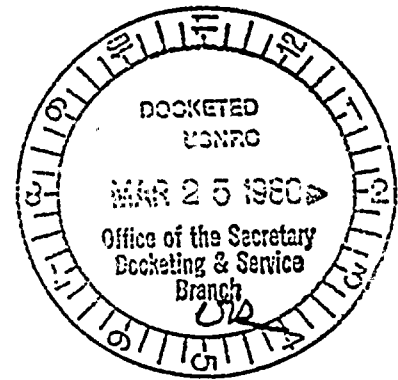


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

John H. Buck
Member, Appeal Board



In the Matter of
PACIFIC GAS & ELECTRIC COMPANY
(Diablo Canyon Nuclear Power
Plant, Units 1 and 2)

Docket Nos. 50-275 OL
50-323 OL

MEMORANDUM TO THE COMMISSION

March 24, 1980

On March 13, 1980, joint intervenors filed with the Commission a request that it either take upon itself the hearing of the appeal on the seismic issues now before the Appeal Board or reconstitute the Appeal Board to hear that appeal. Claiming they are entitled to an impartial Appeal Board, the joint intervenors advance as ground for their alternative request that "Dr. Buck's appointment to the Appeal Board violates the appearance of impartiality."

Apparently recognizing the possibility that neither request might be granted, the joint intervenors asked as a third possibility that the Commission "refer to Dr. Buck the question as to whether, in view of the argument cited



in [joint intervenors'] motion, he should recuse himself from the Appeal Board assigned to hearing the appeal." By order dated March 21, 1980, (CLI-80-8, 11 NRC ____) the Commission has done so. This memorandum responds to that directive.

That a right to a hearing before an impartial tribunal is a fundamental requirement is not at question. What must be decided is whether my continuation on the Appeal Board jeopardizes joint intervenors' due process rights, therefore requiring my recusation from the Board. Joint intervenors do not allege actual inability on my part to deal objectively with the issues that may be involved in their appeal. Indeed, they grant that I may well have that capability. Motion, p. 15. Rather, the joint intervenors charge that my appointment to this Board may "violate the appearance of impartiality" because I may have "'difficulty in putting aside previously expressed views' relevant to the seismic issues on appeal," and that I have a "preconceived attitude toward those issues." Id., pp. 14-16.

The joint intervenors cite two bases for this assertion. One is that I had rejected as "too conservative" the opinions of Dr. Mihailo Trifunac, an expert witness who appeared on behalf of opponents to the issuance of construction permits in two different proceedings and whose testimony is also

involved in the proceeding at bar. Having twice rejected his opinions, they say, I am "predisposed to do the same here." Motion, p. 16. This ground is simply insufficient in law and fact. The Supreme Court has noted with approval that "judges frequently try the same case more than once and decide identical issues each time." FTC v. Cement Institute, 333 U.S. 683, 703 (1947). Certainly, a stronger constitutional compulsion is not imposed on an agency adjudication in this respect. Ibid.

The joint intervenors base their "appearance" of partiality claim on the following circumstances. Dr. Trifunac appeared in these earlier proceedings^{1/} to give expert testimony on the relationship between earthquake intensity and the resulting ground acceleration. He expressed his opinion as to the level of ground acceleration which the reactors in question should be built to withstand in order to provide reasonable protection for the public health and safety. Both the applicants and NRC staff presented their own expert witnesses on the subject. There was agreement among all the witnesses on the general relationship between earthquake intensity and resultant ground acceleration, but

1/ Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33 (1977) and Consolidated Edison Company of New York (Indian Point, Units 1, 2 and 3), ALAB-436, 6 NRC 547 (1977).



.

.

B

e

S

e

u

r

Dr. Trifunac differed from the other witnesses in the value of acceleration which the reactors at the two sites should be built to withstand. In each case, on the evidence presented, the majority members of the two Boards decided that Dr. Trifunac's opinion was more conservative than necessary considering all the factors involved.^{2/} To be sure, there was disagreement among the members of each Board on the weight to be given Dr. Trifunac's opinion. But it is neither sinister nor even unique for judges or adjudicators to disagree. All this shows is the truth of the old adage that reasonable minds can and often do differ on any given issue.^{3/} I find no substance to joint intervenors' claim that my votes in these two proceedings suggest the appearance of personal bias.

