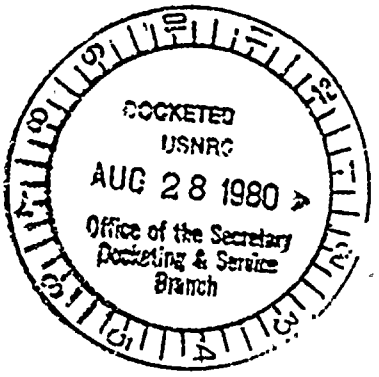
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



ATOMIC SAFETY AND LICENSING APPEAL BOARDS */

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

SERVED AUG 28 1980

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

ORDER

August 28, 1980

The purpose of this order is to schedule trials for and resolve other procedural questions involving two issues before us in this case -- the reopened seismic questions and the adequacy of the applicant's physical security plan. We turn first to the seismic proceeding.

I.

1. Our order reopening the record on seismic matters gave the parties 45 days to submit evidence in response to

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*/ For reasons explained in his January 4, 1980 memorandum, the Appeal Panel Chairman assigned the seismic and security plan issues to separate Appeal Boards: Mr. Salzman and Dr. Johnson serve on both; Dr. Buck is assigned with them to hear seismic matters and Mr. Moore for security plan issues. For obvious reasons all four members coordinated the schedules for the two hearings set out in this order; other matters treated here were decided by the Board directly concerned. This order covering both proceedings is simply for convenience.

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the issues we raised. ALAB-598, 11 NRC ___, (June 24, 1980). Those responses (the parties' direct evidence) were filed and served by August 6th. We also granted a request that two ACRS consultants (who testified before the Licensing Board on seismic matters) be given opportunity to comment on the newly submitted evidence. Copies of the parties' responses were sent to them and they were instructed to file and serve their comments by September 2nd. ALAB-604, 11 NRC __ (August 7, 1980). That same order announced that we contemplated starting the reopened seismic hearings on September 23, 1980. At our request, staff counsel canvassed the parties about their readiness for trial.

We have learned that only the staff is prepared to go forward on September 23rd. The other parties ask for a later start of the hearing because key witnesses will be unavailable on the date we proposed or they need more time to prepare (or both). In addition, one of the ACRS consultants has sufficient personal reasons for being unavailable in late September. The applicant proposes October 13, 1980 as an appropriate starting date for the reopened seismic hearings; Mrs. Nordlinger (on behalf of the ACRS witnesses), October 14th; SLOMFP, October 21st; and the Governor of California, October 28th.

The parties have had the direct testimony in hand since early August. The September 23rd date allowed more than six weeks to get ready for trial. We deemed this adequate, given the relatively narrow and well defined issues before us. However, the absence of key witnesses on that date and for some time thereafter requires us to accede to the requests to put off the hearing. Accordingly, we calendar the reopened seismic proceeding for an evidentiary hearing to begin on Monday, October 20, 1980. (No witnesses are reportedly unavailable that week.) The hearing will be held in the San Luis Obispo area, to commence at a time and place to be announced in a future order. All parties thus have four additional weeks for trial preparation; in these circumstances we will be unreceptive to requests for a further postponement. 1/

2. The Governor's response indicated that he might wish to submit "supplemental" direct testimony. We had not anticipated the filing of further direct evidence. However, the delay effected by this order leaves sufficient time before the hearing starts so that such "supplemental" submissions need not create unfair surprise or otherwise cause delay. Accordingly, on or before September 19, 1980, a party may move

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1/ The parties should allow a full week for trial. While we believe this more than adequate, we will start early, sit late, and hold a Saturday session if need be to avoid holding witnesses and counsel over to the following week.

for leave to submit supplemental direct evidence on the issues reopened in ALAB-598.[2/] Such a motion must establish good cause for failure to file that evidence within the time initially established; the proposed testimony shall accompany the motion. The time for answers is governed by 10 C.F.R. §2.730.

II.

