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March 15, 1982



Richard C. DeYoung, Director
Office of Inspection and Enforcement
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: Docket No. 50-275
License No. DPR-76
Notice of Violation EA 82-13

Dear Mr. DeYoung:

This is in response to your letter dated February 11, 1982 concerning statements made by Pacific Gas and Electric Company ("PGandE") representatives at a meeting with NRC personnel on November 3, 1981 at Bethesda, Maryland to discuss the status of the Diablo Canyon Nuclear Power Plant seismic reverification program. Enclosed with your letter was a Notice of Violation, EA82-13, reciting the operative facts, which you claim constituted a material false statement in violation of Section 186a of the Atomic Energy Act, as amended. ("Act".)

Although it is our position that no material false statement within the intendment of Section 186a of the Act was made by PGandE representatives as we shall hereinafter demonstrate, PGandE has complied with NRC's request for a meeting between high-level PGandE management and NRC representatives to discuss NRC perceived deficiencies regarding the exchange of information between the Company and the NRC. We believe the meeting provided a timely opportunity for a full and frank discussion on problems of communication.

At this meeting (March 8, 1982) PGandE reaffirmed its commitment to a full and open exchange of information between the Company and the NRC. Furthermore, we have prepared and will soon furnish to all officers and personnel involved in nuclear power work a letter reemphasizing

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PGandE's commitment to full and open communication between PGandE, its contractors, and the NRC. In our view, these actions demonstrate PGandE's good faith in attempting to resolve NRC perceived weaknesses in these areas even though we do not agree with the substantive conclusions of the Notice of Violation. In fact, we have always had, and will continue to maintain, an open-door policy vis-a-vis the NRC seeking to solicit advice on ways to improve our conduct of nuclear power operations. This policy is no more or less than we believe Congress intended when it enacted the Atomic Energy Act of 1954.

The basis for the alleged violation was given in your Notice of Violation, EA82-13, as follows:

"At a meeting held in Bethesda, Maryland, on November 3, 1981, as part of the NRC Staff review of the seismic reverification program at the Diablo Canyon Nuclear Power Plant, Unit 1, the NRC Staff inquired of the licensee whether it had received reports dealing with the seismic reverification program being conducted by R. L. Cloud Associates, Inc., which the NRC did not have. Representatives of the licensee made responses indicating that no written reports existed.

"Contrary to the above, the responses (at pages 215-217 of the transcript of the November 3, 1981 meeting) of the licensee's representatives on November 3, 1981 to the NRC Staff constituted a material false statement by omission within the meaning of Section 186 of the Atomic Energy Act of 1954, as amended. The responses were false only insofar as at the time the responses were made indicating that no reports existed which had not been provided to the NRC Staff, at least two draft reports had been prepared by R.L. Cloud Associates, Inc., and made available to the licensee on October 21, 1981 and on October 26, 1981, but had not been provided to the NRC Staff. When the responses were made, licensee representatives, other than those making the false statement, were present and recognized the responses as inaccurate but failed to take steps to correct the information. Other licensee representatives including one who unintentionally made, in part, the false statement stated after they knew of the existence of the draft reports, that the responses made were inaccurate. The false statement is material in that the NRC Staff would have requested submittal of the draft reports along with all comments submitted by the licensee in order to evaluate the independence of the reverification program."

As the following analysis will demonstrate, the exchange of information during the November 3 meeting referred to immediately above did not result in a material false statement.

(a) THE FACTS CLEARLY ESTABLISH THAT THERE WAS NO INTENT TO MISLEAD AND EVERY INTENT OF COOPERATING FULLY WITH THE STAFF'S INSTRUCTION.

At the November 3, 1981 meeting, as part of an overall PGandE presentation Dr. Cloud gave two oral reports: (1) an outline of his overall verification program and (2) his findings to date. During this presentation on the status of the program, NRC staff asked PGandE representatives and Dr. Cloud several questions regarding the program which were later the focus of the enclosed NRC investigation. This series of questions and responses noted in the Notice of Violation contained the ingredients for a misunderstanding where each participant is thinking of something different from the other. They involved several different reports - oral and written.

Dr. Cloud was obviously talking about a report (written) he was to submit in the near future (Tr. 216) when he responded to Mr. Eisenhut's question "When will we be expecting to see that short-term report, Bob Cloud said it's essentially complete." (TR. 215)

Mr. Denton in reference to that same short-term report asked how do "you propose to handle comments on this draft, or are you going to send us the same report he sends you and add your (sic) cover letter to it? Or how will you preserve independence?" (Tr. 216)

Mr. Norton replied that "any suggestions you have -- if you want the report before we see it, fine." (Tr. 216)

Quite clearly the conversation was directed toward the future. As to the future PGandE offered to have all drafts sent simultaneously to it and the NRC. But that offer was not accepted. Furthermore, no NRC representative asked whether any drafts had yet been prepared or requested that all existing drafts and future drafts be sent simultaneously to the NRC and PGandE. Had they done so, they would have been advised of the earlier drafts by those who knew -- for there was absolutely no reason whatsoever for withholding that information. Quite the contrary was so. PGandE representatives explicitly stated a clear desire to cooperate fully with whatever procedures the Staff desired. But they were not informed of those desires.