The joint intervenors rely on Holley v. Lavine, 553 F.2d 845 (2d Cir. 1977), cert.denied, 435 U.S. 947 (1978), as compelling my disqualification from the present Board. Motion, pp. 14-16. In that case, the court of appeals considered for the second time a district judge's denial of a

^{2/} 6 NRC at 62-64; 6 NRC at 581-585.

^{3/} In this connection, Mr. Rosenthal voted with me in the Seabrook appeal. He is a lawyer with long experience. He has served as Chairman of the Atomic Safety and Licensing Appeal Panel since 1972. In the Indian Point appeal, I was joined by Dr. Quarles. He is a former Dean of the School of Engineering and Applied Science, University of Virginia, who has a broad technical background. It is significant that persons with such diverse training and experience also agreed with my evaluation of Dr. Trifunac's opinion.



claim for financial assistance under New York's Social Services Law and Regulations. In its consideration of the second appeal, the court found that the claimant was entitled to such assistance but left for trial court determination the appropriate remedy. In sending the case back to the lower court for the second time, the court made the observation on which the joint intervenors heavily rely:

Since it appears the original judge might have difficulty in putting aside previously expressed views, and reassignment is advisable to avoid the appearance of prejudgment, the case will be remanded to the District Court for reassignment in keeping with the principles stated in United States v. Robin, 553 F.2d 8, 10 (2nd Cir. March 30, 1977).^{4/}

Just what factors relating to the original trial judge's conduct persuaded the Court of Appeals to direct reassignment are not evident. When that Court heard the claimant's earlier appeal, it had directed the trial judge to convene a three-judge court to consider the claimant's constitutional arguments in the event that the judge should find such assistance

^{4/} 563 F.2d at 851. In United States v. Robin, the appellate court set out the principal factors for determining whether further proceedings should be conducted before a different judge, absent proof of personal bias requiring recusation. In that connection, the court stated that reassignment to another judge may be advisable in order to avoid "an exercise of futility" in the "rare case where a judge has repeatedly adhered to an erroneous view after the error is called to his attention." Applying the facts of that case to the principles enunciated, the court found no warrant for assignment of the remanded proceeding to a different judge.

barred by state law. Even though, on remand, that was found to be the case, the trial judge nevertheless denied a motion to convene a three-judge court.

From its reference to the Robin decision, it is reasonable to assume that the recalcitrance of the trial judge which earlier heard the case was the basis for the appellate court's decision directing reassignment. But the circumstances alleged by the joint intervenors as suggesting the "difficulty" I may have in "'putting aside previously expressed views' relevant to the issues now under appeal" are far different from those which confronted the Holley court. Certainly, there has been no showing -- much less an allegation -- of refusal on my part to carry out any specific direction of the Commission in this or any other proceeding. I find no cause in the joint intervenors' first basis for recusing myself from the proceeding.

As their second basis for claiming "violation of the appearance of impartiality," the joint intervenors point to my earlier membership on the Appeal Board for the construction permit proceeding for the Diablo Canyon plant. In their view, that Board "failed to consider adequately the intervenors' valid concerns regarding the plant's seismic design and, instead, approved issuance of a construction permit for Unit 2 at Diablo Canyon." Motion, p. 16. One error occurred, according to the joint intervenors, because the Board sanctioned an

inadequate site investigation; the second is alleged to have been caused by the Board's rejection of requests to reopen the record to examine new earthquake data. Id., pp. 16-17.

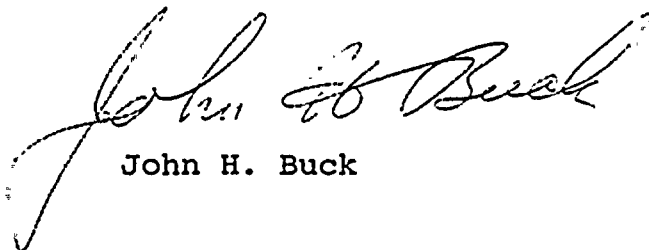
These allegations of error are nothing but a bald attempt to resurrect ancient history. The alleged transgressions which are claimed to have occurred took place in 1971 when the Appeal Board decided an appeal from the Licensing Board's decision authorizing construction of Unit 2 of the Diablo Canyon plant. ALAB-27, 4 AEC 652. It is far too late to bring up these claims of error.

