



*Central File*

**UNITED STATES  
NUCLEAR REGULATORY COMMISSION**

**In the matter of:**

*50-275*

Pacific Gas & Electric Company  
(Diablo Canyon)

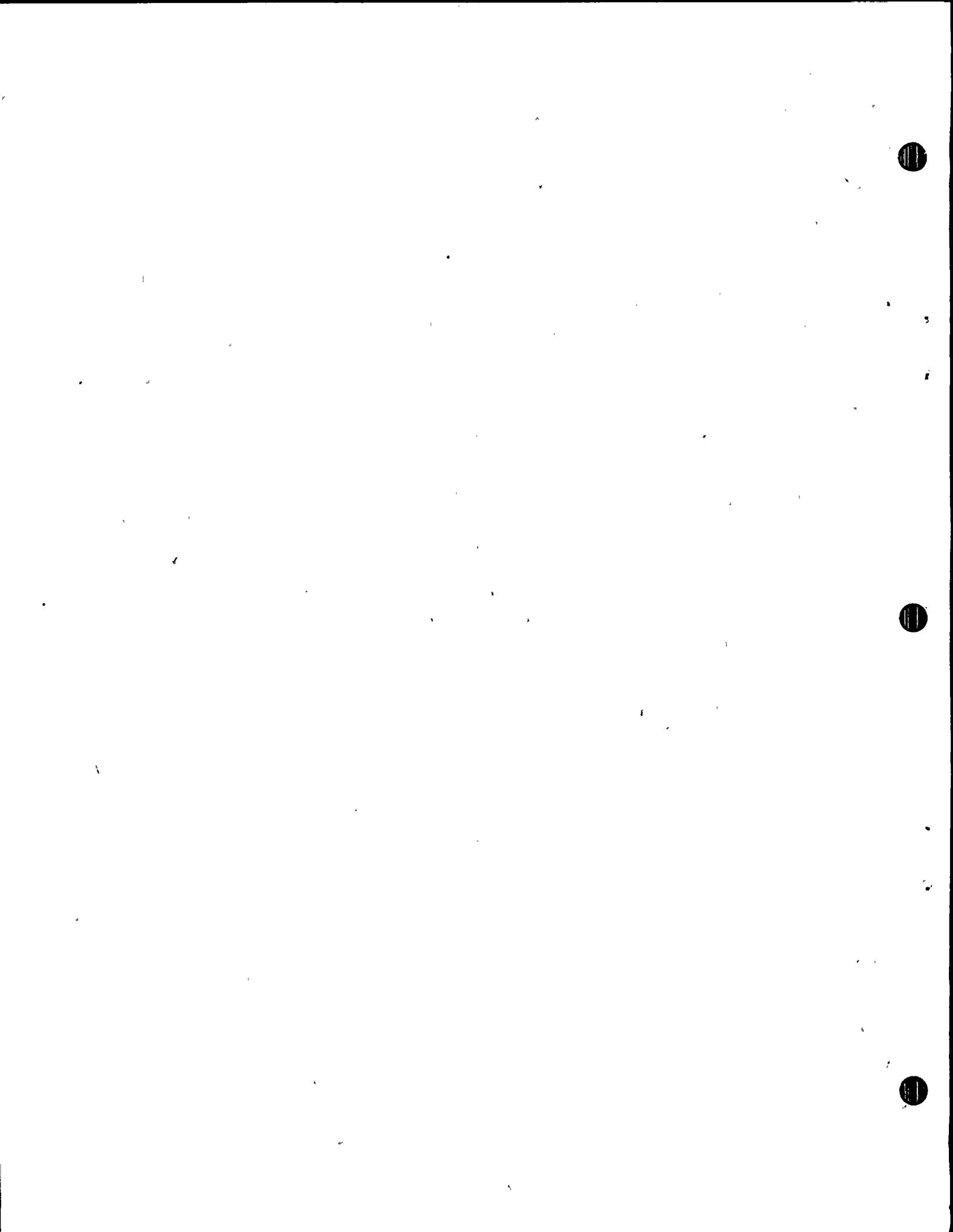
**Place:** San Francisco, Ca.

**Date:** January 23, 1980

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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In the Matter of: :  
PACIFIC GAS & ELECTRIC COMPANY :  
(Diablo Canyon) :  
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Docket No. 50-275, 50-323

Courtroom 12, 19th Floor  
450 Golden Gate Avenue  
U.S. Federal Building  
San Francisco, California

Wednesday, January 23, 1980

ORAL ARGUMENT

Oral argument was heard in the above-entitled  
matter, commencing at 9:30 a.m.

BEFORE:

Mr. Richard Salzman, Chairman

Mr. Thomas Moore

Dr. W. Reed Johnson

APPEARANCES:

On behalf of the Intervenor:

Mr. Paul Valentine

Mr. Yale Jones

Mr. Andrew Baldwin

On behalf of the Applicant:

Mr. Bruce Norton

On behalf of the NRC Staff:

Mr. James R. Tourtellotte



ORAL ARGUMENTS OF:

1		
2		Page
3	MR. PAUL VALENTINE	3
4	MR. YALE JONES	20
5	MR. ANDREW BALDWIN	34
6	MR. BRUCE NORTON	49
7	MR. JAMES TOURTELLOTTE	83
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
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21		
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1 MR. MOORE: Good morning, ladies and gentlemen.  
2 The Appeal Board of the United States Nuclear  
3 Regulatory Commission is convened here in the United States  
4 District Courtroom in San Francisco to hear argument on the  
5 exceptions taken by Intervenors, San Luis Obispo Mothers for  
6 Peace to a licensing board decision approving Pacific Gas  
7 and Electric Company's physical security plan designed to  
8 protect its Diablo Canyon Nuclear Power Plant from industrial  
9 sabotage.

10 With me on the Board today is, on my right,  
11 Dr. W. Reed Johnson, who is also a Professor of Nuclear  
12 Engineering at the University of Virginia. On my left, is  
13 Mr. Richard Salzman, an attorney on the Appeal Panel, and  
14 but for Mr. Salzman's laryngitis, he would be presiding today.

15 My name is Thomas Moore and I am also an attorney  
16 on the Appeal Panel.

17 Counsel who will be arguing today, please now  
18 introduce yourself; state who you represent, identify any  
19 members of the Bar accompanying you at counsel table. Let  
20 us begin with Intervenor's counsel.

21 MR. VALENTINE: Good morning, Mr. Chairman, Members  
22 of the Panel, my name is Paul Valentine. I will be repre-  
23 senting the Intervenor and I would like to introduce  
24 Mr. Yale Jones, Mr. Andrew Baldwin. And as I indicated by  
25 telephone yesterday -- I do not know whether you received the



1 message -- that we had intended to share the time with each  
2 of us arguing approximately twelve minutes on the three issues  
3 of this appeal.

4 MR. MOORE: All right.

5 MR. NORTON: Good morning. Bruce Norton, appearing  
6 fo Applicant, Pacific Gas and Electric Company, and with me  
7 at the counsel table is Mr. Mark Pierre, to my far right and  
8 across the table is Mr. Philip Crane.

9 MR. TOURTELLOTTE: My name is Jim Tourtellotte. I  
10 am assistant cheif hearing counsel for the Nuclear Regulatory  
11 Commission and I will be presenting the argument today.

12 MR. MOORE: Gentlemen, it would be helpful, before  
13 you leave the courtroom if you would give the Reporter one  
14 of your business cards. This would help insure that your  
15 name appears correctly in the transcript and that the  
16 Reporter sends it to the right address.

17 In our order calendering this cause, we allocated  
18 one hour per side. We'd appreciate it if counsel would keep  
19 that in mind. Before we begin the argument, you should be  
20 aware that the Board has read the briefs and familiarized  
21 itself with the record. In doing so, a number of questions  
22 have come to mind; this is our only opportunity to address  
23 you directly, so do not be disturbed if we interrupt your  
24 prepared remarks. We will, of course, let you make any points  
25 that you feel you must, but please bear in mind that the



1 argument is for our benefit; its purpose is to shed light  
2 on the matters we deem important and our questions will be  
3 directed to that end. Please answer them fully and carefully.

4 Counsel for the Intervenor, you may start your  
5 argument.

6 MR. VALENTINE: Thank you, Mr. Chairman.

7 I should like to state again and clarify that our  
8 brief raises essentially three issues and that I will be  
9 addressing the first of those issues. It has to do with our  
10 request for the review of this Panel of the decision of the  
11 licensing board on the qualifications of David Comey as an  
12 expert qualified to review the security plan in this case.

13 The second part of our appeal has to do with what  
14 actually happened at the hearing; it has to do with the  
15 significance of the death of Mr. Comey; and the question of  
16 mootness. Mr. Jones will address himself to those issues.

17 And with respect to the denial of right of cross-  
18 examination at the hearing itself, Mr. Baldwin will address  
19 himself.

20 Our intent is to talk for approximately ten or  
21 twelve minutes and to reserve the remainder of our time for  
22 rebuttal, and I should like to say that we particularly  
23 welcome the questions that we know will be forthcoming from  
24 the Board.

25 I think it's important in the beginning to think



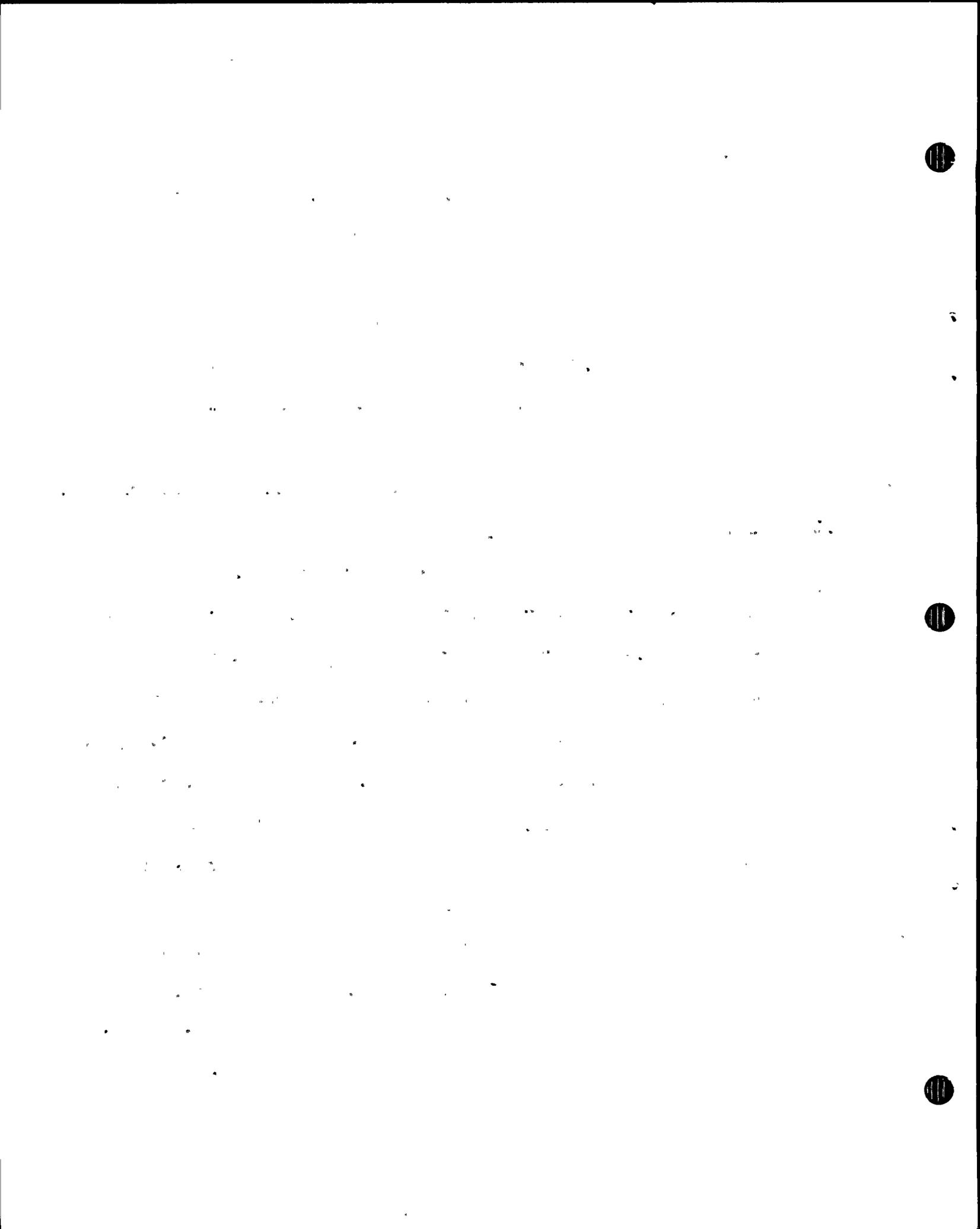
1 about what's at stake here. And to say that two years ago  
2 we were before this Panel and frankly I'm surprised and dis-  
3 appointed that we are here again because we believed at that  
4 time when we were arguing over the Applicant's strong  
5 argument that there was simply no place for an Intervenor in  
6 this proceeding and that the right to examine the security  
7 plan did not exist.

