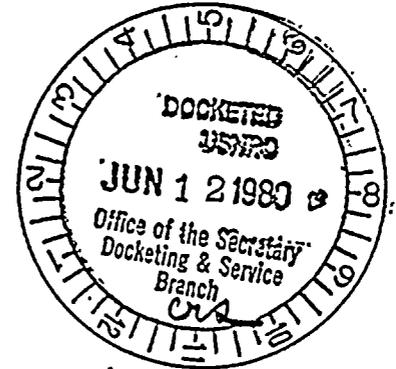


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

6-11-80

COMMISSIONERS:

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



In the Matter of

PACIFIC GAS AND ELECTRIC COMPANY

(Diablo Canyon Nuclear Power Plant,
Unit Nos. 1 and 2)

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

MEMORANDUM AND ORDER

CLI-80- 24

On April 11, 1980, the Appeal Board issued a Second Prehearing Conference Order (ALAB-592) directing that representatives of intervenor, San Luis Obispo Mothers for Peace, be provided access to a sanitized version of the Diablo Canyon physical security plan. The Board directed that the plan be released to intervenor's counsel and to its expert witness under the terms of a protective order and upon execution by these individuals of an affidavit of non-disclosure. On April 14, 1980 the applicant, Pacific Gas and Electric Company (PG&E) filed a motion with the Commission seeking a stay of the Appeal Board's order and also filed a petition requesting Commission review of the Board's decision to release the plan to the intervenor. PG&E opposes turning over the sanitized physical security plan to the intervenor because it believes that there is inadequate assurance that one of intervenor's counsel will abide by the terms of the

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affidavit of non-disclosure. On April 21, 1980, the Commission issued an order directing that the sanitized physical security plan not be turned over to the intervenor unless and until the Commission so directed. On April 23, 1980, intervenor filed a motion with the Commission requesting a stay of the Board's order and petitioning the Commission to review the Board's decision. Intervenor believes that one of the provisions of the proposed affidavit of non-disclosure is unconstitutional.

Intervenor filed pleadings opposing PG&E's requests; PG&E filed a pleading opposing intervenor's motions; and the NRC staff filed pleadings opposing the requests of both PG&E and the intervenor.

The Commission has reviewed these pleadings, has denied the petition for review filed by PG&E, and has granted the petition for review filed by the intervenor. Because the Commission has acted upon the petitions for review, the motions to stay the Appeal Board order are moot and the Commission will not rule upon them.

In its petition for review PG&E argues that the physical security plan should not be made available to petitioners because the best method of preventing public disclosure of this sensitive document is to make it available to the fewest number of individuals possible. The Commission recognizes PG&E's concerns, but emphasizes that intervenors in Commission proceedings may raise contentions relating to the adequacy of the applicant's proposed physical security arrangements, ^{1/} and that the Commission's regulations, 10 CFR 2.790, contemplate that sensitive information may be turned over to intervenors in NRC proceedings under

^{1/} Consolidated Edison Company of New York (Indian Point Station, Unit 2),
7 AEC 947, 949 (1974).



appropriate protective orders. ^{2/} In this proceeding the Appeal Board in ALAB-410, 5 NRC 1398 (1977) and in its Second Prehearing Conference Order of April 11, 1980 (ALAB-592), has set forth guidelines on when and under what conditions physical security plans may be made available to intervenors. The Commission has reviewed these orders, and with the one exception noted below, endorses the guidelines developed by the Appeal Board. We believe that the Board has done a commendable job of interpreting the law and balancing competing policy interests, and has handled the sensitive issues raised by requests for access to the Diablo Canyon physical security plan wisely.

With respect to the PG&E claim that it is unable to determine whether one of intervenor's counsel is likely to abide by the terms of the protective order and affidavit of non-disclosure, we noted that the individual has assured the Appeal Board that he will abide by the terms of the protective order and the affidavit of non-disclosure. As a member of the Bar of the Supreme Court of California, he must be acutely aware that if it can be demonstrated that he has breached these agreements, his license to practice law could be placed in jeopardy. We believe this possible sanction, plus his assurances, are sufficient grounds to conclude that the counsel will abide by his commitments. We therefore direct that PG&E make the sanitized version available to the intervenor.