1. Commission policy and regulations require the physical security plan for safeguarding a nuclear plant from industrial sabotage to be given confidential treatment. Where a party in a licensing proceeding challenges a plan as not meeting Commission requirements, it may be entitled to access to that plan -- but only under terms and conditions designed to insure its continued confidentiality. ALAB-410, 5 NRC 1398, review denied, CLI-77-23, 6 NRC 455 (1977). In this case, those conditions are spelled out in the protective order incorporating a non-disclosure affidavit that we issued following a prehearing conference held for that purpose last April 2nd in San Luis Obispo, California. Except for a Commission-directed modification on a point not here at issue and changes

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2/ We reiterate that rebuttal evidence is not what is contemplated here; that is to be provided by witnesses at the hearing following cross-examination.

approved by us, those terms and conditions continue to govern. ALAB-592, 11 NRC 744 (1980), modified and remanded, CLI-80-24, 11 NRC __(June 11, 1980), on remand, ALAB-600, 12 NRC __(July 15, 1980).[3/]

For this order it is sufficient to note that intervenors' counsel and experts were given access to the full security plan in San Francisco at facilities the applicant provided for that purpose. The plan was not to be removed from that facility; notes, memoranda, pleadings, and other papers regarding it prepared on those premises were to be kept there in a locked safe, to which only intervenor's counsel possesses the combination. Special provision was also made for filing pleadings containing information about the plan.[4/]

Counsel and expert witnesses for the Governor of California -- who did not elect to enter this phase of this proceeding until June 11th of this year -- were granted access to the security plan "to the extent and under the same terms and conditions afforded the intervenor's representatives." ALAB-600, supra, 12 NRC at __(slip opinion at 12). However, to accommodate the Governor's lead counsel whose office is in Washington, D. C., we granted his request

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3/ The protective order and form of non-disclosure affidavit are appended to ALAB-600, supra, 12 NRC at ___.

4/ Fourth Prehearing Conference Order of August 8, 1980 (unpublished).

to review the plan under similar restrictions at an NRC staff facility in Bethesda, Maryland.[5/]

2. The Governor was given access to the applicant's security plan on August 11, 1980; on August 13th, he moved to revise the terms of that access.[6/] He asks that the non-disclosure affidavit (which embodies the restrictions in question) be modified (1) to allow counsel to remove their notes about the plan from the NRC and applicant's facilities and keep them in their office safe when not in use; (2) to permit their personal secretaries to type the pleadings and other materials at counsel's office; and (3) to give the Governor's five expert consultants similar permission to take away their notes on the security plan and keep them in a personal safe when not in their actual possession. Based on a total of two days experience under the prescribed restrictions, the Governor asserts that the conditions are "unworkable", inconvenient and cripple his efforts to analyze

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5/ Ibid.

6/ The safeguards contingency plan -- now an appendix to the physical security plan -- was not made available until August 15th. Because of this, the Governor also moved for a day-for-day extension of date for meeting certain filings due August 25th. By order dated August 22, 1980, however, we granted all parties a week's extension of that deadline. This portion of the Governor's request has thus been mooted.

the plan and to prepare testimony and other papers for the forthcoming hearing.

The Governor's motion has been supplemented with copies of letters and telephone calls from his counsel. These are to the effect that the applicant has been hampering the review of the security plan by such things as providing fewer copies of the security plan that requested, posting a guard outside the discovery room door, and keeping protected information in a safe with a combination known only to counsel for SLOMFP.[7/] SLOMFP supports the Governor's motion and asks that similar relief be afforded as well to its counsel and its expert witness.

The staff interposes no objection to the motion provided the phrase, "this material is protected under an affidavit of non-disclosure," is "stamped on each page, top and bottom," of any notes about the plan or pleadings developed from them, and suitable arrangements are made for their later destruction.

The applicant, on the other hand, strongly opposes any relaxation of the restrictions governing access to its security

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7/ Letter of August 19, 1980, from Mr. L. C. Lanpher, counsel for the Governor, to Mr. Bruce Norton, counsel for applicant, with copies to the Board and all parties; telephone calls from Mr. H. H. Brown, counsel to the Governor, to Ms. C. Jean Bishop, Secretary to the Appeal Board, on August 20 and 21, 1980. The substance of those calls was transcribed and copies sent to the Public Document Room. See 10 C.F.R. §2.780.

plan... In its judgment, the Governor's request is based solely on considerations of personal convenience. The applicant believes that granting the motion would open the Diablo Canyon security plan to a serious possibility of compromise, given the number of people who would be entitled to remove notes about that plan to various locations scattered about California and Washington. The applicant also takes issue with what it calls the Governor's "informal submittals" to the Board. Characterizing these as inaccurate and misleading, the applicant denies that it has done anything other than comply with the terms of our orders and suggests that not it but the intervenors are being unreasonable.

