UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

JOINT INTERVENORS' RESPONSE TO THE MEMORANDUM OF COMMISSIONER HENDRIE TO COUNSEL FOR THE PARTIES

The SAN LUIS OBISPO MOTHERS FOR PEACE, SCENIC SHORELINE PRESERVATION CONFERENCE, INC., ECOLOGY ACTION CLUB, SANDRA SILVER, GORDON SILVER, ELIZABETH APFELBERG, JOHN J. FORSTER ("Joint Intervenors") hereby respond to Commissioner Hendrie's invitation to interested parties to comment on his interim decision to remain in the Diablo Canyon Nuclear Power Plant ("Diablo Canyon") proceedings.[1/] We call upon Commissioner Hendrie to retract his interim decision and recuse himself from the Diablo Canyon proceedings. As a matter of law and sound policy, Commissioner Hendrie's decision is ill-founded. An examination of his memorandum setting forth the basis for that decision shows why that is the case.

1/ Memorandum to Counsel for the Parties at 6, (March 13, 1980) (cited hereinafter as Memorandum to Counsel).

I. THE MEMORANDUM TO COUNSEL FAILS TO ADDRESS ALL RELEVANT LEGAL REQUIREMENTS.

Although Commissioner Hendrie has conceded that the October meeting with high-level executives of PG&E constituted an ex parte communication, he asserts, as a matter of law, that there is no basis for disqualification, for the following reasons:

A. He is "not biased in favor or against" any party to the proceeding and he has not "lost his independence of judgment" in the proceeding.2/

B. The Administrative Procedure Act (APA) and NRC regulations do not require that a Commissioner disqualify himself "solely because he received an ex parte communication."3/

C. The ex parte meeting is not sufficient basis for any inference that he is biased or that future proceedings will be unfair.4/

D. In any event, he complied with the law by placing a memorandum in the public record setting forth the substance of the ex parte communication.5/

However true or relevant those assertions may be, they do not satisfy constitutional due process and statutory standards as defined and applied by the courts to administrative agency adjudicatory proceedings.

2/ Memorandum to Counsel at 6.

3/ Id. at 4.

4/ Id.

5/ Id. at 3.

A. Lack of Bias

The mere statement of an interested agency official that he is not biased neither establishes in fact that no bias or prejudice exists, nor addresses the additional legal requirement that administrative proceedings exhibit the utmost appearance of fairness. That requirement was upheld in three of the cases cited in the Commissioner's memorandum, in which the courts stated:

> [A]n administrative hearing 'must be attended; not only with every element of fairness but with the very appearance of complete fairness.' Cinderella Career and Finishing Schools, Inc. v. FTC, 425 F.2d 583, 591 (D.C. Cir. 1970), citing Amos Treat & Co. v. SEC, 306 F.2d 260, 267 (D.C. Cir. 1962).

And,

> [A]ppearance of fairness and impartiality is probably of as great importance as its attainment, if the public is to have confidence in the judicial process. Jarrott v. Scrivener, 225 F. Supp. 827, 834 (D.D.C. 1964).

Despite the unambiguous and numerous endorsements of the "appearance of fairness" doctrine in the case law, Commissioner Hendrie's memorandum contains no mention of that doctrine.

B. APA and NRC Regulatory Requirements

Commissioner Hendrie's assurance that he has found no decision requiring a Commissioner to disqualify himself from a proceeding solely because he received an ex parte communication[6/] ignores the import of decisions that have

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6/ Memorandum to Counsel at 4.

overturned agency orders and remanded cases for new hearings before a disinterested panel, because of improper ex parte communications. For the sake of brevity, only one case will be discussed. In Jarrott v. Scrivener, 225 F. Supp. 827 (D.D.C. 1964) (cited by Commissioner Hendrie on page four of the Memorandum to Counsel), the court overturned a decision of the administrative board, some of whose members had received verbal and written ex parte communications, even though the affected board members denied being influenced by the communications. Taking into account "the frailties and infirmities of human nature," and the overriding importance of the appearance of fairness, the court determined that it should remand the case for a new hearing.[7/] It also instructed that a special board be constituted "for hearing this particular appeal," from which the agency members who had received ex parte contacts would be excluded.[8/]

See also, Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. Cir. 1959); Berkshire Employees Ass'n. v. National Labor R. Bd., 121 F.2d 235, 239 (3rd Cir. 1949).

