February 23, 1981

SECY-81-115

ADJUDICATORY ISSUE
(Commission Meeting)

FOR: The Commissioners

FROM: Leonard Bickwit, Jr.
General Counsel

SUBJECT: DIABLO CANYON PREHEARING CONFERENCE ORDER

DISCUSSION: On February 17, 1981, the Atomic Safety and Licensing Board issued a Prehearing Conference Order addressing applicant Pacific Gas and Electric's motion seeking fuel loading and low power testing authorization and, to a lesser degree, Joint Intervenors' motion to reopen full power hearings and Governor Brown's request to participate on several subjects.

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SECY NOTE: This paper, which is currently scheduled for discussion at a closed Commission meeting at 10:00 a.m. on Wednesday, February 25, is identical to Advance copies which were distributed to Commissioners on February 23.

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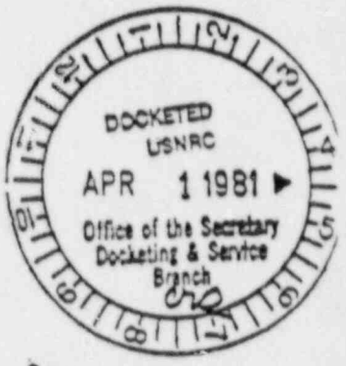

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COMMISSIONERS:

Joseph M. Hendrie, Chairman
Victor Gilinsky
Peter A. Bradford
John F. Ahearne

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)	)	

ORDER

CLI-81-5

The Commission has reviewed the Atomic Safety and Licensing Board's Prehearing Conference Order dated February 17, 1981, as well as the underlying papers and oral argument, and determinined that additional Commission guidance, consistent with its Revised Statement of Policy, CLI-80-42, 12 NRC ___ (1980), needs to be provided on litigation of Three Mile Island (TMI) accident related issues in licensing proceedings. The Commission recognizes that this guidance could lead to reconsideration of some of the various rulings contained in the February 17, 1981 Order. In providing this guidance the Commission is exercising its inherent supervisory

authority over pending adjudications. 1/ See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503 (1977).

1. The Board Should Rule Promptly on Motions for Fuel Loading and Low Power Testing

Pursuant to 10 CFR 50.57(c), the filing of a motion for a partial initial decision on fuel loading and low power testing requires an initial determination by the Licensing Board on whether the evidentiary record compiled to that point is adequate for such a partial decision. 10 CFR 50.57(c) does not generally contemplate that a new evidentiary record, based on litigation of new contentions, would be compiled on the motion for fuel loading and low power testing. When the record has been closed but motions to reopen have been filed, the Licensing Board should decide whether the record must be reopened for new evidence directly relevant to the fuel loading and low power licensing request. Decisions on full power issues associated with the motion to reopen could be postponed until later.

2. The Record Should Not Be Reopened Absent a Showing that Significant New Evidence Which Would Affect the Decision Is Available

As we stated in the Revised Policy Statement, where the evidentiary record on safety issues has been closed,

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1/ The Commission is aware of the various participants' requests for certification or directed certification to the Commission regarding the February 17, 1981 Prehearing Conference Order. These motions appealing an interlocutory order are not provided for in the Commission's Rules of Practice and are accordingly denied. 10 CFR 2.730(f). In issuing this Order the Commission is exercising its authority sua sponte. The Union of Concerned Scientists' Request to Participate as Amicus Curiae is similarly denied.

the record should not be reopened on TMI-related issues relating to either low or full power absent a showing, by the moving party, of "significant new evidence not included in the record, that materially affects the decision." This is in accord with longstanding Commission practice. E.g. Kansas Gas & Electric Co., et al. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978). We emphasize that bare allegations or simple submission of new contentions is not sufficient. Only significant new evidence requires reopening. Of course, in moving to reopen, a party need not supply written testimony of independent experts, but is free to rely on admissions and statements from applicant and NRC staff and official NRC documents or other documentary evidence.

3. Where A Party Can Adduce Significant New Evidence That an NRC Regulation Would Be Violated by Plant Operation, that Contention Should Be Admitted Notwithstanding the Fact that this Matter Is Not Addressed in NUREG-0737 and 0694

Parties are generally free to raise issues of compliance with NRC regulations, subject to 10 CFR 2.714 specificity and lateness requirements, where applicable, and standards for reopening records, where applicable. This holds true for TMI-related issues, and nothing in the Revised Policy Statement affects this. Thus, if a party comes forward on a timely basis with significant new TMI-related evidence indicating that an NRC safety regulation would be violated by plant operation, we believe that the record should be reopened notwithstanding that the noncompliance item is not

discussed in NUREG-0737 and 0694. However, the parties are required to make the initial case that significant new evidence is available, not merely make claims to that effect.

4. Procedures for Arguing that there is Insufficient Protection to the Public Despite Compliance with All NRC Regulations

Where the new evidence raises no issue of compliance but rather questions whether there is adequate protection despite compliance with all applicable regulations, a party has two procedural options under the Revised Statement of Policy. First, a party may challenge the sufficiency of an item in the NUREG documents. However, the scope of the inquiry under this option is limited to the particular safety concerns that prompted the specific "requirements" in NUREG-0694 and 0737. What we had in mind was allowing a party to focus on the same safety concern that formed the basis for the NUREG requirement and litigate the issue of whether the NUREG "requirement" is a sufficient response to that concern. 2/ Contentions which address a safety concern

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2/ For example, the Item I.A.1.3 of NUREG-0737, which deals with shift manning and imposes additional requirements above and beyond 10 CFR 50.54(k), deals with the safety concern that there must be adequate expertise in the control room at all times to cope with any accident or unexpected event. The concern does not relate to the general design of the control room or to the need for specific control room equipment. Thus, a contention which purports to challenge the sufficiency of the shift manning requirement would have to be based on the argument that this requirement was inadequate to deal with control room staffing, and a challenge to Item I.A.1.3 which focused on control room design and equipment would not be permissible.

not considered in NUREG-0694 and 0737 shall not be entertained as challenges to the sufficiency of those requirements. Second, where the contention or new evidence cannot be associated with a safety concern identified by NUREG-0694 or 0737, 10 CFR 2.758 may be used to bring the matter to the Commission's attention without prior litigation on the merits. In this situation, a party must first make a prima facie case to the Board that application of a given rule in this particular proceeding would not serve the purpose for which that rule was adopted. If the party is able to make this case, the Commission will determine whether that rule will be waived or an exception made from its requirements in that case.

We note that quite apart from the procedures of 10 CFR 2.758, parties are always free to bring to the attention of the Commission any matter within its jurisdiction. This course would be available to a party even where a Board had ruled that the party had not made the prima facie case required by 10 CFR 2.758. In such cases, the Commission is under no obligation to respond to the matter.

In addition, of course, the specificity and lateness requirement of 10 CFR 2.714 must be satisfied, where applicable, and the standards for reopening records must be satisfied, where applicable. Thus, to have a late filed contention admitted, the following factors must be considered:

(i) Good cause, if any, for failure to file on time.

(ii) The availability of other means whereby the the petitioner's interest will be protected.

(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

(iv) The extent to which the petitioner's interest will be represented by existing parties.

(v) The extent to which the petitioner's participation will broaden the issue or delay the proceeding.

In addition, the proponent of reopening the record must present significant new information, a requirement which could be satisfied by reference to new information in NUREG-0737. Finally, it must be shown that the new information would have caused a different result had it been considered originally.

It is so ORDERED.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, D.C.
the 1st day of April, 1981.