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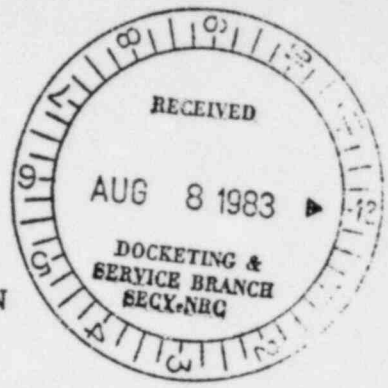

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	
PACIFIC GAS AND ELECTRIC COMPANY	Docket Nos. 50-275 50-323
(Diablo Canyon Nuclear Power Plant, Units No. 1 and 2)	(Reopened Hearing -- Design Quality Assurance)

REPLY OF LICENSEE PACIFIC GAS AND ELECTRIC COMPANY TO RESPONSE TO MOTION TO COMPEL ANSWERS TO INTERROGATORIES TO JOINT INTERVENORS

In their Response to Licensee's Motion to Compel, Joint Intervenors state that "first and foremost, the Joint Intervenors wish to emphasize that, contrary to PG&E's assertion, they are committed to complying with their obligations in the discovery process." Assuming, arguendo, the truth of this assertion, a review of their Response discloses a complete lack of understanding of those obligations. Discovery may be had of any matter not privileged which appears reasonably calculated to lead to the discovery of admissible evidence. 10 C.F.R. § 2.740(b)(1):

As noted in Licensee's Motion to Compel:

> "It is not proper for a party to ignore a discovery request. Interrogatories, for example, must either be answered or objected to in the time allowed. 10 CFR 2.740b(b). Objections may be accompanied by a motion for a "protective order" to modify or eliminate the obligation to respond, but the movant must establish "good cause" for issuing such an order. 10 CFR 2.740(c). And as in judicial practice, general objections do not provide that cause. Challenges to interrogatories must be
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> > 'specific enough so that the (tribunal) can understand in what way the interrogatories are claimed to be objectionable. General objections, such as the objection that the interrogatories will require the party to conduct research and compile data, or that they are unreasonably burdensome, oppressive, or vexatious, or that they seek information that is as easily available to the interrogating as to the interrogated party, or that they would cause annoyance, expense, and oppression to the objecting party without serving any purpose relevant to the action, or that they are duplicative of material already discovered through depositions, or that they are irrelevant and immaterial, or that they call for opinions and conclusions, are insufficient.' (Citing 4A Moore's Federal Practice (1980 ed), ¶33.27 (at pp. 33-25 and 33-152.)"

Pennsylvania Power and Light Company and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station Units 1 and 2), ALAB-613, 12 NRC 317, 322-323 (1980). Despite the foregoing principals, Joint Intervenors continue to adhere

to groundless objections and refuse to respond to legitimate discovery requests.

Interrogatory #1

Joint Intervenors' counsel now claim a rather elaborate "informer's privilege" as a basis for not answering Interrogatory #1. Interestingly enough, Licensee was not intending to seek any information concerning the subject informant or his information when the interrogatory was sent. At that time the information available to Licensee was that the informant was anonymous and that not even Joint Intervenors' counsel knew his identity. Further, his allegations had been seen in writing by Licensee and responded to in a May 4, 1983 meeting conducted by the NRC Staff. In fact, the interrogatory was drafted because the undersigned counsel had first hand knowledge that one of the individual intervenors had made a number of telephone calls to an engineer working for the Diablo Canyon Project asking that engineer if he would be willing to supply information which would assist the Joint Intervenors. Licensee simply wanted to know to what extent other such contacts had been made and what information, if any, had been solicited. We were also interested to know if the individual intervenor would admit to the known attempt of soliciting design information. Clearly such information is not in any way covered under any theory of "immunity."

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What is of paramount importance to Licensee is the information that Joint Intervenors have in their possession which concerns design quality assurance at Diablo Canyon. When framing the interrogatory, Licensee believed it was engaged in discovery leading to a hearing on design quality assurance at Diablo Canyon. Obviously any facts that Joint Intervenors possess on that subject are both relevant and discoverable. One might now ask why the contact referred to above which had nothing to do with immunity was not disclosed by Joint Intervenors or their counsel.

In support of their claim of informer's privilege, the Joint Intervenors assert the theory that a third-party who is not a governmental representative has standing to claim the informer's privilege. This theory has no basis in the Federal Common Law.