To refute these allegations point by point at this juncture would give an unwarranted semblance of credence to the charges. It suffices to observe that the decision to approve construction of Unit 2 of the Diablo Canyon plant was made (and necessarily, the adequacy of the plant's seismic design was agreed to) by both the Licensing and Appeal Boards based on the evidence in the record.^{5/} This means that six different persons on the two Boards -- each with a broad legal or technical background --

^{5/} Their reasons are fully explained in the decisions. See Licensing Board Decision dated December 8, 1970, 4 AEC 447 and the decision of the Appeal Board, ALAB-27, 4 AEC 652. The actions taken by the applicant and agency staff in connection with the seismic matters both before and after issuance of the construction permit for Unit 2 are also discussed in the enclosure to the letter dated March 31, 1977, from Lee V. Gossick to Congressman Morris K. Udall, referenced in the joint intervenors' motion.

joined in that assessment.^{6/} To claim now that my involvement in that decision, unanimously agreed to by all who were called upon to adjudge the matter, somehow foreshadows "partiality" in my consideration of the seismic issues currently under appeal goes beyond reason.

As a final matter, I reviewed the relevant Appeal Board opinions before coming to a firm decision.^{7/} I find nothing in them requiring my recusation from the Appeal Board for this proceeding.



John H. Buck

6/ The Licensing Board members were: James P. Gleason, a lawyer who later served as the elected chief executive officer for Montgomery County, Maryland; Thomas H. Pigford, Professor of Nuclear Engineering at the University of California at Berkeley (and recently a member of the Kemeny Commission); and Hugh C. Paxton, a physicist at the Los Alamos Scientific Laboratory. The Appeal Board members were: Algie A. Wells, a long-time government lawyer and administrator; Lawrence R. Quarles, and myself.

7/ In our Midland decision we reviewed the grounds on which a member of an adjudicatory body such as an Atomic Safety and Licensing Board may be disqualified. An administrative trier "is subject to disqualification if he has a direct, personal, substantial pecuniary interest in a result; if he has a 'personal bias' against a participant; if he has served in a prosecutive or investigative role with regard to the same facts as are in issue; if he has prejudged factual -- as distinguished from legal or policy -- issues; or if he has engaged in conduct which gives the appearance of personal bias or prejudgment of factual issues." Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-101, 6 AEC 60, 63 (1973). Certainly none of these bases, save the last, has any possible relevance to the joint intervenors' accusations. As to the last factor, I have already covered it, supra.

COPY

REGULATORY DOCKET FILE COPY

PACIFIC GAS AND ELECTRIC COMPANY

LAW DEPARTMENT - 77 BEALE STREET, 31ST FLOOR • SAN FRANCISCO, CALIFORNIA 94106 • (415) 781-4211

March 21, 1980

Mr. Richard S. Salzman
Chairman
Atomic Safety and Licensing
Appeal Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Re: Docket No. 50-275
Docket No. 50-323
Diablo Canyon Units 1 and 2

Dear Mr. Salzman:

In accordance with the Prehearing Conference Order dated February 25, 1980, enclosed are the names and qualifications of two witnesses we may offer in connection with the hearing to be held on the Diablo Canyon security plan. The order also solicited additional suggested procedures and we have two, both concerning the schedule.

1. Intervenors are given until April 16, 1980 to study the sanitized version of the security plan and set forth with particularity the exact aspects of the plan they challenge. However, until we have that information we cannot be certain that we have named all our witnesses. We may elect to offer witnesses with more specialized knowledge of those portions of the security plan being challenged than the two named herein.

2. All parties are given until May 7 to challenge any proffered witness yet the Intervenors must refine their contentions by April 16. However, the witness cannot look at the plan or a sanitized version thereof until he has been qualified.

The prehearing conference order directed the staff to prepare a form of affidavit of non-disclosure and protective order. As this is written, due to mechanical transmission difficulties only the affidavit has been received. However, our comments are applicable to both.

We have difficulties with certain portions of the affidavit



COPY

Mr. Richard S. Salzman

2

March 21, 1980

which are set forth below:

1. We believe the exception in paragraph 3 makes this paragraph virtually meaningless and the exception should be deleted.

2. Paragraph 4 might read better if everything from the word "photocopies" were deleted and the following inserted

" . . . copies of protected information and any evaluations which contain protected information."

