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

CHAIRMAN

February 25, 1985

The Honorable Edward Markey
United States House of Representatives
Washington, D.C. 20515

Dear Congressman Markey:

This will respond to your letter of December 17, 1984, requesting detailed responses to the criticisms raised by Commissioner Asselstine with regard to the Commission's decision to license Diablo Canyon without requiring adjudicatory proceedings on the possible effects of an earthquake on emergency planning. This letter will supplement the Commission's earlier letter of December 13, 1984, to you regarding this issue.

Before responding charge-by-charge to Commissioner Asselstine's criticisms we want to stress several matters which underlie the overall response of the Commission majority.

First, on December 31, 1984 the District of Columbia Circuit Court of Appeals issued its decision in Deukmejian v. NRC, No. 81-2034. That opinion affirmed, in all respects, the Commission's licensing action regarding Diablo Canyon. In reaching this decision the Court had before it all of Commissioner Asselstine's charges. Although the Court split over the question of whether it was reasonable for the Commission to exclude the possible effects of earthquakes on emergency planning from the Diablo Canyon litigation, not a single judge voted to stay that licensing decision. Thus, no judge shared Commissioner Asselstine's view that this issue was so material that operation of Diablo Canyon was required to await the outcome of mandatory litigation over this matter.

Second, the transcripts which we are discussing reflect the give and take of the Commission's group deliberations on this issue. Such materials are not the proper subject for a line-by-line discussion of what was meant by a particular person at a particular time. As with any deliberations on a difficult issue, ideas are expressed, examined, rejected, and refined during the process by which a final decision is reached. The Commission rendered its final decision on this issue on August 10, 1984. That decision must stand or fall on its own merits, not by reference to the discussions made prior to the Commission agreement on a final decision and the rationale for that decision. We are quite concerned that

debate over the meaning of each word spoken in Commission deliberations will greatly undermine the Commission's future ability both to receive the candid advice of our subordinates and to exchange preliminary thoughts among ourselves.

Third, Commissioner Asselstine's criticisms focus attention solely on the three meetings at which the Commission as a group discussed the issue of earthquakes and emergency preparedness at Diablo Canyon. This emphasis leaves the impression that these meetings were the only times that the Commissioners ever considered or discussed this difficult issue. Indeed, quite the opposite is the case. Each Commissioner has legal and technical advisors with whom he could discuss this matter at length. Moreover, each Commissioner and the personal staffs of each Commissioner have access to the lawyers in the Office of General Counsel and to the technical advisors in the Office of Policy Evaluation to discuss this matter in detail. None of these individual discussions is reflected in any transcripts. Similarly, there is no transcript made of each Commissioner's review of the record in this case and the manner in which each Commissioner arrived at his own decision. In short, the transcribed meetings do not reflect all the legal or technical advice rendered to the Commissioners nor do they reflect all the Commissioners' thought processes in reaching the decision at issue.

Fourth, as Commissioner Asselstine asserts, it is unquestionably true that the Commissioners received some advice from their advisors that cautioned them of the possible risk that a Court might reverse the action which the majority ultimately decided to take. This is neither novel, nor is it evidence of any wrongdoing. Commissioners must be given candid advice on risks of any action which they are considering. But advisors are not given the task of making the Commission's decision. Particularly on difficult, close, judgmental matters, such as the likelihood of an earthquake affecting emergency planning, the Commissioners themselves must make their own and then their collegial decision of what is proper. This point was noted in our December 13 letter to you and underscored by the Deukmejian Court:

> [T]he Commission majority [is not] required to accept the advice of some members of their legal and technical staff (and no inference of bad faith can be derived from their failure to do so). The Commissioners are appointed by the President to administer the agency, the agency's staff is not.

Slip Op. at 75.

We now respond to Commissioner Asselstine's specific criticisms of the Commission's actions.

ALLEGATION 1:

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 189a. of the Atomic Energy Act of 1954.

RESPONSE:

Our previous general comments have addressed this allegation. The Commission is not bound to take the advice of its advisors if, in its judgment, it feels that another conclusion is warranted. In this case, while it is true that some of the Commission's advisors urged a more cautious approach than that which the Commission majority ultimately took, it is also true that the Commission majority felt that, in its judgment, the decision which it reached was justified. Moreover, as is also obvious, the majority of the panel of the District of Columbia Circuit Court of Appeals that heard this case agreed with the Commission that the decision was legally justified. Indeed, since no judge on that panel voted to stay the licensing of Diablo Canyon, no judge felt that this issue was so material that litigation over the matter had to precede the licensing of Diablo Canyon.

