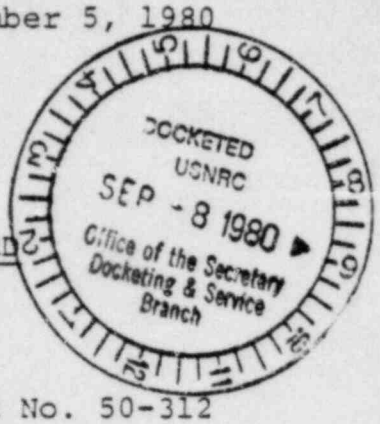
September 5, 1980




UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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| In the Matter of | ) | |
| | ) | |
| SACRAMENTO MUNICIPAL UTILITY DISTRICT | ) | Docket No. 50-312 |
| | ) | |
| (Rancho Seco Nuclear Generating Station) | ) | |
| | ) | |

LICENSEE'S MEMORANDUM OF LAW
IN ASSOCIATION WITH ITS REPLY PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW

None of the participants in this hearing asserted that the Nuclear Regulatory Commission's ("the Commission's") Order of May 7, 1979, in this docket was inadequate or required modification -- until the California Energy Commission ("CEC"), participating as the representative of an interested state pursuant to 10 C.F.R. § 2.715(c), filed its proposed findings of fact and conclusions of law on August 4, 1980. Because Licensee has not proposed any modifications to the Commission's Order, it has been neither necessary nor appropriate until now for Licensee to present its views on the legal basis for any action by this Board if it should determine that the Commission's Order was insufficient.

It is Licensee's firmly held view, apparently shared by the NRC Staff,[1/] that the record before the Board does not support the findings, advanced by CEC, that the Commission's

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1/ See NRC Staff's Proposed Findings of Fact and Conclusions of Law in the Form of an Initial Decision, August 22, 1980.

Order is insufficient and requires eighteen additional actions or modifications to be imposed upon Licensee in order to protect the health and safety of the public. Consequently, we believe that the Board need not reach and decide the legal issues raised in this memorandum. Nevertheless, in view of CEC's proposed findings of fact and conclusions of law, Licensee cannot ignore the possibility that the Board will disagree with both Licensee and the NRC Staff, and will find for CEC as to one or more of the eighteen proposed modifications. Accordingly, Licensee submits the following memorandum of law.

The Commission's Orders of May 7 and June 21, 1979, which gave rise to this proceeding, did not advise the Board on the scope of its authority with respect to any possible revisions to the May 7 Order, or on the appropriate procedure to be followed if the Board found that revisions were necessary. There are principles of due process and fairness to Licensee which should govern the procedure followed by the Board if it decides to recommend revision to the Commission's Order.

Licensee Sacramento Municipal Utility District did not request a hearing on, or challenge in any other way, the Commission's Order of May 7, 1979, which directed a temporary shutdown of the Rancho Seco Nuclear Generating Station and the implementation of specified short-term actions and long-term modifications at the facility. Licensee has proceeded to comply with the provisions of the Order while the Order's adequacy was the subject of a lengthy adjudicatory proceeding before this Atomic Safety and Licensing Board.

All of the parties who requested the hearing and advanced contentions challenging the Commission's Order withdrew from the proceeding prior to the start of the hearing. Consequently, the matters heard were: (a) 18 Licensing Board questions; (b) 4 contentions of a withdrawn intervenor (leaving no one to come forward with supportive evidence as directed by the Board); and (c) 7 "issues," in the form of questions, raised by CEC, but on which CEC took no position. Licensee was not confronted at any time during the hearing with an assertion by a party or the Board that the Commission's Order of May 7, 1979, was insufficient, or that any particular amendment of the Order would be proposed depending on the answers to the Board and CEC's questions. Consequently, it is Licensee's position that it was not put on notice of, or given the opportunity to contest, the additional modifications and actions now proposed by the California Energy Commission.[2/] We do not fault CEC or the Board for this situation. CEC acted within its rights under 10 C.F.R. § 2.715(c) in declining to take positions, and the Board could hardly prevent the withdrawal of the intervenors. Rather, this situation has been created by the unique coupling of a novel administrative setting established by the Commission and the unforeseen actions of the intervening parties who requested the hearing.

