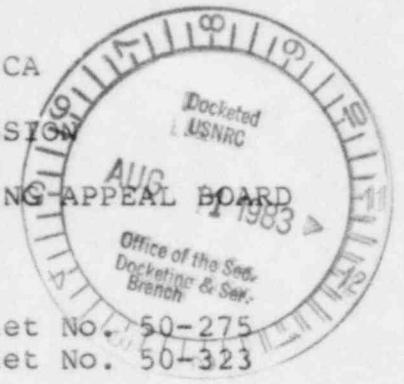
UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD



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

RESPONSE OF GOVERNOR DEUKMEJIAN TO MOTION OF APPLICANT PACIFIC GAS AND ELECTRIC COMPANY TO COMPEL DOCUMENT PRODUCTION

INTRODUCTION

On June 10, 1983, PG&E served a request to produce documents on the Governor, and the Governor responded by mail on July 15, 1983, objecting to some requests and fulfilling others. On July 20, 1983, PG&E served a "Motion to Compel Production of Documents," which the Governor hereby answers.

As a preliminary matter, the Governor wishes to reiterate a statement made on the record at the July 22, 1983 scheduling conference, regarding documents requested by PG&E that were written or acquired prior to Governor Deukmejian's entry into office on January 3, 1983. In the Governor's original response to PG&E's request to produce documents, it was stated that the response was limited to documents "presently in the possession of the current administration, its counsel, and their consultants." By this statement it was meant that no effort has

been made to regain any documents that previous administration members took with them when they left office or that were not in identifiable files. All identifiable documents possessed by the current administration, including those in files turned over by past counsel and those in the files of current consultants were considered as available in responding to the documents production request.

The responses to particular requests follow.

PRODUCTION REQUESTS

Requests 1, 2, 5 and 6

Requests for Production Nos. 1, 2, 5 and that portion of number 6 that requests notes and meeting minutes were and are objected to on grounds that they call for the production of work product, and as such are privileged from discovery under 10 CFR, section 2.740(b)(2). These requests call for production of meeting minutes, notes, document summaries, studies and analyses done by oral direction of counsel for litigation purposes.

In its motion to compel, PG&E asserts that the work product privilege claimed was not properly invoked and cannot be properly evaluated. PG&E insists that the documents whose production is objected to must be listed and described in order for the validity of the claim of privilege to be evaluated.

As to these particular requests, PG&E's argument is mistaken. A listing and detailed description of the documents is not necessary to evaluate the claim of privilege; rather, the request itself describes the documents quite fully enough to

allow the board to determine that they are work product and immune from discovery.

Request 1

PG&E has, in these requests, quite clearly and baldly asked for material that represents the mental impressions, opinions, and conclusions of counsel, or of counsel's agents. Request No. 1 asks for all meeting notes taken by the Governor's representatives at meetings involving the NRC, PG&E, and/or the IDVP. As this board well knows, such meetings are open and each could be and is attended by PG&E, if the facts presented at such meetings were sought by PG&E. Transcripts of many such meetings are made. Certainly, PG&E has had full access to the factual content of all such meetings, and does not need to seek the Governor's counsel's meeting notes to find it. Clearly, what is being sought by this request is not facts, but rather the opinions and impressions of the notetaker on what was said and what transpired. Under the NRC Rules of Practice, such mental impressions, opinions, and conclusions are clearly and explicitly protected from discovery.

Request 2

Similarly, Request No. 2 asks for certain Diablo Canyon documents prepared by the NRC, PG&E, or the IDVP, having marginal notes on them, and for any notes or writings discussing such documents. Again, the factual contents of the NRC, PG&E, and IDVP documents in question are perfectly available to PG&E, since it regularly receives some of these documents and produced the

rest. It is the marginal notes of counsel and their consultants written on the documents, and the summaries and notes written about the documents, that PG&E seeks, and it is precisely that material that is work product and immune from discovery. It is plain that this is precisely the type of discovery forbidden by the work product rule. As is stated in Hickman v. Taylor (1946) 329 U.S. 495, 510:

> "Here is simply an attempt, without purported necessity or justification, to secure . . . private memoranda . . . prepared or formed by an adverse party's counsel in the course of his legal duties. . . not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney."

It is precisely this sort of intrusion into the minds of counsel and counsel's agents that PG&E makes, without any showing of necessity (and indeed, no showing could be made).