3. We would prefer that there be no public discussion about the security plan proceeding to cut off a potential source of leaks. Accordingly, we would propose that the following sentence be added to the affidavit:

"I will not express any opinion as to the adequacy of the security plan except at an in camera hearing."

4. We believe that the location where the plan will be made available should be specified. This appears to be contemplated by the prehearing conference order (top of page 6). We suggest that the location be a room in our 215 Market Street Building to be specified. Arrangements can be made to preserve the privacy of the witness and his counsel.

Finally, we wish to advise the Board and all parties in advance that if and when we are ordered to turn over even the sanitized version of the plan we will file a motion for a stay and an appeal to the Commission. We believe this matter is of sufficient importance that it ought to be decided by the Commission itself. Such an appeal should have a minimal adverse effect upon the schedule. We did not earlier appeal ALAB-580 because there was no qualified witness, no final order to turn over the plan, and thus nothing to appeal. We believe that in fairness we should make known in advance what our position on this matter will be.

Very truly yours,

Philip A. Crane, Jr.

Enclosure

CC w/enc.: W. Reed Johnson
Thomas S. Moore
NRC Commissioners
Service List

NAME: Alfred W. Medcalf

SOCIAL SECURITY NUMBER: 405-44-3198

TITLE: Senior Nuclear Generation Engineer

DEPARTMENT: Nuclear Generation, General Office
Pacific Gas and Electric Company
77 Beale Street, San Francisco, CA 94106

EDUCATION: B.E.E. University of Louisville, 1956

MS in Physics, University of Louisville, 1961
Graduate Classes in Nuclear Engineering,
University of Washington 1962-1964

Professional Affiliations: Northern Chapter of
American Nuclear Society

WORK EXPERIENCE:

1956-1959 U. S. Navy, Lt. (jg), Gunnery Officer
aboard an attack transport (APA-188).
Boat group commander for small craft
making amphibious landings and officer
in charge of the landing party from
APA-188. Instructor at the Naval Amphibious
School, Little Creek, Va. in landing tactics
and control of a beachhead.

1961-1964 General Electric Company, Pile Physicist,
Plutonium Production Reactors, Hanford,
Washington. Performed safety and loading
calculations for several large reactors.
(Q Clearance)

1964-1966 U.S. Atomic Energy Commission, Reactor
Physicist, Technical Staff of Berkeley, CA
office. Responsible for technical guidance
of projects concerning nuclear reactor
physics. (Q Clearance)

1966-1970 University of California, Lawrence
Livermore Laboratory, Shift Physicist
at the Livermore Pool Type Reactor.
Responsible for the safe and efficient
operation and loading of a 3 megawatt test
reactor. (Q Clearance)

1971-1979 Pacific Gas and Electric Company, Steam
Generation Engineer. Performed technical
and licensing support work for an operating
BWR unit, including safety studies, fuel
management, reactor operations and plant
security.

CLEARANCE: Currently hold a U.S. Nuclear Regulatory Commission
"L" Clearance.



Bryan A. Dettman
2001 San Miguel Drive
Walnut Creek, CA 94596
(415) 937-4158 (Res.)
(415) 781-4211 (Bus.)

EMPLOYMENT HISTORY

I. August 1975 - Present - Pacific Gas and Electric Co.

77 Beale Street
San Francisco, CA 94106

A. June 1979 - Present: Supervising Security Representative, Corporate Security Department

Primary Responsibilities:

1. Supervision of Corporate Investigations Staff.
2. Supervision of Corporate Nuclear Security Program.
 - a) Nuclear site personnel security screening.
 - b) Federally mandated security program audits.
3. Liquified Natural Gas (LNG) Security Plans and Programs
(California, Alaska and Indonesia terminals)
4. Emergency Planning
 - a) Corporate
 - b) Nuclear Sites
5. Subsidiary Company Security (Coal, Oil and Gas Pipelines
Drilling Operations, etc.)

B. August 1975 - June 1979: Security Supervisor responsible for Security of Nuclear Power Plants owned and operated by P. G. and E.

Primary Responsibilities:

1. Development and implementation of plans and procedures which are
in compliance with Federal Regulations pertaining to nuclear
facilities. (All nuclear facilities are Federally regulated and
subject to Nuclear Regulatory Commission audit and inspection.)

