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

CHAIRMAN

PDR

December 13, 1984

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

Dear Mr. Chairman:

In your letter of November 14, 1984, you requested specific Commission answers to concerns expressed in Commissioner Asselstine's views on the NRC's decision not to release to the public certain transcripts of closed Commission meetings and predecisional memoranda related to the licensing of Diablo Canyon. Since the significance of the transcripts for the D. C. Circuit's review of the Diablo Canyon licensing decision is a matter still in litigation, our response is limited to the following information.

Several of the matters raised by Commissioner Asselstine have already been addressed in my October 29, 1984 letter to you (p. 5). Others are addressed in a recent filing to the Court of Appeals for the District of Columbia Circuit, a copy of which is enclosed for your information.

In particular the enclosed filing explains the respective roles and responsibilities of the Commissioners and their legal and technical support staff (pp. 7-9) and demonstrates that the Commission's earthquake/emergency planning decision was based on the record in the Diablo Canyon proceedings (pp. 4-6). That filing also sets forth the importance of maintaining the confidentiality of the Commission's deliberative process (pp. 10-12). It is to serve that important goal that the Commission has refused to make its deliberations public.

The Commission has, however, provided copies of the transcripts of the closed Commission meetings and the related predecisional memoranda to you, in confidence. In your review of this material, you should keep in mind the points that the Commission has made in its filing with the Court of Appeals. We believe you will find that the Commission conducted the Diablo Canyon decisionmaking properly and reached a conclusion that has substantial support in the record.

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Commissioner Asselstine disagrees with the Commission's response to your letter. He will provide his own response in more detail in a separate letter within the next few days.

Sincerely,

Nunzio J. Palladino

Enclosure:
As Stated

cc: Rep. Ron Marlenee

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SAN LUIS OBISPO MOTHERS FOR PEACE, et al., Petitioners, v. UNITED STATES NUCLEAR REGULATORY COMMISSION and THE UNITED STATES OF AMERICA, Respondents, PACIFIC GAS AND ELECTRIC COMPANY Intervenors.	No. 84-1410

RESPONDENTS' OPPOSITION TO PETITIONERS' MOTION TO SUPPLEMENT THE RECORD

Petitioners have asked this Court to supplement the record with transcripts of certain meetings between the Commissioners, attorneys in the NRC's Office of General Counsel, and technical advisors in the Commission's Office of Policy Evaluation. These meetings were part of the formal agency proceeding to determine whether an operating license should be issued for the Diablo Canyon plant. These particular meetings addressed the question of whether the possible complicating effects of earthquakes on offsite emergency preparedness plans

at Diablo Canyon were material to issuance of the license.[1] They were held specifically to discuss views on this issue which the Commission had solicited from the parties in the course of this on-the-record proceeding. CLI-84-4, 19 NRC 937 (1984).

Petitioners' motion reflects a basic misunderstanding of the issue before this Court, the role of the Commission's advisors in the deliberative process, and the importance of protecting that process from unwarranted probing. In short, petitioners seek to supplement the record with material that is irrelevant to judicial review of the Diablo Canyon license and that is not properly before the Court. Their motion should be denied.

ARGUMENT

I. TRANSCRIPTS OF THE COMMISSION'S DELIBERATIVE PROCESS ARE IRRELEVANT TO THE ISSUES BEFORE THIS COURT

A. The Issue Before This Court Is Whether The Commission's Articulated Decision Is Lawful

For purposes of considering this motion, the issue before the Court is simply the lawfulness of the Commission's decision not to allow petitioners to litigate the possible complicating effects of earthquakes on offsite emergency

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[1] This issue has been fully briefed and argued. See, e.g., Respondents' Brief at Argument III.

planning. The manner in which this Court should resolve this issue has been clearly set forth by the Supreme Court:

> The validity of [the NRC's] action must, therefore, stand or fall on the propriety of [the NRC's] finding, judged, of course, by the appropriate standard of review. If that finding is not sustainable on the administrative record made, then [the NRC's] decision must be vacated and this matter remanded to [it] for further consideration .... It is in this context that the Court of Appeals should determine whether and to what extent, in light of the administrative record, further explanation is necessary to a proper assessment of the agency's decision.

Camp v. Pitts, 411 U.S. 138, 143 (1973). Thus, the NRC decision at issue, CLI-84-12, 20 NRC ___ (Aug. 10, 1984) (J.A.S. 251), must stand or fall on its articulated basis and the record now before the Court.