PG&E argues that these marginally noted documents must be listed and described in order for the claim of privilege to be evaluated. This is not correct. As with the request for meeting notes, the production request itself describes the documents well enough to permit evaluation of the work product privilege asserted. The request asks for all documents concerning design or design quality assurance at Diablo Canyon, prepared by PG&E, the IDVP, or the NRC, which documents have notes made on them, and for any writings discussing those documents. The category of all Diablo Canyon documents dealing with design or design quality

assurance, and prepared by the designated authors, is a class of documents known to all participants in the case. All that the Governor could add would be a list of those documents in that class that have notes on them, or that have been summarized or discussed in writing. Such an exercise would not make the factual content of the documents any more available to PG&E than it is now, and would only serve to inform PG&E as to what documents opposing counsel considers most worthy of notes, summaries, and discussion. Such a list would, in short, serve only to reveal the thought processes of counsel in this case, in violation of the Commission's own Rules of Practice. PG&E is not entitled to such.

Request 5

Request No. 5 seeks correspondence between Mr. Hubbard and Dr. Roesett, two consultants employed by the Governor, and notes of any meetings between them, concerning Diablo Canyon's design. The previous objection to this request is renewed. That objection made clear that any meeting notes were made in meetings with counsel, and that they reflect the mental impressions, legal theories, opinions and conclusions of the notetakers, who were both counsel and the consultants. PG&E also insists that these documents be listed and described, asserting that the claim of work product privilege cannot be properly evaluated without such a list. This is not correct. The only further information that could be added by the listing and description of such notes is the dates of such meetings, the general subject matter of the

meetings, and the identity of each notetaker. Such information is not needed to evaluate the claim of work product protection for personal meeting notes, which are clearly protected.

Without waiving its objection in any way, and solely as an accomodation to PG&E, the Governor will state that no correspondence has passed between Mr. Hubbard (or his associates) and Dr. Roesett save for the transmission of copies of some of the documents requested and objected to in Request No. 1.

Request 6

The portion of Request No. 6 that asks for notes or meeting minutes is again objected to for the reasons discussed above. Identification of the individual members of a class of documents should not be required and would not be helpful when it is apparent that the entire class of documents is protected, and so it is here with personal notes and meeting minutes.

Request Nos. 3, 4 and 6

These requests ask for all calculations, analyses, computer programs or outputs, or other writings or documents relating to design or design quality that have been prepared or reviewed by the Governor, his counsel or his consultants.

These requests were objected to previously as seeking material prepared by counsel or at counsel's direction for litigation, and containing the mental impressions, opinions, and conclusions of the authors. That objection is renewed.

The studies and reviews PG&E has requested are plainly work product, since they were performed by counsel as preparation

for trial, or were performed by counsel's consultants solely for use of counsel in preparing for trial. Such trial preparation materials are the essence of work product, and are unconditionally protected from disclosure. (Fed. R. Civ. Proc., Rule 26(b)(3), Upjohn Co. v. United States (1981) 449 U.S. 383, 401.)

Further, a detailed list and description of the documents is equally as objectionable. In Peterson v. United States (1971) 52 FR.D. 317, 320, it is stated that:

> "Discovery of a detailed description of the contents of documents . . . is equivalent to the discovery of the documents themselves."

Analogously, if the identity, date, and description of every review or study by or for counsel were set forth, an opposing attorney would have little difficulty in determining what issues the Governor has considered and then dropped, where the greatest resources are being devoted, and what materials and issues counsel considers most vital and which least. In short, opposing counsel could fairly readily determine the thought processes and the course of preparation for litigation of the Governor's counsel. Such a glimpse into the mind of counsel is forbidden by the work product rule.

For similar reasons, any listing of these protected documents is also impermissible, for it would also reveal the course of attorneys' preparation for trial, identifying the priority counsel has assigned to various issues. Such a "pattern

of investigation" is protected by the work product privilege and is undiscoverable. It should not be subject to compulsion. (In re Grand Jury Subpoena (6th Cir. 1980) 622 F.2d 933, 935; James Julian, Inc. v. Raytheon Co. (D. Del. 1982) 93 F.R.D. 138, 144.)

CONCLUSION

PG&E has requested a vast array of materials that, under PG&E's own descriptions, are work product and immune from discovery. Until and unless PG&E makes the showing of necessity required by the Commission's Rules of Practice, 10 CFR 2.740(b)(2), its motion to compel production of these materials should be denied.

DATED:

Respectfully submitted,

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PACIFIC GAS AND ELECTRIC COMPANY	)	Docket Nos. 50-275 O.L. 50-323 O.L.
(Diablo Canyon Nuclear Power Plant, Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused copies of the foregoing "Response of Governor Deukmejian to Motion of Applicant Pacific Gas & Electric Company to Compel Document Production" served on the following by U.S. Mail, first class, postage prepaid.

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