8 This Panel issued a Lab 410 which we believe es-  
9 tablished guidelines that could have been reasonably imple-  
10 mented to provide the right of review of the security plan  
11 so that the determination could be made as to the integrity  
12 of the security system at Diablo Canyon.

13 We believe that it's incumbent on this Panel this  
14 morning to again examine the procedure in these intervening  
15 two years and that it's essential that this Panel once again  
16 clarify the distorted reasoning and the interpretation of  
17 your earlier ruling by the licensing board which has, in  
18 effect, perpetuated the close system between the Applicant  
19 and the NRC and effectively excluded us for two years from  
20 the right of reviewing that system.

21 MR. MOORE: Mr. Valentine, but in this instance,  
22 why is, in light of Mr. Comey's untimely death, why is not  
23 the matter of his qualification moot?

24 MR. VALENTINE: The question of mootness, I'm sure,  
25 is the first thing in your mind. I would like to just briefly



1 say that, of course, the question of qualification is moot  
2 with respect to Mr. Comey's particular qualifications. It is  
3 not moot with respect to what the licensing board did. The  
4 licensing board in it's proceeding, which I will call for  
5 shorthand the reconsideration of November '78, after having  
6 once reviewed it and as you know, come to this Panel for  
7 further clarification, was directed to go back and to restate  
8 the reasons for its denial of Mr. Comey, then did issue an  
9 opinion with reasons.

10 Now that opinion is erroneous. There is substantial  
11 error in that.

12 MR. MOORE: But, if one were to assume that your  
13 example was correct that it was erroneous, what business do  
14 we have to review it today since there is no witness prepared  
15 to testify who is qualified before the licensing board?

16 MR. VALENTINE: Mr. Chairman, we are here today to  
17 ask this Panel to reverse and remand the determination of  
18 the security finding, to re-open those hearings, and to  
19 establish a period of time for us to seek another expert.

20 We are, in fact, in no different position this  
21 morning than if Mr. Comey had lived. And we preserve our  
22 right of appeal from the licensing board proceeding. Indeed,  
23 as soon as the licensing board ruled, we applied for directed  
24 certification; we were denied, and it was at that time clear  
25 that we preserved our right of appeal from that decision.



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And then subsequently, of course, the NRC ruled.

MR. MOORE: At that point, didn't you have an obligation to go back to the licensing board and request time to find a new witness since it was at about that time that your witness died?

MR. VALENTINE: There was just absolutely no opportunity to do that. We had been at this proceeding for three years. Mr. Comey died on January 5. It took us about five days to sort out exactly what had happened and what had happened with respect to this proceeding. It took us, in fact, two weeks to decide exactly what we should respond to and it was just that it was a very difficult set of facts to deal with.

And, we also knew that the proceeding was coming and we also knew that we had had four different occasions to qualify experts and one of which we still believe would have qualified for the level of confidence as defined by this Panel to review the security plan.

The test that we set out was whether the person who reviews the plan has sufficient technical competence to understand it and to be able to see how the system works.

The licensing board in examining Mr. Comey's qualifications erred greivously ; it erred in his experience, the reading of his academic capabilities; it overlooked substantial and abundant qualification that he had



1 both as a member of the Office of Technology Assessment on  
2 nuclear security matters; and most importantly, the licensing  
3 board didn't even mention the contentions to set the frame-  
4 work within which the expert's qualifications are to be  
5 measured.

6 It's inconceivable that a determination could be  
7 made as to expertness without asking expert about what. The  
8 licensing board issues an opinion and said that Mr. Comey is  
9 denied because he doesn't have, quote, hands-on ability or  
10 nuts-and-bolts knowledge about how the equipment in a security  
11 system works. That's just part of the problem, gentlemen;  
12 that's just part of the problem.

13 MR. SALZMAN: Excuse my whisper; can you hear me?

14 MR. VALENTINE: Yes.

15 MR. SALZMAN: Well, my question is this: when  
16 Mr. Comey died, you had no witnesses. Your witnesses had been  
17 found unqualified by the board. Your remedy was to appeal.  
18 But, you haven't appealed for any except Mr. Comey; he's no  
19 longer with us.

20 At that point, wasn't your obligation to ask for  
21 reasonable time to get another witness?

22 MR. VALENTINE: At that time, Mr. Salzman, that  
23 clearly is one of the remedies that we could have sought. But  
24 we knew that there was -- in good faith, at that time, did  
25 not believe that we could find anybody in two weeks or in a



1 month. And as I stand before you today, I cannot assure you  
 2 that I can -- that I'm clear in my mind that we are entitled  
 3 to that right because we were wrongfully denied the services  
 4 of a qualified expert.

5 MR. SALZMAN: Have you found anyone in the inter-  
 6 vening year? Have you found anyone now? Have you looked in  
 7 the last year?

8 MR. VALENTINE: I have; I have looked in the last  
 9 two weeks. I cannot furnish you a name; I can tell you that  
 10 I have talked to several people and that the one problem that  
 11 we have had throughout in finding an expert is to find a  
 12 truly independent and objective person. And within the  
 13 guidelines laid out, it means someone who does not now work  
 14 for the NRC, who does not now work for Babcock and Wilcox, or  
 15 any of the people who are in the industry. That is an  
 16 inordinately difficult task.

17 But, I have talked to the Staffs of Congressional  
 18 Committees; I have talked to other people who I believe I  
 19 could get to a witness if we were again given that opportunity.

20 The point I believe is that there is too much at  
 21 stake in this proceeding to be so much -- have it be deter-  
 22 mined on the procedural mechanism that was employed to ex-  
 23 clude us from having a right to participate in this proceeding  
 24 and I think that the whole context of the security issue de-  
 25 mands that independent evaluation of that plan.

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1 MR. SALZMAN: I take it by excluding you on the  
2 hearing, sir, you mean exclude you from the hearing with a  
3 witness? No one excluded you from the hearing without a  
4 witness.

5 MR. VALENTINE: I'm sorry --

6 MR. MOORE: Mr. Salzman's point was that you were  
7 excluded from the hearing last year with a witness, but you  
8 were, in fact, not excluded as counsel from cross-examining  
9 witnesses that appeared for the Staff and Applicant.

10 MR. VALENTINE: That's correct.

11 Mr. Salzman, the reason that we sent the letter of  
12 January 19 to the board was to announce to the board, to  
13 notify the board that we could not participate. And our  
14 position has been and remains that we cannot -- I cannot nor  
15 can Mr. Jones participate and significantly cross-examine  
16 witnesses without the services of an expert or without the  
17 opportunity to review the plan.

18 MR. SALZMAN: Just one moment, sir. The right to  
19 participate is not yours nor Mr. Jones'. It's the Inter-  
20 venor's.

21 MR. VALENTINE: Yes.

22 MR. SALZMAN: Well, you think at this point,  
23 Mr. Baldwin could do so? Was that the point?

24 MR. VALENTINE: I'm very sorry, Mr. Salzman --

25 MR. SALZMAN: My problem is this, sir: if you and

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1 Mr. Jones could not do so, I take it your client could get  
2 a lawyer who could.

3 MR. VALENTINE: And they did that and that's why  
4 Mr. Baldwin was there. And he is qualified because he has  
5 had experience in the security field and was able, without the  
6 services of an expert, to conduct cross-examination and he  
7 was excluded.

8 MR. SALZMAN: Where is that in the record, sir?

9 MR. VALENTINE: I beg your pardon, sir?

10 MR. SALZMAN: Is there any indication of that in  
11 the record, sir?

12 MR. VALENTINE: Of his qualifications? I do not  
13 know the answer to that, Mr. Salzman. I was not there. But  
14 Mr. Baldwin will be able to respond to that; he was.

15 MR. SALZMAN: Did you know that Mr. Baldwin was  
16 going to appear?

17 MR. VALENTINE: I did not know Mr. Baldwin was going  
18 to appear prior to the time that he did appear. I was advised  
19 of the fact of his appearance the night of the first day that  
20 he appeared.

21 MR. MOORE: Are you speaking of the 7th or the 8th  
22 of February?

23 MR. VALENTINE: I can't tell you the date, Mr. Moore.  
24 It was the night -- I know that he appeared on one day and  
25 the question came up about whether we had known that and I was



1 called at home that night and advised that he had appeared.  
2 I had not objection to his appearing on behalf of the  
3 Intervenors and in fact said that I thought that he should  
4 appear if he felt qualified to participate in that hearing.

5 MR. MOORE: In the paper you filed on the 19th,  
6 what was your intent in filing that? Was it, in fact, that  
7 you would not be appearing for whatever reason at the security  
8 hearing?

9 MR. VALENTINE: That is the singular and sole intent  
10 in filing that. It was a matter of courtesy to advise the  
11 board. And I think the board knew ahead, also, that we had  
12 said that we could not participate without an expert. To  
13 take the Panel's time with cross-examination without having  
14 had an opportunity to review it and talk with an expert, is  
15 nonsense.

16 MR. MOORE: Is it ever appropriate that when counsel  
17 perceives a proceeding going, perhaps, not as well as he had  
18 planned to take his ball and go home, so to speak, as opposed  
19 to doing the best one can under what counsel might perceive  
20 as adverse circumstances and then take an appeal so that he's  
21 protected his record?

22 MR. VALENTINE: Of course.

23 MR. MOORE: Isn't that the position the Intervenor  
24 was faced with here?

25 MR. VALENTINE: I don't believe it was, Mr. Moore.



1 I don't believe that's where it was because our appeal had  
2 already -- our right to appeal had already been vested.

3 When Mr. Comey died, the matter was still before the  
4 NRC. The NRC had not yet ruled, and we decided -- we knew  
5 when we filed that notice that the NRC was either going to  
6 turn this Panel around or we would be without Mr. Comey. And  
7 we, at that time, without an expert, there was no choice for  
8 us. We were not going to enter without an expert.

9 MR. MOORE: You did have the choice, did you not, of  
10 you yourself as counsel for Intervenor participating in the  
11 security hearing and conducting cross-examination as best you  
12 could and taking an appeal if you were not satisfied?

13 MR. VALENTINE: Yes, I personally could have done  
14 that as could have Mr. Jones. Now, Mr. Baldwin, of course,  
15 appeared and attempted to do that and was denied that right.  
16 But, of course, we could have done that.

17 I would submit again that in my experience cross-  
18 examination without preparation of an expert on a highly  
19 technical subject is of no benefit to the fact-finder and  
20 does no credit to the lawyer who does it.