Apparently oblivious to the sole issue before this Court and to the Supreme Court's instructions regarding the manner in which that issue is to be resolved, petitioners contend that the transcripts are relevant to this case because they allegedly will reveal whether "the Commission has knowingly acted in disregard of the insufficiency of the record to justify its action," Pet. Motion at 3, and because they will allow the Court to determine whether "the Commission has knowingly relied in its decision on material outside the record." Id. Both of petitioners' assertions of relevancy are without merit. The petitioners' motion is simply an undisguised attempt to initiate an impermissible probing of the minds of the decision-maker. See United States v. Morgan, 304 U.S. 1, 18 (1937).

If the record the Commission has certified to the Court is insufficient to support the Commission's decision, the

Court has before it all that it needs to make such a determination, i.e. the record itself. None of the cases relied upon by petitioners involve situations where the Court had before it the agency's decision at issue as well as the record upon which that decision must be evaluated. We would concede that a failure by the Commission to adequately explain its actions could require a supplementation of the record, if not a remand. Pet. Motion at 5-8. However, the Commission's decision at issue, CLI-84-12, supra, is a full and contemporaneous explanation of why the Commission took the action which it did. It is that explanation, and only that explanation, that is now at issue. Similarly, had the Commission's decision noted its reliance upon some document not in the present record, we again agree that that document could properly be made the subject of an effort to supplement the present record. Pet. Motion at 8-10. Again, however, that situation is not presented by this case. The Commission's decision, CLI-84-12, does not purport to rely upon extra-record material; nor do we seek to justify the Commission's decision on such a basis to this Court.

The thrust of petitioners' argument on the earthquake-emergency planning issue is that the record does not support the decision. It is self-contradictory for them to claim that the Court must supplement the record in order to review such an argument. The Court has before it the record on which the Commission relied in concluding that specific accident sequences involving an earthquake's possible disruption of emergency planning need not be the subject for litigation in

this administrative proceeding, and the Court can see for itself that the necessary support for the Commission's conclusion is there.

The Commission's decision rests in large part on its conclusion that the likelihood of the contemporaneous occurrence of a radiological emergency and an earthquake severe enough to disrupt emergency planning is very small. The record fully supports this conclusion. LBP-79-26, 10 NRC 453 (1979); ALAB-644, 13 NRC 903 (1981); CLI-84-12, supra. See also, CLI-84-4, 19 NRC 937 (1984). Much of the Diablo Canyon licensing proceeding was devoted to determining that an earthquake is highly unlikely to cause a radiologicial release. Similarly, the record supports the Commission's conclusion that the occurrence of an earthquake large enough to disrupt emergency planning coincidental with an unrelated radiological emergency is an accident sequence too remote to demand its inclusion among the events which emergency planning should explicitly address. The Commission noted in its order that there is specific record support establishing that the Diablo Canyon area is one of "low to moderate seismicity." ALAB-644, 13 NRC 903, 994 (1981). CLI-84-12, supra, slip op. at 8 (J.A.S. 258). Simple mathematics dictates that the chance occurrence of a remote and speculative radiological emergency and the coincidental occurrence of a serious earthquake in a "low to moderate" seismic zone is an event which, although theoretically possible, is of far less probability than the overall risk for which emergency planning is designed.

Finally, petitioners have nowhere disputed the fact that emergency planning is a flexible tool that is generally designed to account for those common recurring disruptive phenomenon such as "fog, severe storms and heavy rain." CLI-84-12, slip op. at 5-6 (J.A.S. 255-56). It was reasonable for the Commission to conclude that this flexibility provides some assurance that an emergency plan would be able to handle the disruptions which might be caused by earthquakes.

B Petitioners' Allegations Of Misconduct Do Not Support Their Effort To Probe The Commission's Deliberative Process

In a final effort to justify their request to probe the NRC's decision-making process, petitioners assert that the deliberative process transcripts will demonstrate whether "the Commission has knowingly misrepresented the record and the basis for its decision, both in its August 10, 1984 Order and in its brief filed with this Court." Pet. Motion at 3. Even putting aside the obvious fact that the Court has before it all the facts it needs to review the merits of the Commission's decision and our arguments to this Court as the Administrative Procedure Act provides, see Argument I, A, supra, this allegation of misconduct does not justify adding transcripts of the Commission's deliberative process to the record.