Intervenor challenges a provision of the proposed affidavit of non-disclosure which would prohibit those subject to the protective order and affidavit of non-disclosure from publicly discussing or commenting upon protected information which is obtained (a) outside of the course of this pro-

^{2/} The regulations are consistent with the policy set forth in Section 181 of the Atomic Energy Act.



ceeding or (b) which has been publicly disclosed by others. Intervenor argues that this limitation violates the First Amendment of the Constitution.

The Commission agrees with the intervenor. In several recent cases, the courts have made clear that protective orders may not constitutionally preclude public dissemination of information which is obtained outside of the hearing process. See Rodgers v. United States Steel Corporation, 536 F.2d 1001, 1007 (3rd Cir. 1976); International Products Corporation v. Koons, 325 F.2d 403, 408 (2d Cir. 1963); and In Re Halkin, 598 F.2d 176, 195, n.45 (D.C. Cir. 1979).

In reaching these conclusions the Commission wishes to emphasize two points. First, the affiant making the public disclosure is prohibited from corroborating the accuracy or inaccuracy of the outside information by using protected information gained through the hearing process. Second, the Commission discourages participants in Commission proceedings from gathering protected information from independent means and publicly disseminating such information.

Chairman Ahearne and Commissioner Hendrie believe that before intervenors publicly disseminate protected information gained outside the hearing process they should be required to establish to the satisfaction of the board presiding over the Commission proceeding -- in the present case the Appeal Board -- that the information was in fact gained outside of the hearing process. Commissioners Gilinsky and Bradford do not believe that the parties should be required to secure prior Appeal Board clearance. They believe that any such clearance procedure is an unconstitutional prior restraint. Because the Commission is divided on this matter it remands this issue back to the Appeal Board and directs the Board based on its own reading of the law to select one of these two options. After making its decision the Appeal Board shall modify



the affidavit of non-disclosure so that it conforms with the Board's decision. The Board's decision will not be reviewed by the Commission. As soon as intervenor's counsel and witnesses have executed a revised affidavit of non-disclosure, PG&E is to make the sanitized version of the physical security plan available to these individuals.

It is so ORDERED.*

For the Commission



SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, D.C.

this 11th day of June, 1980.

* Commissioner Kennedy has recused himself from this proceeding.



ADDITIONAL VIEWS OF COMMISSIONER BRADFORD

I agree that the First Amendment prohibits an affidavit which forecloses public comment on protected information obtained outside the proceeding or disclosed by others. Such a prohibition constitutes a prior restraint on the speech of the intervenors in violation of the First Amendment. Rodgers v. United States Steel Corporation, 536 F.2d 1001, 1006 (3rd Cir. 1976). To cure this infirmity, the Commission amends the affidavit to remove the absolute restraint on discussion of independently obtained information, but leaves open the possibility of a prior restraint upon the speech of the intervenors in the form of Appeal Board clearance prior to public comment.

I do not agree that this prior restraint is permissible. It is clear that the First Amendment sought to protect not only against absolute restraints, but also against restraints which might or might not through governmental processes be subsequently lifted. See Near v. Minnesota ex rel Olson, 283 U.S. 697 (1931).

Furthermore, this prior restraint would be unreasonable and discriminatory in its application. An examination of such a restraint order reveals the following:

1. The purpose of such a prior restraint order must be to prevent disclosure of features of the security plan. However, our order explicitly recognizes that the



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possible sanctions flowing from disclosure "are sufficient grounds to conclude that the counsel will abide by his commitments." It is not clear how the proposed restraint will be any more effective than the sanctions already in place.

2. The affidavits need only be signed by the intervenors, not by utility personnel or NRC employees. No showing has been made that the intervenors are inherently less trustworthy than other persons who have seen the plan, yet they are singled out. Utility employees are under no NRC sanction whatsoever from disclosing this information, and they certainly would not be required to come to the Board prior to discussing the plan.* Commission staff would face sanctions if they were still with the Commission, but they would not be subject to the proposed prior restraint and would be free to comment upon publicly available information regarding the security plan.

In conclusion, I agree that PG&E should be required to turn over the physical security plan to the intervenor. I would support a protective order which provides for an affidavit

* It is not enough to argue that the utility is free to release its own proprietary information, for the public health and safety consequences are all that are alleged to justify the measures being taken.



prohibiting disclosure of the protected information gained through participation in this proceeding. I would, however, require the same affidavit from other attorneys and witnesses.

