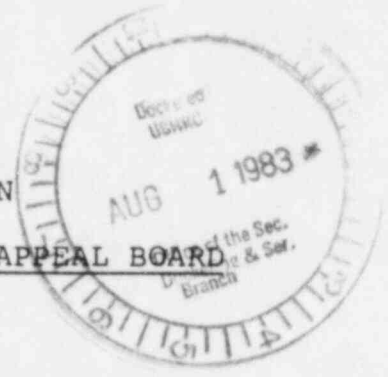

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL 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, Units 1 and 2)	)	(Reopened Hearing -- Design Quality Assurance)

JOINT INTERVENORS' RESPONSE TO PACIFIC GAS AND ELECTRIC COMPANY'S MOTION TO COMPEL

On July 12, 1983, Pacific Gas and Electric Company ("PGandE") moved this Appeal Board for an order compelling the Joint Intervenors to answer certain interrogatories served on June 10, 1983. The Joint Intervenors hereby respond to PGandE's motion to compel and respectfully request that it be denied and further that a protective order against disclosure of the information requested be issued.

First and foremost, the Joint Intervenors wish to emphasize that, contrary to PGandE's assertion, they are committed to complying with their obligations in the discovery process. They have provided and will continue to provide all relevant information available to them to which PGandE is lawfully entitled. Further, as additional information becomes available, they will supplement their responses consistent with the Commission's regulations. To the extent, however, that the information is covered by a valid privilege, PGandE is as a

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matter of law not entitled to the information, and hence the Joint Intervenors' countervailing rights -- and the interests of the public generally -- protected by such privilege must take precedence over PGandE's desire for disclosure. This is particularly true where to do otherwise might result in retaliation to a confidential informant who has been providing information through the Joint Intervenors to responsible officials of the United States government. See discussion infra at 3-8. Under such circumstances, PGandE's asserted interest in obtaining an answer to a particular discovery request must give way to the recognized societal and public policy interests that underlie the privilege in question.

Interrogatory No. 1:

PGandE has simply mischaracterized the Joint Intervenors' response to Interrogatory No. 1. The interrogatory calls for information regarding every communication since November 1981 by the Joint Intervenors with "each person employed by PGandE, Bechtel, the PGandE/Bechtel 'Project,' or any of those entities' subcontractors working on Diablo Canyon . . . ."

This interrogatory is not only burdensome but calls for clearly irrelevant information. The Joint Intervenors interact with such employees on a daily basis in San Luis Obispo, and the conversations potentially covered by this request may number in the hundreds, if not the thousands.

Equally important, the information requested is irrelevant to the subject matter of the hearing since the fact that such conversations may or may not have taken place has nothing whatsoever to do with the subject of design quality assurance at Diablo Canyon. To the extent that relevant information may have been provided by PGandE/Bechtel employees upon which the Joint Intervenors will rely at the hearing, PGandE has already received such information as part of the motion to reopen or will in the future receive it in response to proper discovery requests that focus on the basis for admitted contentions. Further, as has already been stated in the interrogatory response, PGandE can certainly ask its own employees what conversations they may have had if it feels the need to learn such information. The existence of any such conversation, however, is irrelevant to the matter set for hearing.

To the extent that the interrogatory seeks information provided to the Joint Intervenors by an anonymous informant, it is objectionable for the reasons stated in the Joint Intervenors' response and in the Declaration of Joel Reynolds ("Reynolds Declaration"), attached hereto. As this Board may be aware -- and as PGandE is certainly aware -- the Joint Intervenors have received information from a confidential informant within the Diablo Canyon Project. That information has been passed on promptly by the Joint Intervenors either to

the NRC,[1/] to the Office of the Chairman of the House Committee on Interior and Insular Affairs and House Subcommittee on Energy and the Environment, and to the United States Department of Justice. In effect, the Joint Intervenors have been acting as a conduit for information provided by this informant to the United States government at the request of the informant, who fears that providing information without such a conduit would lead to disclosure of his/her identity and, as a result, retaliation by the Diablo Canyon Project.

