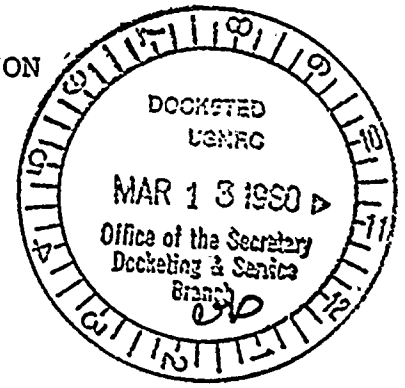
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



ATOMIC SAFETY AND LICENSING APPEAL BOARD

Richard S. Salzman, Chairman
Dr. John H. Buck
Dr. W. Reed Johnson

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

Messrs. J. Anthony Kline, Sacramento, California, and Herbert H. Brown, Washington, D. C., for the Governor of California, petitioner.

Messrs. Malcolm H. Furbush and Philip A. Crane, Jr., San Francisco, California and Arthur C. Gehr and Bruce Norton, Phoenix, Arizona, for Pacific Gas and Electric Company, applicant.

Messrs. L. Dow Davis, IV, Edward G. Ketchen, and James R. Tourtellotte for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

March 12, 1980

(ALAB-583)

1. This proceeding, begun in 1973,[1/] involves an application for an operating license for the now nearly completed twin-unit Diablo Canyon Nuclear Power Plant. A key issue has been whether the plant is properly designed to withstand

1/ 38 Fed. Reg. 29105.

GD

AD1 Duke

8003240575

potential earthquakes. The Licensing Board found the design satisfactory following evidentiary hearings that explored seismic issues at length. LBP-79-26, 10 NRC 453 (September 27, 1979).

After those hearings were over and after the Licensing Board's decision was rendered, Governor Edmund G. Brown, Jr., of California petitioned to intervene as a representative of an "interested state."[2/] See 10 C.F.R. §2.715(c). The Board below granted the petition on November 16, 1979, cautioning the Governor that he must "take the proceeding as he finds it."

The Governor, offering no explanation for his failure to participate when the seismic matters were before the Licensing Board, now seeks to challenge the soundness of that Board's resolution of those issues. He asks to have the proceeding remanded for further hearings at which his representatives would take part. To that end he has lodged an appellate brief with us, assertedly in support of an exception filed by the Joint Intervenors (who did litigate the earthquake contentions). Anticipating that the applicant and the staff might challenge his right to appeal in the circumstances, the Governor "requests that, in the alternative, [his] brief be

---

2/ The petition was filed on October 15, 1979.

considered [as that of an] amicus curiae * * *."[3/]

2. The Governor of California is not entitled to an appeal as of right on the seismic issues. An administrative hearing would be a meaningless charade if those with ample opportunity to participate were allowed to stand idly by and then, nevertheless, demand a replay when they do not like the result.[4/] The courts have explained that

> There must be an end to determinations and redeterminations. The issue was crystallized and the record could have been made before the Commission's action. * * *
>
> * * * Under these circumstances to allow the appellant to allege as an error of law a situation that it took no timely steps to correct by presenting its evidence in full would change its

---

3/ The staff simply treats the Governor's brief as that of an amicus; the applicant argues (Brief of January 11, 1980 at 11): "Because [Governor] Brown [chose] not to seek participation until well after the seismic hearings had concluded, there is no basis upon which he can be granted appellate rights."

4/ "We have long adhered to the view that it is incumbent 'upon an interested person to act affirmatively to protect himself' in administrative proceedings, and that '[s]uch a person should not be entitled to sit back and wait until all interested persons who do so act have been heard, and then complain that he has not been properly treated.' As we have admonished, '[t]o permit such a person to stand aside and speculate on the outcome; if adversely affected, come into this court for relief; and then permit the whole matter to be reopened in his behalf, would create an impossible situation." Nader v. NRC, 513 F.2d 1045, 1054-55
(FOOTNOTE CONTINUED ON NEXT PAGE)

> position from that of an interested party under the statute to that of a mere vigilante. 5/