To justify inquiring into the mental processes of the administrative decisionmaker -- particularly where the decision being attacked is supported by published contemporaneous findings -- "there must be a strong showing of bad faith or

improper behavior before such inquiry may be made." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971). Petitioners' allegations, even if true, would not amount to a showing of bad faith or improper behavior justifying their effort to probe the Commission's deliberative processes.

The allegations of bad faith being leveled here are not assertions of an improper deliberative process tainted by, for example, ex parte contacts or illegal "personal relationships" with a party to the administrative proceeding.[2] See United Savings Bank v. Saxon, 209 F. Supp. 319 (D.D.C. 1962). Nor do petitioners assert that the Commission was aware of some material which demonstrated, or even raised the possibility, that its decision was contradicted by facts not in the public record.[3] What is alleged here is that the transcripts may reveal that the Commission did not share the views or take the advice of some of its attorneys and other advisors. Even if true this would not evidence bad faith or misrepresentation. Indeed, the suggestion that it does

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[2]Petitioners do assert -- wholly without support from any quarter -- that "the Commission has apparently received a number of ex parte communications on the issue from the NRC Staff." Petitioner's Motion at 15 n.12. We have no idea to what this unsupported assertion refers, although it does not appear from its context to be linked in any way to the Diablo Canyon proceedings. Nor could it be; petitioners had before them the same materials as the Commission had before it when it made its August 10, 1984 decision. See, e.g., CLI-84-4, 19 NRC 937 (1984).

[3]Certainly, were this the case, Commissioner Asselstine, who obviously feels strongly about the issue, would have called his colleagues to task.

represents a fundamental misunderstanding of the NRC's deliberative process, the respective roles of the Commission's advisors and the Commissioners, and the nature of judicial review of administrative actions.[4]

It is not the job of the attorneys in the NRC's Office of General Counsel to make the agency's decisions in the Diablo Canyon or any other adjudicatory proceeding. That difficult and demanding task falls squarely on the five Commissioners, who are appointed by the President. It is, however, a duty of the General Counsel and his attorneys to advise the Commissioners of the nature and extent of the litigative risks which accompany their alternatives. That advice must be rendered clearly and forcefully, to ensure that the Commissioners know full well the possible legal consequences of the decision they are contemplating. That important advice-giving role was properly performed in the Diablo Canyon proceeding on all the issues. The Commissioners thereupon arrived at a collegial resolution of

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[4]It is particularly relevant here that in the Morgan cases, in which the Supreme Court established that it is "not the function of the court to probe the mental processes of the [decisionmaker]", United States v. Morgan, 304 U.S. 1, 18 (1937), the Court specifically held that allegations that the Secretary of Agriculture had disregarded advice did not justify an inquiry into the deliberative process.

> Much was made of his disregard of a memorandum from one of his officials who, on reading the proposed order, urged considerations favorable to the market agencies. But the short of the business is that the Secretary should never have been subjected to this examination.

United States v. Morgan, 313 U.S. 409, 422 (1940).

those issues, including the issue of whether to allow litigation on the possible effects of earthquakes on emergency preparedness plans. These Commission decisions are set forth in the agency orders under review in this action. The judicial evaluation of those orders must now focus on their legal and technical merits as presented rather than on the deliberative process by which they were developed. The Commission's decision regarding Diablo Canyon must stand or fall on the record which this Court already has before it -- not a record supplemented with bits and pieces of the deliberative process.

Once the Commissioners made their decision, the job of the attorneys in the NRC's General Counsel's office moved from an advice-giving role to the role of defenders of that decision within the adversarial process. The NRC's attorneys are required to defend the Commission's decisions in accordance with the law and the canons of ethics. That job has been done in the briefs and arguments presented in this case, and it has been done lawfully, ethically, and entirely properly. This Court can readily confirm this fact for itself, by comparing the Commission's decision in CLI-84-12 with the analysis and defense of that decision in the Commission's brief. We know full well our obligations as officers of this Court; we strongly resent both personally and professionally the allegations that we have made misrepresentations to the Court.

II. IMPORTANT PUBLIC POLICY CONSIDERATIONS PROTECT THE COMMISSION'S DELIBERATIVE PROCESSES FROM UNWARRANTED PROBING

Wholly apart from the petitioners' failure to show relevance of the Commission's deliberations to the issue before the Court, their motion ignores the important policy reasons that generally prohibit the probing of the Commission's deliberative processes. This Court has long recognized and respected these important policy considerations.