The courts and the Commission have long recognized the so-called "informer's privilege," which seeks to insure the cooperation of informants by removing the fear of reprisal. See, e.g., In re United States, et al., 565 F.2d 19, 22 (2d Cir. 1977), cert. denied sub nom. Bell v. Socialist Workers Party, 436 U.S. 962 (1978); Wirtz v. Continental Finance and Loan Co., 326 F.2d 561, 563-64 (5th Cir. 1964); Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623 (1957); Northern States Power Co. (Monticello Plant, Unit 1), ALAB-16, 4 AEC 435, aff'd, 4 AEC 440 (1970); Houston Lighting and Power Company (South Texas Project, Units 1 and 2), ALAB-639, 13 NRC 469 (1981). Indeed, the Appeal Board has repeatedly recognized that:

[1/] The information provided to the NRC has been issued as a Board Notification, and a meeting with PGandE officials to consider such information was convened by the NRC on May 4, 1983 in San Francisco, California. See attached Reynolds Declaration, at 1-2.

> Common sense tells us that a retaliatory discharge of an employee for "whistleblowing" is likely to discourage others from coming forward with information about apparent safety discrepancies. Yet, the Commission's safety inspectors cannot be everywhere; to an extent they must depend on help of this kind to do their jobs.

Union Electric Company (Calloway Plant, Units 1 and 2), ALAB-527, 9 NRC 126, 134 (1979); Houston Lighting and Power, 13 NRC at 475. This Board has acknowledged that retaliation may take the form not only of "financial and social penalities . . ., but physical abuse as well." Id.[2/]

This well-grounded privilege is applicable in this case. Although in its Motion to Compel, at 6, PGandE contends that the privilege is inapplicable because the "Joint Intervenors are clearly not a governmental agency," PGandE has proposed an improperly constricted interpretation of the privilege clearly inappropriate in this case. As appears in the attached Reynolds Declaration, at 2-3, the Joint Intervenors have been acting merely as a conduit for information from the informant to responsible government officials, including the United States Department of Justice. They have received the information under a condition of nondisclosure except to such

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2/ In Houston Lighting and Power, 13 NRC at 474 (quoting In re United States, et al., 565 F.2d at 22), the Appeal Board explained that the informer's privilege derives from "an ancient doctrine . . . founded upon the proposition that an informer may well suffer adverse effects from the disclosure of his identity," and that "the most effective protection from retaliation is the anonymity of the informer . . . . By withholding the identity of the informer, the government profits in that the continued value of informants placed in strategic positions is protected, and other persons are encouraged to cooperate in the administration of justice."

government officials, and they have complied with that condition. Moreover, the Joint Intervenors have been explicitly requested by the Department of Justice -- as the government agency receiving the information -- to assert the informer's privilege to prevent disclosure for precisely the reasons underlying the privilege -- namely, that disclosure through the discovery process would discourage informants from coming forward with information.

California Evidence Code § 1041, regarding the informer's privilege, provides for precisely this kind of circumstance:

> (a) Except as provided in this section, a public entity has a privilege to refuse to disclose the identity of a person who has furnished information as provided in subdivision (b) purporting to disclose a violation of a law of the United States or of this state or a public entity in this state, and to prevent another from disclosing such identity, if the privilege is claimed by a person authorized by the public entity to do so and:
>
> (1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or
>
> (2) Disclosure of the identity of the informer is against the public interest because there is a necessity for preserving the confidentiality of his identity that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the identity of the informer be disclosed in the proceeding. In determining whether disclosure of the identity of the informer is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.

> (b) This section applies only if the information is furnished in confidence by the informer to:
>
> (1) A law enforcement officer;
>
> (2) A representative of an administrative agency charged with the administration or enforcement of the law alleged to be violated; or
>
> (3) Any person for the purpose of transmittal to a person listed in paragraph (1) or (2).
>
> (c) There is no privilege under this section to prevent the informer from disclosing his identity.[3/]

The Joint Intervenors are clearly persons who have received the information in question "for the purpose of transmittal" to a law enforcement officer or a representative of a responsible government agency. Having transmitted the information and been authorized by such government officials or representatives to assert the privilege, they fall clearly within the scope of § 1041(b)(3). PGandE's citation of Houston Light and Power, supra, suggests nothing to the contrary.

