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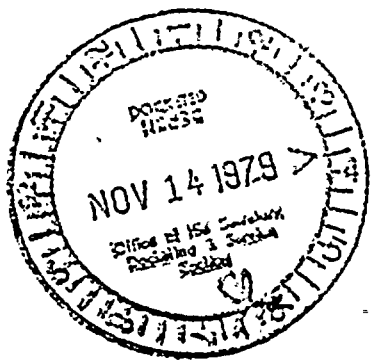
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



ATOMIC SAFETY AND LICENSING APPEAL BOARD

Richard S. Salzman, Chairman
Alan S. Rosenthal
Dr. W. Reed Johnson

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)	)	

BRIEF IN SUPPORT OF EXCEPTIONS TO PART IV OF PARTIAL INITIAL DECISION of September 27, 1979

November 12, 1979

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INTRODUCTION

On October 13, 1979 this Intervenor, San Luis Obispo Mothers for Peace, filed NOTICE OF APPEAL AND EXCEPTIONS TO PARTIAL INITIAL DECISION (OPERATING LICENSING PROCEEDINGS) of September 27, 1979.

This brief is filed, in accordance with 10 CFR §2.762(a), in support of this Intervenor's exception to these portions of the PARTIAL INITIAL DECISION:

1. Part IV, p. 93:

> "Due to the inability to produce a qualified expert as mandated by the Appeal Board in ALAB-410, Intervenors in a letter dated January 19, 1979 withdrew from the proceeding, and the Board accepted the letter as a voluntary default under 10 CFR §2.707. (Tr. 9367-9368)."

2. Part IV, p. 93, 94:

> "Based upon the evidence presented the Board finds that the PG&E security plan complies with all applicable NRC regulations."

In this brief your Intervenor will show the systematic and unlawful violation by the Licensing Board of Intervenor's right:

1. To participate in the evaluation of the security plan;

2. To have the assistance of a qualified expert witness;

3. To be represented by attorneys of its own choosing; and

4. To have the serious security contentions it advanced be fully heard and considered by the Licensing Board.

I

THIS INTERVENOR WAS PREJUDICED BY THE LICENSING BOARD'S FUNDAMENTAL ERROR IN REFUSING THE PARTICIPATION OF DAVID DINSMORE COMEY, AN EXPERT WELL-QUALIFIED IN SECURITY MATTERS.

Consideration of this issue begins with an examination of the fundamental misconception of expertise in security matters under which the Licensing Board labored. The error is in the RECONSIDERATION OF BOARD'S ORDER OF SEPTEMBER 5, 1978, issued November 3, 1978 (hereafter "RECONSIDERATION"), as follows:

A. The "RECONSIDERATION" did not follow either ALAB-504 or ALAB-410 and was contrary to the Federal Rules of Evidence.

1. In limiting the qualification of an expert to those who have had "nuts and bolts" experience with the actual hardware components of the plan, the Board violated ALAB-410 and mistakingly narrowed the security issue by virtually eliminating as potential experts all those who have not worked in the nuclear industry.

The essence of the Licensing Board's reasoning was that to qualify as a security expert, Mr. Comey must have worked with the "nuts and bolts" of components of security systems "at least to the extent of being able to design an overall system." ("RECONSIDERATION", p. 3.) The Licensing

Board had the mistaken idea that the main issue regarding security was whether certain equipment had been assembled properly and will function dependably as designed.

The real issue is much broader; namely, whether the overall security plan is adequate to ". . .provide protection with high assurance against successful industrial sabotage. . . ." (10 CFR §73.55(a)), even if it is assumed that the hardware performs as it was designed to do. As will be discussed infra, hardware components, such as alarm devices, are only one of many elements of a security plan that must be evaluated. In fact, the hardware components are the least of the problem. No one seriously questions the functioning of the mechanical components; the issue is the adequacy of the entire system against breach by sabotage or terrorist attack. Included is the issue of adequately conceived and executed personnel functioning.

