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MEMORANDUM FOR: Chairman Palladino
Commissioner Gilinsky
Commissioner Roberts
Commissioner Asselstine
Commissioner Bernthal

FROM: William J. Dircks
Executive Director for Operations

SUBJECT: DIABLO CANYON

As requested in the closed Commission Meeting on Diablo Canyon of Thursday, November 3, 1983, enclosed is a staff analysis of the reportability of the Nuclear Service Corporation's 1977 audit of Pullman Power Products' quality assurance program at Diablo Canyon. Since this matter involves enforcement issues, the enclosure should not be publicly disclosed.

(Signed) Jack W. Roe

William J. Dircks
Executive Director for Operations

Enclosure:
As stated

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NRC STAFF VIEWS ON REPORTABILITY OF 1977 NSC AUDIT OF PULLMAN POWER
PRODUCTS' QUALITY ASSURANCE PROGRAM AT DIABLO CANYON

On October 20, 1983, the persons who are the joint intervenors in the Diablo Canyon licensing proceeding filed a request to revoke or, alternatively, to continue the suspension of, the low power licenses for Diablo Canyon. The joint intervenors' request rests on the alleged failure of Pacific Gas and Electric Company (PG&E or the licensee) to report the existence of a 1977 audit performed by Nuclear Services Corporation (NSC) of Pullman Power Products' quality assurance program for Pullman's activities as the principal piping contractor at Diablo Canyon. PG&E opposed the joint intervenors' request in a response dated October 25, 1983. As described in the staff's memorandum of November 3rd to the Commission, the staff believes that the joint intervenors' request is best treated as a request for action under 10 CFR 2.206, because the request to revoke does not fall within the scope of any existing proceeding on Diablo Canyon. The purpose of this memorandum is to provide the Commission with the staff's initial review of the question of the NSC audit's reportability under the Commission's reporting standards.

Factual Background

In July 1977 PG&E requested Pullman to have performed an independent audit of Pullman's work at Diablo Canyon. PG&E concurred in Pullman's

selection of NSC to perform the audit.^{1/} NSC conducted the audit between August 22 and September 20, 1977, and submitted its report to Pullman on October 24, 1977. Apparently, PG&E did not receive a copy of the NSC audit until February 1978 when Pullman provided a draft of its review of the audit and the NSC audit report to PG&E.^{2/} Pullman submitted the final report of its review of the NSC audit to PG&E on April 11, 1978.^{3/} PG&E undertook a review of the NSC audit and an audit of Pullman's actual installation work. This audit by PG&E was conducted from April 2 through June 1, 1978, and resulted in a report to J. D. Worthington, PG&E Executive Vice President, on June 13, 1978, and a separate report to R. S. Bain, PG&E Manager of Station Construction on June 16, 1978.^{4/} While PG&E concluded generally that, contrary to the NSC audit, Pullman met applicable requirements, PG&E opened two non-conformance reports and four minor variation reports to initiate corrective actions as the result of its review.

1/ See Affidavit of Russell P. Wischow, at 1-2, attached to PG&E's Answer to Joint Intervenors' Supplement to Motion to Reopen the Record on the Issue of Construction Quality Assurance (Sept. 21, 1983).

2/ Id. at 2-3.

3/ The Pullman report is attached to the PG&E filing referenced in footnote 1.

4/ These reports are attached to the PG&E filing referenced in footnote 1.

Quality assurance was being considered as an issue in the Diablo Canyon operating licensing proceeding by the Atomic Safety and Licensing Board at its own initiative. On May 25, 1977, the board had denied the joint intervenors' motion of April 29, 1977, to add a quality assurance contention to the proceeding. At the same time, however, the board directed PG&E and the staff to present evidence on the Diablo Canyon quality assurance program. The hearing was conducted on October 18 and 19, 1977, at which Russell Wischow, the Director of the Quality Assurance Department, testified on behalf of PG&E. A panel of three witnesses from Region V and NRR testified on behalf of the staff. Mr. Wischow described the quality assurance program and testified that the program had generally been effective in detecting defects and in ensuring their correction. The staff testified that implementation of the Diablo Canyon quality assurance program had been adequate. Counsel for the joint intervenors declined to cross-examine either Mr. Wischow or the staff's witnesses. PG&E filed its proposed findings of fact and conclusions of law on the quality assurance issue on November 11, 1977, and the joint intervenors opposed those findings on February 28, 1978. PG&E replied to the joint intervenors' opposition on March 14, 1978, reiterating its view that the quality assurance program was acceptable. The staff filed its proposed findings on March 17, 1978. The board did not render its decision on quality assurance until it issued a Partial Initial Decision in 1981. The board found that the quality assurance program for the design and construction phase of Diablo Canyon complied with 10 CFR Part 50, Appendix B, and that implementation had been acceptable. LBP-81-21, 14 NRC 107, 116 (1981).