21 MR. MOORE: Mr. Valentine, have you ever seen the  
22 security plan in this case?

23 MR. VALENTINE: No, I have not.

24 MR. MOORE: Had you previously signed a protective  
25 order?



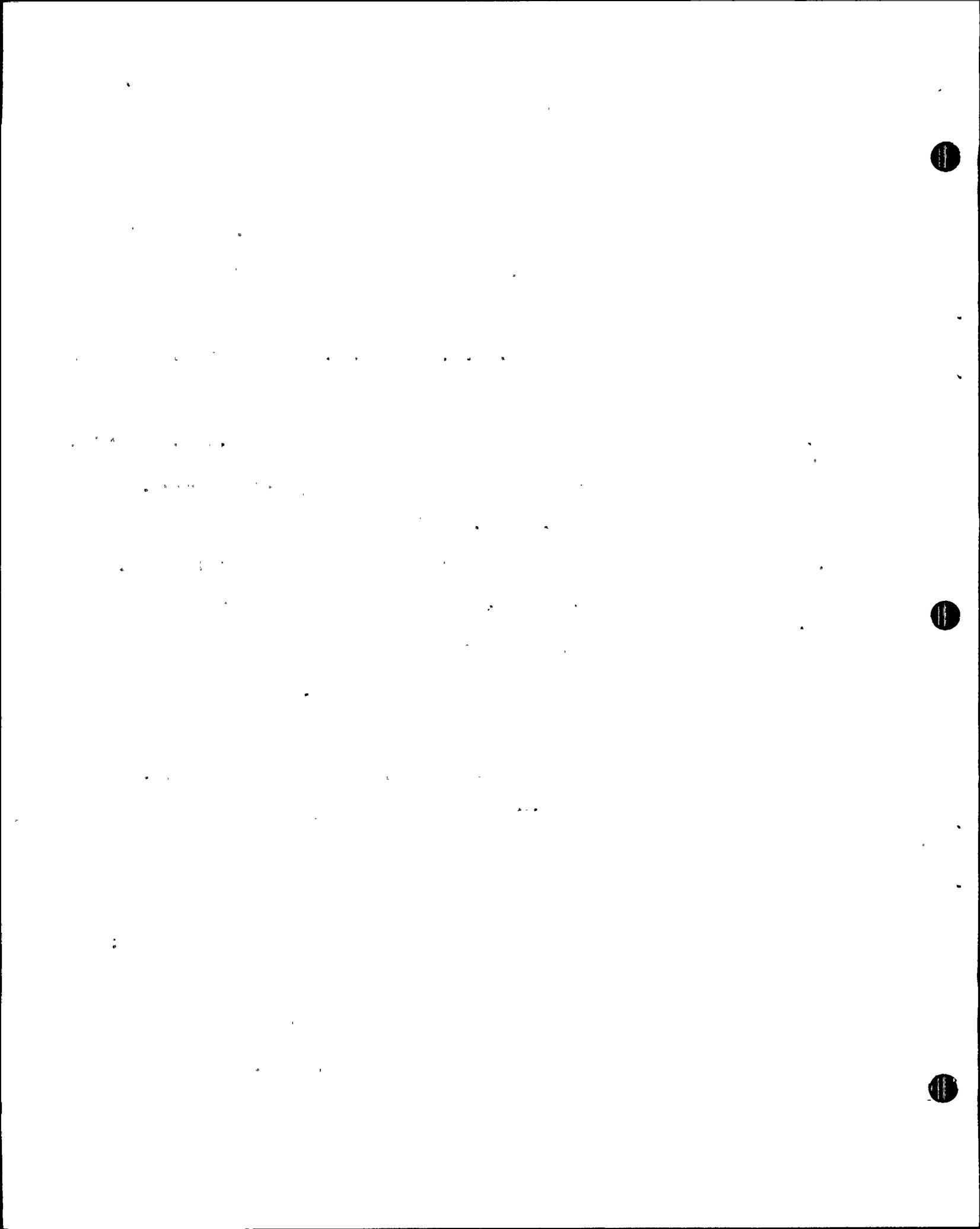
1 MR. VALENTINE: We signed a protective order and  
2 honestly, Mr. Moore, we talked about that yesterday. I am  
3 not sure of the scope of that order. We were asked to sign a  
4 protective order on the very first day that we entered this  
5 proceeding which was three years ago with the hearing of the  
6 licensing board in Los Angeles. And there was discussion at  
7 the licensing board hearing on that day about which it was  
8 in the ambit of a protective order which we signed and I am  
9 not sure this morning whether that protective order applied  
10 only to that proceeding or any subsequent matters that might  
11 be disclosed.

12 But, we did sign that order.

13 MR. MOORE: At any point asked as counsel for the  
14 Intervenor to see the security plan?

15 MR. VALENTINE: Yes, we did. At that hearing in  
16 Los Angeles, the agreement was that we would be shown an  
17 excised version of the security plan, and it was after that  
18 hearing that counsel for the Applicant came back and was  
19 directed that they were not going to show us that order and  
20 that's what triggered this whole business.

21 MR. MOORE: So, you requested of Applicant to see,  
22 as counsel for Intervenor, not to show it to a witness or a  
23 proposed witness or proffered witness, but as counsel for  
24 Intervenor, you requested Applicant to show you a copy of  
25 the security plan.



1 MR. VALENTINE: That was, in fact, an agreement.  
2 In fact, the licensing board had ruled that the plan would  
3 be shown to us in 1976.

4 MR. MOORE: And would you put that in the context  
5 of time; that was before the licensing -- the appeal board  
6 ruled in 410?

7 MR. VALENTINE: Yes, that's right. That was before  
8 410.

9 MR. MOORE: Did you ever after 410 where it appears  
10 very clearly that counsel was entitled to see it, did you  
11 make that request of Applicant?

12 MR. VALENTINE: I don't believe I ever made a direct  
13 request. I believe our statement always was that we did not  
14 want to see the plan unless we had an expert --

15 MR. MOORE: Is that your position today?

16 MR. VALENTINE: I beg your pardon?

17 MR. MOORE: Is that your position today also?

18 MR. VALENTINE: Yes, it is, although if we had an  
19 expert, I would want to see an expurgated version of the plan  
20 so that we could make the determination as to the specific  
21 qualifications of an expert: that was one of the questions.

22 DR. JOHNSON: While my colleagues are conferring,  
23 you mention that you have been having a great deal of  
24 difficulty of finding an objective expert witness. I believe  
25 the Staff recommended a number of people at some point.



1 MR. VALENTINE: That's correct.

2 DR. JOHNSON: And I also believe that Intervenor  
3 made no attempt to qualify any of those people suggested.

4 Was it your opinion that these people were not  
5 obejctive in your view?

6 MR. VALENTINE: No, Dr. Johnson, we did, in fact,  
7 follow up with the Staff. We wrote letters to all four of  
8 the people and we received back -- I talked to two of them on  
9 the phone. Out of the four, three were not interested in  
10 working for Intervenor and the fourth grudgingly accepted  
11 that he would talk to us at fees that we simply could not  
12 afford. We just couldn't afford him.

13 DR. JOHNSON: Let me ask you: were you able to  
14 obtain a perception as to whether these -- any of these men  
15 or women, I don't remember exactly who they were --

16 MR. VALENTINE: They were all men in my recollection.

17 DR. JOHNSON: Would any of them been willing to  
18 serve as witnesses for the licensing board had the licensing  
19 board chosen to have its own expert witness at such a hearing?

20 MR. VALENTINE: I did not discuss that with them,  
21 Dr. Johnson, but my strong supposition is that they would  
22 have been willing to so serve.

23 I think the thing that they were concerned about  
24 was the taint of Intervenor, and they did not want to be an  
25 Intervenor's witness because that is a burdeon for a pro-



1 professional man to carry. They are very candid about that  
2 because once you become an expert with an Intervenor, you  
3 have got problems. I think they would have been willing to  
4 serve as Commission witnesses.

5 DR. JOHNSON: But, it was your answer that the  
6 objectivity of these people who were offered was not a  
7 difficulty in the Intervenor's mind?

8 MR. VALENTINE: No, it really wasn't because we  
9 had not gotten to that point, and I would want to say that  
10 we have changed our thinking about that a bit. Ideally,  
11 we would like to have an independent free-thinker and I think  
12 that serves the public interest and the interest of the  
13 Nuclear Regulatory Commission in looking at security. I  
14 think that was the peculiar qualification Mr. Comey had  
15 because he was an independent witness in every sense and he  
16 was a man of complete integrity. I don't think anybody that  
17 ever had anything to do with things that Mr. Comey had done  
18 every doubted his integrity.

19 I feel now that we could find a witness; I think  
20 our standard is somewhat different in that I think we could  
21 find somebody that had some experience in the industry. I  
22 would prefer that it were not a current employee, but I think  
23 it's possible that we could find a person who was probably  
24 closer -- the reality is that you have to. I mean, anybody  
25 who knows anything about security has got to have been in



1 security.

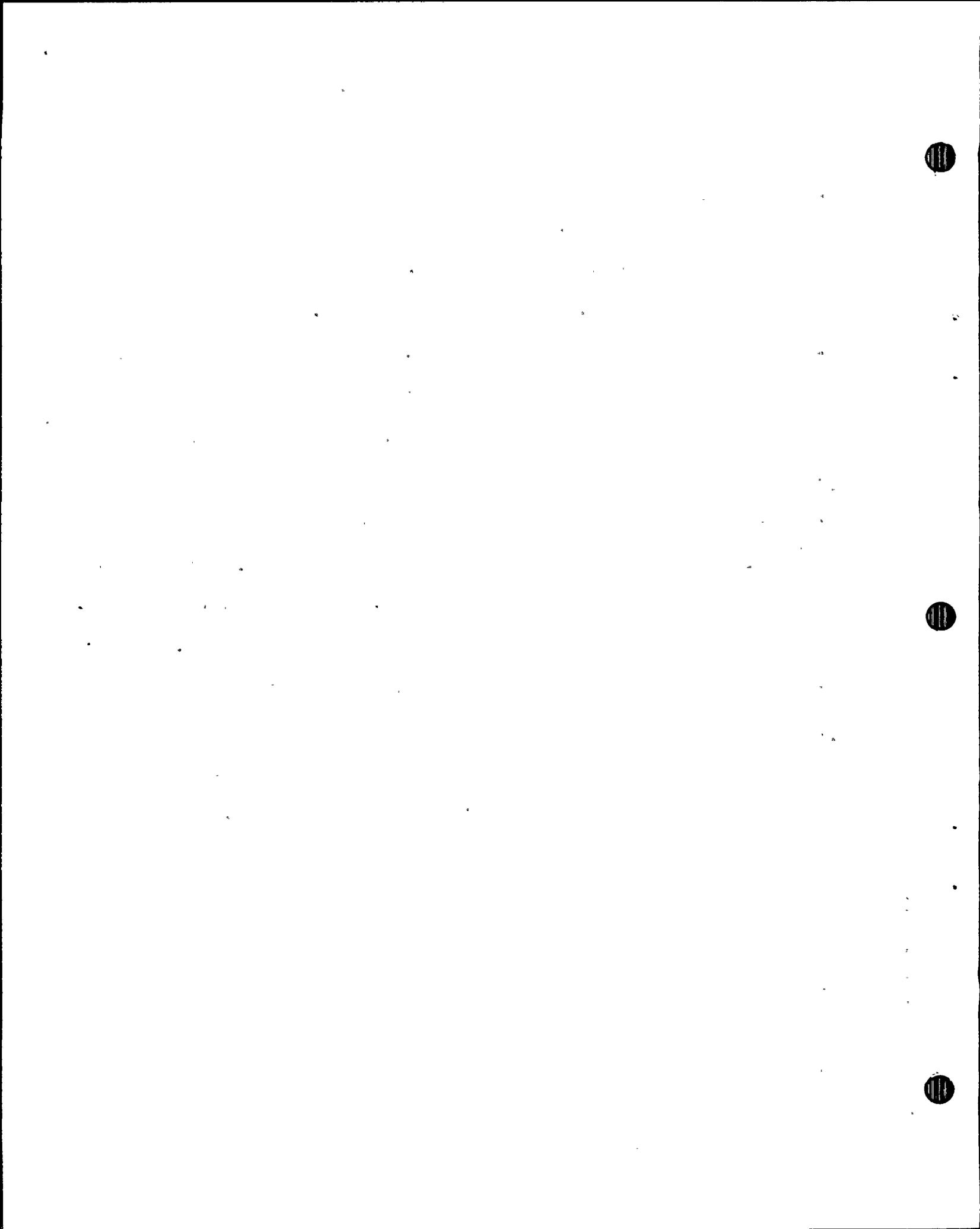
2 But, I want to point out that --

3 MR. MOORE: Mr. Valentine, your allotted time is  
4 about up. I have two other questions if I may inquire at  
5 this point.