Mr. Comey was uniquely qualified to evaluate the adequacy of the overall plan. The Licensing Board, in its preoccupation with the dependability of hardware, dismissed the unique combination of his qualifications on the basis that each one of them alone did not establish "prima facie" qualification ("RECONSIDERATION", p. 7). The "RECONSIDERATION" ignored the composite picture of Mr. Comey's knowledge and relevant experience in nuclear power plants and security, his past participation in similar proceedings, and even his

"perhaps, prestigious" ("RECONSIDERATION" p. 10) participation in a study of Nuclear Proliferation and Safeguards performed by the Office of Technology Assessment of the United States Congress because it was not apparent to the Board ". . .what they [the members of the Advisory Panel] actually do. . ." ("RECONSIDERATION", p. 10). The Cover, Advisory Panel and Table of Contents of this study are attached as Exhibit A to show the relevance of this work to the qualification of Mr. Comey.

The Board similarly discounts Mr. Comey's testimony before the California Energy Commission on Sabotage Considerations of the Proposed Sundesert Nuclear Powerplant. This testimony, incorporated into his deposition and attached as Exhibit B, is a part of the record in this proceeding. Had the Licensing Board reviewed the Sundesert testimony (rather than the one entry noted in a footnote, p. 10 of the "RECONSIDERATION") it would have seen the detailed discussion of the work of the Advisory Panel (the "January" group), particularly with regard to threat levels, "insider" sabotage, security responses and guard qualifications (see pp. 15-17, Exhibit B). The Licensing Board did concede, at page 12, that Mr. Comey ". . .ha[d] acceptable status in his general knowledge of reactor plant layout and operation of its various components," but concluded that ". . .the general tenor of Mr. Comey's statement appeared to the Board to be at the level we would expect of a well-informed layman." ("RECONSIDERATION", p. 12)

Intervenor contends that a security expert is one whose broad general knowledge of the field, whose education, knowledge, and experience enable him to evaluate the overall adequacy of a security plan that by its nature includes, but is not limited to "nuts and bolts". Mr. Comey was precisely such an expert. He had previously testified on security matters in other NRC licensing cases; he had studied security matters for years; he stayed current on breaches of security; he had even described in his Sundesert testimony how a pressurized water reactor of the same design as Diablo Canyon may be sabotaged to result in a meltdown (Ex. B, p. 11). To rule that Mr. Comey was not qualified is contrary to ALAB-504 and ALAB-410 and was a de facto ruling that the only security experts are those who have previously designed or installed alarm devices, and other equipment, at other nuclear power facilities and, hence, that the only "experts" are those who are working, or have worked, in the nuclear industry.

2. The "Sensitive Nature" of security plans had no bearing on the issue of expertise, and the Licensing Board's reliance on this irrelevant consideration is improper and contrary to law.

While conceding in a footnote ("RECONSIDERATION", p. 5) that the Licensing Board had no reason to believe that Mr. Comey would violate a protective order, the Board nevertheless raised the misleading spectre of a security breach by dredging out of the public file resolutions of

concern ("RECONSIDERATION", p. 3-4) about unauthorized disclosure of the security plan. These documents are not a part of the record in this proceeding and were irrelevant to the legal issue of what constitutes expertise. The emotional impact of these resolutions on the Licensing Board, and of this entire secrecy issue, has led the Board to establish, without any legal authority, ". . .somewhat more restrictive requirements for the demonstration of expertise than has existed previously." ("RECONSIDERATION", p. 5.) The Board has, in effect and directly contrary to ALAB-504, adopted a different standard than exists at law under Rule 702, Federal Rules of Evidence,[1] for the qualification of experts in security cases.

Intervenor urges this Appeal Board to reaffirm that it is one thing to determine the qualifications of an expert witness; and entirely another to establish, through use of protective orders, safeguards against disclosure of a security plan by an expert so qualified.

