



CHAIRMAN

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

October 29, 1984

PDR

50-275
50-323

The Honorable Edward Markey, Chairman
Subcommittee on Oversight and Investigations
Committee on Interior and Insular Affairs
United States House of Representatives
Washington, DC 20515

Dear Chairman Markey:

This is in response to your letter of October 25, 1984, requesting the Commission's further views on whether the public interest would be better served by continuing to maintain the confidentiality of the Diablo Canyon transcripts rather than by releasing those transcripts to the public in their entirety.

The Government in the Sunshine Act is based on the policy that "the public is entitled to the fullest practical information regarding the decisionmaking process of the Federal Government" while at the same time "protecting . . . the ability of the Government to carry out its responsibilities." 5 U.S.C. 552b note. In order to accomplish this dual purpose, the Congress tempered the general presumption of openness articulated by the Act by ten permissive exemptions. 5 U.S.C. 552b(c). In so doing, Congress sensibly "recognized that there are agency actions for which general public scrutiny may not be appropriate." Pacific Legal Foundation v. Council on Environmental Quality, 636 F.2d 1259, 1265 (D.C. Cir. 1980). Among those ten exemptions is one preserving the confidentiality of collegial discussions which, inter alia, "specifically concern . . . the agency's participation in a civil action or proceeding . . . or the initiation, conduct or disposition by the agency of a particular case of formal agency adjudication . . ." 5 U.S.C. 552b(c)(10). The Commission's meetings on Diablo Canyon involved both aspects of this exemption.

In recommending enactment of this exemption, the House Committee on Government Operations noted that

[a]mong the reasons for this exemption are the need to allow an agency to discuss in private its strategy in litigation in which it is involved and the fact that, when acting in an adjudicatory proceeding, the agency is relying upon the written record and acting in a quasi-judicial fashion.

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H.R. Rpt. No. 94-880 (Part 1), 94th Cong., 2d Sess. 12 (1976). Similarly, the Senate Committee on Government Operations concluded, in support of this exemption, that

it would be inappropriate for several reasons to require agencies to open meetings discussing specific cases of adjudication. Public disclosure of an agency's legal strategy in a case before the agency or in the courts could make it impossible to litigate successfully the action. * * * Adjudications of the type covered by this paragraph must already be decided solely on the information in the record. Unlike other cases, the entire record on which the agency must make its decision in adjudication is open to inspection by any member of the public. * * * Finally, many aspects of the adjudicative process, such as the trial before an administrative law judge or appellate arguments before the Commission are generally open now to the public.

S. Rpt. No. 94-354, 94th Cong., 1st Sess. 26 (1975). This legislative history makes clear that agencies such as the Commission have a valid interest in preserving the integrity of litigative or adjudicatory deliberations by maintaining the confidentiality of those discussions.

As recognized by the Sunshine Act, the public interest with respect to agency litigation/adjudication has two components. The public has a right to observe the Commission's decisionmaking; however, public observance should not destroy or effectively impair the underlying purposes of the collegial deliberations. The public has a right to expect that the Commission will preserve the integrity and quality of its quasi-judicial decisionmaking. The wholesale disclosure of the candid, sometimes pointed, deliberations among the Commissioners and between the Commission and its principal policy and legal advisors would most likely cause the participants to temper their advice or statements in future meetings and thus would adversely affect the quality of the Commission's judicial deliberations. Yet, it is the exchange of these very differences of opinion that is the hallmark and purpose of litigative or adjudicatory decisionmaking by a collegial body: To subject these preliminary views, rather than the reasons ultimately adopted by the Commission in taking action, to public scrutiny would make it impossible for the agency to litigate successfully and would divert any proper review away from the decision of the Commission and toward the isolated comments of individual Commissioners or Commission employees. In the Commission's view, neither the Sunshine Act nor the public is served when satisfaction of the first component of the public interest is had at the expense of the second component.

In assessing the public interest with respect to the release of the transcripts at issue here, the Commission has determined that the public interest is better served by protecting the quality of its collegial adjudicatory deliberations rather than by the disclosure of a particular predecisional example of that process.

Below are Commissioner Asselstine's comments and Commission views regarding his comments:

Commissioner Asselstine has the following comments:

I agree with the general principle, stated in the Commission's response, that there is a benefit in preserving the confidentiality of the Commission's deliberations in adjudicatory proceedings and the Commission's discussions of litigation options in pending judicial proceedings. Preserving the confidentiality of such discussions encourages candid and open discussion among the members of the Commission as well as the frank advice of our legal and technical advisors. However, I believe that there is a broader, and overriding, public interest in this case which calls for the public release of the transcripts of the Commission's deliberations on the question of the complicating effects of earthquakes on emergency planning in the Diablo Canyon proceeding. This is the public interest in identifying and correcting serious abuses by the Commission in the conduct of its adjudicatory proceeding, and taking steps to assure that similar abuses do not recur in the future.

In that regard, I agree entirely with the descriptions of the Commission's deliberations in the Diablo Canyon case which were contained in Chairman Ottinger's October 26, 1984 letter to the Commission. In reaching its decision in the Diablo Canyon case, the Commission ignored the advice of its legal advisors that the question of the complicating effects of earthquakes on emergency planning was most probably a material issue, and that intervenors were entitled to a hearing on the issue under section 189 a. of the Atomic Energy Act of 1954. The Commission distinguished between the complicating effects of earthquakes on emergency planning and the complicating effects of other natural phenomena, even though the Commission's legal and technical advisors told the Commission that there was no factual basis in the record of the Diablo Canyon proceeding for doing so. The Commission concluded that the probability of an earthquake which could affect emergency planning is much lower than the probabilities of other natural phenomena which are routinely

considered by the Commission even though the Commission's legal and technical advisors told the Commission that there was no factual basis in the Diablo Canyon record to support this conclusion.