> It is "not the function of the court to probe the mental processes" of administrative officers, Morgan v. United States .... Agencies are no more bound to enter for the record the time, place and content of their deliberations than are courts.
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> * * * *
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> The general rule remains that a party is not entitled to probe the deliberations of administrative officials, oversee their relationships with their assistants, or screen the internal documents and communications they utilize. "Just as a judge cannot be subjected to such scrutiny ... so the integrity of the administrative process must be equally respected."

Braniff Airways v. C.A.B., 379 F.2d 453, 460, 462 (D.C. Cir. 1967).

This Court's past recognition of the importance of confidentiality of the decision-making process is well grounded in law and public policy. Opinions, recommendations, and advice generated in the process of formulating policies and making decisions are protected from judicial probing by the well-established deliberative process privilege. The privilege rests in part on the same need for uninhibited communication that underlies the attorney-client privilege. See 2 Weinstein's Evidence ¶ 509[05] at 509-34. It's basis is a recognition that

frank and open discussions within the Government will be stifled if disclosure of the deliberations leading to a decision is compelled in litigation. See, e.g., Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966), aff'd on opinion below, 384 F.2d 979 (D.C. Cir.), cert. denied, 389 U.S. 952 (1967). The result of such a chilling on input to the decision-makers is that the quality of Government decision-making will decline. See N.L.R.B. v. Sears, Roebuck & Company, 421 U.S. 132, 150-51 (1975).[5]

Commissioners must depend on their legal and technical advisors to offer frank and candid advice regarding the options available to them and the risks accompanying those options. Knowledge that opinions are given in confidence encourages the kind of open, forceful, even blunt advice that the Commission needs in order to fully understand its options and the risks

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[5]The court in Carl Zeiss cited "another policy of equal vitality an scope" underlying the privilege, seemingly founded on the doctrine of separation of powers:

> The judiciary, the courts declare, is not authorized "to probe the mental processes"of an executive or administrative officer. This salutary rule forecloses investigation into the methods by which a decision is reached, the matters considered, the contributing influences, or the role played by the work of others -- results demanded by exigencies of the most imperative character. No judge could tolerate a inquisition into the elements comprising his decision -- indeed, "[s]uch an examination of a judge would be destructive of judicial responsibility" -- and by the same token "the integrity of administrative process must be equally respected."

40 F.R.D. at 325-26. (Footnotes omitted.) See also, United States v. Nixon, 418 U.S. 683, 705-06 (1974).

which each option entails. On the other hand, even a perception that advice will be scrutinized by litigants and, if rejected, will be used to undermine the agency's ultimate decision, encourages equivocation, hedging, and posturing that destroys the utility of the deliberative process and ultimately harms the public's right to a decision made by an agency fully aware of all the relevant considerations and risks.

Nothing even alleged by petitioners justifies departure from the important policies embodied in the general rule that "a party is not entitled to probe the deliberations of administrative officials ...." Braniff Airways, supra, 379 F.2d at 462.[6]

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[6]Regardless of the resolution of petitioners' Sunshine Act claims, the NRC's deliberative process transcripts are not properly a part of the record to be reviewed in this action. Accordingly, we do not address petitioners' argument that those transcripts should be released under the Sunshine Act. It is clear, however, that petitioners' Sunshine Act claim is wrong. These transcripts "specifically concern ... the agency's participation in a civil action or proceeding ... or the ... conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures [of 5 U.S.C. § 554]." 5 U.S.C. § 552b(c)(10). The earthquakes/emergency planning issue discussed in the transcripts at issue was the resolution of a specific Commission request for the views of the parties in the Diablo Canyon adjudicatory proceeding. CLI-84-4, 19 NRC 937 (1984). Moreover, this issue was also then pending in the low power briefs which had been filed before this Court at the time of the NRC meetings in question. Deukmejian v. NRC, No. 81-2034 and San Luis Obispo Mothers for Peace, et al. v. NRC, Nos. 81-2035, 83-1073, 84-1042.

CONCLUSION

For the reasons set forth herein we urge the Court to deny Petitioners' Motion to Supplement the Record.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certity that on this 13th day of November, 1984, copies of the foregoing "Respondents' Opposition to Petitioners' Motion to Supplement the Record" were served on counsel for all parties by placing a copy in the mail, postpaid, to the following:

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