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1. Rule 702, Federal Rules of Evidence, raises two issues: (1) the qualification of the expert and (2) whether the testimony will assist the trier of fact to understand the evidence, Moore's Federal Practice, Vol. II, p. VII-23 (2d Ed. 1976). There can be no serious doubt but that Mr. Comey's testimony would aid the Licensing Board in this proceeding. Further, "expertise for legal purposes means that a witness has sufficient specialized knowledge, skill, experience, training or education to testify in the form of an opinion." Forbro Design Co. v. Raytheon Co. (C.A. 5th 1976) 532 F.2d 758, 762.

In the context of its erroneous concept of expertise let us now examine Mr. Comey's qualifications.

B. Mr. Comey was uniquely qualified to review Applicant's security plan to determine whether the plan conforms to current regulations and should have been allowed to participate by the Licensing Board.

Mr. Comey's qualifications should have been examined by the Licensing Board in light of the elements of a security plan set forth in §73.55, Title 10 of the Code of Federal Regulations. These elements go far beyond the parameters of ability of hardware to function as designed:

> "(a) General Performance Requirements. The licensee shall establish and maintain an onsight physical protection system and security organization which will provide protection with high assurance against successful industrial sabotage by both the following:
>
> (1) A determined violent external assault, attack by stealth, or deceptive actions, or several persons with the following attributes. . .
>
> (i) Well-trained (including military skills). . .;
>
> (ii) Inside assistance;
>
> (iii) Suitable weapons;
>
> (iv) Hand-carried equipment.
>
> (2) An internal threat of an insider.
>
> (b) Physical Security Organization.
>
> (1) The licensee shall establish a security organization including guards, to protect its facility against industrial sabotage. . .

(c) Physical Barriers.

(1) The licensee shall locate vital equipment only within a vital area. . ., located within a protected area. . .

(d) Access Requirements.

(1) The licensee shall control all points of personnel and vehicle access into the protected area. . .

(e) Detection Aids. All alarms required pursuant to this part shall enunciate in a continuously manned central alarm station located within the protected area. . .that a single act cannot remove the capability of calling for assistance. . .

(f) Communication Requirements.

(1) Each guard, watchman or armed responsible individual on duty shall be capable of maintaining continuous communication with an individual in each continuously manned alarm station. . .

(g) Testing and Maintenance. Each licensee shall test and maintain intrusion alarms, emergency alarms, communications equipment, physical barriers and other security related devices. . .

(h) Response Requirement.

(1) The licensee shall establish and document liaison with local law enforcement authorities. . ."

From the inception of its participation in this matter, this Intervenor has contended, and still contends, that the Applicant's security plan does not comply with these requirements. Technical "nuts and bolts" are only one element of the plan.

A statement of Mr. Comey's qualifications to be an expert witness for discovery purposes on security matters,

as developed in the record and submitted in previous pleadings, is attached hereto as Exhibit C. Mr. Comey possessed the composite professional qualifications to analyze Applicant's plan for conformity with current guidelines and these regulations. He had previously been found qualified to testify in other NRC Licensing proceedings.[2] This statement of broad qualification included the requisite knowledge, skill, training and experience in specific areas of greatest concern in judging the adequacy of Applicant's security plan; for example:

(1) Guard Force Requirements. (See Exhibit B at p. 15; Exhibit C, ¶8, 15).

(2) Sabotage and Definition of Threat Level. (See Exhibit B at pp. 13-17; Exhibit C, ¶4, 5; and Deposition of David Dinsmore Comey, Chicago, Illinois, July 5, 1978, p. 17).

(3) Organizational Structure, Deployment of Security Forces, Coordination with Local Law Enforcement Authorities. (See Exhibit B; and Deposition of David Dinsmore Comey, Chicago, Illinois, July 5, 1978, p. 32).

(4) Physical Barriers, Perimeter Detection Systems. (See Exhibit C, ¶9, 12).