ALLEGATION 2:

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 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 record of the Diablo Canyon proceeding for doing so.

RESPONSE:

The Commission's treatment of the possible complicating effects of earthquakes on emergency planning was based, in part, on the Commission's unusually extensive review of the adequacy of the seismic design of Diablo Canyon and on its conclusion that the probability of the occurrence of significant earthquakes in the vicinity of Diablo Canyon was low since the record revealed that "at most, the region is one of 'moderate seismicity'." Deukmejian, slip op. at 29 n.91 quoting CLI-84-12, at 8, J.A.S. at 258 (emphasis by the Court). The Commission concluded that both prongs of this analysis were supported by an extensive record that provided ample factual basis for treating the possible effects of

earthquakes on emergency planning differently from the treatment of the possible effects of other natural phenomenon on emergency planning. Had a similar record reflected that the "other natural phenomena" which were considered in the Diablo Canyon emergency preparedness review were similarly unlikely to cause a radiological release or to complicate emergency planning and had the issue of whether further litigation over the possible effects of these other phenomena been before the Commission, the majority could have considered whether or not to refuse to require further litigation over these matters as well.

ALLEGATION 3:

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.

RESPONSE:

We reiterate our prior response. There is record support for the Commission majority's finding that the Diablo Canyon site is "at most, one of moderate seismicity." CLI-84-12 at 8, J.A.S. at 258. As the Appeal Board noted "the region is at most one of low to moderate seismicity." ALAB-644, 13 NRC 903, 994 (1981). The Deukmejian majority acknowledged this record support on several occasions. Slip op. at 29 n.91, 35 n.115.

Similarly, it is beyond dispute that the record extensively demonstrates that the likelihood of an earthquake causing a radiological release is extraordinarily small. Indeed, both the Deukmejian majority and dissent found the Commission well justified in concluding that an earthquake was not likely to initiate a radiological emergency and that the possible effects of such an earthquake on emergency planning need not be litigated. Slip op. at 35-36, dissent at 7.

These are the only findings necessary to determine whether the possible effects of earthquakes on emergency planning should be the subject of litigation in the Diablo Canyon proceedings. A comparative evaluation with the possible effects of other natural phenomena is simply irrelevant to a determination of whether the possible effect of earthquakes on emergency planning is a required subject for litigation. Moreover, as noted above, the Commission did not have before it and, thus, did not pass on the issue of whether or not it was mandatory to litigate the possible effects of such phenomena on emergency planning.

ALLEGATION 4:

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 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.

RESPONSE:

Again, our prior responses are fully applicable here. Our position was adopted by the panel majority in Deukmejian. We reiterate their specific holding in response to this charge:

> Judge Wald faults the Commission for "cit[ing] no specific record support for its conclusion that it is very unlikely that an earthquake will occur contemporaneously with an unrelated radiological accident." Opinion of Wald, J. at 8. In fact, the Commission's findings more than adequately provide the proof for its conclusion. The Commission specifically found that the Diablo Canyon site is one of "moderate" rather than "high" seismicity. CLI-84-12, at 9, J.A.S. at 258 (1984). Distinguishing earthquakes from "frequently occurring natural phenomena," the Commission stated that "earthquakes of sufficient size to disrupt emergency response at Diablo Canyon would be so infrequent that their specific consideration is not warranted." CLI-84-12, at 5, J.A.S. at 255 (1984). Similarly, the Commission continues to regard the probability of a radiologic accident with significant off-site impacts as "very low." Nuclear Power Plant Accident Considerations Under the National Environmental Policy Act of 1969, 45 Fed. Reg. 40,101, 40,101 (1980).
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> The likelihood that an earthquake will disrupt emergency procedures during a radiologic accident brought about by other causes is the product of these two probabilities. Because each probability is considered very small, the product is much smaller still, yielding a joint probability that falls well below the threshold of scientific and legal significance. Cf. Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 103 S. Ct. 2246 (1983) (approving NRC's "zero-release assumption" for nuclear waste storage). The only conceivable grounds on which the Commission can be faulted is that it failed to perform the final step in its mathematical analysis. Because the result is

> self-evident, however, we see no reason to delay operations at Diablo Canyon and demand that the Commission formally perform an elementary exercise in multiplication.

Slip op. at 35-36, n.115. (Emphasis added).

ALLEGATION 5:

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.