6 You are speaking as counsel for Intervenor now and  
7 you stated that it was your position that you would not  
8 appear at the in camera security hearing to cross-examine  
9 without an expert. I want to make sure that that's the  
10 position of the Intervenor and that we don't have a difference  
11 of opinion between counsel for the same party.

12 MR. VALENTINE: Well, we do have a difference of  
13 counsel, but it really isn't a difference. It really is  
14 transformed or moved beyond in time. Our position was that  
15 we could not do it simply because we weren't qualified.  
16 Mr. Baldwin happens to be qualified. He became available  
17 and he was associated by the Intervenor to appear. So, it  
18 was just the events in time that happened, but I don't  
19 believe that there's a difference. In fact, it prompts me  
20 to move to be a little more specific about what we are asking  
21 this Appeal Panel to do.

22 I has to do with re-opening the hearing, giving us  
23 a reasonable time, a reasonable 60 or 90 days, to try to find  
24 an expert again and I can represent to you that I feel more  
25 hopeful about that than we have been in the past.



1           If, for some reason, the Panel decides not to grant  
2 us a right to go back with an expert, I believe that the  
3 hearing should be re-opened to permit Mr. Baldwin, who is  
4 .qualified, to appear and cross-examine.

5           MR. MOORE: Thank you, Mr. Valentine.

6           MR. VALENTINE: Thank you, gentlemen.

7           MR. JONES: Mr. Chairman, the essence of what I have  
8 to say on default is this: that in the request, the second  
9 request for reconsideration from the licensing -- or the  
10 second request for directed certification from the licensing  
11 board's denial of Mr. Comey's qualification, the board, a  
12 majority of two, on this board said and PG&E by the way agreed  
13 in its brief, we're are not going to look at the merits of the  
14 man's qualifications. The remedy is by subsequent appeal  
15 if you feel that he was wrongfully disqualified and then a  
16 new hearing.

17           Let me read to you what was stated in the PG&E  
18 brief in response to that request for reconsideration of  
19 the September 5 order. This is in their pleading dated  
20 December 5, 1978, on Page 3. They said, The Intervenors are  
21 not without an adequate remedy through normal appellant  
22 procedures of the Nuclear Regulatory Commission. If, indeed  
23 Intervenor should ultimately be ruled correct in their  
24 argument that Mr. Comey is qualified to review the security  
25 plan, then the matter can be re-opened for that limited



1 purpose.

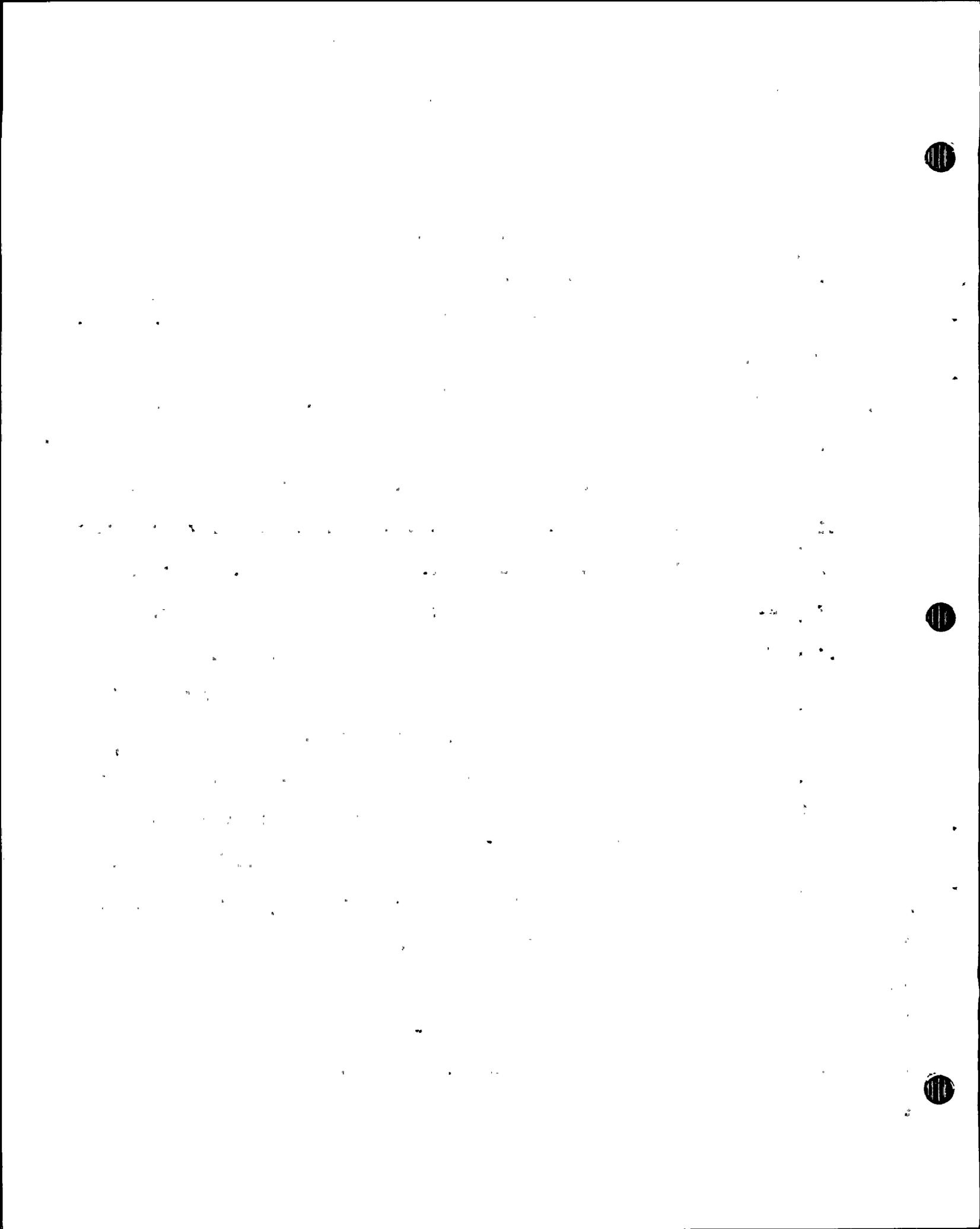
2 That was also the thrust of the majority opinion  
3 in ALAB 514.

4 Now, the Intervenor goes ahead and does exactly  
5 what was suggested in those briefs. Mr. Valentine and I felt  
6 that and the Intervenor itself felt that participation was  
7 really meaningless given the level of our personal knowledge  
8 of the technicalities of this field without the aid of an  
9 expert. So, we did what was suggested in the briefs; we sent  
10 the letter as a courtesy --

11 MR. MOORE: Mr. Jones, you're not suggesting, are  
12 you, that counsel can ignore the realities of life and once  
13 that your witness died and your appeal thus was mooted, as  
14 you've conceded it was mooted, that you could sit back and  
15 rest on a course of action which then became essentially  
16 inoperable because of the mootness of your appeal? Aren't  
17 you required to do other things at that point?

18 MR. JONES: I do disagree with that, because of  
19 this reason: first of all, the interval of time between the  
20 commencement of the hearings and Mr. Comey's death made it  
21 impossible for us to find and qualify another expert. Just  
22 to give you an example, it took the licensing board over  
23 three months to rule on our initial request that Mr. Comey  
24 be qualified, so it would have been --

25 MR. MOORE: Under the circumstances, did you ask



1 for the licensing board to grant you an extension of time to  
2 do that, to postpone the security hearing?

3 MR. JONES: No, we didn't and I think essentially  
4 for the reasons that Mr. Valentine stated in response to  
5 a similar question earlier.

6 The point I want to make is this, Mr. Chairman: if  
7 Mr. Comey would have been alive, I think this whole question  
8 would not even be before the board now, if he would not have  
9 died in the automobile accident that he did.

10 The fact that he's dead doesn't change, I think,  
11 the legal implications of what the consequence of your action  
12 today should be that rather than have a new hearing with  
13 Mr. Comey participating as our expert witness, we should be  
14 given a new hearing with a similarly qualified expert.

15 The Intervenor, in a way, is caught in a Catch-22  
16 situation here because first, the licensing board says you  
17 announced your inability to participate without the help of  
18 an expert and so we are going to infer a default and withdraw  
19 the security contentions. So by doing that, they take away  
20 the very right to appeal which was referred to by this board  
21 in its last opinion before today.

22 DR. JOHNSON: But, the letter of January 19, didn't  
23 seem to offer the licensing board many other alternatives.  
24 There was nothing in that letter about reserving rights or  
25 please delay the hearing until we can find a new witness or



1 anything of that nature.

2 It really did look like a pick up the ball and go  
3 home situation rather than a situation of not knowing what  
4 to do.

5 .MR. JONES: Not at all. Nowhere in that letter was  
6 the word default used; nowhere was the words we withdraw  
7 our contentions used.

8 In fact, to show you the confusion that transpired  
9 from when the licensing board met in early February, look  
10 at the contrast between the account in PG&E's brief before  
11 you today and the Staff brief about what happened.

12 In PG&E's brief on Page 7 they say, Nowhere did  
13 the board rule that Intervenor had withdrawn the security  
14 contention. On Page 10, PG&E says, The board did not dismiss  
15 the contentions. Page 19, they say, The contentions were  
16 considered as a matter of law.

17 On the contrary, the Staff says this: No showing  
18 was made to resurrect the contentions, this is at Page 24.  
19 Page 28, they say, The Intervenor relinquished the contentions.

20 No one is really clear about what happened, except  
21 I can tell you that this happened: when Mr. Baldwin showed  
22 up and was an attorney who had some individual and personal  
23 knowledge that would enable him to cross-examine effectively,  
24 that's the first time that the whole idea of default came up  
25 in the board's mind.



1 MR. SALZMAN: Did Mr. Baldwin tell the board that  
2 he had special qualifications?

3 MR. JONES: As I understand the regs, to participate  
4 in this kind of proceeding --

5 MR. SALZMAN: No, no. Answer my question, Mr. Jones.  
6 Did Mr. Baldwin, when Mr. Baldwin appeared --

7 MR. JONES: Mr. Baldwin appeared and said that he  
8 felt able to participate. Now, I don't think he said, I'm  
9 uniquely qualified because I've got a background in physics  
10 or this or that.

11 MR. SALZMAN: But, you're making an argument that  
12 he is uniquely qualified and the board didn't know it.

13 MR. JONES: He didn't make the argument that he's  
14 uniquely qualified --

15 MR. SALZMAN: Well, then how can you make it?

16 MR. JONES: I don't think it has to be made,  
17 Mr. Salzman, because --

18 MR. SALZMAN: You just made it.

19 MR. JONES: No, the point is this: Mr. Valentine  
20 and I personally didn't feel we had the knowledge to effect-  
21 ively present the Intervenor's case without the aid of an  
22 expert. This man does, but from the licensing board's frame  
23 of reference, and under the regs, the only issue is that  
24 the man admitted as an attorney in the State of California  
25 or in some jurisdiction within the Country that qualifies him



1 and is he willing to sign a protective order, and he was.

2 And the board got off on this whole thing, this  
3 man is unfamiliar to us; we don't know him. Whether he is  
4 familiar or not is irrelevant. I know of no other court  
5 in this Country or no other administrative tribunal where the  
6 adversary or the tribunal has to be familiar with an  
7 attorney for him to appear or participate.