Intervenor recognized the possibility, but did not concede, there may have been subjects of inquiry into Applicant's security plan as to which Mr. Comey was not an

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2. The Board discounted Mr. Comey's participation as a security expert in Zion 1 and 2 because "[t]he Board has no way of determining what standards were adopted by the Zion Board for Mr. Comey's qualifications as an expert." "RECONSIDERATION", p. 9.

expert. Intervenor would not know that until the Licensing Board followed the direction of ALAB-410 (p. 15) to permit inspection of a "sanitized" version of the plan. Such an inspection would have permitted Intervenor to determine what portions of the plan were relevant to Intervenor's contentions, and what portions may have been beyond Mr. Comey's expertise.

Reasoned analysis of the regulatory requirements, Intervenor's contentions and Mr. Comey's qualifications, noted in this paragraph B supra, required the conclusion that Mr. Comey was qualified to testify on most, if not all, elements of the security plan. Even if Mr. Comey was not qualified to testify on the "nuts and bolts" of the security system components (which Intervenor does not concede), he should not have been excluded as an expert for discovery of other elements of the plan as to which he was qualified. Further, to the extent that Mr. Comey may have had a higher degree of expertise with respect to one element of the plan (e.g., threat levels) relative to other subjects (e.g., assuming arguendo, "nuts and bolts" of components) the significance of the distinction should go to the weight to be given to his testimony[3] not to his admissibility as an expert witness for the purpose of discovery as well as testimony.

3. See, Moore's Federal Practice, supra, fn. 1 at p. VII-35.

II

THE LICENSING BOARD ERRONEOUSLY INFERRED A "DEFAULT" BY SEIZING ON MR. COMEY'S TRAGIC DEATH AND THE CONSEQUENT INABILITY OF INTERVENORS TO APPEAL HIS DISQUALIFICATION OR TO OTHERWISE MEANINGFULLY PARTICIPATE IN THE LICENSING BOARD PROCEEDINGS.

On January 19, 1979 this Intervenor filed INTERVENOR'S RESPONSE AS TO PARTICIPATION IN HEARING ON SECURITY PLAN ("RESPONSE"), attached as Exhibit D. The "RESPONSE" summarizes Intervenor's unsuccessful efforts, since 1977, to seek qualification, first, of Dr. L. Douglas De Nike; then Dr. Bruce L. Welch; then Richard L. Hubbard; and finally David Dinsmore Comey, as expert witnesses for purposes of discovery of Applicant's security plan. Mr. Comey was killed on January 5, 1979. The "RESPONSE" notified the Licensing Board that (i) Mr. Comey's death had made moot Intervenor's planned petition to the Commission for review of this Appeal Board's denial of directed certification; and (ii) that because the Licensing Board had wrongfully refused to qualify an expert witness, Intervenor would not be able to participate in the hearing on the security plan:

> "Without the qualification of an expert witness to inspect the plan and advise Intervenor's attorney, it is impossible for this Intervenor to prepare, either for significant cross-examination on the inadequacies of the applicant's security plan or to present affirmative evidence to support Intervenor's contentions." INTERVENOR'S RESPONSE AS TO PARTICIPATION IN HEARING ON SECURITY PLAN, January 19, 1979, p. 4.

The Licensing Board erroneously and unlawfully inferred from the "RESPONSE" that Intervenor "withdrew from the proceeding". PARTIAL INITIAL DECISION, supra, at 93. The Board's self-serving interpretation of the "RESPONSE" was in error. It is clear on its face that the "RESPONSE" (Exhibit D) was only notice to the Licensing Board that this Intervenor would not be able to participate in the in camera security plan hearing. The "RESPONSE" was nothing more than notice. Nowhere did Intervenor withdraw its security contentions.

However, even assuming, incorrectly, that the "RESPONSE" was a request to withdraw its security contentions, that request was never granted. The Licensing Board never dismissed the security contentions from the record. The Licensing Board acknowledged at Tr. 9105, 9106, that it never entered an order withdrawing Intervenor's security contention. If such an order had been entered, it would at least have put Intervenor on notice that the Licensing Board had misinterpreted the January 19, 1979 "RESPONSE". Such an order would have provided an opportunity to inform the Licensing Board that Intervenor had no intention of withdrawing its security contention, and would have provided Intervenor the opportunity, ultimately, to appeal. Instead, Invervenor was presented with the Licensing Board's interpretation of the January 19, 1979 "RESPONSE" on February 8, 1979, on the eve of the hearings and tour of the plant

security system, and had no opportunity to obtain review of this de facto decision.