Rule 501 of the Federal Rules of Evidence provides:

> "Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decison, the privilege of a witness, person, government, State, or political subdivision thereof shall be

determined in accordance with State law."

The contours and exceptions of such privileges are clearly a matter of Federal Common Law; state-created principles or privileges do not control. In Re Pebsworth, 705 F.2d 261 (7th Cir. 1983). Despite the fact that under the California privilege cited by the Joint Intervenors, a third-party may claim the informants privilege, California law is not decisive because the action arises under Federal law. See Lora v. Board of Education of City of New York, 74 F.R.D. 565, (D.C.Ed.N.Y. 1977).

The Federal Common Law has no counterpart to the California privilege. In fact, the Federal privilege is very narrow. Only the identity of the informant is privileged; communications are not included except to the extent that disclosure would operate also to disclose the informer's identity. See Roviaro v. United States, 353 U.S. 53 (1957). 10 CFR § 2.790(a)(7).

This Board recognized in Houston Lighting and Power Company (South Texas Project, Units 1 and 2), ALAB 639, 13 NRC 469 (1981) that the Intervenors have no right to claim this privilege. In footnote 26, the majority commented upon the dissent's curiosity at the staff's failure to object to the Licensing Board's order compelling the Intervenors in that case to disclose their confidential

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sources to the applicant's counsel. As noted by the majority,

> "Nor is it a 'curiosity' as the dissent suggests (p. 483) that the staff did not object to disclosure of the private intervenor's informants; the informer's privilege inures only to law enforcement officials." Footnote 26 at 478.

Even the dissent in Houston Power, supra, recognized that the Intervenors there did not enjoy even a qualified informer's privilege to withhold disclosure of their informants. Based on the foregoing, it is clear that the informant's privilege is not available to a non-governmental individual or agency under the Federal Common Law. Therefore, this claim of privilege by the Joint Intervenors must fail.

In addition to the informer's privilege, the Joint Intervenors claimed the work product privilege with respect to Interrogatory #1. In their repsonse however, Joint Intervenors do not address Licensee's argument as to work product. As a result, it is assumed that they have abandoned their earlier claim of privilege.

Finally, the Joint Intervenors continue to assert the general objection to this Interrogatory that it is burdensome and calls for irrelevant evidence. As noted in Pennsylvania Power, supra, this type of general objection is insufficient to sustain an objection to a discovery request.

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In conclusion, Licensee, while not waiving its rights to such information, is not particularly interested in the identity of the so-called informant. What it is interested in, and entitled to, is any and all information concerning allegations of inadequate design at Diablo Canyon. If the Board believes the identity of the informant should not be revealed under the circumstances of this case, the Board can then review the information in possession of Joint Intervenors and distill and disseminate that information in such a fashion as to protect the informant's identity.

Interrogatories 5-7, 14-16, and 23

Contending that they have properly responded, the Joint Intervenors assert that they, like the Governor, will supplement their responses when they are ready. The problem with this position is that the continuing refusal to take any position on these matters destroys the Licensee's ability to prepare for a hearing. It is precisely this cavalier attitude, i.e., "we will tell you what we want to tell you when we want to tell it to you," that exemplifies their disregard for their discovery obligations.

Interrogatories 13-15

The responses of the Joint Intervenors to the Motion to Compel with respect to these Interrogatories borders on the ludicrous. In Response to Interrogatory #13, the Joint Intervenors disclaimed Mr. Hubbard as their

witness. In Response to Interrogaotry #18, the Joint Intervenors reclaim him as a witness and refer Licensee to the Governor's answers to Interrogatories.

Conclusion

Despite assertions to the contrary by Joint Intervenors, they have not met their discovery obligations. Their failure to do so literally destroys the Licensee's ability to adequately prepare for hearing. The only remedy for their failure is an order compelling the Joint Intervenors to immediately comply with the discovery requests or to otherwise be dismissed from this proceeding. It is respectfully requested that the Board enter its order accordingly.

Respectfully submitted,

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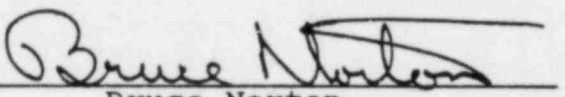
By 
Bruce Norton

DATED: August 4, 1983.