

708
GRANTED
For the Appeal Board

C. Joan Sheemaker 7-31-84
Secretary to the Appeal Board

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY & LICENSING APPEAL BOARD

84 AUG -1 11:23

50-275-OL
50-323-OL

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

Docket Nos. 50-274 O.L.
50-323 O.L.

MOTION FOR LEAVE TO WITHDRAW
CONFIDENTIAL EXHIBIT PREVIOUSLY
FILED IN SUPPORT OF MOTION
TO AUGMENT OR, IN THE ALTERNATIVE,
TO REOPEN THE RECORD

The Joint Intervenors hereby move this Appeal Board for leave to withdraw a confidential exhibit previously served on the Board in support of their February 14, 1984 Motion to Augment or, in the Alternative, to Reopen the Record ("Motion to Augment") in this proceeding. As appears below, this motion is necessitated by the continuing refusal of the affiant to authorize the Joint Intervenors to release the affidavit to the NRC Staff or PGandE, despite this Board's orders directing such release.

BACKGROUND

On February 14, 1984, the Joint Intervenors filed a Motion to Augment or, in the Alternative, to Reopen the Record in this proceeding. Following various responses and supplementary filings, this Board, by Order dated May 23, 1984, invited the

8408060217 840730
PDR ADOCK 05000275
PDR

DS02

Joint Intervenors to submit a reply based on affidavits by qualified experts or persons having knowledge of the information on which the motion was based.

On June 11, 1984, the Joint Intervenors submitted a reply supported by ten exhibits, of which four -- Exhibits 3, 4, 7, and 10 -- were served only on the Board. The motion was accompanied by a Motion for Protective Order requesting this Board's permission to withhold Exhibits 3, 4, 7, and 10 from the other parties because the affiants had provided the information (affidavits and supporting documentation) only upon express assurances that their identities would not be divulged to PGandE. The motion for protective order was based on (1) past inadvertent disclosure by the NRC Staff of information that led to the loss of anonymity of previous confidential affiants, and (2) past incidents of harassment on-site following such inadvertent disclosure.

By Order dated June 28, 1984, the Board denied both the Motion to Augment and the Motion for Protective Order and directed the Joint Intervenors to serve Exhibits 3, 4, 7, and 10 on the NRC Staff and PGandE, apparently for purposes of any appeal by the Joint Intervenors of the denial of their Motion to Augment.

In response to the Board's Order, the Joint Intervenors sought to obtain authorization for release from the sources of Exhibits 3, 4, 7, and 10. Because the Motion to Augment had already been denied, those efforts proved unsuccessful, as the affiants refused the requested authorization, and the Joint Intervenors' counsel so informed this Board and all parties by letter dated July 17, 1984. The Joint Intervenors assumed in so

doing that, because the exhibits could not be served as directed, they would necessarily be disregarded for purposes of any appeal of the denial of their Motion to Augment.

On the morning of July 30, 1984, the Joint Intervenors' counsel was informed by a San Luis Obispo County newspaper reporter that this Board had issued an order on July 25, 1984 directing the Joint Intervenors to serve Exhibits 3, 4, 7, and 10 by no later than July 31, 1984 or sanctions would be imposed, including possible dismissal of the Joint Intervenors from this proceeding. Although the Joint Intervenors had not yet received such order,^{1/} they immediately attempted once again to obtain the essential authorization for release of the exhibits in light of the Board's most recent order.

As the Joint Intervenors' counsel informed the Board by telephone on July 30, 1984, one of the affiants -- the source of Exhibit 10 -- will not consent to release, notwithstanding the possibility of sanctions stated by the Board in its July 25 Order. Because, as an ethical matter, the Joint Intervenors cannot release the affidavit without the consent of the affiant, the Joint Intervenors immediately telephoned the Board and requested leave to withdraw the exhibit in question. The Chairman of this Board, through C. Jean Shoemaker, suggested that the instant Motion for Leave to Withdraw Confidential Exhibit be filed by in-hand delivery to the Board no later than July 31, 1984.

