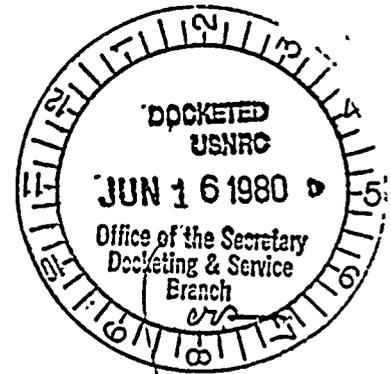


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONER:

Joseph M. Hendrie



In the Matter of
PACIFIC GAS AND ELECTRIC COMPANY
(Diablo Canyon Nuclear Power Plant,
Units 1 & 2)

Docket Nos. 50-275 OL
✓ 50-323 OL

MEMORANDUM TO COUNSEL FOR THE PARTIES

On April 21, 1980 I issued a Memorandum To Counsel For The Parties describing my prior involvement with seismic issues arising from the Diablo Canyon operating license application during the period I was Deputy Director for Technical Review, Directorate of Licensing, Atomic Energy Commission. I determined that I could not have been involved in the development of the AEC-NRC staff substantive position on the merits of issues related to the existence of the Hosgri fault and tentatively concluded that I would participate in the Commission review of the Diablo Canyon operating license applications. I invited the participants in this proceeding to comment on this matter.

The Joint Intervenors are the only party that commented. In their May 5, 1980 pleading, they suggested that I recuse myself from this proceeding arguing that my participation violates the Commission's separation of functions regulations and the requirements of due process. I have reviewed their arguments and have concluded that there is no legal bar to my participation in this proceeding. I therefore will participate.

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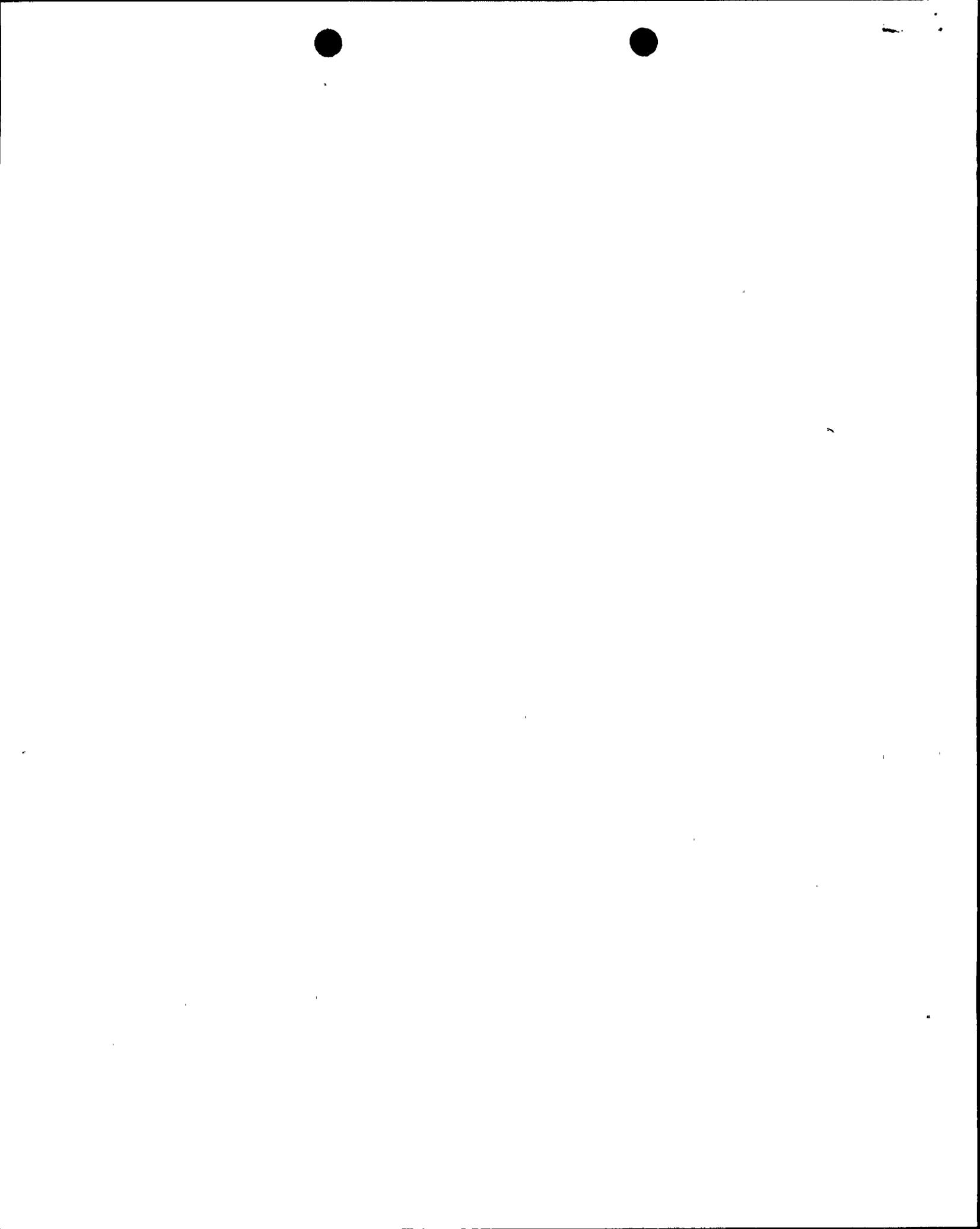
10 CFR Section 2.719(d) provides:

Except as provided in paragraph (c) of this section and Sec. 2.780(e), in any case of adjudication, no officer or employee of the Commission who has engaged in the performance of any investigative or prosecuting function in the case of [sic] a factually related case may participate or advise in the initial or final decision, except as a witness or counsel in the proceedings.

Under this regulation, which codifies Section 5(d) of the Administrative Procedure Act, an NRC Commissioner may not participate in a decision if (1) the decision arises in the context of an administrative adjudication; and (2) as an AEC-NRC employee the Commissioner worked in a prosecuting or investigative role on the very same case or a factually related one.

In the present matter there is no dispute that the review of the Diablo Canyon operating license applications arises in the context of an administrative adjudication and that I formerly served as an Atomic Energy Commission employee. In the April 21, 1980 Memorandum to Counsel, I stated that as an AEC employee I participated in the decision to docket the Diablo Canyon application and that I attended a June 4, 1974 meeting with Pacific Gas & Electric Company (PG&E) officials. At that meeting I expressed the view that the information gathered as of that date by PG&E regarding the fault was not adequate and suggested that additional investigation was required. In my Memorandum I also indicated that by the nature of my position with the AEC I may have attended other meetings with PG&E officials but that I had no recollection of having attended any such meetings.

Based on this information, Joint Intervenors asserted that it "seems likely" that I attended a January 1974 meeting with United States Geological Survey officials to discuss evidence gathered regarding the existence and magnitude of the Hosgri fault and participated in the AEC decision to deny a



December 13, 1973 motion filed by the Scientific Shoreline Preservation Conference calling for the suspension of construction at Diablo Canyon. After reviewing Joint Intervenors' pleading, I requested Trip Rothschild of the Commission's Office of the General Counsel to contact counsel for Joint Intervenors, the NRC Staff, and PG&E to ascertain if they had additional information regarding (a) my attendance at the several AEC meetings held with PG&E officials and (b) whether I participated in the development of the AEC response to the motion to suspend construction.

Philip Crane, Counsel for PG&E, informed Mr. Rothschild that PG&E has minutes of most, if not all, of the meetings PG&E officials had with the AEC staff held during my tenure with the AEC on the Diablo Canyon operating license applications and that these records indicate that the only meeting that I attended was the June 4 meeting.

