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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
PACIFIC GAS AND ELECTRIC COMPANY	)	Docket Nos. 50-275 O.L.
	)	50-323 O.L.
(Diablo Canyon Nuclear Power Plant Unit Nos. 1 and 2)	)	

RESPONSE TO GOVERNOR BROWN'S MOTION TO
REOPEN THE RECORD IN THE LOW POWER PROCEEDING

INTRODUCTION AND BACKGROUND

On July 14, 1980, PG&E filed a motion before the Atomic Safety and Licensing Board (ASLB) requesting authorization for fuel loading and low power testing. Following hearings held from May 19 to 22, 1981, the record was closed and findings were filed by the parties. On July 15, 1981, Governor Brown filed a pleading entitled "Motion of Governor Edmund G. Brown, Jr. to Reopen Record to Correct Staff Misstatement." Shortly thereafter, on July 17, 1981, the Licensing Board issued a partial initial decision authorizing issuance of a low power license subject to a favorable decision by the Appeal Board on the remaining security issues.

Governor Brown seeks to reopen the record because a Staff witness, John Sears, testified during cross-examination by Joint Intervenors' counsel that "Bullhorns from the helicopter could warn anybody in that area." (Tr. 11068, line 12). The Governor admits that helicopters are available for emergency operations. However, he alleges that bullhorns are not available for use with the helicopters. As grounds for raising

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this point at such a late date, the Governor argues that he only learned of the helicopter statement at the hearing. (Motion p. 4 fn. 3). The NRC Staff opposes the motion.

DISCUSSION

The test for reopening a closed record is (1) there must be significant new information and (2) that information must be such as would have changed the result if originally considered. Kansas Gas & Electric Co. et. al. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978). After the Licensing Board has issued its final decision, as is the case in the present proceeding, the party seeking to reopen the record bears the heavy burden of showing that the new information was unavailable prior to the close of the hearing. Northern States Power Company, et. al. (Tyrone Energy Park, Unit 1) ALAB-464, 7 NRC 372, 374 n.4 (1978).

Governor Brown has failed to meet the requirements for reopening the record. Governor Brown claims that the whole subject of using helicopters was not brought to his attention until he learned of Mr. Sear's statements. (Governor Brown's Motion at 3). However, the fact that Governor Brown had not explored the extent to which helicopters might be used, or the capability of their use, does not mean that the "new" information was unavailable prior to the close of the hearing. First, the whole subject of evacuation of the Montana de Oro State Park was not an item which was unknown prior to Mr. Sear's statements. Evacuation of the park is discussed in the San Luis Obispo County

evacuation plan. That plan specifically states that "because of the remoteness of some hiking trails that are used by Park visitors, personnel on foot or using horses must be utilized. In addition, use of a helicopter to notify park visitors on remote trails should be considered." San Luis Obispo County Nuclear Power Plant Emergency Evacuation, § B.3.K., p. 35. [emphasis added]. The county plan was available to the Governor well before the hearing and the Governor should have been well aware of not only the need to evacuate the park, but the possibility that a helicopter would be used as a method of notification. In fact, it is a reasonable conclusion that Governor Brown was aware of the need to evacuate the park, since the Governor's counsel was the first to explore the issue of evacuation of Montana de Oro State Park during cross examination of the PG&E panel. (ASLB Hearing Tr. at 10807).

Governor Brown engaged in discovery on emergency planning for a period of almost six weeks prior to the hearing. Neither Governor Brown, nor the affidavit of Richard Felty attached to the Governor's motion to reopen, alleges that the capabilities of the helicopters available for use during an evacuation of the Montana de Oro State Park has changed since the time for discovery commenced. Thus, the information which Governor Brown now seeks to use as a basis for reopening the low power proceeding is not new information which was unavailable prior to the close of the hearing.

In addition, the Staff does not believe that the information presented in Governor Brown's motion is such as would have led to a different result to that reached by the Licensing Board in the low power

proceeding. It should be noted to begin with, that Mr. Sears specifically stated during the hearing that he had never verified that the helicopters had the capability to notify persons in the park, other than to read of the planned use of the helicopters. Tr. at 11068. Significantly, Mr. Sears direct testimony does not mention helicopters equipped with bullhorns. The matter of how the helicopter will communicate with park visitors is addressed in exactly three lines of cross examination of Mr. Sears by Joint Intervenors' counsel. Mr. Sears stated that helicopters could be in the area and that "Bullhorns from the helicopter could warn anybody in that area. [Tr. 11068 lines 11-13]. Mr. Sears then testified that that capability had not been demonstrated by a specific helicopter from that base and that he was basing his testimony on a review of the plans of PG&E and the Sheriff. Obviously, the Governor could have followed this matter up by referring Mr. Sears to the appropriate sections of the plans and clarifying the matter with other witnesses from PG&E or the Sheriff's office, but chose not to do so. 1/

The Staff objects to characterizing an obvious inference drawn by Mr. Sears as a "material misstatement." Inferences are conclusions which are properly drawn as logical consequences from certain information. The testimony clearly indicates the basis for Mr. Sears' conclusion and the

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1/ The Governor attaches an affidavit from Richard E. Felty with the California State Department of Parks and Recreation which in pertinent part is based on a conversation with a Chief Warrant Officer at Fort Ord, California. This hearsay statement is set forth in detail by Mr. Felty. It is not evident that either Mr. Felty or the Chief Warrant Officer is expert in acoustics nor are they prepared to rule out the use of properly equipped helicopters.

degree to which it was verified. It devolved to the Governor or Joint Intervenors to rebut the inference if they believed it should not be drawn.