^{1/} The Board's July 25, 1984 Order was not received by the Joint Intervenors' counsel until the early afternoon of July 30, 1984.

DISCUSSION

By Express Mail today, the Joint Intervenors have served counsel for the NRC Staff and PGandE with copies of Exhibits 3, 4, and 7 to the Joint Intervenors' July 11, 1984 Reply, thus complying with this Board's July 25, 1984 Order as to those exhibits. However, as to Exhibit 10, the Joint Intervenors have been unable to obtain the affiant's consent to its release, and, consequently, the Joint Intervenors cannot comply with this Board's Order, despite their good faith desire and efforts to do so, without breaching the conditions under which the affidavit was initially provided. Consequently, in light of the affiant's continuing refusal, and in order to prevent any prejudice to the other parties, the Joint Intervenors wish affirmatively to withdraw Exhibit 10 from this proceeding, for purposes of the initial Motion to Augment, the appeal of this Board's denial of that motion, or any other purpose in this licensing proceeding.

The Joint Intervenors wish to emphasize that this motion and their prior failure to serve the withheld exhibits was in no way intended as willful disregard of the Board's prior order denying the motion for protective order, but was solely a result of their effort to comply with their ethical obligations based on the conditions under which the affidavits were obtained in the first instance. Because the Motion to Augment was itself denied by the Board, the affiants felt that there was no reason to risk possible on-the-job harassment or threats as a result of release of the exhibits; consequently, they refused to authorize the Joint Intervenors to serve them as directed by the Board. The Joint Intervenors' July 17, 1984 letter to the Board was intended to

notify the Board and all parties that the Joint Intervenors had been unsuccessful in their efforts to obtain consent for release of the exhibits. Since that time, the Joint Intervenors have not sought to pursue the matter further, believing that even without the four affidavits the record was sufficient to justify a petition to the Commission for hearing on ALAB-775.

To comply with the Board's most recent order, however, three of the exhibits have now been served. The author of Exhibit 10 has not consented to its release, thus necessitating this application to the Board for leave to withdraw the exhibit in its entirety. Accordingly, the Joint Intervenors request that this Motion for Leave to Withdraw Exhibit 10 be granted.

Dated: July 30, 1984

Respectfully submitted,

JOEL R. REYNOLDS, ESQ.
ETHAN P. SCHULMAN, ESQ.
ERIC HAVIAN, ESQ.
JOHN R. PHILLIPS, ESQ.
Center for Law in the
Public Interest
10951 W. Pico Boulevard
Los Angeles, CA 90064
(213) 470-3000

DAVID S. FLEISCHAKER, ESQ.
P.O. Box 1178
Oklahoma City, OK 73101

By


JOEL R. REYNOLDS

Attorneys for Joint Intervenors

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY & LICENSING APPEAL BOARD

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

Docket Nos. 50-274 O.L.
50-323 O.L.

DECLARATION OF JOEL R. REYNOLDS
IN SUPPORT OF
MOTION FOR LEAVE TO WITHDRAW
CONFIDENTIAL EXHIBIT PREVIOUSLY
FILED IN SUPPORT OF MOTION
TO AUGMENT OR, IN THE ALTERNATIVE,
TO REOPEN THE RECORD

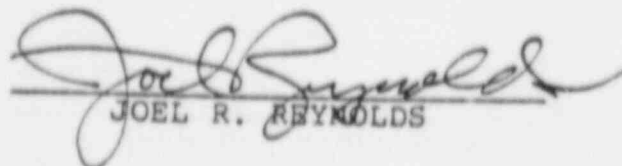
I, Joel R. Reynolds, declare and say:

1. I am one of the attorneys for the Joint Intervenors in this proceeding.

2. I have read the attached Motion for Leave to Withdraw Confidential Exhibit Previously Filed in Support of Motion to Augment or, in the Alternative, to Reopen the Record. The facts as stated therein are true and correct to the best of my knowledge and belief.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 30th day of July, 1984, at Los Angeles, California.


JOEL R. REYNOLDS