To date there has been no order of the Licensing Board dismissing the Intervenor's security contentions. There is discussion that the Board would have entered such an order "had it not been inconvenient" (Tr. 9105, noting that there had been no such order entered). There is discussion that the Board treated Mr. Valentine's "RESPONSE" as a voluntary default (Tr. 9375-9376), PARTIAL INITIAL DECISION at 93. But no actual order of default or dismissal of the contentions was ever entered.

The Intervenor's Amended Security Contentions of Intervenor, filed January 18, 1978 were then, and still are, at issue in the proceeding. On receipt of the "RESPONSE" and notice that this Intervenor was not able to participate in the hearing, and because serious security matters are involved (10 CFR §2.760(a)), the Licensing Board nonetheless should have made inquiry into the security issues raised by Intervenor's contentions. In the Matter of Virginia Electric and Power Company (North Anna Power Station, Units 1 and 2), Docket Nos. 50-338 OL and 50-339 OL, Order, Atomic Safety and Licensing Board, December 15, 1976 [Full text]. CCH NRR ¶30,125.

Even if the Board had considered and then declined to make Intervenor's contentions its own, at the very least

". . .[t]he best practice in such a situation [i.e. if the Intervenor does not appear] is for the Board to make thorough inquiry as to the issues raised by the absent intervenor despite the absence." Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3) ALAB-242, 8 AEC 847, 849 (1974) cited in United States Nuclear Regulatory Commission Staff Practice and Procedure Digest, NUREG-0386, (1978) at 36, 7.

III

NEITHER THE "RESPONSE" OF JANUARY 19, 1979, NOR ANY OTHER FACTS OR DOCUMENTS IN THIS RECORD SUPPORT A FINDING OF VOLUNTARY DEFAULT UNDER 10 CFR §2.707.

The Board construed the "RESPONSE" of January 19, 1979 to be a voluntary default under 10 CFR §2.707, which provides, in pertinent part:

> "On failure of a party. . .to appear at a hearing. . .the Commission or the presiding officer may make such orders in regard to the failure as are just, including, among others, the following:
>
> a) . . .enter such order as may be appropriate; or
>
> b) Proceed without further notice to take proof on the issues specified." 10 CFR §2.707 (Rev. Jan. 1, 1978)

The "RESPONSE" of January 19th says nothing about either abandonment or withdrawal of Intervenor's contentions, or about "withdrawal" from the proceeding, nor could such an

interpretation be inferred. Nevertheless, the Board so found. PARTIAL INITIAL DECISION, p. 93. This ruling, initially made in error, was compounded by the Board's refusal to permit Mr. Baldwin, retained as associate counsel by this Intervenor after the "RESPONSE" was filed, to attend the hearing on the security plan (discussed, infra, Section IV of this Brief). Mr. Baldwin's presence and willingness to proceed precludes the Board's finding that the Intervenor "failed to appear at the hearing", as would be required to support a finding of voluntary default under 10 CFR §2.707.

IV

THE LICENSING BOARD FURTHER COMPOUNDED THE FOREGOING PROCEDURAL ERRORS BY REFUSING TO ALLOW INTERVENOR'S ASSOCIATE COUNSEL THE RIGHT TO PARTICIPATE, DIMINISHING EVEN FURTHER THE LIKELIHOOD OF FULL INVESTIGATION OF THE SECURITY ISSUES.

Mr. Baldwin, a member of the California Bar, filed a notice of appearance as counsel for Intervenors by wire on February 8, 1979. He requested the opportunity to participate in the examination of the Diablo Canyon security system. Mr. Baldwin appeared personally before the Board on February 12 and argued his right to participate in the proceedings. The Board denied his request.