The Licensing Board apparently recognized that the capability of the helicopters to notify park visitors was unconfirmed as evidenced by the language of the Board's factual findings. The Licensing Board stated:

> "117. Evacuation of the State Park would be coordinated with State Park personnel. Persons in remote sections of the park can be notified by personnel on foot or using horses ... Mr. Sears also testified that the Sheriff has an agreement with Hunter Ligget Air Force Base for use of a helicopter which, when equipped with bullhorns could be used to warn persons in the park. The helicopter can fly in adverse weather." PID at 46. [emphasis added].

The above paragraph illustrates two facts. First, the Licensing Board was not assuming that the helicopter was already equipped with the bullhorns, but rather, stated that "when" equipped with bullhorns they could be used to warn visitors to the park. Secondly, it indicates contrary to the statement by Governor Brown in his motion to reopen, that methods other than helicopters are not only available, but are expected to be used to notify visitors to the park. The importance of these two facts is that they are evidence that the use of helicopters to notify visitors to the park was not a crucial element in the Licensing Board's decision. It is worthy of some note that the finding by the Board on the use of helicopters to notify park visitors was but one line out of some 94 paragraphs and 34 pages of the Licensing Board's opinion which dealt with the emergency planning issue. While this fact alone does not indicate that the fact identified is unimportant, it would seem, as a practical matter, to require the Governor to make a clear showing that

the information was such as would have led to a different result. The Governor has not made any such clear showing in his motion.

CONCLUSION

In order to reopen the closed record in the Diablo Canyon low power testing proceeding, Governor Brown must show (1) significant new information; (2) the new information was not available prior to the close of the record; and (3) that the new information would have changed the result if originally considered. As demonstrated above, the information is not new, and, in fact, was available long before the close of the record if Governor Brown had made an effort to obtain the information during the weeks available for discovery prior to the close of the record. In addition, the information does not appear to be of such stature that it would change the initial result reached by the Licensing Board. For the above reasons the NRC Staff opposes Governor Brown's motion to reopen and urges this Board to deny that motion.

Respectfully submitted,

Bradley W. Jones

Bradley W. Jones
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 4th day of August, 1981.

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CERTIFICATE OF SERVICE

I hereby certify that copies of RESPONSE TO GOVERNOR BROWN'S MOTION TO REOPEN THE RECORD IN THE LOW POWER PROCEEDING 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 4th day of August, 1981.

John F. Wolf, Esq., Chairman
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

Glenn O. Bright, Esq.
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

Dr. Jerry Kline
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

Elizabeth Apfelberg
1415 Cozadero
San Luis Obispo, California 93401

Philip A. Crane, Jr., Esq.
Pacific Gas and Electric Company
P.O. Box 7442
San Francisco, California 94106

Mr. Frederick Eissler
Scenic Shoreline Preservation
Conference, Inc.
4623 More Mesa Drive
Santa Barbara, California 93105

Mrs. Raye Fleming
1920 Mattie Road
Shell Beach, California 93449

Richard E. Blankenburg
Co-publisher
Wayne A. Soroyan, News Reporter
South County Publishing Company
P.O. Box 460
Arroyo Grande, California 93420

Marjorie Nordlinger
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

Mr. Gordon Silver
Mrs. Sandra A. Silver
1760 Alisal Street
San Luis Obispo, California 93401

Arthur C. Gehr, Esq.
Snell & Wilmer
3100 Valley Center
Phoenix, Arizona 95073

Paul C. Valentine, Esq.
321 Lytton Avenue
Palo Alto, California 94302

Bruce Norton, Esq.
3216 North 3rd Street
Suite 202
Phoenix, Arizona 85012

Andrew Baldwin, Esq.
124 Spear Street
San Francisco, California 94105

John R. Phillips, Esq.
Simon Klevansky, Esq.
Margaret Blodgett, Esq.
Marion P. Johnston, Esq.
Joel Reynolds, Esq.
Center for Law in the Public Interest
10203 Santa Monica Boulevard
Los Angeles, California 90067

Byron S. Georgiou
Legal Affairs Secretary
Governor's Office
State Capitol
Sacramento, California 95814

David S. Fleischaker, Esq.
Suite 709
1735 Eye Street, N.W.
Washington, D.C. 20006

Richard B. Hubbard
MHB Technical Associates
1723 Hamilton Avenue - Suite K
San Jose, California 95125

John Marrs, Managing Editor
San Luis Obispo County
Telegram-Tribune
1321 Johnson Avenue
P.O. Box 112
San Luis Obispo, California 93406

Herbert H. Brown
Hill, Christopher & Phillips, P.C.
1900 M Street, N.W.
Washington, D.C. 20036

Harry M. Willis
Seymour & Willis
601 California St., Suite 2100
San Francisco, California 94108

Janice E. Kerr, Esq.
Lawrence Q. Carcia, Esq.
350 McAllister Street
San Francisco, California 94102

Mr. James O. Schuyler
Nuclear Projects Engineer
Pacific Gas and Electric Company
77 Beale Street
San Francisco, California 94106

Atomic Safety and Licensing Appeal Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

Docketing and Service Section
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

Mark Gottlieb
California Energy Commission
MS-18
1111 Howe Avenue
Sacramento, California 95825

Bradley W. Jones
Counsel for NRC Staff