In passing on the Governor's motion, we bear in mind the Commission's cogent observation earlier in this proceeding that "the prospect of even limited disclosure of physical security plans for nuclear facilities poses serious and difficult questions." CLI-77-23, supra, 6 NRC at 456. Particularly where, as here, the entire security plan has been made available for inspection, we must be careful to minimize the possibility of its disclosure. The applicant quite correctly points out that, while not asking for the plan itself, the Governor's motion would allow no less than ten individuals -- Messrs. Brown and

Lanpher, counsel for the Governor; Messrs. Willis and Baldwin, counsel for SLOMFP; Messrs. Sievers, White, Guiffrida, Cunningham and Kearns, expert consultants for the Governor; and Mr. Taylor, expert for SLOMFP -- to make detailed notes on all or part of its provisions and remove them from the security of the applicant's or NRC premises to their respective offices and, perhaps, their homes as well.[8/] It does not impugn the integrity of any of those individuals to recognize that the Governor's proposal entails substantially increased possibilities for disclosure of the security plan.

Before we could allow such an undertaking, we would have to be shown that the conditions we adopted for safeguarding the plan's confidentiality were indeed "unworkable," i.e., an insurmountable block except at unreasonable cost to review of the plan. No such demonstration has been made -- or even seriously attempted. It is not unknown in private litigation for counsel to work for extended periods at facilities provided by an adversary "away from home." Particularly is this so in complex matters such as antitrust cases and in litigation involving trade secrets and confidential

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8/ Any relief of this nature would have to be extended to the intervenor's as well as to the Governor's representatives and experts.

financial data.[9] No doubt distinctions exist between those situations and this one. But here we have information that, if disclosed -- even inadvertently -- can lead to consequences for the public health and safety far more injurious than financial loss.

We note that the facilities made available to review the plan are open during normal business hours five days a week. We believe that, with reasonable effort, coordination and cooperation on the part of all concerned, able counsel representing the litigants before us can prepare their cases under the conditions we have instituted in the time available to them. In these circumstances, convenience must yield to security.

We are quite aware that restrictions of this nature are bothersome. For this reason we discussed them in advance with counsel at the April prehearing conference. The terms now complained of were established following negotiations among counsel for SLOMFP,[10] the applicant and the staff; our order essentially ratified the conditions thus

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9/ The Governor's difficulties are perhaps exacerbated by the need to coordinate, across the breadth of the nation, the activities of counsel in Washington and consultants in California.

10/ In this regard, we find it passing strange for SLOMFP to "question whether the 'proper function of the adversary system' is served by the regime established" in the non-disclosure affidavit that its own counsel negotiated.

agreed upon. To be sure, for reasons satisfactory to himself, the Governor had not yet elected to enter this phase of the proceeding and hence did not take part in that conference.[11/] But we do not see that his concerns differ significantly from those of SLOMFP, which did.

For all the foregoing reasons, the Governor's motion to revise the non-disclosure affidavit is denied.

3. Our Fourth Prehearing Conference Order of August 8, 1980, conveyed our intention to hear the security plan issues no later than mid-October. This would follow the seismic proceedings, then expected to start on September 23rd. For reasons we explained in Part I, we have acceded of necessity to the parties' requests and postponed the seismic hearing to late October. We do not believe it feasible to reverse the order of the proceedings and hold the security hearings first, in late September. A moment's reflection confirms that necessary steps which must occur before the hearing, e.g., the approval of contentions and the preparation and submission of direct testimony, cannot reasonably be compressed into the time available before a September hearing date. Practicalities thus force postponement of the start of the hearing on the security plan hearing until completion of the one on the seismic issues. It remains our intention, however, to set a tight schedule that allows no un-

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11/ We note that on the following day the Governor participated in an oral argument before us (involving the seismic side of these proceedings) held at the site of the prehearing conference.

necessary delay. We have done so in Part III, below.

4. The Governor's August 13th motion includes a request that we "fix, after conferring with all participants at a prehearing conference, the necessary schedule to allow prehearing discovery." The Governor explains that he contemplates interrogatories, documentary requests, a site visit, and "follow-up interrogatories and depositions of personnel with key responsibilities in preparation of an implementation of PG&E's security arrangements."

