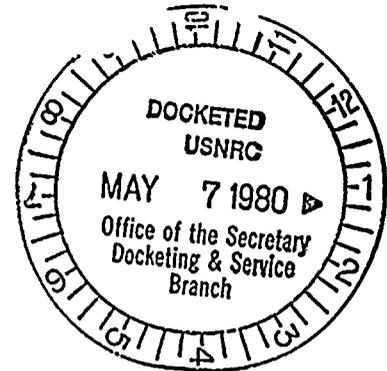


UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
BEFORE THE COMMISSION



\_\_\_\_\_ )  
In the Matter of: )

PACIFIC GAS & ELECTRIC )  
COMPANY )  
(Diablo Canyon Nuclear )  
Power Plant, Units 1 & 2) )

*May 5, 1980*

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 parties to comment on his tentative decision to remain in the Diablo Canyon Nuclear Power Plant ("Diablo Canyon") proceedings.<sup>1/</sup> We call upon the Commissioner to retract his interim decision and recuse himself from the Diablo Canyon proceedings. Commissioner Hendrie's continued participation in those proceedings violates the regulations of the Nuclear Regulatory Commission ("NRC") and the due

1/ Memorandum to Counsel for the Parties at 4 (April 21, 1980) (cited hereinafter as Memorandum to Counsel).



process rights of Joint Intervenors, as documented by the Memorandum to Counsel, the agency materials accompanying that memorandum, and the cumulative record of the Diablo Canyon licensing proceedings.

I. NRC REGULATIONS EXPRESSLY AND UNAMBIGUOUSLY PROHIBIT COMMISSIONER HENDRIE'S PARTICIPATION IN ANY DECISION ON DIABLO CANYON.

Commissioner Hendrie has offered the following rationalization for his interim decision to participate in the Diablo Canyon licensing review.

. . . I could not have been involved in the development of the AEC-NRC staff substantive position on the merits of issues related to the existence of the Hosgri fault . . . .  
[T]he record upon which the Commission will base its decision was generated after I left the AEC. In these circumstances, I will be able to consider the issues raised by the Diablo Canyon operating license application in an impartial manner unaffected by the limited involvement described above.<sup>2/</sup>

Even if that explanation has factual support, the Commissioner's opinion and recollection of his prior involvement are largely irrelevant. The decisive issue in this matter is whether the formal regulations of the NRC concerning the separation of functions within that agency permit Commissioner Hendrie to participate as decision-maker in future Diablo Canyon proceedings.

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<sup>2/</sup> Id.



The applicable regulation, adopted in its present form in 1962,<sup>3/</sup> is codified in 10 C.F.R. §2.719. It states, in part:

(d) Except as provided in paragraph (c) of this section and §2.780(e), in any case of adjudication, no officer or employee of the Commission who has engaged in the performance of any investigative or prosecuting function in the case of [sic] a factually related case may participate or advise in the initial or final decision, except as a witness or counsel in the proceedings.<sup>4/</sup>

According to the rule, an administrative official will be prevented from participating in a decision if three conditions are met: (1) the decision arises in the context of an administrative adjudication; (2) the official was formerly an employee of the agency; and (3) as an employee, the official worked in a prosecutory or investigatory role on the very same case or a factually related one.

In the present matter, no party disputes whether the Diablo Canyon licensing proceeding is an adjudication on the record, as defined by NRC regulations and the Administrative Procedure Act ("APA"). It is also admitted that, from May 15, 1972 to July 23, 1974, Commissioner Hendrie was an

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<sup>3/</sup> NRC Staff Report, "A Study of the Separation of Functions and Ex Parte Rules in Nuclear Regulatory Commission Adjudications for Domestic Licensing" at 48-49 (1980) (cited hereinafter as Separation of Functions Study).

<sup>4/</sup> Section 2.780(e) and paragraph (c) apply only to adjudications "other than a contested proceeding," and therefore are not relevant to this matter.



employee of the NRC in the position of Deputy Director of Technical Review,<sup>5/</sup> and that, as Commissioner, he ultimately will be called upon to adjudicate the many issues raised by the Diablo Canyon application. Therefore, the only remaining question is whether the Commissioner previously "engaged in the performance of any investigative" functions with respect to Diablo Canyon.

