



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

PDR

August 12, 1985

50-275
50-323

The Honorable Edward J. Markey, Chairman
Subcommittee on Energy Conservation and Power
Committee on Energy and Commerce
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

At the July 10, 1985 Subcommittee hearing on Diablo Canyon, NRC was requested to forward a report to you regarding errors in the Subcommittee staff's analysis. That report is attached.

There is a fundamental flaw in the Subcommittee staff's approach using internal Commission documents and transcripts to support conclusions as to the "true" motives and reasoning of the Commission. The flaw is that these internal documents and transcripts portray an incomplete picture of the Commission's deliberations and in large measure relate to drafts and proposals that were, in fact, not finally adopted.

Commissioner Asselstine is on official travel. He will provide his views on these issues by the end of this week.

Sincerely,

Frederick M. Bernthal
Acting Chairman

cc: Rep. Carlos Moorhead

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CORRESPONDENCE PDR

REPORT TO THE SUBCOMMITTEE ON
ENERGY CONSERVATION AND POWER

This report identifies significant inaccuracies in the July 9, 1985 memorandum from the Subcommittee Staff to Chairman Markey.

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Contrary to the Staff report, the Commission did not base its Diablo Canyon decision on a belief that the earthquake/emergency planning issue is generic in nature. The Diablo Canyon decision rests on the information in the record of the Diablo Canyon case. That information supported the Commission's judgment that there was no need to adjudicate the effects of earthquakes on emergency planning because the probability of a contemporaneous occurrence of an earthquake and a radiologic release from the Diablo Canyon plant would be very low.

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The Commission did not state that the "seismic risk" at Diablo Canyon is "low to moderate" nor did it convey the impression that the "seismic risk" at Diablo Canyon is insignificant. Rather, the Commission found that seismicity, the frequency of earthquakes, at the Diablo Canyon site was low to moderate. The Subcommittee staff's presentation improperly uses frequency and magnitude interchangeably. Seismicity or frequency is different from magnitude or possible energy released by an earthquake

at the site. There is no question that the magnitude of the Safe Shutdown Earthquake at the site presented the possibility of a very infrequent but very large energy release that was relevant to how the plant should be designed to shut down safely in the event of such an earthquake. This risk is different, however, from the frequency of earthquakes.

The above discussion also applies to the Subcommittee staff's comment on page 8 which again confuses the NRC staff's statement regarding seismic risk in California with the Appeal Board's finding regarding seismicity of the Diablo Canyon site.

Page 6-7

The analysis fails to acknowledge the following considerations in its discussion of the matter of generic treatment. First, the Commission's Diablo Canyon decision was not based on a plan to conduct a rulemaking. See comment above, page 4. Second, the Commission's decision readily acknowledged that the Commission "should have acted sooner and initiated rulemaking." CLI-84-12, 20 NRC at 255. And third, the Chairman, as well as Commissioner Asselstine, expressed interest in pursuing the issue of possible rulemaking on the effects of earthquakes on emergency planning. In September, 1983 the Chairman met with the NRC staff and

requested a technical analysis of the issue. The staff provided it in its January 13, 1984 memorandum which the Subcommittee has.

Pages 7 and 8

The Subcommittee staff analysis relies on Commissioner Asselstine's contention that the Commission implicitly found that earthquakes occur less frequently than other natural phenomena which are considered in emergency planning. However, a reading of the Commission's decision clearly shows that the Commission made no such comparison of the relative frequency of natural phenomena. Rather, the Commission determined as an absolute matter, based on the record on earthquake recurrence times, that the frequency of significant earthquakes at Diablo Canyon was too low to warrant the consideration of the effects of those earthquakes on emergency planning. The Commission's letter of February 25, 1985 to you which is not referenced in the Subcommittee's analysis, states that the issue of the consideration to be given to other, infrequently occurring natural phenomena was not before the Commission in the Diablo Canyon case.

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Inasmuch as the Commission decided in Diablo Canyon that consideration need not be given to the earthquake emergency/planning issue, there is

nothing "ironic" about a proposal to make that decision explicit in its regulations through a proposed rule that would exclude consideration of earthquakes from emergency planning. The proposed rule put forward this proposition as a working hypothesis suited to eliciting the broadest range of public comment. A proposed rule does not prejudice the outcome of a rulemaking.

