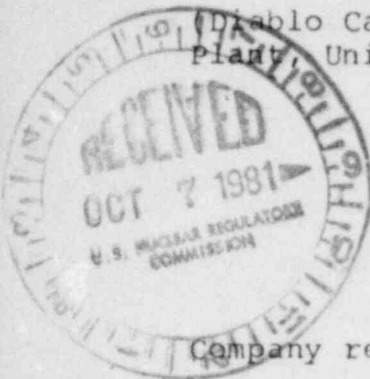


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD



In the Matter of)
PACIFIC GAS AND ELECTRIC COMPANY) Docket Nos. 50-275 O.L.
) 50-323 O.L.
)
) Diablo Canyon Nuclear Power) Full Power
) Plant, Unit Nos. 1 and 2) Proceedings)



APPLICANT PACIFIC GAS AND ELECTRIC COMPANY'S
MOTION TO COMPEL DISCOVERY AS
AGAINST GOVERNOR BROWN

On August 18, 1981, Applicant Pacific Gas and Electric Company requested Governor Brown, as a representative of an interested State, to produce certain documents for inspection and/or copying. On September 18, 1981, Governor Brown filed a "Response" to that request which, in effect, is a motion for a protective order. No documents were identified or produced as requested. For the reasons set forth below, Applicant respectfully requests that this Board order the Governor to comply with the Request for Production.

I. The Governor's "Response"

Governor Brown complains that the Applicant's Request for Production is "so broad and burdensome that compliance is impossible within the time limits set forth in the NRC's regulations" and that compliance by the Governor "would require the State to expend more than \$1,000,000." He then demands that the Applicant should agree in advance to reimburse the State for all expenses incurred by the State in complying with the request or that Applicant should limit the request in "some reasonable manner."

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Governor Brown's "response" complains bitterly about the definition of "documents" in Applicant's request as well as the fact that the request is directed at any agency, etc., past or present. Applicant finds these complaints ironic at best. Governor Brown submitted two requests for production to the Applicant one dated August 5, 1981, and the other dated August 25, 1981, the first before the Applicant's only request of August 18 and the second after. The Governor's definition of documents is broader than the Applicant's. It is indeed obvious that the Applicant's definition of documents was directly derived from the Governor's.

As respects the phrase past or present, Governor Brown has construed this phrase to his own detriment. The Applicant is asking for relevant documents which might be in the possession of a contractor, consultant, etc., even if he no longer is employed by the state. A logical approach does not require the Governor to contact each and every employee or consultant who ever worked for the state. It does, however, require the state to contact those who worked on emergency planning for a critical facility or earthquake planning to see if documents not otherwise available might exist. Common sense dictates that this request is not aimed at a file clerk who worked for three weeks at a state hospital in 1952 but that same common sense would also mandate an inquiry of a large consulting firm who perhaps had a several hundred thousand dollar contract in 1980 to study the effects of earthquakes on emergency planning.

II. Applicant's Request For Production Is Relevant And Proper

The discovery rules applicable to the case at bar are 10 C.F.R. §2.741 and §2.740, which mirror the provisions of the Federal Rules of Civil Procedure concerning the request for production of documents (Rule 34) and a motion for protective order (Rule 26). This Board is to be guided by the Federal Rules and cases decided hereunder. See, e.g., In the Matter of Boston Edison Company, 1 NRC 579 (1975). The touchstone case in this area has been Hickman v. Taylor, 329 U.S. 495, 91 L.Ed. 451 (1947) wherein the Supreme Court stated:

We agree, of course, that the discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.
(329 U.S. 495, 507-508)

The fact that Governor Brown is crying "fishing expedition" is of no moment. The Hickman v. Taylor doctrine continues to control. The Federal Courts of Appeal have stated in clear and convincing language that the test for determining whether material is discoverable under Rule 34 (requests for production) is relevancy. Weahkee v. Norton, 621 F.2d 1080 (10th Cir., 1980). Governor Brown never argues that the request is not relevant. He complains the request is "burdensome," time consuming and expensive. It is respectfully submitted that it is the Governor who has thrust himself into these proceedings and

has demanded that hearings be held and discovery be had on emergency planning at Diablo Canyon. It is the Governor who maintains that the effects of earthquakes on emergency planning must be considered. It is the Governor who in answer to an interrogatory requesting the names of witnesses the Governor may call or subpoena to the emergency planning hearing states:

Governor Brown has not identified any witnesses he may call or subpoena for the emergency preparedness hearing. In accordance with the requirements of NRC regulations, Governor Brown will supplement this response as soon as witnesses are identified. (Brown Response to Applicant Interrogatories dated August 26, 1981) (As of this writing no such supplement has been received.)

It is the Governor who has requested voluminous documents be produced by the NRC Staff and the Applicant. (Document production requests dated 8/5/81, 8/7/81, 8/13/81 and 8/26/81.) It is the Governor who has the unmitigated gall to request from this Board (two days after the filing of their instant "response") the issuance of subpoenas for the production of documents from a county and federal agency, neither of which is a party to these proceedings, which has the same definition of "documents" of which they complain.

It is respectfully submitted that the Governor's behavior in these proceedings is unprecedented. He literally whines at the cost of discovery which is directed at him, as a result of a process which he has steadfastly insisted upon, and within two days files requests for subpoenas to inflict

virtually the same discovery upon two much smaller agencies of a county and the federal government who are not even parties to this administrative process.