The answer to that question is contained in the Memorandum to Counsel and the documentary evidence accompanying it. Commissioner Hendrie participated in the decision to docket the operating license application of Pacific Gas & Electric Company ("PG&E")<sup>6/</sup> after his division subjected the application to intense review for nearly two months, rejected it for incompleteness, and then re-evaluated it after it was resubmitted by PG&E in September, 1973.<sup>7/</sup> In addition, even the limited evidence adduced by Commissioner Hendrie verifies that he attended high-level meetings with PG&E representatives.<sup>8/</sup> It furthermore seems likely that he was present at the January, 1974 meeting with USGS officials to discuss the strong evidence

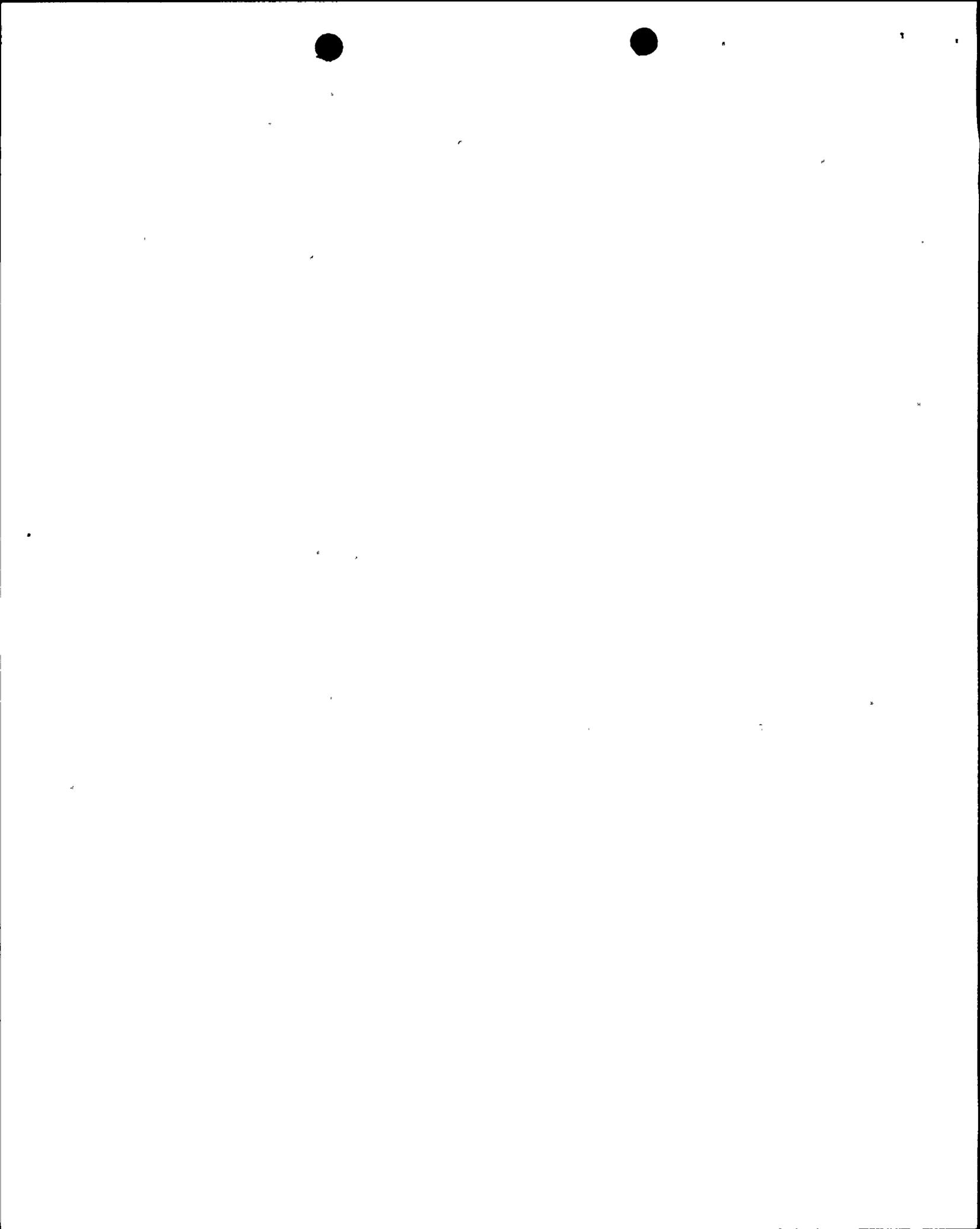
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<sup>5/</sup> Memorandum to Counsel at 1.

