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NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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In the Matter of)
PACIFIC GAS AND ELECTRIC COMPANY)
(Diablo Canyon Nuclear Power)
Plant, Units 1 and 2))

Docket Nos. 50-275 O.L.
50-323 O.L.

APPLICANT'S REPLY TO JOINT INTERVENORS'
MOTION FOR PROTECTIVE ORDER

The Joint Intervenors, by motion dated June 11, 1984, have sought a protective order for Exhibits 3, 4, 7, and 10 which were submitted in support of their reply to PGandE and Staff responses to the Joint Intervenors' latest motion to reopen.

Neither the Staff nor PGandE were served copies of those exhibits, and the Joint Intervenors by their motion have requested that access to the substance of the exhibits be denied to the Staff and PGandE (JI motion pp. 5-6). It is PGandE's understanding that this Board has received such exhibits but in an edited form with the names of affiants and other identifying material removed. On receipt of the motion for a protective order, this Board issued an order

1503

1 requesting response to the motion and certain questions by
2 June 19, 1984.¹

3 I. DISCUSSION

4 Joint Intervenors' motion for a protective order
5 is predicated on two points. The first is that the informa-
6 tion given in each subject exhibit is conditioned by the
7 affiant that it not be released to the Staff or the Appli-
8 cant. The second is that the withholding of the substance
9 of the exhibits is necessary to protect the anonymity of the
10 affiants.²

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¹The order requested Staff and PGandE to answer the
13 following:

- 14 (1) What documents were served on the applicant and the
15 staff as joint intervenors' reply?
- 16 (2) If the same documents, in the same form, as those
17 served on the Appeal Board were received by the
18 applicant and the staff, is there any need for a
19 protective order?
- 20 (3) Is the Commission's policy statement of August 5, 1983,
21 48 Fed. Reg. 36,358, applicable to joint intervenors'
22 request for a protective order? If so, with what
23 result?
- 24 (4) If the Commission's policy statement is not applicable,
25 is the protective order sought by joint intervenors
26 appropriate in the circumstances presented?
- (5) If the protective order sought by joint intervenors is
not appropriate, is a less encompassing order suitable?

²Although Joint Intervenors claim the informers
privilege, this Board has previously acknowledged that the
privilege may be claimed only by the government. Houston
(Footnote Continued)

1 Joint Intervenors seek to reopen the record based
2 in part on new affidavits, the substance of which they seek
3 to keep from Applicant. Fundamental to the acceptance of
4 such affidavits as evidence upon which this Board may rely
5 is the underlying truthfulness and veracity of the affiants
6 and the factual basis for establishing that the affiants
7 possess the necessary expertise to offer opinion testimony.
8 By the requested terms of their motion for a protective
9 order, Joint Intervenors attempt to restrict this Board in
10 its function by not allowing the substance of the affidavits
11 from seeing the light of day. Such a process, if allowed,
12 would be extremely prejudicial to Applicant and approaches a
13 trial in absentia.³

14 _____
15 (Footnote Continued)

16 Lighting and Power Company (South Texas Project Units 1 and
17 2), ALAB-639, 13 NRC 469, (1981), footnote 26 at 478. See
18 Roviaro v. United States, 353 U.S. 53, 59 (1957). In this
case, rather than advancing the interest of the government
in its investigation of the truth, Joint Intervenors seek to
use the privilege to thwart such investigation.

19 ³With this unexamined evidence, Joint Intervenors claim
20 that a "cloud" hangs over the adequacy of the safety-related
21 design and construction at Diablo Canyon citing Commonwealth
22 Edison Company (Byron Nuclear Power Station Units 1 and 2)
23 ALAB 770. That case is distinguishable from the instant
24 proceeding. First, the "cloud" there was not
25 unsubstantiated claims which had not even been examined, but
rather the Licensing Board's findings made after hearing and
Staff determinations over a period of years. In this case,
Joint Intervenors seek to manufacture a "cloud" with
anonymous affidavits which they refuse to expose to
Applicant or Staff. The uncertainty that existed in Byron
was that which was the result of findings, not merely

(Footnote Continued)