2. Design of systems and facilities required for the protection of the plants, including an access control building in excess of 8,000 sq. ft.
3. Specification and purchase of security related equipment including radios, alarm systems, computers, vehicles, emergency equipment, etc.
4. Liaison with local, state and federal law enforcement agencies.
5. Administration of guard forces comprising in excess of 200+ persons.
6. Handling anti-nuclear demonstrations.

II. December 1971 - August 1975 - Bay Area Rapid Transit District (BART)

800 Madison Street
Oakland, CA
Police Services Division
Police Lieutenant
(Under California law, the Bay Area Rapid Transit District maintains its own police force charged with the total law enforcement responsibilities for the system.)

Positions held while with BART POLICE:

- A. Watch Commander: Responsible for command of a shift in the Bureau of Field Operations consisting of 30+ Officers, 7 Sergeants, and 6 non-sworn clerical and communications personnel. Included in this function was the development of beat structures and operating procedures, since this was a totally new operation. It was not only new, but unique, in that we were charged with the total law enforcement responsibility ranging from traffic control to homicide investigation, over a widely dispersed system linked together by high speed rapid transit vehicles operating through numerous political subdivisions.
- B. Technical Services Bureau Commander: Responsible for setting up the following sections prior to system start up, and overseeing their development and daily operation after the system opened. In this capacity, I was responsible for 21 total personnel.

BRYAN A. DETTMAN

Detective Bureau
Communications Section
Records Section

Property and Equipment Control
Revenue Protection Section
Training

All of these sections were developed from the ground up. All personnel had to be hired and trained. Procedures and forms were designed. Agreements were negotiated with 9 judicial districts and 18 law enforcement agencies with whom detailed operating interfaces had to be established. Equipment was ordered and installed, including teletype and computer terminals, a complex radio system, patrol vehicles, armored trucks for our revenue protection section, weapons, uniforms, etc.

- C. Personnel: My initial task upon employment was to design and implement a hiring procedure which would enable us to staff our total complement on a precise time table to correspond with various system segment openings. I developed a process which included community representation in the oral board segment of the procedure which resulted in a police force whose racial and ethnic make up compared favorably with the Bay Area as a whole. Additionally, these officers averaged 7 years of police experience and 2 years of college.
- D. Special Projects Coordinator: Responsible for Planning and Research section and the establishment of a uniform traffic and parking program for the 20,000+ parking stalls and miles of access and circulation roads owned and controlled by the District and defined as streets under California Vehicle Code. I was further involved in planning future programs and in writing and actively seeking new legislation at the state capitol. In this capacity, I conferred with state legislators and their staffs. I also maintained our departmental liaison with the Federal Law Enforcement Assistance Administration in the area of grants.

III. 1974 - Bechtel Corporation, 50 Beale St., San Francisco, CA 94119

(This job was performed while on a leave of absence from BART)

I was retained by Bechtel on a contractual basis for one month in a consulting capacity to examine a security program being implemented by Bechtel at the Honolulu International Airport under a contract with the State of Hawaii. My task was to evaluate the design of the program, assess the progress of both its construction and implementation, and determine whether it would bring the airport into compliance with Federal Aviation Regulations dealing with airport and aircraft security.

VI. 1964 - 1971 - Walnut Creek Police Department

1649 N. Broadway
Walnut Creek, CA 94596

(Walnut Creek is a suburban community in the Bay Area with a population of approximately 50,000 people)

I started out as a patrolman at the age of 21. Three years later, I was promoted to Detective and worked the following areas over the next 4 years: burglary, auto theft, juvenile, robbery and crimes against persons.

I was promoted to the rank of Sergeant in 1969 and assumed the position of Director of the Investigative Bureau that same year. In that capacity, I supervised 7 Detectives.

EDUCATION

M.A. Public Administration - Golden Gate University, San Francisco, CA

B.A. Police Science and Administration - Sacramento State University, Sacramento, CA

PROFESSIONAL CERTIFICATION

A. State of California Commission on Peace Officer Standards and Training (POST)

1. Advanced Officer Certificate
2. Supervisory Certificate
3. Middle Management Certificate

B. State of California Community Colleges Lifetime Instructor Credential
(Credential No. 554-62-1686-001)

C. State of California, Bureau of Consumer Affairs Certified Instructor:

1. Laws of Arrest
2. Firearms

D. National Rifle Association (NRA) Police Firearms Instructor Certification

CLEARANCE

United States Government "L" Clearance (Nuclear Regulatory Commission)