The applicant opposes the Governor's request as unnecessary, productive of delay, and increasing the possibility of breaching the security plan. The staff is also opposed. It points out that we provided limited discovery in our First Prehearing Conference Order of February 25th, to be completed by April 23rd, and ruled that no other discovery would be permitted. The staff reminds us of the Commission's statement in West Valley that a "tardy petitioner with no good excuse may be required to take the proceeding as he finds it. For * * * 'any disadvantage which it might suffer in terms of opportunity for hearing would be entirely of its own making.'"[12/] The staff contends that the Governor's request is but a belated effort to have our earlier ruling reconsidered and

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12/ Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 276 (1975)(on application of a county government to participate).

therefore should be denied. SLOMFP, which took no advantage of the initial discovery period, takes no stand on the Governor's request.

There is merit in what the applicant says; an exchange of written testimony before the hearing would be adequate to allow the trial to proceed. And the staff's point is also well taken. Were the security hearings to be heard in mid-October (as initially contemplated), we would deny the Governor's discovery request as a late intervenor's attempt to change procedures settled before it entered the case.

The security plan hearing must be put off in any event, however. We think that no further postponement should be required -- and perhaps some hearing time saved -- if the parties are allowed an additional round of discovery under prescribed conditions designed to prevent delay. Accordingly, we will allow one more round of discovery, limited to interrogatories, document requests and a site visit (the applicant's response of August 20, 1980, indicates that SLOMFP counsel and expert have already been accorded such a visit; the Governor's tour should be under similar conditions at a time mutually agreed upon.)[13/] A time table for formal

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13/ The Board may also elect to make such a visit at a later date.

discovery requests and responses is contained in Part III, below. In the interests of expedition, we will forego the prehearing conference contemplated by 10 C.F.R. §2.740(a)(1) and allow discovery relevant to the contentions and statement of issues as filed by the parties; discovery requests should state the contention or issue to which they relate. Objections to those requests may therefore be based on objections to the acceptability of the related contention.

Documents sought for inspection need be produced only in the discovery rooms provided by the applicant or the staff for security purposes. These are to be treated in the same manner as the security plan itself. Neither they nor any notes on them are to be removed from those rooms absent the applicant and staff's consent given on the ground that no "protected information" is involved. Interrogatory answers containing or referring to protected information shall be filed and served as previously indicated on pages 6 and 7 of our Third Prehearing Conference Order of August 4, 1980.

The parties may proceed immediately with informal requests for discovery. Formal requests and all replies shall be filed and served according to the schedule in Part III below.

III.

Schedule of Security Plan hearing.

(1) September 2, 1980. Amended contentions and the Governor's "statement of issues" due (per our order of August 22, 1980).

(2) September 2. Discovery opens (limited to interrogatories, document requests and a site visit).

(3) September 8. Last day for filing discovery requests.

(4) September 8. Objections due in our hands to contentions and statement of issues.

(5) September 15. Responses to item (4) due in our hands.

(6) September 22. Answers to discovery requests due in our hands.

(7) September 26. Motions to compel discovery (if any) due in our hands.

(8) October 2. Responses to item (7)(if any) due in our hands.

(9) 30 days after our ruling on (4), all direct written testimony of all witnesses to be filed. 14/

(10) On or about November 10, Security plan hearings to commence in camera. 15/

14/ In our Fourth Prehearing Conference Order of August 8, 1980 we presented the parties with the opportunity to establish a schedule for the timing and order for filing direct testimony. In order to avoid any delays, we now are establishing the schedule ourselves.

15/ It is our present intention to disregard the Federal holiday on November 11, if necessary.

IV.

Finally, we are concerned about the note of asperity we have detected in recent pleadings. No doubt this is attributable to counsel's difficulties in dealing with the myriad problems of complex litigation under pressures of time and distance. But personal discord only magnifies such difficulties. Counsel should pause a moment, recall that not they but their clients are the adversaries here, and return to the spirit of accommodation of each other's legitimate problems they have previously displayed. In this way all can concentrate on the merits of the case -- the true focus of concern.

To that end we direct that no procedural matters be brought to our attention except by formal motion. Such motions are not to be filed unless and until counsel concerned have discussed the problem candidly and thoroughly and the movant can fairly state that a reasonable accommodation is not possible without our intercession. Our knowledge of the character and capability of counsel gives us cause to believe that if this is done in the spirit we ask, there will be no need for such motions.

It is so ORDERED.[16/]

FOR THE APPEAL BOARD

C. Jean Bishop
Secretary to the
Appeal Board

16/ Dr. Johnson participated in the rulings reflected here and concurs in the results reached; he did not, however, review the final draft of this order.