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A careful review of the November 3 transcript confirms that there was simply a lack of knowledge of the existence of the draft on the part of Mr. Norton ^{1/} resulting in a miscommunication. See Attachment A. This then resulted in one person interpreting a question in one manner and another party to the conversation placing a different interpretation on the same exchange. However, there was plainly no motive to intentionally mislead anyone about anything of substance so far as PGandE representatives were concerned. These unintentionally misleading statements concerning collateral matters not involving the public health and safety are, in our opinion, not the stuff "material false statements" are made of.

(b) THE STATEMENTS WERE NOT MATERIAL.

The Notice of Violation assigns materiality to the statements on the grounds:

" . . . the NRC Staff would have requested submittal of the draft reports along with all comments submitted by the licensee in order to evaluate the independence of the reverification program."

That is simply creating materiality after the events of November 3. There was no indication at the meeting that the Staff would have made such a request. Indeed, the Staff's failure to accept PGandE's offer of simultaneous delivery of drafts from RLCA to PGandE and the Staff implied differently. Furthermore, the above quoted statement wholly ignores the fact that when the draft reports and comments were reviewed by NRC investigators, they found that in only two instances out of several hundred were the revisions in the text made by RLCA in response to comments not justified by data obtained by RLCA (NUREG-0862, Issue 3, pp. 5-7). Even for these two cases RLCA has submitted documentation that in our opinion convincingly refutes the two exceptions noted (Letter - Anderson/Denison to Faulkenberry 2/12/82). So far as I know no reply to this letter has ever been received. But, wholly apart from that, the fact that there were only two exceptions out of hundreds clearly indicates

1/ Had Mr. Norton or the undersigned known of the earlier drafts either one would have mentioned them because as trial attorneys of many years experience they would have recognized the possibility of misunderstanding and hence the possibility that the Staff could be misled.

that there was no biased editing done by anyone. In short, the reason given for assigning materiality to the statements is invalid because the action suggested has in fact been carried out, and the results indicate that the independence of the reverification program was not affected. Thus the statements in question are immaterial rather than material.

That the statements were not material is further confirmed in SECY-82-89 (March 4, 1982) wherein the Staff questioned RLCA's independence not on the basis of his having submitted advance drafts of his report to PGandE but on financial grounds.

In hindsight, it can perhaps be argued that PGandE employees who were aware of the existence of the drafts should have realized that the Commission Staff might have been unintentionally misled (on a matter immaterial to safety) and taken affirmative steps to assure that there would be no misunderstanding. However, such a failure to act does not, in our opinion, rise to the level of a material false statement in violation of Section 186a of the Act.

The subject matter under discussion was not material or significant under the Atomic Energy Act, the Commission regulations, or any statement of the Commission. It did not involve safety or anything PGandE was required to do under instructions of the Commission or its Staff. Certainly, by no stretch of the imagination do the statements fall within the existing or proposed definition of Severity Level III violations which involve substantial impacts on the public.

We note that it is the universal practice for independent auditors of every type to provide the audited party with drafts prior to preparation of the report in order to determine whether the facts are correct and complete. Further to our knowledge, it is not NRC practice to require licensees to submit drafts of documents along with final documents for NRC review.

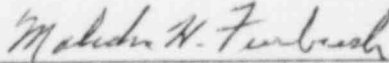
This being so, when PGandE offered on November 3 to request RLCA to send drafts to the Commission at the same time they would be sent to PGandE, the Commission should have then and there informed PGandE that this was a material matter and that such should be done. This the Staff did not do until the meeting of February 3, 1982.

For the foregoing reasons, we believe that the Notice of Violation should be withdrawn. In the alternative, we urge that the Severity Level III designation be reduced.

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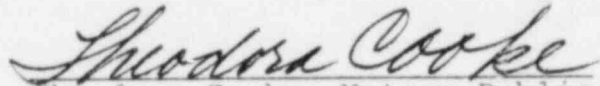
I am authorized to file this submittal with the NRC and certify that the matters set forth herein are true and correct to the best of my knowledge and belief.

Very truly yours,



Malcolm H. Furbush

Subscribed and sworn to before
me this 15th day of March, 1982



Theodora Cooke, Notary Public
in and for the City and County
of San Francisco, California

My Commission expires
January 28, 1985.

Attachment A

The first statement of concern to the Commission was in response to a question from Mr. Eisenhut asking when the NRC could expect to see the so-called short term report. Mr. Norton responded that:

"I might add we do not have it. It is not a question of receiving it. We don't have it either. It just hasn't been done yet." (Tr. 11/3/81 meeting, p. 216).

