counsel for the Joint Intervenors and the Governor discussed at length the safety significance of each of the contentions, as well as the reasons why such TMI-related contentions could not have been raised prior to the occurrence of the accident. See Prehearing Conference Transcript, passim (January 28-29, 1981).

The Appeal Board's rejection of the Joint Intervenors' significant safety contentions was premised solely upon its mistaken assumption that the reopening

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5/ LBP-81-5, 13 NRC 226 (1981) ("Preliminary Conference Order").

and late-filing standards were not addressed. Its decision must, therefore, be reversed by the Commission.

B. Full Power Contentions[6/]

The Appeal Board also affirmed the Licensing Board's August 4, 1981 rejection of all but one of the Joint Intervenors' full power TMI-related contentions. In so doing, it once again disregarded the lower board's obviously fallacious reasoning and substituted its own. However, in reaching the identical conclusion, the Appeal Board adopted a rationale which distorts the Commission's guidance for litigation of TMI-related issues and nullifies the explicitly established right of all parties to challenge the sufficiency of additional TMI-related licensing requirements in individual licensing proceedings.

Although the Commission had initially permitted limited parties to challenge only the "necessity for" its TMI-related licensing requirements,[7/] that artificial and illegal limitation was eliminated in December 1980 when the Commission stated that such parties could also challenge the "sufficiency of" such requirements.[8/] This right became still clearer when, on April 1, 1981, the Commission issued an order in this proceeding explicitly authorizing parties to "focus on the same safety concern that formed the basis for the NUREG requirements and litigate the issue of whether the NUREG 'requirement' is a sufficient response to that concern."[9/] In addition, the Commission stated

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6/ The Joint Intervenors are aware of the limitations imposed upon Petitions for Review by 10 C.F.R. § 2.786(b)(1) with respect to interlocutory appeals, requests for directed ceritification, and referrals. Review is requested here in light of the manifest error of the Appeal Board's decision and in order to afford the Commission the opportunity to remedy that error.

7/ Statement of Policy, at 7-8.

8/ Revised Statement of Policy, at 8.

9/ April 1 Order, at 3-5 (emphasis added).

that even where no relation to NUREG-0737 is established, the record should be reopened on TMI issues "if a party comes forward on a timely basis with significant new TMI-related evidence indicating that an NRC safety regulation would be violated by plant operation."[10/]

By its decision in ALAB-728, the Appeal Board reduced the foregoing standards to meaningless words. Completely ignoring the fact that each of the Joint Intervenors' contentions focused explicitly on the same safety concerns as specific NUREG-0694 or 0737 requirements or alleged noncompliance with specific General Design Criteria,[11/] the Appeal Board held them inadmissible on the erroneous premise that the Joint Intervenors were seeking to challenge existing regulations or to impose requirements beyond those contained in existing regulations. ALAB-728, at 40-62. For example, Joint Intervenors' combined contentions 15 and 16 regarding systems interaction alleged noncompliance with GDC 2, 3, 4, 22, and 24 and the single failure requirements of Appendix A to 10 C.F.R. Part 50; nonetheless, the Board simply concluded that since those design criteria "have never been found by the Commission to require the specific systems interaction study called for . . ." -- indeed, that issue has apparently never even been addressed by the Commission -- the contentions are simply inadmissible. Id. at 59. Similarly, Joint Intevenors' combined contentions 2 and 3 regarding hydrogen focused on the same safety concern as NUREG-0694, item II.B.4, and NUREG-0737, item II.E.4.1, and alleged noncompliance with GDC 4, 16, 41, and 50; the Appeal Board, however, simply rejected the contention as a

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10/ Id.