8 MR. SALZMAN: Even when the attorney comes for the  
9 first time to a hearing and takes a position directly  
10 opposite to the position taken by counsel for the last two  
11 years.

12 MR. JONES: Well, the licensing board apparently  
13 characterized his position as directly opposite; we don't  
14 concede that it was directly opposite.

15 MR. SALZMAN: Well, you said Intervenors can't  
16 participate; that's what your letter said. Now, this man  
17 comes up and says Intervenors can participate: that's pretty  
18 opposite.

19 MR. JONES: To that extent, it's directly opposite.

20 MR. SALZMAN: All right. Secondly, suppose a new  
21 counsel came in and he was not authorized and the board let  
22 him go ahead. That would make quite a bit of difficulty.

23 MR. JONES: There was not problem in that respect,  
24 Mr. Salzman, because representatives of the Intervenor were  
25 sitting right there when all of this transpired and if the



1 board was really interested in finding out whether this man  
2 represented them or not, they could have asked that question  
3 and it could have been taken care of in 30 seconds.

4 MR. MOORE: Wasn't that question asked by the board  
5 on the 8th of February?

6 MR. JONES: I'd like to defer that question for  
7 Mr. Baldwin, without meaning any disrespect, because he was  
8 present then and I wasn't.

9 MR. SALZMAN: Mr. Jones, is not the Court entitled  
10 to make any check it pleases? How does the Court find out  
11 that Mr. Baldwin is a party, or is a lawyer?

12 MR. JONES: They made not attempt to find out.  
13 Certainly, the Court is entitled to know if the man is a  
14 lawyer or not, but that wasn't the issue. They didn't deny  
15 that he was a lawyer or say, We have doubts that this man is  
16 a lawyer. That wasn't the issue at all. Let's look at this  
17 in a little bit different way.

18 MR. MOORE: Well, isn't that the gist of the board's  
19 remarks; isn't that what they were really driving at when they  
20 said this man is unfamiliar to us?

21 MR. JONES: Oh, no. They didn't say, We have  
22 doubt that he's a lawyer.

23 MR. MOORE: Well, in doubts that he, in fact, was  
24 representing Intervenor?

25 MR. JONES: The question of familiarity goes back

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1 toward this whole issue that has been skirted around by the  
2 licensing board and I think that's an unstated feeling that  
3 all of this, really, should not be disclosed at all to any  
4 Intervenor or member of the public. That's why they were  
5 concerned about who is this fellow, he should be familiar  
6 to us.

7 And, I would like to look at this a little bit  
8 different way.

9 DR. JOHNSON: Wait just a minute with that.

10 Are you saying that the licensing board had somehow  
11 made it known to you and Mr. Valentine that even though in  
12 ALAB 410 and 507, the appeal board had said Intervenor counsel  
13 had the right to see the plan and prepare to cross-examine,  
14 that the board was not going to let you or Mr. Valentine see  
15 the plan? I mean, you've essentially said that that was  
16 what the board was going to do and, is that your feeling, that  
17 the board was not going to let you or Mr. Valentine see the  
18 plan?

19 MR. JONES: Not at all, with respect to myself and  
20 Mr. Valentine. But, when Mr. Baldwin shows up who apparently  
21 appeared to them to have some personal knowledge which would  
22 enable him to comprehend things a little bit better, that's  
23 when they got all concerned about this question of familiarity  
24 which doesn't -- nowhere else in the United States --

25 MR. SALZMAN: Mr. Jones, I ask you once again to



1 show me in the record where Mr. Baldwin explained that he had  
2 personal knowledge. Where in the record does that appear?

3 MR. JONES: I'm not saying that he explained that  
4 he had personal knowledge or expertise.

5 MR. SALZMAN: Just a moment, Mr. Jones. You  
6 attributed something to the board's thought, that it appeared  
7 to the board that Mr. Baldwin had some special knowledge.  
8 Where in the record can you substantiate that statement?

9 MR. JONES: I don't think you can point to any  
10 remark --

11 MR. SALZMAN: Can you point to anything?

12 MR. JONES: No, I cannot.

13 MR. SALZMAN: Thank you, Mr. Jones.

14 MR. JONES: Let me look at this one other way with  
15 you before I conclude, because I think that the comments of  
16 the Staff brief were illuminating.

17 In their brief, they concede that a voluntary with-  
18 draw is without prejudice to reinstatement of the issue, and  
19 they cite the Mississippi Power and Light Company case, this  
20 is on Page 24. Now assuming, and we don't concede, but  
21 assuming arguendo that the security issues were withdrawn  
22 by the response of January 29, January 19, every consideration  
23 argued in favor of reinstating the issue when Mr. Baldwin  
24 appeared; and these would include this: there would have been  
25 no delay to the Applicant or to the board; there would have



1 been no surprise or prejudice to the Applicant because they  
2 were aware for three years of the Intervenor's concern over  
3 the issue; the public's interest would have been advanced  
4 in having a maximally reviewed security plan; the interest of  
5 the Intervenor would have been advanced; and there would have  
6 been meaningful cross-examination which was something that  
7 the Staff pointed out on Page 27, as being of value.

8 DR. JOHNSON: Who is supposed to argue these four  
9 points? If you want a contention reinstated or reconsidered?

10 MR. JONES: You mean at that point in time,  
11 Dr. Johnson?

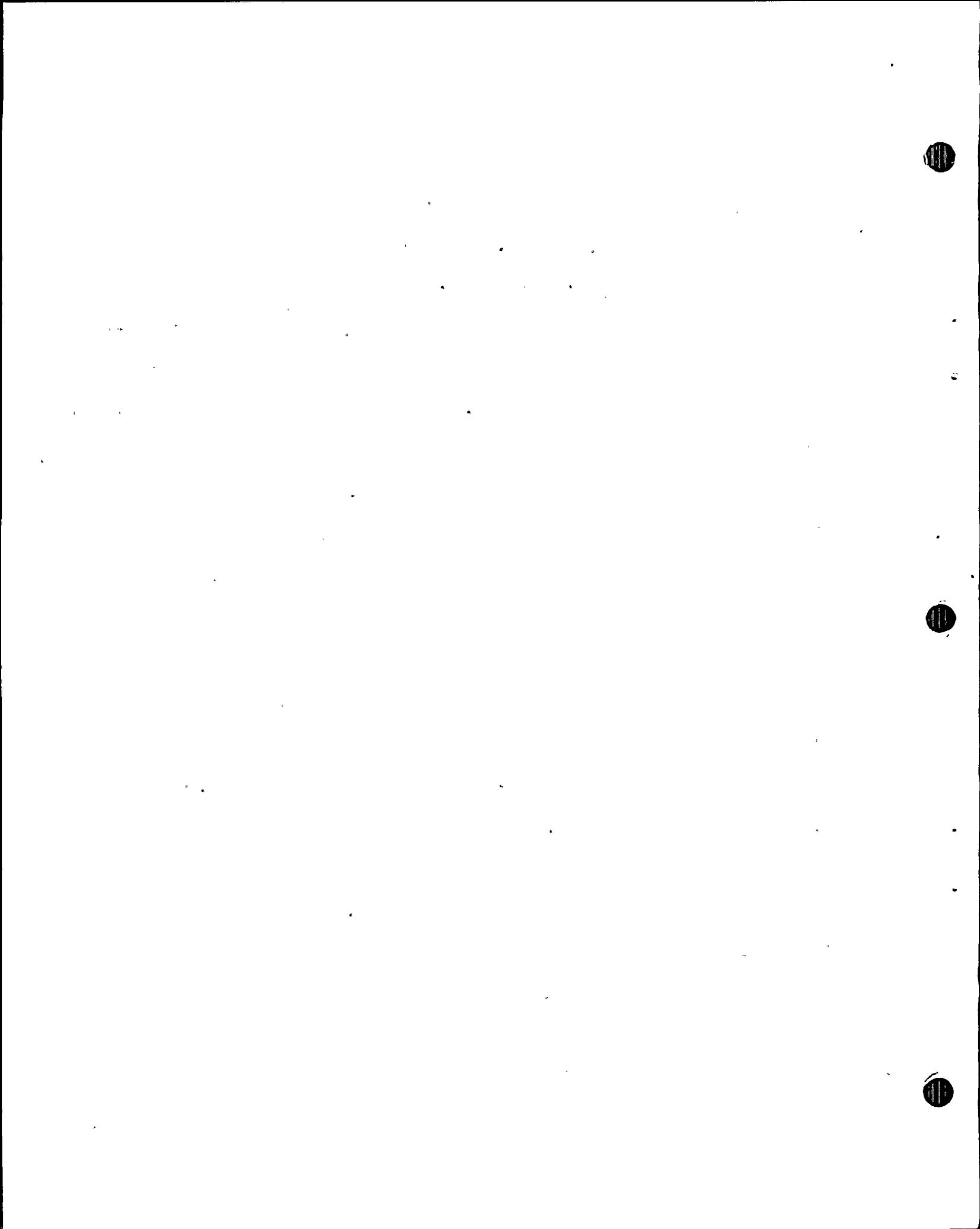
12 DR. JOHNSON: Well, the situation was that the board  
13 thought that the contection had been withdrawn or they  
14 interpreted the letter of January 19 as that.

15 You were stating the four factors for reconsider-  
16 ation, but it's not the burden of the board or the other  
17 parties, it's the burden of the Intervenor to make these  
18 four arguments, is it not?

19 MR. JONES: Of course, the problem was this: using  
20 somewhat Scriptural language, the Staff says why didn't we  
21 resurrect the security contentions at that point in time when  
22 Mr. Baldwin showed up.

23 DR. JOHNSON: That's the word I was looking for.

24 MR. JONES: They like that Scriptural illusion,  
25 apparently. Now, the problem was that until Mr. Baldwin show-



1 ed up, the contentions had never been pronounced dead and the  
2 board had never signed the death certificate. Now, where's  
3 the opportunity to perform a resurrection until we'd been  
4 advised there was a death?

5 What happened was that at that instant when  
6 Mr. Baldwin shows up, they say, Ah ha, the patient is dead and  
7 why didn't you ask for a resurrection. Now, we're telling  
8 you the patient's dead; why didn't you ask for a resurrection  
9 sooner?

10 MR. MOORE: Mr. Jones, if the patient is dead, what  
11 difference does the death certificate make?

12 MR. JONES: We did not, as Mr. Valentine explained  
13 in his argument, we did not intend to communicate a withdrawal  
14 of the contentions or a default. And the licensing board  
15 obviously inferred something from the January 19 pleading that  
16 we didn't intend.

17 So, nowhere else is a default entered and our system  
18 of jurisprudence without either a specific request or a  
19 signed order. So, I think this is really a novel thing.

20 DR. JOHNSON: Suppose Mr. Baldwin had not shown up.  
21 Suppose that there was no Mr. Baldwin for the purposes of  
22 discussion now. And the results would be about the same as  
23 they are today with respect to the contentions.