The Rules of Practice do not insist that a representative of a state (or local government) bear the full burden of an ordinary party to preserve its appellate rights. By appearing as an "interested state" under 10 C.F.R. §2.715(c), it is afforded "a reasonable opportunity to participate and to introduce evidence, interrogate witnesses and advise the Commission without * * * taking a position with respect to the issue(s)." Participation before the Licensing Board in that capacity carries with it the right to appeal. River Bend, supra fn. 5, ALAB-317, 3 NRC at 176-80; Indian Point, supra fn. 4, ALAB-369, 5 NRC at 130. But here, the Governor did not undertake even that minimum obligation to assist in developing the record. We see no cause to depart from our Indian Point holding that in these circumstances the repre-

---

4/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE) (D.C. Cir. 1975)(citations omitted); accord, Easton Utililties Comm. v. AEC, 424 F.2d 847, 851-52 (D.C. Cir. 1970)(in banc) and cases there cited; Consolidated Edison Co. of N.Y. (Indian Point Station, Unit No. 2), ALAB-369, 5 NRC 129 (1977).

5/ Colorado Radio Corp. v. FCC, 118 F.2d 24, 26-27 (D.C. Cir. 1941), quoted in Easton Utilities Comm. v. AEC, supra, 424 F.2d at 851-52 (emphasis in original); accord, Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-317, 3 NRC 175, 177 (1976). (FOOTNOTE CONTINUED ON NEXT PAGE)

sentative of an "interested state" has no right to take an appeal; manifestly the assertion that the decision below rests on an inadequate foundation does not provide that right.

This ruling does not lessen the role of states and local governments in NRC proceedings. We recognize the Governor of California's belated assertion of interest in this case and accept his brief pursuant to section 2.715(d) as that of an amicus curiae in support of Joint Intervenors' appeal (exception number 45). We merely hold that the "reasonable opportunity to participate" afforded by section 2741 of the Atomic Energy Act and section 2.715(c) of the Commission's Rules of Practice[6/] does not permit the representative of an interested state to enter proceedings at the appellate level as a matter of right where he took no part in the hearing below.

5/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE) Indeed, even those who intervene in Commission proceedings must structure their participation so that their contentions are timely and clearly stated. "[A]dministrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure references to matters that 'ought to be' considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters 'forcefully presented.'" Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 553-54 (1978).

6/ 42 U.S.C. §2021(l) and 10 C.F.R. §2.715(c).

The brief tendered by Governor Edmund G. Brown, Jr., is accepted as that of an amicus curiae; insofar as it includes a petition to intervene as a party in our consideration of the seismic issue, the petition is denied. 7/

It is so ORDERED.

FOR THE APPEAL BOARD

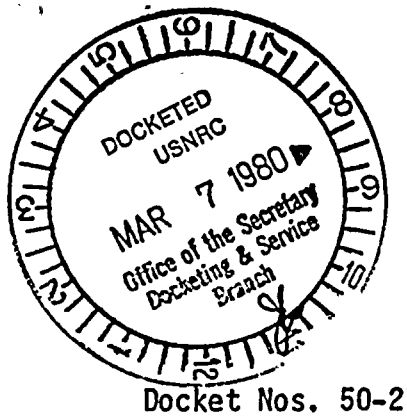
C. Jean Bishop
Secretary to the
Appeal Board

7/ Our acceptance of the amicus brief carries no implications about the merits of the arguments made there.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

John F. Ahearne, Chairman
Victor Gilinsky
Richard T. Kennedy
Joseph M. Hendrie
Peter A. Bradford



In the Matter of

PACIFIC GAS AND ELECTRIC COMPANY

(Diablo Canyon Nuclear Power Plant,
Units 1 and 2)

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

ORDER 3/6/80

CLI-80-6

On October 24 and 26, 1979, Joint Intervenors filed motions with the Commission requesting that Commissioners Kennedy and Hendrie disqualify themselves from the Diablo Canyon operating license proceeding because of off-the-record meetings these officials held on October 19, 1979, with officials of the applicant, Pacific Gas and Electric Company. If they do not elect to disqualify themselves, the Joint Intervenors requested that the Commission institute a proceeding, complete with the rights of discovery and cross-examination, to determine whether Commissioners Kennedy and Hendrie should be disqualified.