In other respects as well, the privilege is clearly applicable. Because the information provided, if true, indicates a violation of law (see Reynolds Declaration, at 1), the public interest is served by protecting and encouraging cooperation by the source of such information. If PGandE's discovery request is granted, the informant's identity

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3/ This provision of the California Evidence Code is made applicable to federal procedings pursuant to 28 U.S.C. Federal Rules of Evidence, Rule 501.

could be revealed and the source of the information endangered. Clearly, therefore, the interest in confidentiality is substantial. On the other hand, PGandE's interest in access is relatively minor, particularly given its irrelevance to the issue of design quality assurance, and, as important, the fact that any information upon which the Joint Intervenors intend to rely at the hearing can be obtained simply by interrogatories directed at the basis for our contentions. As this Board recognized in Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), ALAB-10, 4 AEC 390, 399 (1970):

> [T]he necessity for disclosure is sharply reduced where available alternatives for obtaining information are present. In the face of a proper privilege claim, the proponent for disclosure should demonstrate convincingly that information already furnished or otherwise available is not adequate under the circumstances.4/

Because in this case the public interest in confidentiality clearly outweighs PGandE's asserted need for disclosure, PGandE has failed to meet its burden. Under the circumstances, therefore, the informer's privilege is plainly applicable and disclosure should be denied.

4/ The burden of demonstrating need for disclosure rests clearly on the propounding party. In Houston Light and Power, supra, the Appeal Board held:

> To overcome the acknowledged importance of the need for confidential treatment of informants, the burden was on the intervenors to demonstrate the need for their disclosure.

13 NRC at 475.

Interrogatory Nos. 5-7:

Contrary to PGandE's assertion, the Joint Intervenors have properly responded to the interrogatories in question. As stated, we are unable at this time to identify the SS&C's "important to safety" but not Class I, because PGandE has not made clear in its FSAR what, if any, non-Class I SS&C's important to safety exist at Diablo Canyon. Because its definitions of the various categories -- FSAR, at Table 3.2-1 -- suggest such a category of SS&C's, the Joint Intervenors have a clear basis for their belief that such SS&C's exist. Once more precise information is obtained, we will supplement our interrogatory responses accordingly.

Interrogatory No. 13:

Although stating an objection to the interrogatory in question, the Joint Intervenors fully provided the information requested. The interrogatory was addressed to the Joint Intervenors and requested "your" definition of the terms listed. That those definitions were provided in our response is apparent on the very face of PGandE's motion.

Intrrogatory Nos. 14-15:

Once again, after preserving their objections, the Joint Intervenors responded to the interrogatories by explaining that no conclusions of the sort requested have yet been reached. As the Board is aware, the number, volume, and complexity of the documents cited are great, and we have not yet been able to

conduct the kind of detailed review assumed by the interrogatories. Our motion to reopen was based upon and granted by the Board in light of the extensive testimony and documentation provided to date. The fact that we have not yet thoroughly analyzed the documents cited by PGandE in these interrogatories -- documents that PGandE itself has had numerous employees compiling and reviewing for months -- does not in any way suggest that a hearing is "unnecessary." To the contrary, the hearing process is intended to permit the kind of close scrutiny necessary to determine whether the relevant documents are accurate and complete.

Interrogatory No. 16:

The Joint Intervenors' "personal knowledge" of the design of Diablo Canyon and its DQA program is limited, as stated in the response, to "items viewed during site tours of the Diablo Canyon Nuclear Plant." PGandE personnel were present at all times during those tours and, consequently, PGandE is already aware of what such personal knowledge entails.

Interrogatory No. 18:

The information requested by this interrogatory has been provided and is set forth in the June 27, 1983 Response of Governor Deukmejian to First Set of Interrogatories Propounded by Applicant Pacific Gas and Electric Company, at 26.

Interrogatory No. 23:

The documents and pertinent sections thereof relied upon by the Joint Intervenors have been cited in the documents listed in the response to this interrogatory. As the list of documents increases, we will supplement our responses accordingly.

Request for Protective Order

Pursuant to 10 C.F.R. § 2.740(c), the Joint Intervenors hereby request the issuance of a protective order providing that, to the extent objected to in Joint Intervenors' Response to PGandE's First Set of Interrogatories, the requested discovery not be had. Good cause exists for such order in that PGandE is not legally entitled to such information for the reasons stated herein and in the aforesaid response to interrogatories.

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Conclusion

For the reasons discussed above, the Joint Intervenors respectfully request this Appeal Board (1) to deny PGandE's motion to compel and (2) to issue the protective order requested herein.

DATED: July 29, 1981

Respectfully submitted,

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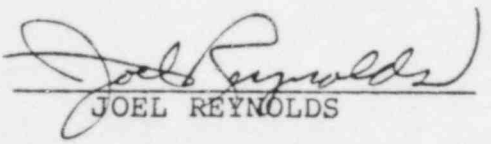
By 
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