The Requests for Production are unquestionably relevant to these proceedings. As such they must be complied with.

The Applicant's first of two requests states as follows:

All documents in possession, custody or control of the State of California (including the possession, custody or control of any agency or organization of the State or of any contractor, employee, consultant, or agent of the State, past or present) which relate in any way to radiological emergency planning (at Diablo Canyon or any other nuclear facility) or earthquake response or emergency planning (at Diablo Canyon or any other critical facility (nuclear, medical or otherwise)).

This request is directed at emergency planning for critical facilities, i.e., those where a possibility of radiological releases exists. The request is not aimed at any non-critical facilities.

The second request is as follows:

All documents in the possession, custody or control of the State of California (including the possession, custody or control of any agency or organization of the State, or of any contractor, employee, consultant or agent of the State, past or present) which relate in any way to State, local, Federal, or utility emergency response plans within the State of California.

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III. No Meaningful Response to the Request for Production Has
Been Made

Neither the Governor nor his counsel have made any meaningful attempt to respond to the request for production. Instead, the Governor has gone to great lengths to avoid production of documents. The Governor started off by sending a self-fulfilling prophecy memo to all agency heads (Exhibit A to Brown Response). The memo intones that "PG&E's foregoing request for documents is unusually broad. The Governor is, of course, concerned that PG&E's request will prove to be an unreasonable burden on State resources." The memo then asks the recipients to provide all "readily-available" documents and requests detailed information regarding costs of full compliance, man-hours, time and the like. A review of the responses to the memo is most enlightening. Several agencies forwarded all or many of the documents in their possession (e.g. Exhibits E, F, G, H, J, M, O, etc. to Brown Response). The Governor has not even bothered to identify these documents in his response, let alone produce them as requested or state when and where they might be examined. In addition, the responsive memo from the Department of Health Services contains a most interesting paragraph.

The search in our office revealed no documents that would be covered by the request. Marian King of my staff discussed with Wade Rose of the Governor's Office the unreasonableness of PG&E's definition of "documents." Mr. Rose stated that the Governor's Office is only interested in receiving "standardized documents." They are not interested in receiving calendars, appointment books, diaries and the like (Exhibit L to Governor Brown's Response).

Apparently Governor Brown had decided not to comply with the request except as he pleased prior to the filing with this Board of any response or request for protective order by his counsel. Again, the definition of "documents" in the Applicant's request was derived from and is less broad than the Governor's definition in his earlier request directed at the Applicant. The Applicant has fully complied with the Governor's requests, including the production of appointment books, diaries, calendars "and the like."^{1/}

In summary, the Governor has found a further convenient tool for delay. Rather than producing any documents under the request, the Governor has filed a "response" which reveals not one single document. It is respectfully requested that this Board order that the documents received by counsel for the Governor pursuant to the request be made available at once at a location convenient to the parties.

IV. Limitation In a "Reasonable Manner"

Governor Brown has requested that the Request for Production be limited in a "reasonable manner" and then suggests reasonable would be to limit the documents to be produced to those documents which relate to Diablo Canyon. The Applicant does not see such a limitation as "reasonable." Request number

^{1/}As set forth in responses to requests filed by the Applicant in this matter, Pacific Gas and Electric Company has spent thousands of man hours and untold monies in timely compliance with the Governor's and Joint Intervenor's Requests for Production.

one is directed at critical facilities within the State of California from which radiological releases might occur. Certainly emergency planning for such facilities is relevant to these proceedings. Do they exist? How thorough are they? Are the plans for Diablo better, more or less comprehensive? These and a multitude of other questions could well be raised by the Governor himself in these proceedings. Will the Governor take the position that the emergency response plans for Diablo Canyon are not as good as those for other nuclear facilities in the state? Will the Governor attempt to introduce documents prepared by various state agencies under his control which make comparisons between the Diablo Canyon emergency plans and those of other utilities or critical facilities? Does the Governor, through agencies under his control, possess documents which prove the Diablo Canyon emergency plans meet certain or all applicable state and federal regulatory criteria?

It is the Applicant's firm position that Request for Production number one is relevant in its entirety and an order should issue from this Board that the Governor comply therewith immediately.

Applicant's request number two may be broader than necessary. Applicant would be willing to limit that request to a request for documents regarding the effects of earthquakes on all emergency response plans for all facilities, critical or not. Remembering it is the Governor who maintains that the effects of earthquakes on emergency planning must be considered

in "a state where earthquakes are common," one cannot seriously believe the Governor would suggest such a document request would not lead to relevant material.

V. Conclusion

It is respectfully requested that this Board order Governor Brown to immediately produce all documents requested pursuant to request number one. It is further requested that the Governor produce all documents currently in his possession or under his control which deal with the effects of earthquakes on emergency response planning.

Respectfully submitted,

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DATED: October 1, 1981.

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(Diablo Canyon Nuclear Power)
Plant, Units No. 1 and 2))

CERTIFICATE OF SERVICE

I hereby certify that copies of "APPLICANT PACIFIC GAS AND ELECTRIC COMPANY'S MOTION TO COMPEL DISCOVERY AS AGAINST GOVERNOR BROWN", dated October 1, 1981, have been served on the following by deposit in the United States mail, postage prepaid, this 1st day of October, 1981:

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