24 Would you be before us today appealing that result  
25 and saying the board wrongfully went ahead on this con-

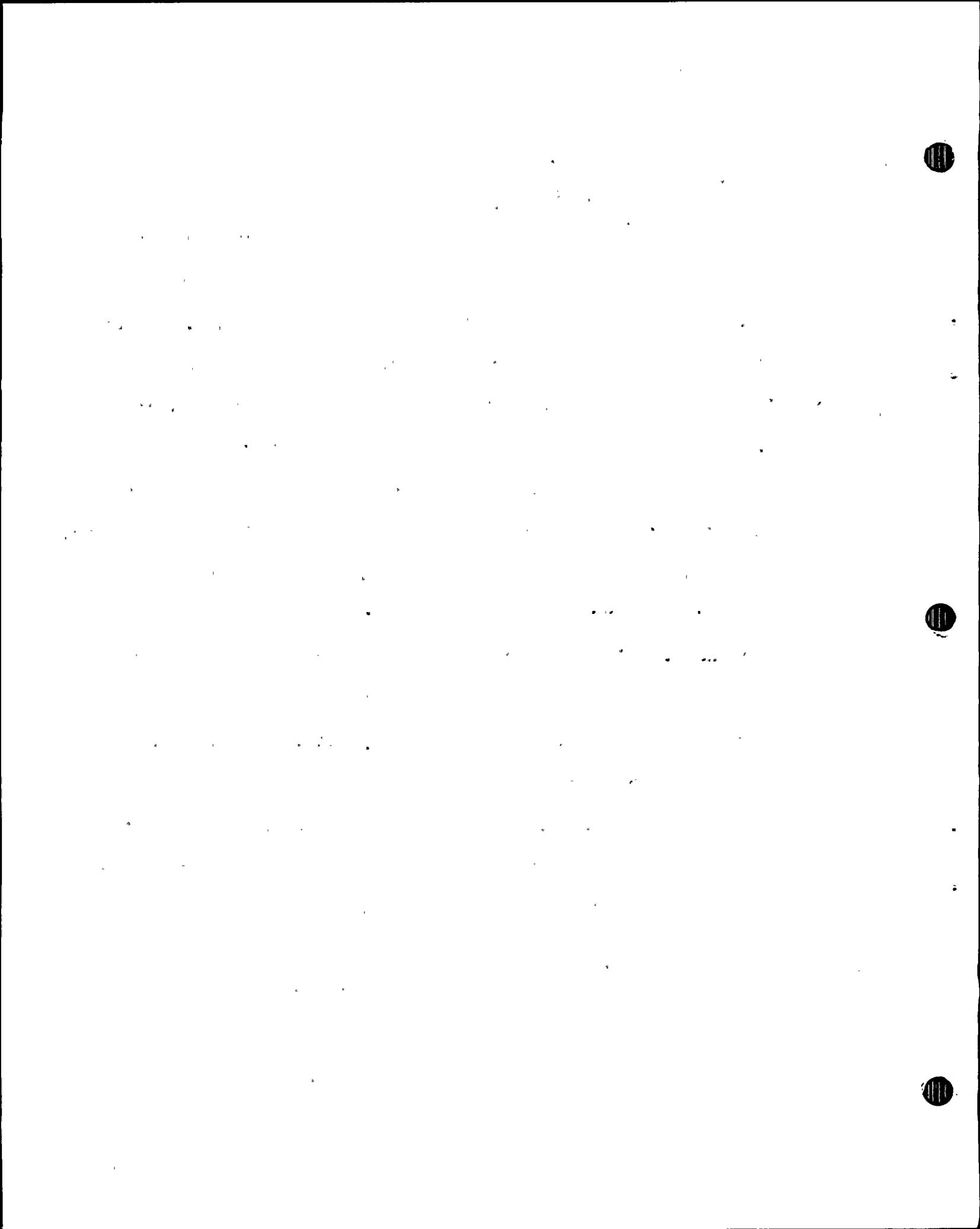


1       tention and wrongfully determined that the Intervenor had  
2       withdrawn if neither you or Mr. Valentine has shown up at  
3       that hearing as you didn't?

4               MR. JONES: Yes, I think I understand your question  
5       and I believe that answer is yes. If Mr. Baldwin had never  
6       showed up, we still would be here contending that Mr. Comey  
7       was wrongfully disqualified and before his death, had a right  
8       to appeal and to a rehearing with a similarly qualified  
9       expert was perfected. But, the fact that Mr. Baldwin showed  
10      up and wanted to cross-examine on the record adds really a  
11      second issue or a second level of problems because this  
12      whole question of instant pronouncement of withdrawal and  
13      refusal to resurrect equally instantly comes up. So, the  
14      second level of problem, even leaving aside the question of  
15      expertise of Mr. Comey, is did this Intervenor have the right  
16      to cross-examine and participate with counsel of its choosing?

17              MR. MOORE: Mr. Jones, if I can follow up  
18      Dr. Johnson's question and take it step by step.

19              If, leave for the moment and for the purposes of  
20      this immediate discussion Mr. Baldwin out of the picture, if  
21      the purpose of the January 19 correspondence to the board was  
22      to announce that you were not going to participate in the  
23      hearing and if that's the case, then Intervenor could not  
24      have carried its burden of persuasion to at least present  
25      some support for its contention. And then, in effect, isn't



1 that situation analogous to or equal to conceding the con-  
2 tentions?

3 MR. JONES: Not at all. I think for two reasons.

4 First of all, that wasn't what was communicated  
5 and second of all, there was nevertheless, in a sense, Mr.  
6 Chairman, these were not even adversary proceedings, although  
7 an adversary format is used, because what is the duty of the  
8 licensing board is to make the determinations necessary to  
9 finding the safest possible facility down there.

10 And, so they had the -- what you're saying would  
11 almost suggest that if you so interpret that January 19 letter  
12 they don't even have to review the issue, and that's not  
13 my understanding of the way licensing board proceedings work.  
14 They nevertheless have the burden of making their determin-  
15 ations and in fact, at least according to the way PG&E  
16 interpreted the goings on, the contentions raised by this  
17 Intervenor were considered.

18 I'm concerned about time, Mr. Chairman, and I would  
19 like to have Mr. Baldwin address the issues pertaining par-  
20 ticularly to participation by counsel with Intervenor's own  
21 choosing.

22 MR. MOORE: Fine, and I think Dr. Johnson has one  
23 further question.

24 DR. JOHNSON: This is an operating licensing hear-  
25 ing, is it not?



1 MR. JONES: That's true.

2 DR. JOHNSON: And it's not a mandatory hearing, is  
3 it? In other words, the only reason that there's a hearing,  
4 the only reason that the operating license states that there  
5 are issues raised is that members of the public raise the  
6 issue.

7 Now, if a member of the public raises an issue  
8 and then says it's not going to participate, then it would  
9 seem to me that the licensing board is fully within its right  
10 to say that we do not have to have a hearing on that issue.  
11 Since the only reason that the issue would have been heard in  
12 the first place is because a member of the public wanted to  
13 hear it.

14 MR. JONES: Well, truthfully, I can't tell you if  
15 that's correct or not. I'm assuming that we you say is  
16 correct, but I think nevertheless --

17 DR. JOHNSON: Remember, I'm an engineer, so I'm on  
18 dangerous ground making that assumption.

19 MR. JONES: But, nevertheless, I think that as PG&E  
20 conceded that it was incumbent upon this board to really  
21 serve the public interest here and to fulfill its charter by  
22 looking at the issues as carefull as possible.

23 DR. JOHNSON: Well, let me ask -- the brief, the  
24 Intervenor's brief seems to say that the board did not carry  
25 that burden and did not review the issue; is that your under-



1 standing?

2 MR. JONES: I have no understanding one way or  
3 the other because I wasn't there; this was all in camera.

4 DR. JOHNSON: You've not reviewed the transcript  
5 of the hearing on February 8?

6 MR. JONES: The in camera proceedings as far as  
7 security goes?

8 DR. JOHNSON: Negative. The hearing that preceded  
9 the in camera hearing was a hearing in the open.

10 Did the board give any indication as to whether or  
11 not it was going ahead with the site tour and the hearing  
12 in camera?

13 MR. JONES: I cannot tell you that, Dr. Johnson.  
14 I would like to defer that to Mr. Baldwin, who was both  
15 present and has reviewed that transcript.

16 DR. JOHNSON: Thank you.

17 MR. JONES: Thank you.

18 MR. MOORE: Go ahead, Mr. Baldwin, thank you.

19 MR. BALDWIN: Good morning, Mr. Chairman, and  
20 members of the board.

21 My name is Andrew Baldwin and I represent the  
22 San Luis Obispo Mothers for Peace. The issue for this board  
23 to decide beyond the qualifications of Mr. Comey or other  
24 experts in regard to the security plan is this: can an atomic  
25 safety and licensing board impose rules for representation



1 by an attorney before the NRC which are not contained in NRC  
2 regulations.

3 The relevant rule, of course, is 10CFR, Section  
4 2.713A. A person may appear in an adjudication on his on  
5 behalf or by an attorney at law in good standing admitted to  
6 practice before any court of the United States, the District  
7 of Columbia, or the highest court of any state. This is  
8 the rule. It is the only rule.

9 At the time I appeared on February 12, 1979 in  
10 San Luis Obispo, I qualified under that rule. Apparently,  
11 PG&E nor the NRC Staff disputes that fact. Yet the board  
12 applied tests for representation by an attorney which are not  
13 in the regulations and thereby barred an attorney, myself,  
14 qualified under the regulations from participating at the  
15 hearing.

16 Pages 9106 and 7 on February 9, the Chairman of  
17 the board ruled as follows: " We cannot conceive that  
18 Mr. Baldwin could participate in this matter in a meaningful  
19 and productive way. He is a stranger to us. We have no  
20 information on him, about him. To come in at the twelfth hour  
21 with a telegram saying that he is now representing the Mothers  
22 for Peace and intends to participate in the tour on Monday  
23 is simply unacceptable to this board. It is our determination  
24 that Mr. Baldwin has not established the right to participate  
25 in the evidentiary hearing in camera on Monday.



1 MR. MOORE: Mr. Baldwin, did you inform the board  
2 at any time that you had signed a protective order?

3 MR. BALDWIN: That I had?

4 MR. MOORE: Yes.

5 MR. BALDWIN: I had not.

6 MR. MOORE: Were you prepared to sign one?

7 MR. BALDWIN: Yes, I was.

8 MR. MOORE: Did you request of either Applicant  
9 Staff or the board and communicate that willingness to sign  
10 one?

11 MR. BALDWIN: I was never asked. I was willing  
12 and I am willing today.

13 MR. MOORE: Wasn't it your obligation to affirm-  
14 atively act in that regard instead of being asked under  
15 the circumstances under which you entered the hearing?

16 MR. BALDWIN: I think that if the Applicant or the  
17 board found that it was important for counsel for a party to  
18 sign a protective order, that they should ask that counsel  
19 whether he's willing to do that.

20 MR. MOORE: Did you in any way communicate to the  
21 licensing board that the Intervenor had altered its course  
22 and was not wishing to participate and that Mr. Valentine  
23 had full knowledge of this?

24 MR. BALDWIN: I informed the board at Pages 9357  
25 and following in some detail exactly what it was that I in-



1 tened to pursue. These included, in general, two issues.

2 First, whether the security plan will work; I don't  
3 believe it will. And secondly, whether the security plan  
4 contains aspects which maybe illegal or unconstitutional.

5 DR. JOHNSON: Were you aware of the letter of  
6 January 19 the Mr. Valentin and Mr. Jones had written to the  
7 board?

8 MR. BALDWIN: Yes, I was.

9 DR. JOHNSON: I guess Mr. Moore's question phrased  
10 differently, did you make any effort to point out to the board  
11 that whereas they had this letter from Intervenor counsel,  
12 that Intervenor had in deed changed its mind about how they  
13 were going to procede in this security matter and make any  
14 effort then to explain to the board why on the one hand they..  
15 had a letter which at least the interpreted as a withdrawal  
16 and on the other hand you were showing up asking to participate  
17 in the hearing in the name of the Intervenors?

18 MR. BALDWIN: I stated on Page 9359 and 9358, I  
19 explained that Mr. Valentine -- that I knew of Mr. Valentine's  
20 letter and that the letter was intended to inform the board  
21 that Mr. Valentine did not feel capable to participate  
22 meaningfully without an expert and that my opinion, quote,  
23 my opinion is different. I don't feel that way. That's  
24 what I said on February 12.

25 MR. MOORE: Mr. Baldwin, were either Mr. Valentine



1 or Mr. Jones on February 8, aware that you were appearing  
2 and altering the position previously taken by them as counsel  
3 for the Intervenor?

4 MR. BALDWIN: I believe the answer to that question  
5 is privileged; however, I'll answer it anyway and the answer  
6 is yes. Mr. Valentine was very much aware that I was going  
7 to send the telegram on February 8.