Consistent with the Commission's past practice, and the generally accepted practice of the federal courts and administrative agencies, the Commission has determined that disqualification decisions should reside exclusively with the challenged Commissioner and are not reviewable by the Commission. Commissioners Kennedy and Hendrie are now considering the Joint Intervenors' request. If they

AD
1

GD

are not inclined to disqualify themselves, before making a final decision they will provide the parties to this proceeding with an explanation of their proposed course of action and will afford the parties an opportunity to present any information to them which may bear on their disqualification decision.

Commissioner Bradford dissents from this order. He would have preferred at least to allow depositions after which the two Commissioners would make the first decision and, in the event of an appeal, the full Commission would review the fairness of the result.*

It is so ORDERED.

For the Commission

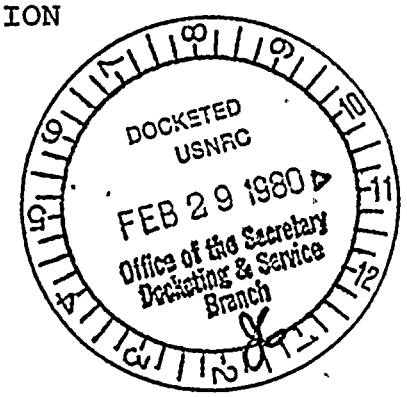
SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, D.C.
this 6th day of March, 1980.

---

* Section 201 of the Energy Reorganization Act, 42 U.S.C. 5841, provides that action of the Commission shall be determined by a "majority vote of the members present." Commissioners Gilinsky and Kennedy were not present at the meeting at which this Order was approved. Had they been present they would have voted with the majority. Accordingly, the formal vote of the Commission is 2-1.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



ATOMIC SAFETY AND LICENSING APPEAL BOARD

Richard S. Salzman, Chairman
Dr. John H. Buck
Dr. W. Reed Johnson

In the Matter of	)	
PACIFIC GAS AND ELECTRIC COMPANY	)	Docket Nos. 50-275 OL 50-323 OL
(Diablo Canyon Nuclear Power Plant, Units 1 and 2)	)	

MEMORANDUM AND ORDER

February 28, 1980

We previously calendared oral argument on one aspect of this case (intervenors' exceptions related to the nuclear plant's ability to withstand earthquakes) for April 2, 1980 in San Luis Obispo. We were able to accommodate intervenors' request to hold the argument in California, although their counsel's office is in Washington, because Board members in any event had to be in San Luis Obispo the following day (April 3rd) for a prehearing conference on another aspect of the case. For reasons which need not be repeated here, we explained in our order that the argument date settled upon was a firm one.

On February 26, however, intervenors moved to reschedule the argument. They give two reasons for doing so. First,

60

their counsel points out that April 2nd follows a religious holiday; those (presumably including himself) observing it who do not live in San Luis Obispo would have to travel on that holiday in order to participate in the argument. In addition, intervenors represent that their principal technical assistant, Mr. Richard Hubbard, would be unable to assist counsel on April 2nd because of a long-standing "contractual obligation to speak at the University of New Hampshire on March 31, April 1, 2 and 3." Intervenors ask us to reschedule the argument to make it unnecessary to travel on a religious holiday and to enable Mr. Hubbard to keep his speaking engagement.

We are able to accommodate intervenors in part. As their seismic counsel is not participating in the prehearing conference the following day we will switch the dates, holding that conference one day earlier, on April 2, and moving the oral argument on the seismic issues from that day to April 3rd. This will obviate counsel's need to travel on the religious holiday in order to present argument for intervenors.

The technical issues being raised in this appeal involve geological and seismic questions and the adequacy of the plant's mechanical and structural engineering and design. Although,

according to Mr. Hubbard's own statement of record, he is neither a geologist, seismologist, structural engineer nor mechanical engineer, we can understand that counsel might still wish to have his assistance in preparing for the oral argument. But that preparation and all it entails -- reviewing the record, formulating rejoinders to points made by opponents, and attempting to anticipate the Board's questions -- can be done in the several weeks prior to Mr. Hubbard's departure for New Hampshire. The need for the presence of a technical advisor at the argument itself is not apparent to us. Nonetheless, were it convenient to do so we would attempt to accommodate counsel's wishes in this respect. But other commitments would make it necessary to postpone the argument not for a few days but for some weeks. We do not believe a further postponement of that magnitude is justified in the circumstances.