The Board's failure to recognize Mr. Baldwin as associate counsel for Intervenor is manifested by many

incidents and reflects its intent that the Intervenor not participate in any way in the security issue:

(1) Review of the transcripts of February 8 (Tr. 9080-9099), February 9 (Tr. 9103-9108), and February 12 (Tr. 9356-9377), 1979, set the context of this sad incident. The Board took official notice that Mr. Baldwin might not be a "good guy" (Tr. 9091). Mr. Baldwin's mode of travel was stated by the Board to be a "sashay" (Tr. 9096). The Board made clear its doubt as to the nature of Mr. Baldwin's relationship with his clients ("To come in at the twelfth hour with a telegram saying that he is now representing the Mothers for Peace and intends to participate in the tour Monday is simply unacceptable to this Board." Tr. 9107). Mr. Norton, counsel for PG and E, mispronounced Mr. Baldwin's name four times within five minutes, in three different ways, was repeatedly corrected by Mr. Baldwin, and was not admonished by the Board at any time for this childish and unprofessional conduct (Tr. 9363-9372).

(2) Mr. Baldwin's first request to be placed on the service list for this proceeding was ignored by the Board. Mr. Baldwin's second request to be placed on the service list for this proceeding was responded to, in the following manner:

"We are uncertain of the exact relationship between Mr. Baldwin and Messrs. Valentine and Jones, or

Intervenors he purports to represent, but have decided to mail a copy of our recent order pertaining to Mr. Baldwin's motion relative to the security plan to him." Memorandum Relative to Placing W. Andrew Baldwin, Esq., on the Service List, August 2, 1979, p. 1.

(3) The Licensing Board issued a PARTIAL INITIAL DECISION which purported to reflect consideration of all relevant evidence of all parties on the issues of aircraft and missile accidents, seismic safety, and sufficiency of the security plan. Instructive in this regard is the cover page, which, in the list of appearances by counsel, does not record the appearance of Mr. Baldwin on behalf of any intervenor.

There is no legal precedent whatsoever for the Board to deny this Intervenor -- or any intervenor -- the right to be represented by attorneys of its own choice who are duly admitted to the practice of law. It is obvious from the events set forth above that the Board refused to allow Mr. Baldwin to represent this Intervenor with the specific intent of limiting the inquiry into the adequacy of the security plan.

The Licensing Board's refusal to allow Mr. Baldwin to participate prejudiced this Intervenor by denying its right to cross-examination of witnesses and appeal from adverse findings. How would Intervenor pursue either right where

its counsel was barred from a secret in camera hearing on the merits?

Even assuming (incorrectly) that Intervenor's January 19, 1979 "RESPONSE" was a request to withdraw its security contentions, and assuming (again incorrectly) that the Licensing Board had ordered the security contention withdrawn, it was still a violation of the Administrative Procedure Act and NRC case law and regulations to bar Intervenor's counsel from the hearing and tour of the plant security system. An intervenor in a nuclear power plant licensing proceeding has important functions and rights which require a Licensing Board to allow the presence of intervenor's counsel during the examination of the plant security system, even if the intervenor had never advanced a security contention. They are:

1. Cross-examination. An intervenor in a NRC licensing proceeding has the right to cross-examine witnesses, even when the evidence is outside the scope of intervenor's contentions. Without counsel present, such cross-examination is impossible. The issue arose in Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2) ALAB-244, 1974; where the Appeal Board stated:

> ". . . an intervenor can and should be afforded the opportunity to cross-examine on those portions of a witness' testimony which relate to matters which have been placed into controversy by at least one

> of the parties to the proceeding - so long as that intervenor has a discernible interest in the resolution of the particular matter."

The rule was followed in Clinch River Breeder Reactor Plant, ALAB-354 (1976). This Intervenor's discernible interest, of course, is evidenced by its years-long struggle, described above, to obtain review of the Diablo Canyon security plan by some person not employed by NRC or the Applicant -- an effort which, as described above, NRC and the Applicant have so far frustrated.