The second statement of concern to the Commission was in response to a question from Mr. Denton as to how the independence of Dr. Cloud and his report was to be preserved.

Mr. Norton responded as follows:

"Any suggestion you have -- if you want the report before we see it fine. I frankly resent the implication that Dr. Cloud is not an independent reviewer because he is. As Mr. Maneatis just reported to you, we heard this presentation to you yesterday -- in fact, we heard it Sunday for the first time. I assure you that's the case and we came back here last night or we came back here yesterday, and you heard it this morning. The report itself hasn't been prepared. If you want a copy of it before we get it, fine, or simultaneously. He is an independent consultant, and, you know, I don't know how we can show you that more than to give you the reports when they are prepared. You certainly are welcome to have an auditor, if you will, from the NRC accompany Dr. Cloud and his people in their work. Whatever you want to do. If you want to talk to them directly out of our presence, fine. He is an independent consultant." (Tr. 11/3/81 meeting, p. 217).

In the NRC investigation report dated January 18, 1982, these statements were categorized under what the Commission entitled "Issue 9" which sought an explanation of those

statements. As a result of the investigation regarding "Issue 9" the investigation report made a specific finding as follows:

"Mr. Norton did not become aware until December 14, 1981 that draft reports of Dr. Cloud's work had been submitted to PG&E prior to submittal to the NRC. Mr. Norton considered the statements made by him, as recorded on pages 216-217 of the November 3 transcript, to be the case at the time." (Investigation report, p. 22).

Mr. Norton was requested by the NRC to appear in San Francisco, California on December 18, 1981 to testify under oath concerning this investigation. Mr. Norton appeared, was sworn, and did testify. Prior to Mr. Norton's testimony, Mr. Robert Ohlbach, Vice President and General Attorney for PGandE waived its attorney-client privilege.

At this initial interview Mr. Norton was asked if, when he made the statements to the NRC on November 3, 1981, he knew that two draft reports had been given by Dr. Cloud and Associates to PGandE for review and comment. Mr. Norton testified that he did not know that fact. (Investigation report, p. 258, lines 15-19).

Mr. Norton was requested to return to San Francisco for further sworn testimony and did so on December 28, 1981.

At that second interview Mr. Norton was asked:

"Would you please explain why on page 216 of the transcript of the meeting of November 3 with the NRC you stated that PGandE did not have Dr. Cloud's short term report?"

Mr. Norton: I simply believed that to be the case at the time.

Mr. Lieberman: Would you please explain why on page 217 of the transcript of the meeting of November 3 of the NRC, you stated the report itself had not been prepared?

Mr. Norton: Again, that was what I believed to be the case at that time.

Mr. Lieberman: Were you made aware at any time after the November 3 meeting with the NRC by PG&E personnel or anyone else, that you or Mr. Maneatis may have provided possible misleading or erroneous information to the NRC at the November 3 meeting because of the existence of drafts or working papers of the Cloud report? (underscoring ours)
Mr. Norton: Yes.

Mr. Lieberman: If so, when did you first learn of the existence of draft reports or working papers:

Mr. Norton: December 14, 1981."
(Investigation report, p. 267, lines 4-25)

"Mr. Lieberman: When you became aware of, saw these reports, did you have any questions concerning the possibility that you may have provided misleading information to the Commission on November 3rd? (underscoring ours)

Mr. Norton: Well, obviously when you take the statement I made on page 216 and 217. It's factually incorrect. Indeed PG&E had received a report, so, yes.

Mr. Lieberman: Had you made any inquiry during the November 3rd meeting or before the November 3rd meeting as to the existence of any drafts or working papers or any other materials concerning the status or progress or the results of Dr. Cloud? (Investigation report, p. 270, lines 4-16)

I specifically remember asking the question here in San Francisco on either Saturday or Sunday and the question was, where is the interim report, because my understanding of the schedule was that that interim report was to be done the end of October.

I specifically asked the question, is the report done or do we have the report

yet meaning the report that was going to the NRC. (Investigation report, p. 272, lines 6-13).

"Mr. Lieberman: To clarify that response, (Investigation report, p. 272, line 25) Mr. Norton, other than referring to the actual document that might be sent, you did not make any inquiries as to whether employees of the Company, PG&E had received various drafts of the submittal to be made?

Mr. Norton: Absolutely not.
(Investigation report, p. 273, lines 1-5).

". . .[O]n December 15 when you became aware, saw the other draft reports, did you have any suspicion as to whether the Company may have seen earlier reports?

Mr. Norton: No." (Investigation report, p. 273, lines 12-16).

". . .[D]id you have any conversation with any employee at PG&E that up to December 14th that caused you to have any suspicion that they may have received or commented on any working paper or draft prepared by Dr. Cloud and his associates?

Mr. Norton: No, I did not."
(Investigation report, p. 279, lines 20-25).