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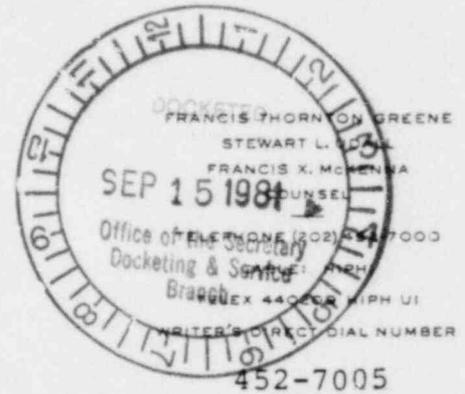
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September 15, 1981



Nunzio J. Palladino, Chairman
Commissioner Victor Gilinsky
Commissioner Peter A. Bradford
Commissioner John F. Ahearne
Commissioner Thomas Roberts
U. S. Nuclear Regulatory Commission
1717 H Street, N. W.
Washington, D. C. 20555

Re: Pacific Gas and Electric Company
(Diablo Canyon Nuclear Power Plant,
Units 1 and 2)
Docket Nos. 50-275 OL; 50-323 OL



Dear Mr. Chairman and Members of the Commission:

This is in reply to Mr. Chilk's letter of September 10, 1981, affording the Governor an opportunity to comment on a memorandum of telephone conversations held by Ms. Joan Aron of the NRC's Office of Policy Evaluation and on a FEMA report, both of which concern the emergency planning exercise at Diablo Canyon on August 19, 1981. We hereby advise the Commission that the Governor will not comment on the substance of the memorandum or the FEMA report. It is our opinion that any consideration of the memorandum or report by the Commission, or of any comments on the memorandum or report that are directed to the Commissioners by a participant in this contested proceeding, would be contrary to lawful procedure.

Mr. Chilk's September 10 letter highlights what is becoming a central issue in this proceeding: whether the Commission is complying with the rudiments of due process and procedural fairness in reaching its immediate effectiveness decision on the low power test license. The recent actions of the Commission in reviewing the pending low power issues disclose that the Commission is not complying with the legal norm. Rather, a pattern of highly prejudicial procedural irregularities has emerged. This pattern was evidenced first by the series of ex parte meetings held by the Commissioners with Staff members in August 1981, and was broadened by Ms. Aron's memorandum and Mr. Chilk's letter of September 10.

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We have stated our view previously, by letters dated August 7, August 17, and August 26, that the Commission's ex parte meetings were unlawful and highly prejudicial. We state herein that any consideration by the Commission of Ms. Aron's memorandum or of the FEMA report would be unlawful and highly prejudicial. This is the case notwithstanding that the Commission has afforded the Governor the opportunity to comment on the ex parte meetings, Ms. Aron's memorandum, and the FEMA report. While the Commission may believe that its excursions from the norm can be cured by offering the Governor an opportunity to comment, we would disagree. In our view, the opportunity to comment does not legitimize the Commission's improper actions; it merely draws attention to them. Indeed, it suggests that the Commission holds itself above compliance with its own regulations, which require that adjudicatory decisions be based upon the evidentiary record. See 10 C.F.R. Part 2, Appendix A; 5 U.S.C. § 556(e).

The Commission's recent actions not only exceed regulatory authority, they also ensure that unreliable evidence will significantly influence the Commission's decision. The evidentiary record in this proceeding was compiled under adversarial procedures that included cross-examination by the parties. The purpose of such procedures was to produce for the Commission's review a body of reliable and probative evidence. By reaching beyond the evidentiary record -- to the ex parte statements of the Staff and to the FEMA report -- the Commission will grasp only unreliable statements that lack probative value. These statements were not tested by the parties or cross-examined. These statements might be sound, or they might be incomplete, misguided, or self-serving; indeed, they might be flatly wrong.*

Thus, at the moment when the Commission must pass judgment on unprecedented issues of public health and safety, the Commissioners themselves are undermining their ability to make a fair and reasoned decision on the record that rests before them. And, while the Commission should be sensitive to the procedural rights of the parties, the Commission is fashioning an extra-legal forum for ex parte meetings with its Staff and an extra-legal record for its adjudicatory review.

*/ At the hearing level, of course, a party would presumably object to unsupported statements such as those in the FEMA report and in Ms. Aron's memorandum as hearsay and unreliable. It is virtually certain that such statements would not be received into evidence, unless of course all parties were first permitted to cross-examine and respond to them on the record in accordance with normal adversarial procedures.

With the foregoing in mind, we believe that the best course now is to ensure that a clear record is made for any future judicial review. This will facilitate the task of the reviewing court and, indeed, will sharply focus the issues. Accordingly, the following discussion addresses the FEMA report and Ms. Aron's memorandum relating thereto. In the succeeding section, the Governor asks that the Commission respond or rule, or both, to the Governor's specific requests for Commission action. For the purpose of ensuring that a clear and orderly record will exist for judicial review, we ask that the Commission issue its responses or rulings prior to or at the time of its immediate effectiveness decision.