Refusal to allow cross-examination is also a violation of the Administrative Procedure Act, 5 U.S.C. 556(d), which provdes that "a party is entitled. . .to conduct such cross-examination as may be required for a full and true disclosure of the facts." Surely such a disclosure should be the Board's prime concern in this matter.

2. Submitting proposed findings of fact and conclusions of law and appellate redress. The Board's refusal to allow presence of counsel at the hearings and the tour of the security system made it impossible for Intervenor to file proposed findings of fact and conclusions of law and to seek appellate redress of Board error. In Prairie Island, supra, the Appeal Board stated:

> ". . .we are free of any doubt that all parties to a proceeding stand on an equal footing with respect to the right both to file proposed findings of fact and conclusions of law and to seek appellate redress of asserted Board error. If

> nothing else, common sense dictates that result. Were, for example, the record to reflect affirmatively that there is a potentially serious safety or environmental problem attendant to operation of the reactor at bar, what possible justification could there be for denying to any party whose interest might be thereby affected the opportunity to call that problem to the attention of the Board through an appropriate proposed finding? And, were the Board to reject the suggested finding in favor of one having inadequate record foundation, what good reason might exist for precluding the party from pressing for appropriate remedial action by a reviewing body?" Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2) ALAB-244, 1974.
>
> This is strong language, making an obvious point.

CONCLUSION

The Licensing Board's incredible sequence of procedural errors in this proceeding has denied the strong public interest and this Intervenor assurance that Applicant's security plan complies with NRC regulations. For the record in this appeal the Intervenor again contends that Applicant's security plan is inadequate for the reasons set forth in its AMENDED SECURITY CONTENTIONS of January 19, 1978.

The strong public interest in effective Intervenor participation derives from Siegal v. Atomic Energy Commission, 400 Fed. 2d 778 (D.C. Cir. 1968) and was buttressed in the Commonwealth Edison case as follows:

> "We have in an earlier memorandum stated our opinion that the development of plant security requirements were influenced considerably by the probing questions of CCPE's counsel (ALAB-177). We continue to adhere to that opinion. The responses of the applicant's witnesses to that counsel's examination at the November 13, 1974, hearing together with their responses to our questions are one of the foundations for our conclusions that the plan is adequate. This constructive participation on an important issue has, in our judgment, contributed to the improvement of the regulatory process, both as an aid to the adjudication of the security issues and in the development of overall regulatory requirements." Commonwealth Edison Co. (Zion Station, Units 1 and 2) ALAB-177 8 AEC at 853.

This Appeal Board has recognized the great value to public health and safety of intervenor participation in review of the adequacy of an applicant's security plan. In the Matter of Pacific Gas and Electric Co. (Diablo Canyon Units 1 and 2), ALAB-410, 2 NRR 30,197; 28,022; 28,024-5, 28,028-29 (1977); Consolidated Edison Co. of New York (Indian Point, Unit 2), ALAB-197 and 197R, 7 AEC 473, 826, on review, CLI-74-23, 7 AEC 947, 949-50, on remand, ALAB-243, 8 AEC 850, 853-54 (1974). This Appeal Board, in a previous ruling supporting the request by this Intervenor for discovery of Applicant's security plan, explicitly noted that participation by an intervenor's expert in Indian Point 2 "helped. . . in assuring that the [security] plan eventually adopted for the plant was adequate." In the Matter of Pacific Gas and Electric Co. (Diablo Canyon, Units 1 and 2), ALAB-410, 2 NRR

30,197; 28,022; 28,024-5 (1977). As Mr. Salzman stated in his additional comments to the Appeal Board's Memorandum in ALAB-410: "[C]onsiderable benefit can be derived from the independent scrutiny of such [security] plans which litigation engenders." Id. at 28,029. [Emphasis added.]

