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September 14, 1981

Mr. Samuel J. Chilk, Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: In the Matter of Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Nos. 50-275 O.L., 50-323 O.L.

Dear Mr. Chilk:

By memorandum dated September 10, 1981, you informed all parties to the above entitled proceeding that the Commission, as part of its 10 C.F.R. §2.764(f) review of the licensing board's July 17, 1981 Partial Initial Decision, intends to consider (1) a FEMA review of the emergency planning exercise conducted on August 19, 1981 in the vicinity of the Diablo Canyon Nuclear Power Plant ("Diablo Canyon") and (2) a related memorandum from Joan Aron, NRC Office of Policy Evaluation, regarding telephone conversations with FEMA officials. You stated further that any comments by the parties about either document must be submitted to the Commission no later than noon, September 16, 1981.

Joint Intervenors object to the Commission's consideration of the FEMA review and Aron memorandum under the circumstances outlined by you. Although we agree -- and, indeed, have argued throughout this proceeding -- that a full scale emergency planning exercise and subsequent FEMA review are relevant to the question of compliance with the Commission's emergency planning regulations, established principles of fairness require at the least that all parties be given a meaningful opportunity both to review and, if necessary, to challenge the adequacy of the exercise

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and FEMA's review of it. Particularly in light of the intensely contested nature of this proceeding, it is critical that Joint Intervenors be afforded their basic right to test the assertions contained in the documents in question through discovery and cross-examination. To do otherwise would undermine the interests of procedural fairness and public safety which the administrative hearing process established by the Administrative Procedure Act, 5 U.S.C. §§ 552 et seq., and the Atomic Energy Act, 42 U.S.C. §§ 2011 et seq., was designed to protect.

The procedure outlined in your September 10 memorandum provides no such opportunity. First, the time period allowed for response is plainly insufficient. Joint Intervenors' counsel did not receive a copy of the FEMA review and Aron memorandum until Friday, September 11, 1981. Because responses are due no later than noon on Wednesday, September 16, less than two full business days remained not only for review of the documents but preparation of a response.

Second, and more important, Joint Intervenors were excluded completely from the August 19 exercise itself and were denied their request to have even one representative present as an observer. Although numerous officials were contacted both at the local level and within the NRC in an attempt to gain access (including Harold Denton, NRC Staff Counsel, and the San Luis Obispo County Director of Emergency Services), all efforts were unsuccessful. Therefore, in order to assess the adequacy of the exercise or the accuracy of FEMA's review, Joint Intervenors must be permitted, through the discovery and hearing process, to investigate and evaluate the events which took place during the course of the August 19 exercise.

Third, at the Diablo Canyon low power test hearing held in San Luis Obispo, California in May of this year, Joint Intervenors requested repeatedly that a FEMA official be produced, through subpoena or other means, in order to permit cross-examination with respect to the extent of FEMA's review, if any, of the Diablo Canyon offsite emergency plans and the

basis, if any, for an alleged FEMA "finding" as to the state of emergency preparedness at Diablo Canyon. That request, however, was denied by the licensing board as untimely, along with an alternative motion to strike related testimony of an NRC Staff witness having no personal knowledge of the FEMA review. (Hearing Transcript, at 11,033-11,035 (May 21, 1981).) For the Commission now -- four months later -- to consider further evidence of a FEMA review without permitting even minimal discovery, cross-examination, or other opportunity to rebut that evidence, makes a mockery of the Commission's hearing process.

Fourth, the Commission's own emergency planning regulations provide that the FEMA findings "will constitute a rebuttable presumption," implying necessarily that the parties will be provided a reasonable opportunity to rebut that presumption. 10 C.F.R. § 50.47(a)(2). The two-day response period outlined in your memorandum is patently unreasonable for that explicitly mandated purpose. Having been excluded even from the exercise itself, Joint Intervenors cannot realistically be expected to have the factual basis necessary to contest FEMA's evaluation without first being afforded the right to discovery and cross-examination.

Finally, the record in this proceeding was closed by the licensing board on May 22, 1981. As the record now stands, all parties have conceded that the combined applicant, State and local emergency plans which will be in effect during low power operation (1) fail to comply with <u>even one</u> of the sixteen planning standards set forth in 10 C.F.R. § 50.47(b) and (2) fail to consider and allow for the effects on implementation of those plans of a radiological emergency occurring simultaneously with a major earthquake on the Hosgri Fault. That is the evidence addressed to date by all parties and the licensing board. For the Commission, <u>sua sponte</u>, to consider significant evidence <u>outside</u> the hearing record without permitting meaningful response not only ignores the established Commission standards for reopening closed hearing records (<u>see In the Matter of Kansas Gas and Electric Co.</u> (Wolf Creek Generating

Stations, Unit 1), ALAB-462, 7 NRC 320, 328 (1978)), but effectively deprives interested parties of their fundamental right to be heard. Where the issue affected is as intensely contested and important to safety as is emergency preparedness in this proceeding, that deprivation cannot lawfully be ignored.

In short, the unprecedented procedure outlined in your September 10 memorandum for consideration by the Commission of evidence outside the closed hearing record cannot be reconciled with basic notions of fairness or established NRC practice. Such consideration is clearly improper and illegal absent the provision to all parties of meaningful opportunity to contest the validity of such evidence through discovery, cross-examination, and hearing.

Accordingly, Joint Intervenors object to the Commission's consideration of either the FEMA review of the August 19 Diablo Canyon exercise or the related Joan Aron memorandum.

Sincerely yours,

Joel R. Reynolds
Counsel to Joint Intervenors

JRR/sg

cc: Diablo Canyon Service List