<sup>6/</sup> Id. at 3. By approving the docketing of the application, Commissioner Hendrie, then a leader of the Technical Review division, certified that it was sufficiently complete to justify formal review. Id.

<sup>7/</sup> See, e.g., Memorandum to L. Manning Muntzig from A. Giambusso, November 8, 1973.

<sup>8/</sup> See Reconstructed Notes of Richard Bettinger of June 4, 1974 Meeting at 1 (March 31, 1980); Memorandum to Counsel at 3.



of the existence and magnitude of the Hosgri fault and that he participated in the decision to deny intervenors' Stop Work petition.<sup>9/</sup> In summary, for over a year, Commissioner Hendrie investigated and evaluated the Diablo Canyon operating license application, met with Applicant's representatives, and worked in conjunction with numerous other members of the NRC investigative staff, "many of whom are presently employed by the NRC."<sup>10/</sup>

Under the circumstances, the NRC's regulations absolutely prohibit the Commissioner from participating in the "initial or final decision" for Diablo. Section 2.719(d) is not a discretionary measure: any investigative involvement in a case triggers the prohibition on adjudication in the same or related case.<sup>11/</sup> Neither good faith lack of memory of matters investigated nor limited prior involvement (in this

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9/ Confirmed accounts prove Commissioner Hendrie was present at the June 4, 1974 meeting, and his Memorandum to Counsel indicates he attended other, similar meetings. As head of his Technical Review division, Commissioner Hendrie likely attended the highly important January 1974 conference with the USGS called by the AEC.

10/ Memorandum to Counsel at 2. Those individuals who were the Commissioner's peers while he headed the Technical Review division continue to work on Diablo Canyon or substantially contributed to the staff's present position on the Diablo Canyon project. See p. 9, infra.

11/ In fact, NRC regulations regarding ex parte communications and the separation of functions are so inflexible that they have "been interpreted to prevent the Commissioners from consulting with the agency staff on even non-accusatory adjudications, even though such staff members would not be performing investigative or prosecuting functions within the meaning of the APA - the prerequisite to the separation of functions are in §554(d)(2)." Separation of Functions Study at 101. Section 554(d)(2) of the APA is the prototype for 10 CFR §2.719(d).



case, 13 months) excuses or exempts an official from the agency's mandatory separation of functions provision.

Therefore, Commissioner Hendrie's Memorandum to Counsel, as well as his interim decision, must be rejected as contrary to rules that are binding on the agency.<sup>12/</sup>

II. COMMISSIONER HENDRIE'S CONTINUED PARTICIPATION IN THE DIABLO PROCEEDINGS VIOLATES DUE PROCESS OF LAW.

The solution dictated by NRC regulations to the controversy sparked by Commissioner Hendrie's prior involvement with Diablo Canyon is fully supported by judicial interpretations of due process rights in administrative adjudications. The commingling of adversarial and investigatory functions with judicial functions is inconsistent with settled notions of fairness and the equally important requirement that administrative proceedings be attended by the appearance of fairness.<sup>13/</sup>

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<sup>12/</sup> A fundamental tenet of administrative law holds that an agency must follow the rules it promulgates.

<sup>13/</sup> The "appearance of fairness" doctrine has been fully outlined and documented in prior pleadings submitted to the Commission. See Joint Intervenor's Response to the Memorandum of Commissioner Kennedy to Counsel for the Parties at 3-4 (March 26, 1980); Joint Intervenor's Response to the Memorandum of Commissioner Hendrie to Counsel for the Parties at 3 (March 26, 1980); Joint Intervenor's 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 4-6 (November 23, 1979). Those arguments will not be repeated here.