Pages 9-10

Contrary to the Subcommittee staff's analysis, the approach adopted by the Commission in response to SECY-84-70 was to address whether to allow consideration of the earthquake/emergency planning issue under the particular circumstances of the Diablo Canyon case. CLI-84-4, 19 NRC 937 (1984). The Commission requested party comments and made its final decision in light of the responses. While the Commission's final decision may appear to the Subcommittee staff to be one of the options in SECY-84-70, the fact remains that the quoted OGC analysis pertains to an option that the Commission did not adopt and was prepared prior to the receipt of responses to CLI-84-4.

Further, the conclusion of the analysis that the Commission's action "would appear to constitute a blatant attempt to escape legal and regulatory requirements" presupposes that only the OGC could have reasonable views on the issues of the materiality of the effects of

earthquakes on emergency planning and the likely outcome of generic rulemaking. Finally, the use of the quoted exchange between OGC and Commissioner Bernthal implies incorrectly that there were no other reasons advanced for going forward with a generic rulemaking on the effects of earthquakes on emergency planning. A review of the transcripts and the record would show that the Commission and the staff were also concerned about large earthquakes in the Eastern United States.

Pages 11-12

The Commission's February 25, 1985 letter did not distinguish between using the TERA report to reach a Commission decision and using it in Court to defend that decision. The letter made no comment regarding use of the TERA report in Court litigation. (The litigation referred to in the Commission's February 25 was litigation before the Licensing Board.) Rather, the Commission's February 25 response simply pointed out that because the TERA report was not in the evidentiary record, it could not be relied on as support for the Commission's decision. And, as the Commission's decision shows, that report was not relied on.

Therefore, it is incorrect to suggest that, in the final analysis, the TERA report played an important role in the Commission's decision. Moreover, the Commission's decision did not refer to any off-the-record material because none of that material was relied on by the Commission

in reaching its decision. The Subcommittee staff does not appear to comprehend that the reasons for the Commission's Diablo Canyon decision are the reasons presented in CLI-84-12 and that the discussions and statements of individuals reflected in the transcripts do not constitute the Commission's decision or its rationale.

Page 12

The quoted statement of Chairman Palladino is taken out of context and was explained by him at the July 10 hearing. See pages 39-48 of the July 10 transcript. Further, the quotes at the bottom of page 12 and the top of page 13 do not reflect that approaches based on information in the adjudicatory record were discussed.

Pages 14-15

The Subcommittee staff suggests that contrary to the Commission's belief, the TERA report does not support the Commission's decision in view of the report's estimate that an earthquake could double or triple evacuation times. However, this estimate does not undercut the Commission's decision. The Commission had before it record evidence that fog could similarly increase evacuation times.

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In stating that OGC argued that the Commission rested its "final decision" on assumptions about the comparison of earthquakes and other natural phenomena, the Subcommittee staff apparently is relying on quotations about drafts of Commission decisions or hypothetical discussions at Commission meetings as necessarily expressing OGC's view on the final decision as issued. However, the final decision rests on the rationale stated in the Commission's decision and does not depend upon a comparison of earthquakes to other national phenomena.

Page 19

The statement quoted from the Commission's February 25, 1985 letter is neither tautological (i.e., including a "needless repetition of the same idea in different words" -- The Random House College Dictionary (1973)) nor does it prejudge the issue. The clear inference from the statement is that no hearing was held in the Diablo Canyon case on the issue of the complicating effects of earthquakes on emergency planning because that issue was found to be immaterial to plant licensing. Indeed, the Subcommittee staff analysis of this matter does not evidence an understanding of the simple point that the Commission decided in CLI-84-12 that the earthquake/emergency planning issue was not material.

The Subcommittee staff study appears to adopt the mistaken view that the Commission "removed" the earthquake/emergency planning issue from the Diablo proceeding because it was a generic issue. On the contrary, the Commission's decision not to consider the issue rested on a judgment that a contemporaneous occurrence of an earthquake and radiologic release from the plant would be very low.

Further, the OGC comment referenced at the top of page 20 does not pertain to the Commission's final decision in Diablo. See the above comments on pages 9-10.

Page 21

The statements regarding delay are quoted out of context. Further, as he explained in the July 10 Subcommittee hearing, the Chairman stated a general observation regarding frustration over the length of time for hearings which does not, as suggested, support any inference regarding the need for a hearing in the Diablo Canyon proceeding.