RESPONSE:

In CLI-84-12 the Commission found that the scope of emergency plans to deal with the variety of natural phenomena which could interfere with their operation implied a flexibility to deal with the effects of earthquakes. For emergency planning purposes it did not matter whether an impassible road was impassible because of heavy fog or because of an earthquake. The Commission's position on this matter was simply a logical inference drawn from undisputed evidence (e.g. the emergency planning at Diablo Canyon had accounted for the effects of heavy fog). Moreover, in Deukmejian the Court majority found that the Commission acted reasonably in relying, in part, on the flexibility of emergency plans to deal with the wide variety of potential disruptions to support its conclusion not to allow litigation over the possible effect of earthquakes on emergency planning. Slip op. at 35-36.

The Court also addressed the erroneous allegation that the Commission relied on extra-record evidence on the flexibility in its emergency planning decision. First, the Court noted that the Commission could not use such material to support and defend its conclusions in Court. Slip op. at 75-76. Of course, the Commission did not attempt to use any extra-record material to justify its decision or to convince the Court that its decision was proper. While the Court recognized that it would be improper for the agency to exclude evidence adverse to its ultimate position from the record, it also quite correctly observed that no such charge had ever been leveled by Commissioner Asselstine or any Congressional critic.

Slip op. at 75-76.

Finally, all the material discussed by the Commission at the meetings in question -- most notably the multi-volume report prepared by the utility to demonstrate that its plans for handling the possible effects of earthquakes and emergency

planning (the so-called TERA Report) -- was provided to all the parties for comment. The Commission was fully advised, however, that this material was not in the adjudicatory record and, thus, that only limited use could be made of the TERA Report. As a result, the Commission did not use that report as a justification for its ultimate rationale not to require litigation over the possible effects of earthquakes on Diablo Canyon emergency planning.

In short, the Commission's conclusion that flexibility is implicit in emergency plans which must deal with a number of interruptions caused to roads, bridges, and the like, is consciously limited. It does not rely on any materials which are not in the adjudicatory record.

ALLEGATION 6:

[T]he 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.

RESPONSE:

The allegation is false. Had the Commission believed that public health and safety required litigation over the earthquake/emergency planning issue, it would have ordered the litigation notwithstanding possible delay in the plant's operation. Not a single Deukmejian judge, even the dissent, believed that the licensing and operation of Diablo Canyon had to await the outcome of a hearing on this issue. Moreover, the Deukmejian majority quite correctly observed that

> What passes for proof of "bad faith" on this motion are inferences -- inferences based on the speculation and conjecture of a dissenting Commissioner and a chairman of a House oversight subcommittee who have "read between the lines" of the Commission's deliberations prior to its final decision. But statements made as part of the collegial exchange of Commission deliberations do not necessarily represent the Commissioners' final belief. Petitioners' characterization of the probity of those transcripts must be further discounted by the likelihood that the authors of the letters read as much into the transcripts as they read in them. Cognitive dissonance applies with special force to "what is one of the most sensitive and difficult issues of our time: the safety of nuclear power."

Slip op. at 77 (footnotes omitted).

ALLEGATION 7:

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 this issue will be meaningless.

RESPONSE:

Commissioner Asselstine is again wrong when he suggests that the pending rulemaking will be a meaningless opportunity for public comment. The Commission's proposed rule on the need to litigate the possible effects of earthquakes on emergency planning is similar to its previous position on this matter. This similarity is not surprising. As with any proposed rule, the Commission first spends substantial time and resources in developing a proposal for public comment. Thus, whenever the Commission proposes a rule, it states a proposed position on the subject of that rule. In the past, this has not led the Commission to ignore public comment, nor will it do so in this case.

We have sought to respond to Commissioner Asselstine's charges in candor and in detail. Like many issues this Commission confronts, the one addressed in this letter touches strong emotions and raises deep feelings. The way to address those issues is directly, on their merits, and with reason, not by ad hominem allegations that attack the integrity of those with differing views. Commissioner Asselstine unquestionably feels that his resolution of this issue was the correct one. You can be assured, however, that the Commission majority is equally convinced that it has properly and wisely decided the matter. However, we never felt that the question was easy nor did we ever suggest that it was one over which reasonable men might not differ. Unless the Court sees fit to grant the motion for rehearing which we expect petitioners to file, or unless the Supreme Court decides to grant a possible petition for certiorari, this case is over; the courts have spoken. It is our most sincere hope that we can put this dispute behind us, and the damage we fear that it has caused our collegiality and our future deliberative process will not materialize.

Commissioner Asselstine adds:

> I obviously disagree with the statements of my colleagues. However, rather than delay their response to you, I will provide my own comments in a separate letter.

Sincerely,

Nunzio J. Palladino

Nunzio J. Palladino

cc: Rep. Ron Marlenee