8 MR. MOORE: Does an Intervenor, when represented by  
9 counsel, speak through his counsel and only through his  
10 counsel?

11 MR. BALDWIN: Presumably yes.

12 MR. MOORE: And if counsel speak with two minds,  
13 doesn't that put the decision maker in somewhat of a quandary?

14 MR. BALDWIN: It might, and I would presume that the  
15 decision maker would there upon try to find out whether in  
16 the first place the Intervenor is speaking with two minds --

17 MR. MOORE: Mr. Baldwin, did you offer the board  
18 any assistance at all in that regard?

19 MR. BALDWIN: Yes, I sure did. My very first  
20 communication to the board on behalf of the San Luis Obispo  
21 Mothers for Peace, although not my first communication to the  
22 board in this case, was my notice of appearance. I stated  
23 to the board that I was a member of the California Bar, and  
24 that I was appearing on behalf of the San Luis Obispo Mothers  
25 for Peace.



1 My position, at that time, and the Intervenor's  
2 position, at that time and since that time, has been that  
3 we can participate meaningfully in the hearing with or without  
4 an expert. And that's exactly what I told them the first  
5 time I had the chance.

6 And the board never tried to find out the answer.

7 MR. MOORE: Would you be so good as to point me to  
8 where in the record that appears, please.

9 MR. BALDWIN: What specifically?

10 MR. MOORE: What you just said that the help and  
11 assistance that you offered the board and that counsel,  
12 although previously speaking in one way, had now changed and  
13 altered its course and wished to participate and that you,  
14 because of your qualifications, could help.

15 Where does that appear in that way in the record?

16 MR. BALDWIN: Page 9359, I say as follows:

17 Mr. Valentine's letter that says that it is impossible for  
18 this Intervenor, meaning San Luis Obispo Mothers for Peace,  
19 to prepare for cross-examine or to participate under the  
20 conditions that Mr. Valentine found himself and therefore,  
21 he would not be able to participate in the hearing scheduled  
22 for the first week in February. At no point did he say that  
23 we withdraw our contention. He didn't say that Diable Canyon  
24 security system is okay, he just said, I don't feel I can  
25 participate.



1 Well, that was Mr. Valentine's position and with all  
2 respect to Mr. Valentine, and that's the most important  
3 thing to remember, my opinion is different. I don't feel  
4 that way.

5 DR. JOHNSON: Well, were you not, then, mischaracter-  
6 izing the letter because at that time, the letter at all times  
7 had said the Intervenor. Mr. Valentine never used the  
8 pronoun I at all; he always referred to this Intervenor.

9 So, in saying that, what you said at the hearing,  
10 you seem to be characterizing Mr. Valentine's opinion whereas  
11 Mr. Valentine's letter can only be read as characterizing the  
12 opinion, I mean, expressing the opinion of the Intervenor.

13 MR. BALDINW: And, as of the time the letter was  
14 sent, that was the opinion of the Intervenor.

15 However, five days before the hearing was about to  
16 go ahead, after four years of frustration at the hands of the  
17 NRC and PG&E Staff, I appeared. I met the Intervenors and  
18 by luck, I believed I was qualified to participate in the  
19 hearing. And the position of the Intervenor, San Luis Obispo  
20 Mothers for Peace, changed at that time. Five days before  
21 the hearing, the position of the Intervenor with respect  
22 to whether they could participate without an expert changed  
23 and the board was immediately informed of that.

24 MR. MOORE: Excuse me, Mr. Baldwin, but five days  
25 before the hearing, where was the board informed? You merely



1 sent them a telegram that you were going to appear. You  
2 were not there in person to explain any of this to them, nor  
3 was anyone else from Intervenor there able to explain to the  
4 board what was going on.

5 MR. BALDWIN: On February 8, from San Francisco, I  
6 sent a telegram to the board informing them that I intended  
7 to participate in the tour and hearings. That was notice  
8 that our position had changed. And as soon as I appeared in  
9 San Luis Obispo on February 12, an appearance which inciden-  
10 tally the board was inclined not to grant in the first  
11 instance, I informed the board of our change in position.

12 Every opportunity I had to make that point, I made  
13 it.

14 MR. MOORE: Mr. Baldwin, is the Applicant, under  
15 the circumstances in which you entered the hearing, entitled  
16 to a reasonable time to check the bona fides of counsel for  
17 Intervenor, the new counsel for Intervenor?

18 MR. BALDWIN: The bona fides of counsel can be  
19 established if counsel can be established to be a member of  
20 the California Bar.

21 PG&E knows that and has known that for quite a  
22 while, in point of fact. And, if they had wanted to know  
23 that in public, they could have asked. And, if they had  
24 asked, I would have told them, and in fact I did tell them.  
25 I told the board, the very first thing I said was, I am a



1 member of the California Bar.

2 MR. SALZMAN: Mr. Baldwin, I think the question is  
3 this: you come in and you say you're a member of the  
4 California Bar and you know that. The point is how could  
5 the lawyers for the other side check that? I'm not familiar  
6 with California practice. I did what most lawyers would do.  
7 I reached for a copy of Martindale-Hubbell, and I couldn't  
8 find your name in it. That's an unofficial source. I presume,  
9 therefore, that you are probably new to the Bar and are not  
10 listed.

11 But, how would the Intervenors check? How would  
12 they know?

13 MR. BALDWIN: Had PG&E taken the time and as I  
14 said before, they know. I mean, I have long experience with  
15 them.

16 But, assuming that they didn't know, or that they  
17 wanted to make me say so, they could have said, Mr. Baldwin,  
18 how do we know that you're a member of the California Bar,  
19 and I would have said, Here is my Bar card, which I had in  
20 my wallet at the time and I have with me today. And that  
21 verification would have taken maybe 10 seconds, maybe 15 if,  
22 I would have had some trouble finding that card.

23 MR. SALZMAN: Well, yes, you have a Bar card; that's  
24 true. My question is wouldn't they be entitled to check it  
25 at a neutral source, i.e. call someone to find out if, in fact,



1 there is such a man?

2 MR. BALDWIN: They could have called the State Bar  
3 in San Francisco. That would have taken 5 minutes, perhaps,  
4 and read my number and they would have said, Yes, that's  
5 Mr. Baldwin and he is a member of the California Bar.

6 MR. SALZMAN: I take it from what you have said,  
7 however, that this is really academic. You've been a member  
8 of the Bar for sometime and appeared in proceedings involving  
9 PG&E.

10 MR. BALDWIN: I have long experience with the  
11 company.

12 MR. SALZMAN: No, no. When were you admitted to  
13 the Bar?

14 MR. BALDWIN: I was admitted to the Bar in December  
15 of 1977.

16 MR. SALZMAN: All right. And you have participated  
17 in some proceedings or matters with PG&E in which they knew  
18 you were a lawyer.

19 MR. BALDWIN: Yes, I have debated PG&E represent-  
20 atives on a number of occasions, some of them in public.

21 MR. SALZMAN: Have you appeared in any legal pro-  
22 ceeding in which you had to show that you were a member of  
23 the Bar so that they would know this? Lots of people debate  
24 with the gas company all the time.

25 MR. BALDWIN: Well, as a matter of fact, yes, I did.



1 I appeared in the Diablo Canyon case and announced in that  
2 case that I was a member of the California Bar, a couple of  
3 days before this incident took place.

4 MR. SALZMAN: Other than that?

5 MR. BALDWIN: No.

6 MR. SALZMAN: Thank you.

7 MR. BALDWIN: But, that's not really important. I  
8 am a member of the California Bar and that fact could have  
9 been verified in 5 minutes and yet it was not.

10 And that, under the regulations, Section 2.713A  
11 is the only rule; the only rule there is.

12 DR. JOHNSON: May I ask a question? We'll give you  
13 time.

14 In ALAB 410, this board said Intervenor's counsel  
15 has the right to review the security plan and the right to  
16 cross-examine and participate under the conditions of a  
17 protective order.

18 In your belief or your interpretation of that appeal  
19 board order, are there no conditions under which the Applicant  
20 or the Staff might object to the appearance of a particular  
21 individual as counsel for the Intervenor to have the right to  
22 review the plan?

23 Do you believe the only requirement necessary, the  
24 requirements necessary are that you be an attorney represent-  
25 ing that Intervenor and that you've signed the protective



1 order?

2 MR. BALDWIN: That is the only qualification con-  
3 tained in the NRC regulations. Yes, I believe that is true.

4 MR. SALZMAN: Mr. Baldwin, is this true though:  
5 let us assume that you're correct and that may be right that  
6 you're entitled to appear at the hearing and look at any  
7 documents that the Commission has. But, does it follow upon  
8 the announcement that you're a lawyer, you're also allowed to  
9 enter upon the property of the utility?

10 MR. BALDWIN: If -- you bet I am. If the tour is  
11 part of the evidentiary hearing, then all the visual impres-  
12 sions of the board during that tour are evidence. Everything  
13 the board sees along that tour is evidence. All the little...  
14 boxes, all the cameras, all the special locks, all that stuff.  
15 And, the board cannot take evidence outside the presence of a  
16 party --

17 MR. SALZMAN: Suppose I'm prepared to grant you  
18 that point, as I may well be.

19 My question is this, though: I think we have to  
20 admit that a security plan is sensitive in the sense that if  
21 it's widely disseminated, it becomes fairly useless in certain  
22 manners.

23 Is the company entitled to look beyond you before  
24 it says anything further -- it's like, let's just wait a  
25 minute. May we find out who Mr. Baldwin is generally and



11

12



13

14



1 are we entitled to a week or something to find out that you're  
2 not, in fact, going to sneak in there and blow up their plant.

3 MR. BALDWIN: If they were entitled to such a thing,  
4 and I don't believe they are, then they could have asked.

5 MR. SALZMAN: Oh, they're not entitled to; they  
6 must admit you immediately.

7 MR. BALDWIN: Under the NRC regulations --

8 MR. SALZMAN: Yes, but the regulations talk only  
9 about the hearings. Remember, the alternative is that they  
10 have rights, too and they could ask that the hearing be put  
11 off until they have checked, is that correct?

12 MR. BALDWIN: If PG&E were nervous about the appear-  
13 ance of an unknown attorney --

14 MR. SALZMAN: Utilities are very nervous.

15 MR. BALDWIN: They could have said to the Chairman,  
16 look, we need a week to think about this. But, they didn't  
17 say that. They said, We're going in there right now.

18 MR. SALZMAN: Let me follow this up. Yes, I suppose  
19 they might have said this, but also, when one comes in late  
20 to a hearing that's already scheduled, one takes it as one  
21 finds it. The hearing was set and PG&E didn't have enough  
22 time to check you out. Your argument is not quite as strong  
23 as it sounds if you had come in a month early; do you see  
24 what I'm driving at?

25 MR. BALDWIN: I came in four days early.



1 MR. SALZMAN: Well, now, that's over the weekend;  
2 be fair.

3 MR. BALDWIN: The announcement that I was present  
4 in the case, representing the Mothers for Peace arrived on  
5 Thursday. There was ample opportunity for PG&E to suggest  
6 that it was uncomfortable about the situation and that it  
7 wanted to think about it.

8 MR. SALZMAN: But, let me suggest this to you: you  
9 put PG&E in a difficult position. Here it is Thursday, for  
10 a tour that has been scheduled for several months, prepara-  
11 tions have already been made.

12 Now, is PG&E going to be forced to stop it; to  
13 choose between stopping the hearing entirely or giving up  
14 the right to check you out? I'm suggesting, sir, that if  
15 you had brought yourself to their attention a month earlier,  
16 there might not have been any problem. But, by coming in on  
17 Thursday afternoon, for a hearing on Monday afternoon, that  
18 may put a different light on things, sir.

19 MR. BALDWIN: The NRC has no right to restrict the  
20 participation of an attorney who meets the tests of Section  
21 2.713A. The NRC has no right to restrict the participation  
22 of that attorney, neither does the Applicant, PG&E.