The adequacy of domestic nuclear power plant security has been the subject of much Congressional concern and criticism. See, e.g., Accuracy of U.S. Nuclear Regulatory Commission Testimony: Oversight Hearing Before the Subcommittee on Energy and the Environment of the House Comm. on Interior and Insular Affairs, 95th Cong., 2d Sess. (Feb. 27, 1978); Allegations Concerning Lax Security in the Domestic Nuclear Industry: Oversight Hearing Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs, 95th Cong., 2d Sess. (July 29, 1977) [hereinafter cited as July 29th Hearing]; Nuclear Reactor Security Against Sabotage: Oversight Hearing Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs, 95th Cong., 1st Sess. (May 5, 1977) [hereinafter cited as May 5th Hearing]; Subcommittee on Energy and the Environment of House Comm. on Interior and Insular Affairs, Report on Safeguards in the Domestic Nuclear Industry, Comm. Print No. 17, 94th Cong., 2d Sess. (August 1976). In recent years, much of the controversy over whether nuclear plants are adequately protected

against sabotage stemmed from a GAO report, released on April 7, 1977, which concluded:

> "[T]he Commission has not operated decisively or effectively in the security area, and as a result, security systems at perhaps all power plants would not be able to withstand sabotage attempts by threats that are now considered minimum by the Commission." See May 5th Hearing, supra, at 1.

Chairman Udall stated in his opening remarks during the hearing held on May 5, 1977:

> "[T]he consequences of sabotage of a nuclear reactor could be disastrous. . . .
>
> "It is because of the enormous consequences . . .that we want to assure ourselves that all reasonable steps are taken to prevent the worst from occurring." Id. at 1. (Emphasis added.)

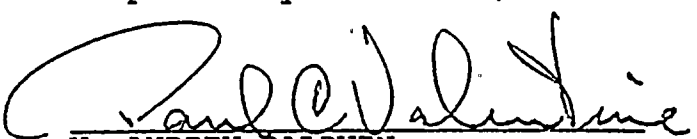
Congressional concern over particular elements of nuclear plant security systems compels the fullest possible review of an applicant's proposed security plan. Elements of security systems receiving particular scrutiny by Congress ought to receive the same high level scrutiny by the NRC, not only in the formulation of regulations, but also in the implementation of those regulations.

The present regulations reflect a commendable effort by the NRC to upgrade levels of safeguards at nuclear power plants, a response in large part to the criticism expressed in Congressional hearings. However, this is not reason for the Licensing Board to exclude qualified experts with potentially different perspectives from analyzing Applicant's

security plan for conformity with those regulations. Quite to the contrary, this is all the more reason the Licensing Board should have solicited rigorous analysis by all concerned to assure that the Applicant's plan complies with the letter and overall purpose of these regulations.

The principle has been violated throughout this proceeding; the Diablo Canyon security plan has been reviewed as to adequacy only by the Applicant, NRC staff and the Board, in a secret proceeding. The Board's continued arbitrary and unlawful procedural obstruction of Intervenor's repeated attempts to participate in the security proceedings and to qualify an expert to review the plan under confidentiality orders, blunted by the death of Mr. Comey, must be reversed and this Intervenor given an opportunity to qualify another expert to review the plan and be heard on the merits.

Respectfully Submitted,



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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of:	
PACIFIC GAS & ELECTRIC COMPANY (Diablo Canyon Nuclear Power Plant, Units 1 & 2)	Docket Nos. 50-275 OL 50-323 OL

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of November, 1979 I have served copies of the foregoing BRIEF IN SUPPORT OF EXCEPTIONS TO PART IV OF PARTIAL INITIAL DECISION of September 27, 1979, mailing them through the U.S. Mails, first-class, postage prepaid.

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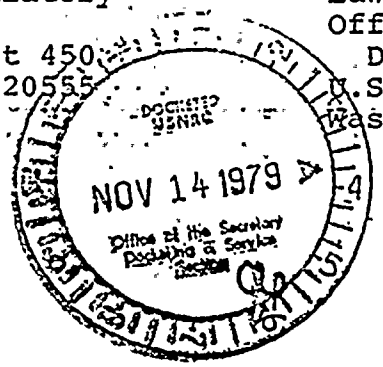

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