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Reportability of the NSC Audit

Under 10 CFR 50.55(e), the holder of a construction permit is required to

notify the Commission of each deficiency found in design and construction, which, were it to have remained uncorrected, could have affected adversely the safety of operations of the nuclear power plant at any time throughout the expected lifetime of the plant, and which represents:

(i) A significant breakdown in any portion of the quality assurance program conducted in accordance with the requirements of Appendix B to this part....

This regulation does not require the reporting of every deficiency in design or construction that could ultimately affect the safety of plant operations. Rather, the deficiency must be significant. In determining whether a particular deficiency represents a significant breakdown in the quality assurance program or another of the types of the significant deficiencies under § 50.55(e), the regulation permits the licensee reasonable latitude in determining whether the deficiency is significant.

Although the timeliness of its evaluation could have been improved, PG&E's failure to make a report under § 50.55(e) does not appear unreasonable under the circumstances here. When PG&E received the NSC audit in 1978, it received the audit with Pullman's own review of it. Although NSC found substantial deficiencies in Pullman's quality assurance program, Pullman's review of the audit determined that the findings did not substantiate major deficiencies in Pullman's quality assurance program. Moreover, NSC had not reviewed or identified any

hardware or installation deficiencies in Pullman's work, though such a review had been intended to be within the scope of the NSC audit. PG&E conducted a review of the NSC audit and Pullman's response as well as of the as-built condition of components and supports fabricated and installed by Pullman. PG&E concluded that Pullman's quality assurance program was generally adequate and that Pullman's response to the NSC audit was generally correct. PG&E found what it termed several minor discrepancies in installation for which it initiated corrective action.

Based on the staff's review of the NSC audit, Pullman's response, PG&E's review and pertinent inspection reports during the period, the staff does not believe that the Pullman quality assurance program suffered a significant breakdown. Quality assurance deficiencies that did occur appear to have been identified and resolved. The staff has not attempted to reconcile each finding of the NSC audit but has looked to determine that the licensee has addressed and resolved the findings of the NSC audit. An inspection was conducted in October 1983 to ensure that the licensee had taken appropriate actions with respect to three areas identified in the NSC audit. The inspection determined that the licensee's actions were acceptable. See Region V Inspection Report Nos. 50-275/83-34 and 50-323/83-24 (Oct. 26,

1983). 5/ Thus, based on the staff's review of the circumstances, it appears that PG&E's actions on reviewing and resolving the NSC audit were reasonable and did not require reporting under 10 CFR 50.55(e). 6/

Apart from 10 CFR 50.55(e), PG&E may have had a reporting obligation under either its board notification responsibilities or under the "full disclosure" doctrine that has developed in NRC case law interpreting section 186 of the Atomic Energy Act. Since the Appeal Board's decision in Duke Power Co. (McGuire Nuclear Station, Units 1 & 2), ALAB-143, C AEC 623, 625-26 (1973), parties to NRC adjudicatory proceedings have been held to an absolute obligation to alert NRC adjudicatory tribunals

5/ This inspection was initiated after the NSC audit was specifically brought to the attention of the staff in September 1983. Although no one on the staff recalls specifically whether the NSC audit was reviewed by NRC inspectors in 1977 or 1978, an inspector may have seen the audit or at least the PG&E report of its review of the NSC audit during a July 1978 inspection. The inspection report only indicates that a number of PG&E quality assurance audits performed between May 25 and July 6, 1978, had been examined, the same time frame within which the PG&E review of the NSC audit was issued. See NRC Region V Inspection Report Nos. 50-275/78-10 & 50-323/78-10, at 10 (July 25-26, 1978), attached to the PG&E filing referenced in footnote 1.

6/ In response to the joint intervenor's supplemental motion to reopen, the staff has taken this same position that the NSC audit report did not reveal a major breakdown in the Pullman quality assurance program. See NRC Staff's Response to Joint Intervenors' Supplement to Motion to Reopen the Record on Construction Quality Assurance (Oct. 6, 1983) and attached Affidavit of Gonzalo H. Hernandez, Jr. (Oct. 4, 1983). Although its opinion has not been released, the Appeal Board denied the joint intervenors' motion to reopen on October 24, 1983.

to new information that is relevant and material to the matters being adjudicated. 7/ In holding that an omission of material information could constitute a material false statement under section 186 of the Atomic Energy Act, the Commission has imposed an obligation on licensees and applicants to ensure that relevant and material information is promptly furnished to the Commission. Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), CLI-76-22, 4 NRC 480 (1976), aff'd sub nom. Virginia Electric & Power Co. v. NRC, 571 F.2d 1289 (4th Cir. 1978).