The Commission ignored the possibility of the simultaneous occurrence of an emergency at the plant (e.g. a fire) which could require emergency response and an unrelated earthquake which could affect emergency response features such as communication and emergency response to the site, even though the Commission's legal and technical advisors told the Commission that this approach was fundamentally different than the Commission's approach for considering the complicating effects of all other natural phenomena on emergency planning and there was no factual basis in the Diablo Canyon record for adopting this different approach for earthquakes. The Commission relied on material not in the record of the Diablo Canyon proceeding to conclude that the Diablo Canyon emergency plan is sufficiently flexible to accommodate the complicating effects of earthquakes on emergency planning despite repeated warnings that such reliance on extra-record material was inappropriate and legally impermissible. Finally, the Commission's decision was motivated solely by the objective of avoiding delay in issuing a full-power license for the Diablo Canyon plant. The Commission refused to recognize the right to a hearing on this issue because such a hearing could delay the issuance of a full-power license for the plant. To provide a semblance of public comment on the issue of the complicating effects of earthquakes on emergency planning, the Commission decided to conduct a generic rulemaking on this issue. However, it is apparent from the proposed rule that the Commission is intent on merely codifying its Diablo Canyon decision, and any opportunity for public comment on the issue will be meaningless.

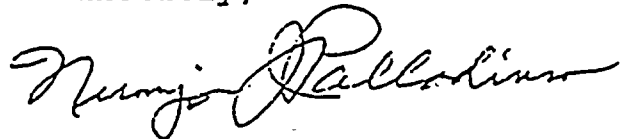
The foregoing abuses in the Commission's conduct of the Diablo Canyon adjudicatory proceeding are readily apparent to any objective reader of the transcripts of the Commission's deliberations in this case. The public interest in bringing this extraordinary situation to light, and in preventing similar abuses in future cases, weighs strongly in favor of making these transcripts publicly available and outweighs any argument that could be made in favor of confidentiality.

Commission views regarding Commissioner Asselstine's comments:

It goes without saying that the Commission strongly disagrees with Commissioner Asselstine's criticisms of its Diablo Canyon decision process. The Commission believes that there have been no abuses and rejects categorically Commissioner Asselstine's speculation as to the motives of the majority in reaching its decision. Simply because Commissioner Asselstine did not prevail is not a valid reason for him to castigate the majority, impugn their motives, and use his disagreement as a basis to urge release of the transcripts to the public. As a matter of fact, his statements are disturbing because this kind of disclosure of preliminary exchanges of views and thoughts of Commissioners and their advisors is destructive of the collegial exchange of Commissioner views and frustrates the testing of preliminary adjudicatory positions in closed meetings before they become final.

The Commission also strongly disagrees with Commissioner Asselstine's assertion that future opportunities for comment on a proposed rule will be meaningless. The Commission is proceeding with this rulemaking in good faith in accordance with established procedures.

Sincerely,



Nunzio J. Palladino,
Chairman

cc: Rep. Ron Marlenee

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DOCKET NO(S) : 50-275/323
The Honorable Morris K. Udall, Chairman
Subcommittee on Energy and the Environment
Committee on Interior and Insular Affairs
United States House of Representatives
Washington, D.C. 20515

SUBJECT: PACIFIC GAS AND ELECTRIC COMPANY, DIABLO CANYON NUCLEAR POWER PLANT,
UNITS 1 AND 2

The following documents concerning our review of the subject facility are transmitted for your information.

- ☐ Notice of Receipt of Application, dated _____.
- ☐ Draft/Final Environmental Statment, dated _____.
- ☐ Notice of Availability of Draft/Final Environmental Statement, dated _____.
- ☒ Safety Evaluation Report, or Supplement No. 24, 25, 26, dated July, 1984 and 27.
- ☐ Notice of Hearing on Application for Construction Permit, dated _____.
- ☐ Notice of Consideration of Issuance of Facility Operating License, dated _____.
- ☐ Monthly Notice; Applications and Amendments to Operating Licenses Involving no Significant Hazards Considerations, dated _____.
- ☐ Application and Safety Analysis Report, Volume _____.
- ☐ Amendment No. _____ to Application/SAR dated _____.
- ☐ Construction Permit No. CPPR- _____, Amendment No. _____ dated _____.
- ☐ Facility Operating License No. _____, Amendment No. _____, dated _____.
- ☐ Order Extending Construction Completion Date, dated _____.
- ☐ Other (Specify) _____

Office of Nuclear Reactor Regulation

Enclosures:
As stated

cc: Representative Manuel Lujan
bcc: OCA

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DOCKET NO(S). : 50-275/323

The Honorable Richard Ottinger, Chairman
Subcommittee on Energy Conservation and Power
Committee on Energy and Commerce
United States House of Representatives
Washington, D.C. 20515

SUBJECT: PACIFIC GAS AND ELECTRIC COMPANY, DIABLO CANYON NUCLEAR POWER
PLANT, UNITS 1 AND 2

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- ☐ Other (Specify) _____

Office of Nuclear Reactor Regulation

Enclosures:
As stated

cc: Representative Carlos Moorhead

bcc: OCA

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DOCKET NO(S). 50-275/323

The Honorable Alan Simpson, Chairman
Subcommittee on Nuclear Regulation
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20515

SUBJECT: PACIFIC GAS AND ELECTRIC COMPANY, DIABLO CANYON NUCLEAR POWER
PLANT UNITS 1 AND 2

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Office of Nuclear Reactor Regulation

Enclosures:
As stated

cc: Senator Gary Hart

bcc: OCA

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