7/ According to the court, a remand for investigation of the claims of prejudice would be futile, since the board was not qualified to investigate itself. Jarrott, 225 F. Supp. at 835.

8/ The court explained: "It would likewise be inappropriate and futile for this case to be reheard by the present Board . . . which has already been under the influence of the contacts referred to." (Emphasis in original.) Id. at 836.

C. Inference of Bias or Prejudice

When Commissioner Hendrie met with the Chairman, and the President of PG&E, a utility whose highly controversial license application was pending before the NRC, the appearance of fairness, if not the fact of impartiality, was essentially destroyed. For more than half an hour, Commissioner Hendrie and the NRC's General Counsel participated in a discussion directed almost solely to future agency action on the Diablo Canyon license. Counsel for the Joint Intervenors was not informed of, nor invited to the meeting, even though he would have been able and would have wanted to attend. As a result, the Commissioner was presented with a one-sided version of the substantive matters raised by PG&E during the meeting.

Most important, the public and the Joint Intervenors, as well as any reviewing court, will never know exactly what words were spoken during the ex parte meeting because a verbatim transcript of the conversation was not kept. That omission has led to decreased confidence in the credibility of the Commission. And, the justifiable suspicions aroused by the secret meeting have not been dispelled by the post hoc filing of a summary statement by Commissioner Hendrie.

D. The Public Record

If, as the Memorandum to Counsel implies, the APA and NRC regulations require only that ex parte communications

be noted in the public record to satisfy due process requirements of a fair hearing and impartial tribunal, any adjudicatory officer is free to engage in any type of discussion, at any time, in any manner he or a party to a licensing proceeding determines -- so long as a post hoc statement is filed in the Public Documents Room. Such a distortion of administrative law is unthinkable.

Section 557(d) of the APA and 10 CFR §2.780 commence with a prohibition of the type of ex parte communication involved in this case. 5 U.S.C. §557(d)(1)(A) and (B); 10 CFR §2.780(a). The rigorous standards set forth in those provisions require that a Commissioner be both unbiased and free from the appearance of prejudice that ex parte discussions impart. Therefore, the fact that Commissioner Hendrie allowed PG&E officials to discuss matters particularly relating to Diablo for over half an hour unquestionably violated those provisions.

Compliance with subsequent subsections of the above-mentioned APA and NRC regulatory provisions does not absolve the communications of their ex parte nature or the agency official of the taint of the unlawful contact. The public and the other parties to the proceeding that were excluded from the meeting have no means of determining or

contesting the contentions raised during the private, off-the-record, prearranged meetings among highest-level utility and Commission officials. Therefore, it is impossible for those parties, or a reviewing court, to determine whether or not a fair hearing, on-the-record, can be provided.

II. THE MEMORANDUM FAILS TO ADDRESS THE SUBSTANTIVE ALLEGATIONS RAISED IN JOINT INTERVENORS' MOTION

The Memorandum to Counsel implies that Joint Intervenors' motion was addressed only to the possibility of his bias in favor of PG&E because of the ex parte meeting.[9/] If that opinion were correct, perhaps Commissioner Hendrie's Memorandum to Counsel would constitute an adequate response to the motion. However, that motion was not grounded solely on an objective claim of actual prejudice, but also raised legally cognizable issues regarding the overall appearance of fairness of the Diablo Canyon proceeding if Commissioner Hendrie continues to participate.[10/] Therefore, the Commissioner's conclusion that Joint Intervenors "have not established a case for disqualification. . ."[11/] must be rejected.

9/ Memorandum to Counsel, at 1.

10/ Joint Intervenors' Reply to the Staff's and Applicant's Responses to the Motions to Institute Proceedings on the Qualifications of Chairman Joseph M. Hendrie and Commissioner Richard T. Kennedy, at 3-5, dated November 23, 1979.