James Tourtellotte, Counsel for the NRC staff, reviewed his files and provided Mr. Rothschild with copies of all the pleadings filed in response to the December 3, 1973 Scientific Shoreline Preservation Conference Petition to Suspend Construction. Mr. Tourtellotte, who served as AEC counsel during this period, informed Mr. Rothschild that to the best of his knowledge I did not participate in the development of the AEC staff response to the petition. An earlier review of AEC-NRC records conducted in response to a FOIA request by Joint Intervenors had not uncovered any records indicating that I had participated in developing the staff response.

David Fleischaker, Counsel for Joint Intervenors, advised Mr. Rothschild that Joint Intervenors had no new information to provide on my prior participation.

I believe that this information coupled with that provided in my April 21 Memorandum provides an accurate description of my participation in the review



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of the Diablo Canyon application as an AEC staff member. The legal questions raised by my prior participation are whether these activities are "investigative or prosecuting" within the meaning of 10 CFR 2.719 and Section 5(d) of the Administrative Procedure Act, or whether the Constitution precludes my participation as a Commissioner in this proceeding.

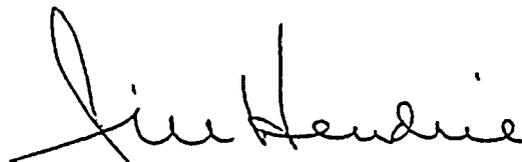
The Commission's General Counsel has recently prepared an exhaustive legal analysis of the separation of functions requirements imposed by the Administrative Procedure Act and the Commission's implementing regulations. See "A Study of the Separation of Functions and Ex Parte Rules in Nuclear Regulatory Commission Adjudications for Domestic Licensing", SECY 80-130, NUREG-0670 at 76-102 (March 1980). In that study, the General Counsel concluded that participating in the review of an application to operate a nuclear power reactor does not constitute the performance of an "investigative or prosecuting" function. The General Counsel determined that for purposes of the APA and the Commission's regulations those terms applied only to proceedings in which the NRC was accusing a party of misconduct, or violating a statute or regulation -- e.g., imposing a fine against a plant operator or revoking an operator's license because of misconduct. I agree with the General Counsel's conclusion and his supporting analysis and refer the parties to his study for a complete analysis of the issue.

Joint Intervenors also claim that due process requires me to recuse myself from this proceeding. It is argued that the fundamental requirement that proceedings not only be fair, but also appear to be fair would be violated if I were to participate as a Commissioner in an adjudicatory proceeding in which I had earlier participated as an AEC staff member. Petitioners cite three cases for the proposition that disqualification is required: Trans World Airways v. CAB, 254 F.2d 90 (D.C. Cir. 1958); Amos Treat & Company v.



Securities and Exchange Commission, 306 F.2d 260 (D.C. Cir. 1962); and American General Insurance Company v. FTC, 589 F.2d 462 (1979). In each of those cases the Commissioner whose participation was challenged had previously participated in the proceeding and had taken positions on the merits of the issues under adjudication. As my April 21, 1980 Memorandum to Counsel for the Parties establishes, I never took a position on the merits of the seismic issues raised by the Diablo Canyon application. The AEC staff did not even begin to formulate its positions on the merits and the record on which the Commission will base its decision was generated only after I had left the AEC. The views I expressed at the June 4, 1974 meeting were prior to both those events, and in any event could not be considered prejudicial to joint intervenors since I suggested that PG&E's investigation of the fault to that date had not been adequate. Consequently, I do not find these cases to be applicable to the present facts. Because my participation was at such an early stage in the proceeding, occurred over six years ago, and pertained only to whether the application was complete, I do not believe that due process requires me to disqualify myself.

In sum, my participation in this proceeding neither violates the Commission's regulations nor the requirements of due process. I therefore will continue to participate in this proceeding.


Joseph M. Hendrie

Dated at Washington, D.C.

this 16th day of June, 1980.