1 As to the first point, every citizen has an
2 obligation to provide evidence, when necessary, to further
3 the system of justice. Consumers Power Company (Midland
4 Plant, Units 1 and 2) ALAB 764, Slip Opinion March 30, 1984.
5 Houston Lighting and Power Company (South Texas Project,
6 Units 1 and 2) ALAB 639, 13 NRC 469, 473 (1981). Wright v.
7 Jeep Corp., 547 F.Supp. 871, 875 (E.D. Mich. 1982). See
8 Branzburg v. Hayes, 408 U.S. 665, 688 (1972), Roviaro v.
9 United States, 353 U.S. 53, 59 (1957). Since every citizen
10 has such a duty which arises from his citizenship, he
11 cannot, on his own, condition his civic obligation. Thus,
12 affiants cannot tell this Board that they will give it
13 information only if the Board agrees, contrary to
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17 (Footnote Continued)
18 unsubstantiated allegations in support of a motion to
19 reopen. Second, this is not a case where there has not yet
20 been a hearing on the Applicant's verification program as
21 was the case in Byron. Here, an extensive hearing on Design
22 Quality Assurance and the adequacy of the verification
23 program which was established pursuant to Commission order,
24 has already been held. In Byron, Applicant argued that a
25 hearing was not necessary even while the verification
26 program was not complete. The Appeal Board remanded the
case to take evidence on the completed verification program.
Here the verification program has been completed and has
been already subjected to hearing. Finally, in Byron, the
Appeal Board found a hearing was necessary because one of
the principle deficiencies that existed was the established
absence of adequate certification procedures for quality
control personnel. Such fundamental absence of proper
certification is not present here.

1 requirements of law, not to relay it to a party whose rights
2 or duties are being litigated.⁴

3 As to the second point, Joint Intervenors claim
4 that because of inadequate editing of prior affidavits by
5 the NRC Staff, Applicant was able to identify three of the
6 anonymous allegeders. As to these three allegeders, they claim
7 in an unsupported allegation that, "Since February 16, all
8 three individuals have been laid off or suffered harassment
9 on-site" (6/7/84 Devine Aff. at 3). Curiously, the docu-
10 ments executed by the anonymous allegeders which disclosed
11 identifying material were not released to Applicant until
12 April 26, 1984. No person was laid off or harassed as a
13 result of his allegations (Exhibit 1, attached). As a part
14 of normal reductions of force, two of the three were laid
15 off earlier this year, but each was rehired by April 9,
16 1984, prior to the date of release of the affidavits to
17 Applicant. All three are currently employed at the site,
18 and there have been no reports of harassment by any of these
19 individuals from any source whatsoever. Consequently the
20

21 ⁴While GAP and Joint Intervenors may consider
22 themselves as chartered to ensure that the NRC satisfies its
23 statutory duties, they cannot sua sponte substitute
24 themselves for the governmental body which Congress charged
25 with the duty to regulate, investigate, and license nuclear
26 power plants. Consequently, the investigative arm of the
Commission, its staff, cannot be deprived of the substantive
information contained in Exhibits 4, 5, 7, and 10 or the
names of the informers.

1 pivotal grounds for the request for the protective order are
2 based, at best, a misleading affidavit.⁵

3 As acknowledged by this Board in the case of
4 Consumers Power Company (Midland Units 1 and 2) ALAB-764,
5 supra., the informer protection extends only to the identity
6 of the informer and not to the substance of the information
7 provided.⁶ See Roviaro v. United States, supra. at 60.

8 Applicant has no other means of access to the
9 allegations which are contained in Exhibits 3, 4, 7, and 10.
10 It is the substance of those allegations and not the identi-
11 ty of the allegers which is of importance to Applicant,
12 Staff, and this Board.

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15 ⁵This pivotal allegation should give the Board cause to
16 question the veracity and forthrightness of Joint
17 Intervenors' allegations. While the allegation in the
18 affidavit is that the three individuals were either laid off
19 or suffered harassment since February 16, 1984, it is clear
20 that the layoffs were not related to their affidavits and
21 that the individuals involved were even reemployed prior to
22 the release of their affidavits. It is also clear that
23 there is an absence of harassment as a result of their
24 allegations. Given such inclination to stretch the facts,
25 this Board must scrutinize all claims of Joint Intervenors.

