

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

10/14/80

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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.L. —

NRC STAFF'S RESPONSE TO BOARD'S OCTOBER 6 ORDER

In its October 6, 1980 Order concerning scheduling of the security plan hearing, the Appeal Board requested the parties' views about convening the hearing on the Applicant's premises. The Board notes a letter from counsel for the Governor dated October 1st in which the Governor objects to holding a hearing on Applicant's premises. In the letter, counsel for the Governor states, "Not only would such a situs of the hearing create the appearance of an improper relationship between regulator and regulated company, but fundamental legal issues would obviously be raised." The Governor's counsel goes on to recognize that the parties may be inconvenienced by holding the hearing in a location where security measures are not adequate but argues ". . . the overriding importance of maintaining both the integrity and the appearance of integrity of the Diablo Canyon proceeding should be of utmost concern." The Governor also offers to make available personnel in the California State Police to assist in the transportation and protection of security plan materials.

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DISCUSSION

Any time a party wishes to argue that a particular action creates "an appearance of an improper relationship," it is difficult to seriously argue the converse since what may "appear" to one person may not similarly "appear" to another. Consequently, arguing about a state of mind would not appear to accomplish much. However, the NRC Staff does not know what "fundamental legal issues" would be raised by holding in-camera hearings in a facility owned by the Applicant. Such issues are certainly not obvious, nor have they been identified.

In determining where to hold in-camera evidentiary hearings on matters subject to protective orders, the Commission's boards should be guided by (1) the convenience and necessity of the parties or their representatives [5 U.S.C. 554]; (2) the Commission's policy and practice to begin evidentiary hearings in the vicinity of the site [10 C.F.R. Part 2, App. AI(a)]; and (3) the need to insure that matters subject to protective order are properly safeguarded [10 C.F.R. § 2.740(c)].

The Governor's counsel does not address the above factors. It should be noted with regard to the first factor that both the Governor's personnel and Intervenor SLOMPF's personnel have been provided facilities in Applicant's San Francisco offices in order to have access to protected information and to prepare for hearing. However, since the Staff is not yet privy to the other parties' responses, it can not determine what other facts may bear on the respective parties convenience and necessity. In addition,



the Board can appropriately consider the convenience of all persons including the agency's. [Burnham Trucking Co. v. U.S., 216 F.Supp. 561, 564 (D.Mass. 1963).] Given the number of Washington, D. C. persons involved, a hearing in the Board's hearing rooms in Bethesda, Maryland should not be automatically ruled out.

With regard to the second factor, proximity of the site, no legal prohibitions are cited by the Governor to support the proposition that holding security hearings in-camera in the Applicant's facility is improper. The conduct of a hearing at a site owned by one of the litigants does not represent an impropriety. [Brotherhood of Railroad Trainmen v. Chicago, M., St. P. & P.R.Co., 237 F.Supp 404, 422 (D.D.C. 1964), rev'd on other grounds 345 F.2d 985 (D.C. Cir. 1965). See also Home Loan Bank Board v. Mallonee, 196 F.2d 336, 373 (9th Cir. 1952).] Although such proceedings have not been common in past Commission practice, it should be noted that in-camera proceedings were held by an Appeal Board in 1974 at the Indian Point facility. [Consolidated Edison Company (Indian Point Unit 2), ALAB-243, 8 AEC 850, 851 (1976).] A search of the record of that highly contested proceeding revealed no objection by any party of the type posed by the Governor. The NRC Staff knows of no regulation, statute or case which prohibits the conduct of a hearing in a facility owned by one of the litigants. If, in order to effectively give proper deference to the Commission's policy on holding hearings near the site, the Applicant's property is used, no legal bar prevents a Board from so deciding.

The third factor, security arrangements for the in-camera proceeding, presents a matter significantly impacting the first two factors. While



there is no doubt that it is possible to hold the security hearings in places other than the Applicant's facility, the parties could be severely inconvenienced. After receiving the parties' respective views, the Board may find on balance that the factors weigh in favor of ordering the hearing held in its own hearing room in Bethesda where security is adequate. Should the Board schedule the hearing for neutral ground near the site, the parties would be inconvenienced by having to have their documents and working papers moved to and from the Applicant's security vaults at the beginning and end of each day. Security arrangements would also be necessary during lunch and recesses. In addition, many more opportunities for access to the details of the security plan would be provided to persons without any demonstrable need for access due to the logistics involved. Additional guards would be required along with additional personnel necessary to transport each party's protected papers back and forth. The court reporters would have to be provided a secure place in which to transcribe. These details would surely require shorter hearing days in order to accommodate the added security precautions. This factor clearly weighs against holding the hearings anywhere other than in Applicant's or NRC's facilities.

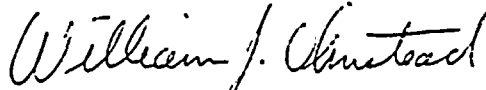
CONCLUSION

The NRC Staff believes the location of the security hearings is a matter best left to the sound discretion of the Appeal Board after receiving the parties' views so that it can weigh and balance (1) the convenience and necessity of the parties and the agency, (2) the Commission policy on holding



hearings in the vicinity of the facility, and (3) the need to insure matters subject to protective order are properly safeguarded.

Respectfully submitted,

A handwritten signature in cursive script that reads "William J. Amstead".

William J. Amstead
Lead Counsel for NRC Staff

Dated at Bethesda, Maryland
this 14th day of October, 1980



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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO BOARD'S OCTOBER 6 ORDER" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 14th day of October, 1980.

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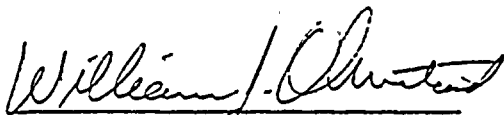
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