Before discussing relevant judicial decision, however, the special character of the Diablo Canyon licensing proceedings should be noted. For the better part of the past decade, including the year of Commissioner Hendrie's employment with the AEC, the Diablo Canyon operating license has been bitterly contested by various members of the Joint Intervenors. In form and impact, the proceedings have taken on the nature of a full adversarial adjudication.<sup>14/</sup>

Evidence produced on seismic and other major issues has been sharply disputed and has provoked allegations of improper conduct on the part of PG&E and the NRC during the seismic reanalysis of the plant. Most important, the NRC staff has been and is still perceived as an advocate for the Applicant -- and an adversary to the Joint Intervenors -- rather than a passive advisor of the Commission.<sup>15/</sup>

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<sup>14/</sup> The fact that licensing proceedings can assume markedly different forms was acknowledged by the NRC Staff in the Separation of Functions Study at 65. "We recognize that [the assumption] that policy issues and legislative facts usually predominate in initial licensing, . . . -- may have far less force for NRC proceedings where intervenors inject sharply disputed evidentiary facts."

<sup>15/</sup> In cases where the staff is cast as an advocate or adversary, the NRC staff recognized in its Separation of Functions Study at 79, 129, 133-134, 159, 160-163, that the prohibition against commingling of agency functions could be violated if such staff communicated with agency adjudicators. By logical extension, that prohibition would apply with even greater force if the adjudicator had actually served as a member of the staff.



The adversarial nature of the Diablo Canyon proceedings enhances the significance of relevant legal precedents. For the sake of brevity, the discussion of that case law will be limited to three appellate decisions. In Trans World Airways v. Civil Aeronautics Board, 254 F.2d 90 (D.C. Cir. 1958), plaintiff TWA brought a claim for compensation before the Civil Aeronautics Board ("CAB"). One of the parties to the proceedings was the Postmaster General, who opposed certain offsets and deductions by TWA. The original brief submitted by the Postmaster General had been signed by the Solicitor of the Post Office, who later became a member of the CAB and actually participated in the final decision favoring the Postmaster General. On the basis of the Solicitor's signing of the pleading, the court reversed the CAB decision, explaining:

The fundamental requirements of fairness in the performance of [quasi-judicial] functions require at least that one who participates in a case on behalf of any party, whether actively or merely formally be being on pleadings or briefs, take no part in the decision of that case by any tribunal on which he may thereafter sit. (emphasis added) 16/

A second case, Amos Treat & Co. v. Securities and Exchange Commission, 306 F.2d 260 (D.C. Cir. 1962), arose when plaintiffs' motion to institute a hearing on the disqualification of

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16/ Trans World Airlines, 245 F.2d at 91.



Commissioners of the Securities and Exchange Commission ("SEC") was denied. According to the complaint, a Mr. Cohen was director of the SEC's Division of Corporate Finance which was "responsible to the [SEC] for the initiation, conduct and supervision" of formal examinations and investigations of target businesses. That office made a recommendation to institute proceedings against the plaintiff, which led to a formal charge by the SEC several months later, after Mr. Cohen left the staff to sit as a Commissioner. Plaintiffs then moved for a hearing on Cohen's qualifications. The SEC denied the motion.

Much like the present case, the Commission's order denying the requested hearing was accompanied by a written statement of Commissioner Cohen "outlining his recollection and conclusions . . . and stating the extent to which he had participated in the actions taken by the Commission."<sup>17/</sup> Nonetheless, the court overturned the order on due process grounds. Citing Trans World Airways, supra, it explained that:

It is not enough that here no corruption has been charged . . . . What must control is the policy . . . and the principles, . . . that the investigative as well as the prosecuting arm of the agency must be kept separate from the decisional function.<sup>18/</sup>

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<sup>17/</sup> Amos Treat & Co., 306 F.2d at 263.

<sup>18/</sup> Id. at 265.



Accordingly, the case was remanded for further consideration by the SEC without the participation of Commissioner Cohen.

The third, and final decision, American General Insurance Co. v. Federal Trade Commission, 589 F.2d 462 (9th Cir. 1979) arose from a divestiture order of the Federal Trade Commission ("FTC") against certain acquisitions by the plaintiff. On appeal, plaintiff contended that the order was void because a member of the FTC had previously "appeared as counsel and signed a brief" arguing the merits of the case against them.<sup>19/</sup> The court of appeals agreed that the prior participation violated due process. Citing Trans World Airways, supra, and alluding to the "uniform practice of Supreme Court Justices" to disqualify themselves from any case pending in the Justice Department during their employment by the agency, the court invalidated the FTC order and remanded for proceedings without the participation of the interested Commissioner. In so doing, it held:

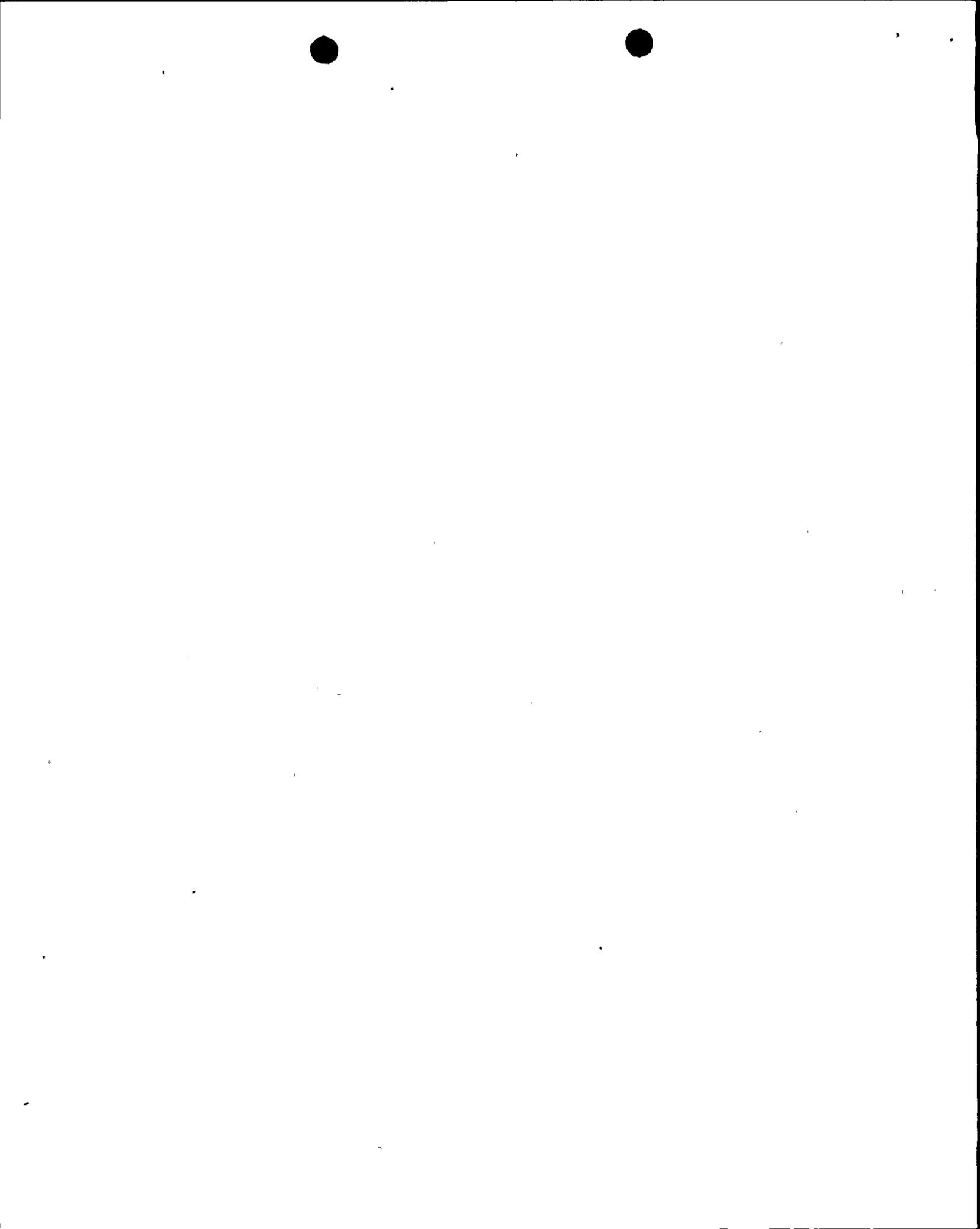
That the judge's or quasi-judicial officer's participation in the case as counsel may have been superficial rather than substantive does not affect the applicability of the [disqualification] principle.<sup>20/</sup>

It is quite apparent from the documents disclosed by Commissioner Hendrie that his involvement in the Diablo Canyon

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<sup>19/</sup> American General Insurance Co., 589 F.2d at 463.