26 ⁶As in the Consumers Power case ALAB 764 supra., there
is no issue of privilege involved here. Any confidentiality
that may have existed between Thomas Devine, affiant, and
the anonymous allegers was clearly breached when disclosure
was made to Joint Intervenors and their counsel. While
Thomas Devine has acted, in other matters, on behalf of
Mothers for Peace, one of the Joint Intervenors, he is not
counsel of record on behalf of all Joint Intervenors in this
action.

1 Accordingly, should the Board be able to determine
2 qualification of the affidavits, the Board should release
3 Exhibits 3, 4, 7, and 10 in the form they have without a
4 protective order.

5 II. RESPONSE TO BOARD CERTIFIED QUESTIONS

6 A. As indicated above, PGandE did not receive
7 Exhibits 3, 4, 7, and 10 with Joint Intervenors' reply. If,
8 in fact, it is the case that this Board received the exhib-
9 its without the names or other identifying material as
10 edited by anonymous allegers, it would appear that consis-
11 tent with protection of informers' interest, this Board
12 could release the substance of the exhibits to the Staff and
13 Applicant, and no protective order would be necessary.

14 B. Applicant does not see that the Commission
15 policy statement of August 5, 1983 (48 Fed.Reg. 36358),
16 applies since the subject information is not in the pos-
17 session of or originated by the Staff in its ongoing inves-
18 tigation or inspection.

19 C. The protective order sought by Joint
20 Intervenors far exceeds what is required to protect the
21 interest of the anonymous informants and if granted as
22 requested would prejudice Applicant and Staff and interfere
23 with the Board's obligation to ascertain the truth of the
24 matters placed before it.

25 E. As acknowledged by the Board in Consumer
26 Power Co. (Midland Units 1 and 2) ALAB 764 supra., a

1 protective order which provides for deletion of names and
2 other identifying material is appropriate for protection of
3 informers' interests.

4 Applicant would suggest, however, that the Board
5 should be presented with unedited versions of the Exhibits
6 in camera so that it can ascertain that the affidavits are,
7 in fact, of persons other than those who have previously
8 provided affidavits. Thereafter, upon qualification of the
9 affidavits, the Board should determine if the edited version
10 protects the informers identity or whether, on weighing of
11 the interests of the parties, a further modification should
12 be made prior to release to Staff and the Applicant.⁷

13 Alternatively, if the Board determines that the affidavits
14 cannot be accepted, then they should be rejected outright.

15 Applicant would like to point out that while Joint
16 Intervenors are seeking extraordinary relief from this
17 Board, they do not approach the Board with altogether "clean
18 hands." The allegations they submit, beyond being repeti-
19 tious, have been tortiously dragged through the licensing
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22 ⁷If Exhibits 4, 5, 7, and 10 contain new materials,
23 obviously Applicant should be afforded the opportunity to
24 respond since they constitute a new motion and not a reply
25 to Applicant's prior response to Joint Intervenor's Motion to
26 Reopen. Applicant is in the process of responding, inter
alia, to the new material contained in the June 11, 1984,
"Reply" of Joint Intervenors and will submit its responses
to the Board by June 29, 1984.

1 process over in excess of six months time. Affiant
2 Thomas Devine has stated under oath that "for the previous
3 seven months," he has "been conducting an investigation of
4 alleged illegal or improper practices at the Diablo Canyon
5 nuclear powerplant" (6/7/84 Devine Aff. at 1). It is not
6 inconceivable that Joint Intervenors and their associated
7 representatives would continue this pattern of conduct over
8 the next several months even though they have been inves-
9 tigating the matter for over at least six months. Applicant
10 would submit, therefore, that if Joint Intervenors seek
11 equity, they must do equity. That should certainly extend
12 to providing the substance of their claims.

13 III. CONCLUSION

14 Applicant submits that consistent with due process
15 and in the interest of fair play and justice, it is vitally
16 necessary that it have access to the substance Exhibits 3,
17 4, 7, and 10. Applicant requests that Exhibits 3, 4, 7, and
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1 10 be released to Staff and Applicant, or alternatively be
2 rejected by the Board if they fail to meet minimal
3 requirements for affidavits.