Oral argument changed to April 3, 1980; the time of day and location remain the same: 9:30 A.M. at the Old County Courthouse, Room 302, Department No. 3, Palm and Osos Streets, San Luis Obispo, California.

It is so ORDERED.[1/]

FOR THE APPEAL BOARD

C. Jean Bishop
Secretary to the
Appeal Board

1/ Dr. Buck and Dr. Johnson concur in the action taken but did not participate in drafting this order; in their absence from the city, the order is being issued under the authority of the Board Chairman. 10 C.F.R. §2.787(b)(1).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Richard S. Salzman, Chairman
Dr. W. Reed Johnson
Thomas S. Moore

In the Matter of PACIFIC GAS AND ELECTRIC COMPANY (Diablo Canyon Nuclear Power Plant, Units 1 and 2)	Docket Nos. 50-275 OL 50-323 OL

FIRST PREHEARING CONFERENCE ORDER

February 25, 1980

I.

On February 15, 1980, we held in ALAB-580 that we would hold a hearing to consider de novo the question of the adequacy of the Diablo Canyon security plan and that the intervenor would be permitted to participate in that proceeding. In moving toward this end, a prehearing conference will be held on April 3rd, 1980 at 9:30 A.M. at the Old County Courthouse, Room 302, Department No. 3, Palm and Osos Streets, San Luis Obispo, California. (Because of the difficulty in arranging for suitable facilities, this date is final.) Among other things, we intend at

AD
1

60

that time to apprise the parties of our own questions about some of the operative details of the security plan. For this reason (among others), the conference necessarily must be closed to the general public. Only the attorneys for the staff, the applicant and the intervenor (upon executing suitable non-disclosure affidavits and subject to a protective order) may attend. To expedite matters, we first outline the procedures we contemplate following and request that the parties respond by written memorandum to be in our hands no later than March 24, 1980, with any additional suggestions. In order that the prehearing conference may be most beneficial, however, the matters set forth in items IIB; IIC(1); IIC(2); IIC(3) and IID(1) are firm and must be done immediately. Accordingly, we order the parties to file the appropriate documents or take the prescribed action by the dates set forth.

Several matters deserve preliminary mention. First, as we stated in Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-543, 9 NRC 626, 628, fn. 5 (1979), "[w]henever we conduct a hearing as part of our appellate review function, we must fashion time periods and procedures for discovery different from those contemplated by the Rules of Practice, which are structured in terms of licensing board hearings"; we will do so here. Second, the principles laid down

earlier in this proceeding in ALAB-410, 5 NRC 1398 (1977), are the law of the case and control the security proceeding. Third, we reiterate the importance of conducting the security hearing with dispatch: requests for extensions of time or postponements will be viewed with disfavor; unexcused delays will not be permitted. Finally, we urge all parties to cooperate with one another in exchanging information and testimony and in scheduling and conducting such limited discovery as is permitted in order to eliminate the delays inherent in obtaining formal rulings from this Board.

II.

Subject to the foregoing comments, the following instructions shall govern this proceeding:

A. Parties.

The only parties to the security plan hearing are: (1) the applicant, Pacific Gas and Electric Company; (2) the intervenor, San Luis Obispo Mothers for Peace (SLOMFP); and (3) the staff of the Nuclear Regulatory Commission.

B. Counsel.

Whether or not counsel have formally done so before, all counsel for each party shall file by March 24, 1980, a notice of appearance with the Secretary of this Board containing

the information specified in 10 C.F.R. §2.713(a) of the NRC Rules of Practice. Where any party is represented by more than one attorney, one of them shall be designated "lead counsel" on the appearance form. That counsel shall be principally responsible for the conduct of the proceeding on behalf of that party. Except upon a timely advance motion filed with this Board, there will be no substitutions of counsel or changes of lead counsel.