<sup>20/</sup> Id. at 464.



investigation extended well beyond that found sufficient to disqualify the officials in Trans World Airways, supra, Amos Treat, supra, or American General Insurance, supra.

According to those documents, the Commissioner:

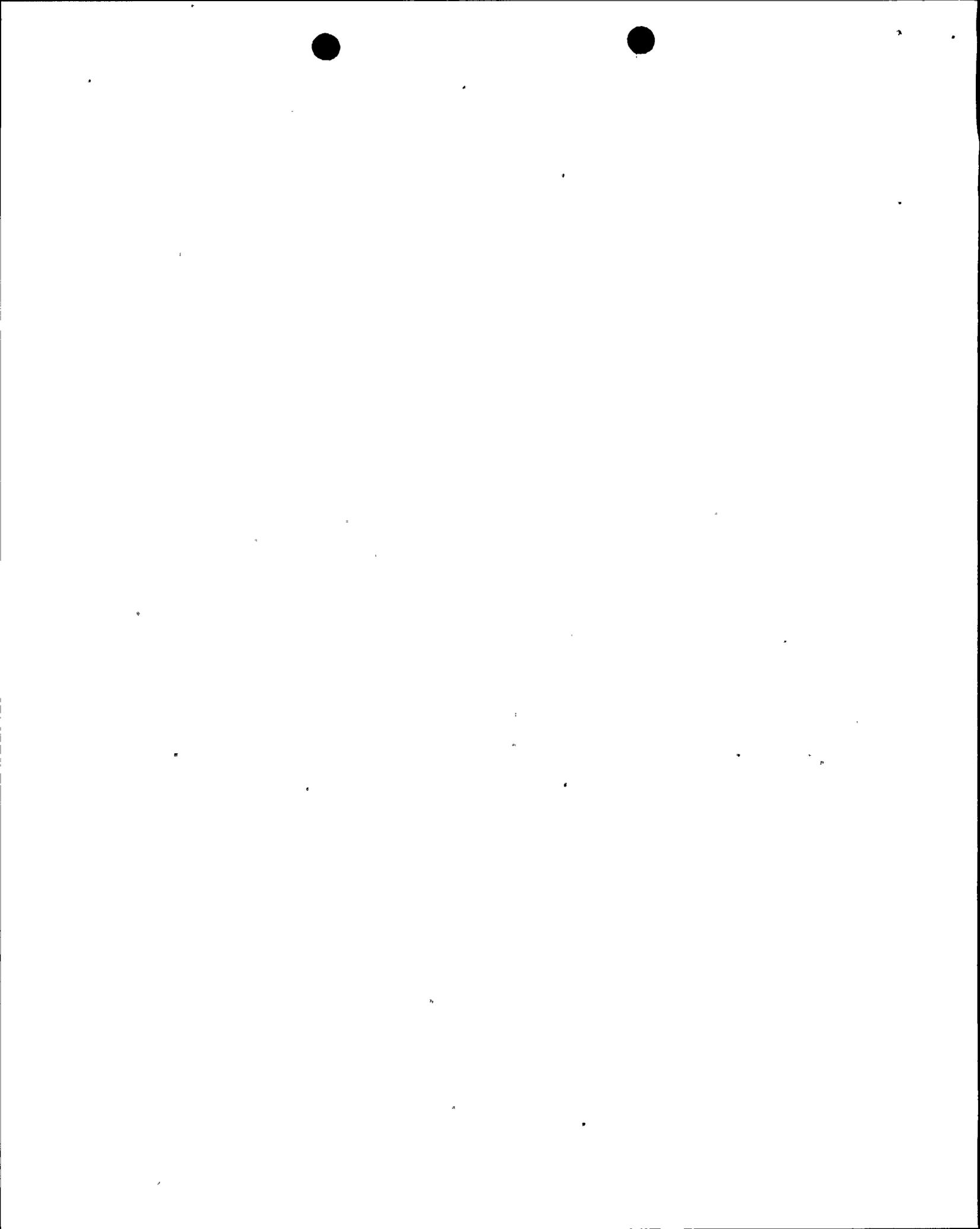
- (1) Participated in at least one, and very likely two, substantive decisions during agency review of the operating license application;<sup>21/</sup>
- (2) Supervised the long-term review of plans and communicated with the Applicant after the USGS "discovery" of the Hosgri fault concerning the need to reappraise the design of Diablo Canyon;
- (3) Attended meetings with PG&E officials, a number of whom continue to hold high level positions with the company.