I. The FEMA Report and Ms. Aron's Memorandum

The FEMA report on the August 19 exercise and the memorandum that characterizes that exercise are irrelevant to the low power test proceeding. These materials should not be considered by the Commission in its immediate effectiveness review. The exercise which is summarized in the report and the memorandum was a test of a new draft County Emergency Plan which is still in the development process. This draft Plan was not the "plan" presented by PG&E or any other party as allegedly providing preparedness for low power operation and was not even introduced into evidence at the low power hearing. The new draft plan and August 19 exercise are thus not a part of the record before the Commission. Indeed, the evidentiary record on low power testing was closed by the Licensing Board on May 22, 1981, nearly three months before the August 19 exercise.*

Thus, the Commission should neither consider these extra-record materials nor ask others to comment on them. We would submit that the appropriate course for the Commission now is to withdraw Mr. Chilk's letter of September 10, and to state that the Commission will disregard the FEMA report and Ms. Aron's memorandum. Any other action by the Commission that takes cognizance of these extra-record materials would be substantially prejudicial to the Governor and at odds with applicable standards of administrative regularity.

Diablo Canyon is a contested proceeding. The Commission's immediate effectiveness decision, therefore, must be based on the evidentiary record, and the Commission's review must comply with the requirements of due process, administrative fairness, and the NRC's own regulations. If the Commission wishes to make the FEMA report and Ms. Aron's memorandum a part of the evidentiary record and, hereafter, a basis for its immediate effectiveness decision, the Commission can avail itself of the procedures set forth in NRC regulations for introducing information into evidence after the record is

* / Low Power Hearing Transcript, pp. 11,339-43.

closed. Thus, the Commission could find that the subject FEMA report and Ms. Aron's memorandum are significant new information, and then: (1) reopen the record sua sponte; (2) provide the Governor and other parties the opportunity to cross-examine the sponsors of the FEMA report, Ms. Aron, and those with whom she conversed; and (3) provide the Governor and other parties the opportunity to introduce evidence of their own on the matters discussed in the FEMA report and by Ms. Aron. Unless the Commission takes these actions, the FEMA report and Ms. Aron's memorandum must be disregarded.

If the Commission were to rely on Ms. Aron's memorandum and the FEMA report in reaching its immediate effectiveness decision, such action would substantially and seriously prejudice the rights of the Governor and the State he represents. Indeed, we presume the Commissioners by now know from their review of the record of the Licensing Board's decision and the related pleadings that there is no County emergency preparedness for low power testing. In fact, there is no County preparedness whatsoever, because the only County emergency plans that ever existed were discarded by the County after the TMI accident. Those plans, which were drafted in 1976, were never implemented, were "shelved" long before the low power test hearing, and remain inoperative to this day. Because the Licensing Board failed to take cognizance of these conclusive facts, the Commission may not lawfully authorize low power testing.

The Governor submits, as he has repeatedly done before, that the only decision properly available to the Commission is to deny the low power license and to hold this proceeding in abeyance until the emergency plan that the County is now preparing is complete. At that time, the plan should be set for hearing with the other issues that the Licensing Board erroneously decided, including post-TMI safety-related contentions that the Board erroneously rejected. If the Commission were to authorize low power operation now, we are of the opinion that its decision could not be sustained on the evidence of record. If the Commission were to do so after having considered the extra-record FEMA report and Ms. Aron's memorandum, we submit that the decision would be indefensible.

II. Requests of the Governor for Responses or Rulings of the Commission

In order to establish a clear record for any judicial review that may be sought in this proceeding, the Governor asks that the Commission respond to each of the following requests.

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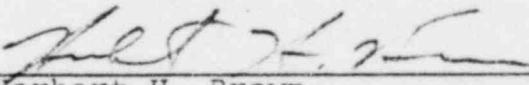
1. The Governor requests that the Commission not consider in its immediate effectiveness review or for any other purpose Ms. Aron's memorandum and the FEMA report transmitted therewith, both of which were attached to Mr. Chilk's letter of September 10. In the event that the Commission nevertheless decides to consider such materials, the Governor requests that the Commission: (a) re-open the recrd in the Diablo Canyon proceeding; (b) establish a forum in which the parties may cross-examine the persons who are determined to be proper sponsors of such materials and in which additional direct testimony may be offered; and (c) establish procedures through which pleadings may be filed with the Commission concerning such cross-examination and direct testimony.

2. The Governor requests that the Commission cease and desist from any further ex parte meetings with the Staff on issues covered by Contentions or Subjects that were rejected by the Licensing Board and which are pending on appeal.

3. The Governor requests that the Commission, sua sponte, immediately direct the Appeal Board to certify to the Commission for expedited review the Contentions and Subjects which were rejected by the Licensing Board and discussed by the Commission at the ex parte meetings with the Staff, including the Governor's Subject 4 relating to shift manning requirements and the Governor's Subject 13 relating to the adequacy of PG&E's equipment for determining inadequate core cooling. The Governor requests that the Commission afford the parties the opportunity to engage in discovery, including depositions if necessary, of Staff personnel who met with the Commissioners at the ex parte meetings. The Governor further requests that the Commission permit the parties to file pleadings with the Commission based on such discovery. Finally, the Governor requests that the Commission hold its immediate effectiveness review in abeyance until such time as the discovery requested above is complete and the related pleadings are submitted.

Sincerely,

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