4 Respectfully submitted,

5 ROBERT OHLBACH
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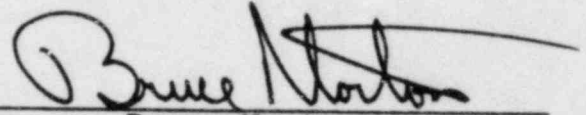
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23 Attorneys for
24 Pacific Gas and Electric Company

25 Dated: June 18, 1984

26 By


Bruce Norton

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of)

PACIFIC GAS AND ELECTRIC COMPANY)

(Diablo Canyon Nuclear Power)
Plant, Units 1 and 2))

Docket Nos. 50-275
50-323

(Construction Quality Assurance)

AFFIDAVIT OF D.A. Rockwell

STATE OF CALIFORNIA)

CITY & COUNTY OF SAN FRANCISCO)

ss

The above, being duly sworn, deposes and says:

I, D.A. Rockwell, am Special Projects Engineer for the Pacific Gas and Electric Company at the Diablo Canyon Nuclear Power Plant. In such capacity, I work directly with management of Pullman Power Products and the H.P. Foley Company who are contractors on site at the Diablo Canyon Nuclear Project. In such capacity I am informed of personnel shifts and force changes of each organization. I have caused that the employment files be reviewed of the three individuals who were identified in the May 17, 1984 submittal of PGandE: Mr. J. McDermott, Mr. T. O'Neal, and Mr. J. Phillips. I have also investigated the possibility of the existence of any claims of harassment made by any of these three individuals as a result of the affidavits. Contrary to the representation of Thomas Devine, no harassment or reprisal by PGandE or its contractors against any of the three individuals has resulted from their anonymous allegations.

Mr. J. McDermott was hired by Pullman on May 13, 1983. In a scheduled force reduction on January 13, 1984, Mr. McDermott was let go by Pullman. He was rehired by Pullman on April 9, 1984. He currently works for Pullman.

Mr. J. Phillips was originally hired by PTGC on March 31, 1983 and, as part of a scheduled force reduction, was let go on March 23, 1984. His ranking in March 1984 was 143 out of 147. Subsequent to his layoff by PTGC he was hired by Pullman on April 9, 1984. He currently works for Pullman.

Mr. T. O'Neal was hired by Pullman as a QC inspector on July 5, 1983 and currently is working for Pullman in that capacity.

The two individuals who were laid off were let go as a result of legitimate reduction of force, and not as the result of any allegation or affidavit they may have signed. Both were let go prior to April 26, 1984, the date when NRC first released the affidavits to PGandE.

Investigation has revealed no reports of harassment by any of these three individuals as a result of their allegations. There have been no reports to their supervisors. There have been no hot-line reports, and there have been no reports by union representatives regarding these individuals.

Mr. T. O'Neal did for the first time come to my office on June 12, 1984, the day after the Joint Intervenors motion was filed, to speak to me about his alleged quality concerns. He demanded my written response to his concerns.

He did not inform me of any physical threats, social harassment or reprisals of any kind resulting from his allegations.

Dated: June 19, 1984

D.A. Rockwell

Subscribed and sworn to
before me this 19th day
of June, 1984

Nancy J. Lemaster,
Notary Public in and for the
City and County of San Francisco
State of California.
My commission expires
April 14, 1986.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

In the Matter of)
)
PACIFIC GAS AND ELECTRIC COMPANY)
)
Diablo Canyon Nuclear Power Plant,)
Units 1 and 2)
)

'84 JUN 19 P12:28

Docket No. 50-275

Docket No. 50-323

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CERTIFICATE OF SERVICE

The foregoing document(s) of Pacific Gas and Electric Company has (have) been served today on the following by deposit in the United States mail, properly stamped and addressed:

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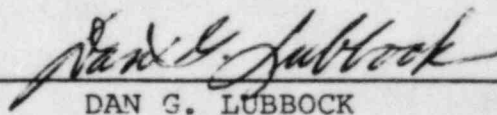
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Date: June 18, 1984

*Via Sky Courier Network


DAN G. LUBBOCK