The documents released with the Memorandum to Counsel also disclose elements of Commissioner Hendrie's involvement that independently cast doubt on his assertion that he cannot be identified with, nor is he sympathetic with, the "AEC-NRC staff substantive position on the merits of issues related to the existence of the Hosgri fault."<sup>22/</sup> Those elements include:

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<sup>21/</sup> The first decision was the docketing of the application of PG&E for an operating license on November 2, 1973. Commissioner Hendrie's participation in that decision is not disputed. The second decision resulted in the denial of intervenor's Stop Work petition in January of 1974. Because Commissioner Hendrie was Deputy Director of Technical Review at the time that meeting with the USGS was called to discuss the implications of the Hosgri fault, and because the Commissioner concedes that he "probably attended" some of the high-level meetings regarding the Hosgri fault during his tenure, it is likely that he was present at the January conference. See Reconstructed Notes of Richard Bettinger of June 4, 1974 Meeting at 1 (March 31, 1980); Notes of Commissioner Hendrie from May 30, 1974 Memorandum.

<sup>22/</sup> Memorandum to Counsel at 4.



- (1) The fact that the Commissioner participated in the decision to docket the Diablo Canyon operating license application even though it was admittedly incomplete;23/
- (2) The fact that Commissioner Hendrie's approach during the initial months after the "discovery" of the Hosgri fault seems to have been to promote, rather than question, continuing advancement of the Diablo Canyon application;24/
- (3) The reference to Commissioner Hendrie as an engineering specialist who could assist the NRC staff in "strengthening" its case, in the Memorandum to A. Giambusso from R. C. DeYoung (February 11, 1975);25/ and
- (4) The fact that many of Commissioner Hendrie's colleagues during his tenure as an investigative employee of the AEC continue to work at the NRC,26/ many continued to review Diablo Canyon even after Commissioner Hendrie departed, and many are now responsible for or identified with the NRC position in support of the operating license application for Diablo Canyon.

In summary, due process considerations reinforce the prophylactic purpose of the NRC regulation mandating strict

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23/ Id. at 3.

24/ See Reconstructed Notes of Richard Bettinger of June 4, 1974 Meeting at 2 (March 31, 1980).

25/ Attachment 1(A) to Points and Authorities to Joint Intervenor's Request to Institute Proceedings on the Qualifications of Chairman Joseph M. Hendrie to Consider the Operating License Application for the Diablo Canyon Nuclear Power Plant at 2 (October 24, 1979).

26/ Memorandum to Counsel at 2.



separation of investigative and adjudicative functions. <sup>27/</sup>

In the present matter, continued participation of Commissioner Hendrie in the Diablo Canyon proceedings would violate settled legal principles as well as sound policy considerations that have been consistently reaffirmed over a number of years.

#### CONCLUSION

The interim decision of Commissioner Hendrie overrides NRC regulations and due process guarantees. That decision should be revoked, and Commissioner Hendrie should recuse himself from this proceeding.

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27/ This conclusion is well supported by the findings of the NRC staff in the Separation of Functions Study at 121, 129-130, 133-134, 156-157, 159, 161-162. For example, the staff wrote:

[T]he regulatory staff in NRC's Office of Nuclear Reactor Regulation . . . typically form an opinion of an application - a non-adversary investigative stage of the initial licensing process. These staff members then take an advocacy role - typically adverse to an intervenor on the merits of the application . . . . [T]hese duties would appear to be inconsistent with the notion of impartial decision-making . . . . [W]e believe that there are potential due process problems with allowing the regulatory staff in a licensing proceeding to privately advise agency adjudicators - including the commissioners, . . . .  
Id. at 129.

A fortiori, "due process problems" arise if such a staff member becomes a commissioner.



Respectfully submitted,

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MAY 5, 1980



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of: )  
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)

PACIFIC GAS & ELECTRIC )  
COMPANY )  
(Diablo Canyon Nuclear )  
Power Plant, Units 1 & 2) )

Docket Nos. 50-275 O.L.  
50-323 O.L.

NOTICE OF APPEARANCE

This NOTICE OF APPEARANCE is filed by Marion P. Johnston, Esq. who will appear in these proceedings as attorney of record for the Center For Law In The Public Interest.