Materiality of an omission or statement depends on "the context in which information appears and the stage of the licensing process involved" and "whether information has a natural tendency or capability to influence a reasonable agency expert." Id., 4 NRC at 491. Put another way, "materiality should be judged by whether a reasonable staff member should consider the information in question in doing his job." Id. at 486. The Commission has noted that "[a]t the hearing stage...where agency decisionmaking is imminent, arguably relevant data must be promptly furnished if the agency is to perform its function." Id. at 488. It should also be recalled that scienter, i.e., intent to mislead or to withhold information, is not a prerequisite to the finding of a material false statement under the Commission's interpretation of section 186. 8/

7/ See also Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1-3), ALAB-677, 15 NRC 1387, 1394 (1982).

8/ See VEPCO, supra, 4 NRC at 486-87. However, the degree of carelessness or intent in failing to provide material information is a pertinent consideration in determining whether and what enforcement action is appropriate for a given material false statement.

Under the circumstances here, PG&E can be said to have had an obligation to submit the NSC audit before it had reached the conclusion that the NSC audit had not revealed significant deficiencies in Pullman's quality assurance program. ^{9/} The obligation to report the NSC audit would have been triggered primarily by the fact that the board had held a hearing to develop a record on quality assurance in the operating license proceeding. Although the board had determined sua sponte to receive evidence on quality assurance, that fact does not in itself absolve the licensee from any reporting obligation. PG&E had testified on October 18, 1977, that its quality assurance program, including that of its contractors, was sufficient to ensure adequate design and construction of the Diablo Canyon plant. Within a few days, Pullman, PG&E's prime piping contractor, received the NSC audit report which on its face suggested serious inadequacies in Pullman's quality assurance program. Thus, the audit's findings would appear to conflict with the testimony of PG&E which portrayed an adequate, effective quality assurance program. Although PG&E determined ultimately that the NSC audit had not detected in fact a significant quality assurance breakdown, PG&E did not make that determination until June 1978. Prior to June, the parties had filed proposed findings on quality assurance, and no decision had been reached on the quality assurance issue. Given the pendency of the quality assurance issue before the board,

^{9/} This may be an instance in which the failure to provide information would constitute a failure to meet the obligation to keep the Boards informed and a material false statement by omission. Although the obligations may be derived from different sources, the obligations under the Board notification policy and under section 186 are very similar. Moreover, two of the omissions for which the applicant was held liable in VEPCO were based upon the applicant's failure to adduce evidence before the Licensing Board. See LBP-75-54, 2 NRC 498, 532-33 (1975).

PG&E should have provided the NSC audit under the existing reporting standards. The audit was reportable not because it was an audit, but because the audit report appeared to contain more significant findings than might be expected of a typical audit and these findings appeared to contradict the record recently developed in the operating license proceeding.

Although PG&E itself apparently did not have the NSC audit until February 1978, this fact alone would not absolve PG&E from any reporting responsibility. In VEPCO, the Commission held that scienter was not element of a material false statement under Section 186 and the licensee was held chargeable with the knowledge of information in the possession of its contractors and consultants. See VEPCO, supra, CLI-76-22, 4 NRC at 486; LBP-75-54, 2 NRC 498, 504-06, 523 (1975); cf. 10 CFR Part 50, Appendix B, Criterion I; Atlantic Research Corp., CLI-80-7, 11 NRC 413, 421-22, 424 (1980). In all events, PG&E did receive the NSC audit in February 1978 with Pullman's draft response. Although PG&E would ultimately determine that the NSC audit did not reveal significant quality assurance deficiencies, it should have reported the NSC audit when it received it, rather than wait to complete its review. At best, the status of the audit was indeterminate when PG&E received it, but, in light of the potential conflict between its earlier testimony and the audit's findings, PG&E should have submitted the NSC audit report under Commission reporting standards. In other instances, licensees and applicants have been expected

to provide arguably material information even where materiality is uncertain. 10/

One could argue that, for purposes of reporting construction deficiencies, the Commission has established a specific reporting threshold in 10 CFR 50.55(e), which requires only the reporting of significant deficiencies determined by the licensee's own evaluation. Nonetheless, the Commission has imposed distinct reporting obligations through the doctrines developed concerning board notification responsibilities and disclosure under section 186 of the Atomic Energy Act. While 10 CFR 50.55(e) establishes a reporting standard for most instances in which construction deficiencies are identified, licensees have an obligation under these other doctrines to report information not otherwise reportable under 10 CFR 50.55(e), particularly in those circumstances that a particular matter has been subject to adjudication before an NRC tribunal.

10/ Compare Duke Power Co., supra, 6 AEC at 625 n.15, with VEPCO, supra, LBP-75-54, 2 NRC at 523. See supra note 9.

Conclusion

These circumstances pose a close question on the issue of reportability of arguably material data to the NRC. We recognize that the Commission is more sensitive to reporting issues today. However, the standards applied in the foregoing analyses were in place in 1977, though VEPCO was pending on appeal before the Fourth Circuit Court of Appeals. On balance, the staff believes that the NSC audit should have been reported.