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2/ Possible exceptions to this argument are Issues CEC 5-1 and 5-2 which, while questions, address specific facility modifications. To some extent Licensee was put on notice of the consequences of a "yes" or "no" answer to these questions.

The Commission's Rules of Practice have particular procedures which apply to proceedings to modify, suspend or revoke a license, to impose civil penalties, and "to impose requirements by order." See Subpart B to 10 C.F.R. Part 2. An order imposing requirements on a licensee cannot be imposed without informing the licensee of the particular violation alleged, 10 C.F.R. § 2.201(a), and, whether or not a violation is alleged, of the action proposed to be taken. 10 C.F.R. § 2.202(a)(1). Furthermore, once the licensee is notified of this action, it is entitled to demand a hearing on the proposed action. 10 C.F.R. § 2.202(a)(3). The licensee is also entitled to know what it is charged with and to be presented with the evidence against it before it is called upon to respond with evidence in its own behalf. Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-315, 3 N.R.C. 101, 110 (1976). The only exceptions to these requirements involve situations where the public health, safety or interest requires the Commission or its staff to take immediate action. See 10 C.F.R. §§ 2.202(f), 2.204. Similarly, in other NRC proceedings, notice of the hearing is required, 10 C.F.R. § 2.703, followed by a specification of the matters in controversy. 10 C.F.R. §§ 2.714(b), 2.752.

The Commission's Order of May 7, 1979, while not an order to show cause or a notice of violation, did present Licensee with the specific modifications it was directed to implement, and provided Licensee with the opportunity to contest those requirements. Now, however, CEC is proposing

that 18 new requirements be added to the Commission's Order, without first having provided Licensee with the opportunity to contest them.

Licensee's rights under the Commission's Rules of Practice essentially flow from the Administrative Procedure Act, 5 U.S.C. § 554(b)(3), which sets forth one of the fundamental due process rights to which individuals are entitled in agency proceedings. In Hess & Clark, Division of Rhodia, Inc. v. Food & Drug Administration, 495 F.2d 975, 983 (D.C. Cir. 1974), wherein the Court of Appeals applied this principle of administrative law in rejecting the summary disposition procedure adopted by the FDA, the Court explained:

> An agency may not validly take action against an individual without a hearing unless its notice to the individual of the adverse action proposed to be taken against him specifies the nature of the facts and evidence on which the agency proposes to take action. Such notice enables the affected party to prepare an informed response which places all the relevant data before the agency.

In Hess & Clark, the Court agreed with petitioners that the FDA's notifying petitioners of the possibility that approval of certain of petitioners' activities would be withdrawn under certain theoretical conditions did not constitute sufficient notice. Petitioners were entitled to know the specific bases for the threatened withdrawal and given an opportunity to respond to these bases before the agency could withdraw its previously given approval.

It is Licensee's position, then, that if this Board's findings of fact warrant a revision to the Commission's May 7

Order in the form of additional long-term modifications, the appropriate procedure for the Board to follow is to conclude its initial decision with a recommendation that the Commission issue an order to show cause, with the opportunity for Licensee to demand a hearing, as to why the specified modification(s) should not also be required in order to provide reasonable assurance that Rancho Seco will respond safety to feedwater transients.[3/]

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

Thomas A. Baxter

Thomas A. Baxter

Counsel for Licensee

1800 M Street, N.W.
Washington, D.C. 20036
(202) 331-4100

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3/ The Commission at least hinted, in its Order of June 21, 1979, that further enforcement action might be the appropriate route. See 9 N.R.C. 680, 681 (1979).