C. Protective Order; Affidavit of Non-disclosure; Release of Security Plan Information.

(1) The physical security plan and information regarding it is confidential information within the meaning of the Commission's regulations, 10 C.F.R. §2.790(d). As such, it may not be released to intervenor's counsel or witnesses until they have executed an appropriate affidavit of non-disclosure that we have approved by incorporation into a protective order. The staff shall, after consulting with the other parties, take the lead in drawing up such an agreement and order. The staff shall then file the proposed agreement and order in time to have it in our hands by March 24, 1980. Intervenor's counsel should be prepared to execute such documents at the prehearing conference. In this regard, we call to the parties' attention (and parenthetically note the appropriateness of many of the provisions of) the protective order set forth in our opinion in Kansas

Gas and Electric Company and Kansas City Power and Light Company (Wolf Creek Nuclear Generating Station, Unit No. 1), ALAB-307, 3 NRC 17, 18 fn. 2 (1976). The security plan (and our own concerns regarding the adequacy of certain of its details) will not be released to individuals or counsel (other than to counsel for the applicant and the staff) who have not executed an appropriate affidavit and who are not subject to a protective order.

(2) The law presumes that counsel will abide by their oaths and comply with protective orders. Therefore, if any party has reason to believe that any counsel is not likely to abide by the terms of a protective order, it shall bring the information upon which its belief is founded to our attention at the prehearing conference in a written motion to exclude that individual from the hearing and from receiving the details of the security plan. See ALAB-410, 5 NRC at 1406.

(3) Applicant and staff should immediately prepare a "sanitized" version of the security plan "together with a general description of the types of information omitted from each section of the plan from which information has been deleted," ALAB-410, 5 NRC at 1405-06, so that intervenor's counsel will have access to that plan (at the location

specified in the protective order) following the prehearing conference. (But see instruction C(1).) The sanitized version of the plan should be tailored to the latest version of intervenor's contentions previously accepted by the Licensing Board.

(4) After intervenor's counsel has had an opportunity to study the sanitized version of the security plan, intervenor shall, no later than April 16, 1980, amend its security plan contentions to set forth with detailed particularity the exact aspects of the plan intervenor challenges. Intervenor shall file its amended contentions under seal as may be directed in the Second Prehearing Conference Order.

D. Witness Lists and Witness Qualifications.

(1) All parties shall file and serve so that it is in our hands by March 24, 1980, a list of their proposed witnesses. For each person expected to be called, there shall be included with the witness list (a) a statement of his educational background, experience, publications and any other information establishing the foundation for his testimonial qualifications and, if appropriate, his expertise, and (b) a statement of the subject matter on which the person is expected to testify.

(2) Discovery by any party concerning the qualifications of any proffered expert witness must be completed by April 23, 1980. Therefore, any party seeking discovery of a proffered expert's qualifications shall be prepared to establish a schedule for such depositions at the prehearing conference. Any objections to the qualifications of any proffered witnesses must be filed and served by May 7, 1980. Similarly, any objections (and supporting information) that any parties' witnesses are not likely to abide by the terms of an affidavit of non-disclosure and a protective order must be filed by the same date. All parties' direct testimony shall be filed within two weeks of the date of our ruling on those objections. If no objections are made to the qualifications of intervenor's proffered witnesses, all parties' direct testimony shall be filed and served by May 21, 1980.

E. Discovery.

No discovery other than that permitted by item IID(2) will be permitted.

F. Hearing.

A hearing in camera on the adequacy of the security plan will begin sometime during the week of June 15, 1980 at a time and place to be announced.

III.

A. We have attempted to anticipate as many contingencies as possible in the foregoing list but we realize that we may not have touched on all of them. In order to be able to enter a further prehearing conference order as soon as possible after the conference, we again request that the parties have in our hands no later than March 24, 1980, their proposed additions or modifications to the schedule and procedures set forth above. We strongly encourage counsel to cooperate in this expedited process and to reach reasonable agreements on these matters. A negotiated solution to procedural problems is almost always better than an imposed one.

B. In conclusion, we repeat that the matters set forth above in items IIB; IIC(1); IIC(2); IIC(3) and IID(1) are firm and are to be carried out in accordance with the schedules specified.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Bishop
Secretary to the
Appeal Board