11/ Memorandum to Counsel, at 1-2.

Moveover, while it is true that the "burden of establishing bias is upon the petitioner,"[12/] the burden of coming forward with credible evidence to refute all the valid claims raised by Joint Intervenors, including the violation of administrative regulations and failure to safeguard the appearance of fairness, is upon the Commissioner. Commissioner Hendrie has not met that burden.

III. THE EX PARTE MEETING

In previous filings in this matter, the Joint Intervenors have detailed the subjects discussed during the ex parte conversation that clearly were not "generic" or procedural" in nature. Those arguments will not be repeated here, since Commissioner Hendrie has conceded that the conversation did constitute a prohibited ex parte communication under the relevant laws. Also, further argument should not be necessary to demonstrate that the manner in which TMI issues will be addressed by the NRC staff directly pertains "to whether the Diablo Facility Canyon [sic] application for an operating license should be issued."[13/]

The Memorandum to Counsel must be rejected because the Commissioner's continued characterization of the ex parte

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12/ Memorandum to Counsel at 4.

13/ Id. at 5.

discussion as essentially "generic," and his insistance that he expressed no views as to the operating license, misconstrue the real issues raised by Joint Intervenors' motion. In addition, the memorandum raises or leaves unanswered a number of vital questions, including:

(1) Why did Commissioner Hendrie agree to meet with PG&E's highest officials, even before determining their reasons for the meeting?

(2) Why, when he knew or should have known of PG&E's intense efforts to obtain a license for Diablo Canyon and that the controversial license application, the subject of a contested proceeding, would soon be before him for a final decision, didn't Chairman Hendrie have the NRC's General Counsel instruct PG&E in advance of the meeting, that discussions regarding Diablo Canyon would not be permitted?

(3) Why didn't the Commissioner initially instruct PG&E officials to speak about Diablo Canyon directly with NRC Staff (e.g., Dr. Harold Denton) who is not in the adjudicatory branch of the NRC?

(4) Why did the Commissioner and General Counsel not end the meeting when it became obvious that PG&E officials were focusing the discussion on substantive Diablo issues?

(5) Why was no verbatim transcript of the meeting kept?

(6) Why was counsel for the Joint Intervenors excluded from the so-called generic discussion?

(7) Why was the General Counsel instructed to research the matter days <u>after</u> the conversation rather than two days prior to the meeting when General Counsel obtained "a detailed description" of what PG&E wished to discuss?14/

14/ Memorandum to Counsel at 2.

(8) Why isn't a request that Diablo be treated the same as all PWR's, even though it is the only facility within 3 miles of a 7.5M earthquake fault, a substantive demand going to the merits of a license application?

(9) Why did Mr. Mielke bring up the need for power in California -- an issue wholly irrelevant to the NRC's jurisdiction over safety matters -- if not to encourage the Commissioner to expedite licensing of the plant?15/

CONCLUSION

The interim decision of Commissioner Hendrie, and his reasons therefor, do not adequately respond to the Joint Intervenors' request that he recuse himself. That decision should be retracted, and Commissioner Hendrie should recuse himself from this proceeding.

15/ Jarrott, described supra. p.4, also involved ex parte communications with the presiding board. The court wrote: "[Ex parte contacts involve] an assurance that there is no thought of asking the person contacted to do other than his duty, followed by an expression of hope that his duty will incline him in the direction described. In the vernacular, . . . this insidious approach is known as the 'soft approach' or 'soft touch'." Jarrott, 225 F. Supp. at 834.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of March, 1980, I have served copies of the foregoing JOINT INTERVENORS' RESPONSE TO THE MEMORANDUM OF COMMISSIONER HENDRIE TO COUNSEL FOR THE PARTIES; and JOINT INTERVENORS' RESPONSE TO THE MEMORANDUM OF COMMISSIONER KENNEDY TO COUNSEL FOR THE PARTIES, mailing them through the U.S. Mails, first-class, postage prepaid.

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