11/ The Joint Intervenors submitted contentions regarding hydrogen, decay heat removal, reactor vessel level indication, LOCA analysis, environmental qualification, systems interaction, and documentation of deviations. In support of those contentions -- and consistent with the Commission's TMI guidance -- the Joint Intervenors cited specific relevant NUREG-0660, 0694, and 0737 requirements in addition to existing Commission regulations, such as General Design Criteria. Those included, for example: NUREG-0660, items I.A.4, I.E.8, I.F.1, II.C.1-3, II.F.5; NUREG-0694, item II.B.4; NUREG-0737, items I.C.1, II.E.4.1, II.F.2; 10 C.F.R. Part 50, Appendix A, GDC 2, 3, 4, 13, 16, 22, 24, 34, 41, and 50.

challenge to the regulations, doing so without even mentioning the foregoing GDC or NUREG requirements. Id. at 46.

The Appeal Board's rationale in rejecting the Joint Intervenors' full power contentions ignores the Commission's prior guidance and orders. Hence, its decision warrants review and must be reversed.

C. Class Nine Accident Analysis

In May 1979, the Joint Intervenors moved to reopen the proceeding to require the Staff to supplement the final environmental impact statement ("EIS") for Diablo Canyon to address the environmental consequences of a Class Nine accident. The Licensing Board rejected that request, ruling instead that, under the Commission's Interim Statement of Policy, no such consideration was required for Diablo Canyon due to the date the EIS was completed and the absence of any special circumstances at Diablo Canyon.[12/]

The Appeal Board affirmed, concluding (1) that the policy announced by the Commission in 1980 was not intended to apply to Diablo Canyon and (2) that the Board need not address the issue of special circumstances because the Joint Intervenors had made no such argument. ALAB-728, at 25-28.

On the contrary, the Joint Intervenors based their application both on the occurrence of a Class Nine accident at TMI and on the special circumstances of Diablo Canyon's mistaken siting less than three miles from a major active earthquake fault discovered after the facility had been designed and substantial construction had begun. Incredibly, the Licensing Board found those circumstances insufficient under the Commission's Statement of Interim Policy in light of the finding by the Appeal Board in ALAB-644 that Diablo Canyon complies with the Commission's seismic safety regulations. More incredible still, however, the Appeal Board explicitly refused even to address the issue of special

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12/ LBP-81-5, 13 NRC 226 (1981).

circumstances (ALAB-728, at 28) despite the lower board's ruling on precisely that issue and the fact that the Joint Intervenors specifically appealed that ruling by filing exceptions to the Licensing Board's findings under the Interim Policy Statement -- including its finding of no special circumstances (Exception No. 51) -- and later briefing those exceptions.[13/]

The Appeal Board has previously recognized the existence of "exceptional circumstances in this proceeding.[14/] Its decision here simply to ignore the issue is plainly inconsistent and improper and must, therefore, be reversed.[15/]

D. Low Power Environmental Analysis

Neither an EIS nor an environmental impact appraisal has been prepared to consider the special environmental effects of low power testing at Diablo Canyon, including particularly the costs and benefits of such testing and its possible impact on the fair adjudication of PGandE's full power application.

13/ Joint Intervenors' Exceptions to the Licensing Board's July 17, 1981 Partial Initial Decision, at 10 (August 3, 1981); Joint Intervenors' Brief in Support of Exceptions, at 56-60 (September 2, 1981).

14/ In ALAB-519, at 12, ___ NRC ___ (January 23, 1979), the Appeal Board stated:

> We have here a nuclear plant designed and largely built on one set of seismic assumptions, an intervening discovery that those assumptions underestimated the magnitude of potential earthquakes, a re-analysis of the plant to take the new estimates into account, and a post hoc conclusion that the plant is essentially satisfactory as is -- but on theoretical bases partly untested and previously unused for those purposes. We do not have to reach the merits of those findings to conclude that the circumstances surrounding the need to make them are exceptional in every sense of that word. (Emphasis added.)

15/ Numerous decisions of the federal courts have recognized the need to supplement an EIS when new information is obtained that was unknown at the time the original EIS was prepared. See, e.g., People Against Nuclear Energy v. U.S. Nuclear Regulatory Commission, 678 F.2d 222 (D.C.Cir. 1982), rev'd on other grounds sub nom. Metropolitan Edison Co. v. People Against Nuclear Energy, No. 81-2399, ___ U.S. ___ (1983); Essex County Preservation Ass'n v. Campbell, 536 F.2d 956 (1st Cir. 1976); Stop H-3 Ass'n v. Lewis, 538 F.Supp. 149 (D.Hawaii 1982).