Pursuant to 10 CFR §2.713(a), the following information is provided.

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

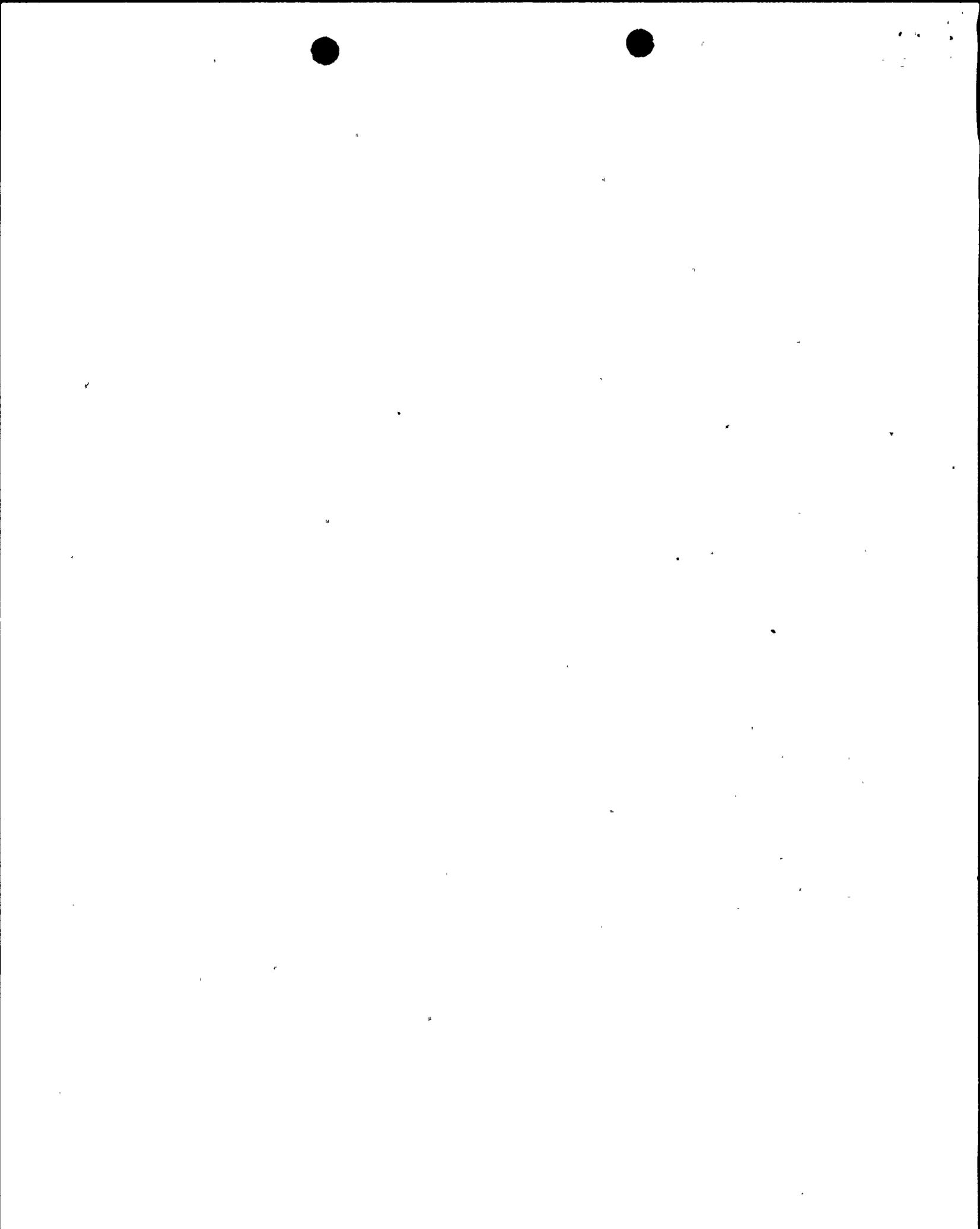
I hereby certify that on this 5th day of May, 1980,  
I have served copies of the foregoing JOINT INTERVENORS'  
RESPONSE TO THE MEMORANDUM OF COMMISSIONER HENDRIE TO  
COUNSEL FOR THE PARTIES; and NOTICE OF APPEARANCE of Marion  
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