Because licensing of nuclear facilities constitutes major federal action within the meaning of NEPA, the preparation of an adequate EIS is a mandatory prerequisite to any decision by the Commission concerning a license application.[16/] The failure of the Licensing or Appeal Boards to require either an EIS or an environmental impact appraisal (ALAB-728, at 21-24) violates the explicit requirement of 10 C.F.R. § 51.5(b) and (c) that either an EIS or a negative declaration and environmental impact appraisal be prepared prior to "[i]ssuance of a license to operate a power reactor . . . at less than full power . . . ." Failure to comply wtih this unambiguous requirement mandates denial of the requested license. 42 U.S.C. §§ 2233(d), 2236(a), and 2237; 10 C.F.R. § 50.57(a) and (c).

E. Emergency Preparedness

Relying upon the Commission's San Onofre decision, the Appeal Board rejected the Joint Intervenors' contention that consideration of the complicating effects of an earthquake on emergency prepareness must be considered prior to licensing. ALAB-728, at 21. The Joint Intervenors respectfully submit that the Appeal Board erred because the San Onofre decision is not controlling in this case for several reasons. First, the mistaken siting of Diablo Canyon described above renders especially acute the risk of major seismic events and, consequently, the need to consider the complicating effects of an earthquake on emergency preparedness. Second, there has been and is currently no generic consideration of the issue, through rulemaking or otherwise, nor is any such consideration appropriate in light of the issue's particular relevance to only one or two facilities located in areas of recognized high seismic risk. Third,

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16/ See, e.g., Natural Resources Defense Council v. U.S. Nuclear Regulatory Commission, 539 F.2d 824 (2d Cir. 1976), vacated for reconsideration of mootness, 434 U.S. 1030 (1977); Izaak Walton League of America v. Schlesinger, 337 F.Supp. 287 (D.D.C. 1971).

10 C.F.R. § 50.47(a) requires that emergency plans be capable of implementation, as does NUREG-0654, item II.J.10.k, which mandates "identification of and means for dealing with potential impediments . . . to use of evacuation routes, and contingency measures." Although earthquakes fall clearly within this category, no "identification of and means for dealing with" seismic-related impediments has been required for Diablo Canyon. To the extent that San Onofre is interpreted by the Commission to dictate such a result, it is inconsistent with the Atomic Energy Act and based upon insufficient evidence in the record, and it must be overruled.

The Appeal Board also rejected the Joint Intervenors' contentions that the Licensing Board improperly failed to address adequately the specific 10 C.F.R § 50.57(b) criteria. In so doing, the Appeal Board relied upon § 50.57(d), recently added to 10 C.F.R. Part 50. The Joint Intervenors submit that such provision as applied by the Board constitutes an improper and ill-advised retrenchment from the Commission's post-TMI improvements, and it undermines even the pretense of offsite preparedness at Diablo Canyon or any other nuclear facility to which it may be applied. As such, it cannot be reconciled with the Commission's responsibility under the Atomic Energy Act to protect the public health and safety.

The Commission has not yet applied § 50.57(d). Its review in this case, therefore, is especially warranted.

V. Conclusion

For the reasons stated, the Joint Intervenors respectfully request the Commission to grant this Petition for Review, to establish a schedule for briefing of the issues raised, and to reverse the rulings of the appeal Board in ALAB-728.

DATED: June 8, 1983

Respectfully submitted,

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(Diablo Canyon Nuclear Power Plant, Units 1 and 2)	)	(Full Power Licensing Proceeding)

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of June, 1983, I have served copies of the foregoing JOINT INTERVENORS' PETITION FOR REVIEW OF ALAB-728, mailing them through the U.S. mails, first class, postage prepaid.

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