23 MR. SALZMAN: No, no. The NRC Chairman, as any  
24 administrative law judge, is entitled to conduct the hearings  
25 in an orderly manner and when the judge is required to travel

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1 3,000 miles away and set up a schedule, which then other cases  
2 have to then be adjusted, the judge may have the right to say,  
3 Intervenors, you've dawdled; you're too late; you should have  
4 thought of this before; and we are going to proceed without  
5 you.

6 That's really what the question is, isn't it, sir?

7 MR. BALDWIN: The board Chairman is not entitled to  
8 say that. If an attorney comes to the board Chairman, who  
9 meets the test of the regulations, that is it. The question  
10 is over and that person is a qualified representation, a  
11 qualified representative of another party under the NRC reg-  
12 ulations.

13 If there is time for PG&E to let it's private  
14 detective agency check me out, something that may have happen-  
15 ed already, then they can go ahead and ask for that opportunity.  
16 But, they don't have any right to do that and neither does  
17 the licensing board. If the qualifications are established  
18 under Section 2.713A, the argument is over.

19 MR. SALZMAN: Mr. Baldwin, the argument may be over  
20 in your mind, but the argument may not be over in the minds  
21 of other reasonable people, sir. That's the real problem.  
22 Most regulations have a lot of lead way in it.

23 Let me ask you this: suppose you had shown up in  
24 the United States District Courtroom, Courtroom No. 12 with  
25 old Judge Krump, and you had shown up at the eleventh hour



1 at the last moment; do you think that old Judge Krump might  
2 not have flipped you in the klink for contempt for daring to  
3 do such a thing and forcing him to put off his hearing?

4 MR. BALDWIN: Well, I believe --

5 MR. SALZMAN: I don't know whose courtroom this is,  
6 by the way.

7 MR. BALDWIN: I believe that if he did do such a  
8 thing, it would be wrongful.

9 MR. SALZMAN: Maybe and maybe not.

10 MR. BALDWIN: People retain counsel at the last  
11 minute and this was not at the last minute. But, people re-  
12 tain counsel at the last minute a lot. Go down to the  
13 criminal courts and you see clients meeting their counsel in  
14 the courtroom: It's not an unusual situation at all.

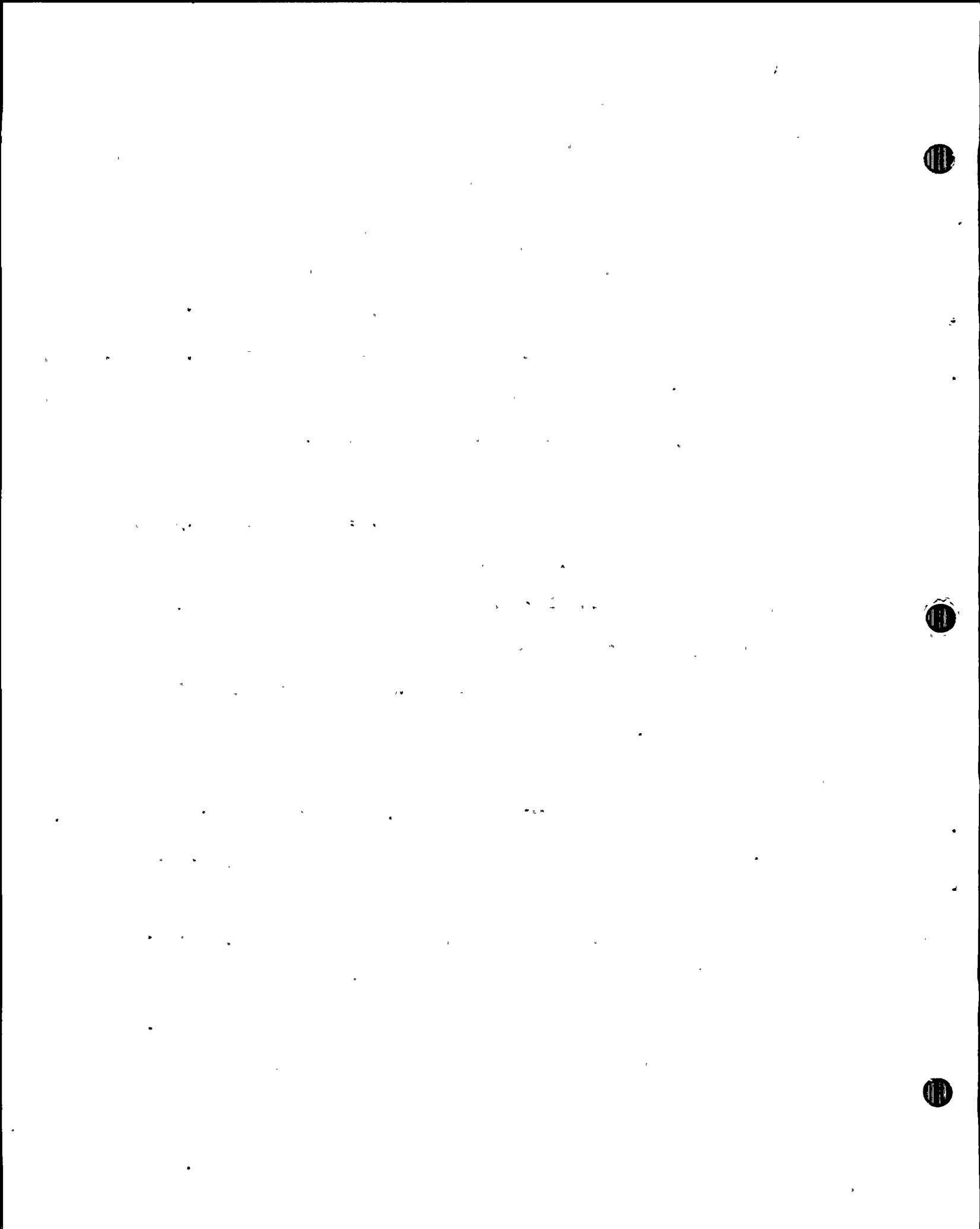
15 Thank you, members of the board.

16 MR. MOORE: We'll hear from counsel for the  
17 Applicant now.

18 MR. NORTON: Good morning, my name is Bruce Norton  
19 for the Applicant.

20 I had hoped that your laryngitis would slow you  
21 down, Mr. Salzman, but it hasn't.

22 I am not sure how the board would like me to pro-  
23 ceed in terms of the argument being broken up in three parts.  
24 But, I think, perhaps, I will go in the same order that the  
25 Intervenors presented their arguments.



1           There are several comments by Mr. Valentine in re-  
2     sponse, basically I think, to questions of this board with  
3     which I take some disagreement. The first one was, and I  
4     quote, We are in no different position this morning than we  
5     would be had Mr. Comey lived.

6           MR. MOORE: Excuse me. Mr. Baldwin, your colleagues  
7     are not present; are they planning to return and might not  
8     it be helpful if they were here?

9           MR. BALDWIN: They are planning to return and it  
10    would be helpful if they were here.

11          MR. SALZMAN: Mr. Valentine has a handicap and I  
12    was wondering if it is a problem.

13          MR. BALDWIN: It might be. He has a problem getting  
14    around sometime.

15          MR. SALZMAN: Would you check for him, sir?

16          MR. BALDWIN: I'll go look for him.

17          MR. NORTON: As I was saying, I disagree with  
18    Mr. Valentine's statement that the Intervenors are in no  
19    different position this morning than they would have been had  
20    Mr. Comey lived.

21           I think very clearly, we have a new set of cir-  
22    cumstances and a new set of facts, had Mr. Comey lived in  
23    this case <sup>then</sup> the arguments would be entirely different.

24           I think, however, that ties in with Mr. Jones'  
25    comments in response to a question by Dr. Johnson regarding



1 what would have happened if Mr. Baldwin had been allowed to  
2 cross-examine. I think Mr. Jones said, We would have appealed  
3 anyway, because Mr. Comey hadn't been qualified.

4 I'm a little bit confused as to, I guess what they're  
5 saying is that even if Mr. Baldwin had been allowed to cross-  
6 examine, that they would have been here on appeal because  
7 Mr. Comey had not been qualified.

8 So, going back to the question of the qualifications  
9 of Mr. Comey, I frankly can find no legal precedent nor has  
10 there been any cited by Intervenor, other than what stands  
11 for the proposition that that question is moot. And it has  
12 been so ruled by this Commission, and frankly, I don't see  
13 how this board can go into that question, because --

14 DR. JOHNSON: How about, excuse me, the matter of  
15 the standard that was used to disqualify Mr. Comey; is it,  
16 in your opinion, are we precluded from addressing that subject?

17 MR. NORTON: I believe you are. It's not unlike  
18 the Supreme Court case and I frankly forget the name of it,  
19 the first one that went up on the quota system in med schools  
20 and law schools, that the Supreme Court claimed it was  
21 moot, because he was now in med school or in law school, which  
22 ever the case may be, and they said, so, it's moot.

23 The next one that came up, the Bacchi case, was not  
24 moot, because Mr. Bacchi was not in med school and they  
25 reached the merits of that. Well, here, you're talking about



1 whether or not Mr. Comey is qualified. You must apply the  
2 facts of Mr. Comey to ALAB 410. And as Mr. Comey is no  
3 longer here, that is moot. Whether you have the opinion that  
4 they were correctly or incorrectly applied makes no difference.  
5 The question is moot; there is no justiciable controversy on  
6 that issue before this board.

7 MR. SALZMAN: Mr. Norton, let me interrupt. There's  
8 an applied complement in your statement, but the document of  
9 mootness is, as you say, a Constitutional doctrine because  
10 the Supreme Court in its wisdom, and also because it likes  
11 to duck questions when it can, doesn't wish to hear anything  
12 that's not a real case or controversy. And, it has raised  
13 that to a Constitutional level. This is just an administrative  
14 board and an administrative agency; no doctrine of Constitu-  
15 tional law prevents us from discussing moot questions or  
16 touching on correct standards.

17 MR. NORTON: I would be in agreement that you can  
18 discuss it, but I think it comes in the form of dicta, at  
19 best, if you choose to discuss it. I think you can make --  
20 and I think you have, incidentally. I think, Mr. Salzman,  
21 you've made your feelings fairly well-known in the certifi-  
22 cation dissent that you wrote. I would gather from reading  
23 that that you have an opinion about that.

24 But, clearly that question is not moot. You cannot  
25 remand to have Mr. Comey come in and testify; it's a physical



1 impossibility.

2 MR. SALZMAN: Even without a death certificate.

3 MR. NORTON: Right.

4 DR. JOHNSON: The licensing board applied, apparent-  
5 ly, applied a standard, a nuts and bolts standard. I would  
6 think certainly, and I think that there are other cases in  
7 the history of the appeal board where the standard that a  
8 board uses to reach a decision came into question and would be  
9 criticized or not criticized by the appeal board and --

10 MR. NORTON: I think that's correct and I think you  
11 can say, again, in terms of a dicta or even a holding if you  
12 want to do that we would suggest that the licensing board in  
13 the future apply this standard. We think that their usage of  
14 410 is all right, it's fine, or perhaps wrong or perhaps if  
15 it was partly wrong. I happen to disagree with that; I  
16 happen to think they applied 410 correctly in that case. They  
17 clearly did.

18 But, I think the specific question of whether  
19 Mr. Comey is qualified or not is moot, because nothing can  
20 be done about that. You cannot go back and have Mr. Comey  
21 review the security plan.

22 DR. JOHNSON: I obviously agree with that, but  
23 whether the standards there were used to disqualify or measure  
24 Mr. Comey's qualifications were correct or incorrect would  
25 certainly seem to me is not a moot question.



1 MR. NORTON: It's moot, as far as Mr. Comey is con-  
2 cerned. It is not moot, of course, generically for other  
3 cases.

4 Well, let me get on to that for a moment, or go  
5 beyond that for a moment and talk about what Intervenors fail-  
6 ed to do here. Upon Mr. Comey's death and I think the board  
7 asked some very searching questions of the Intervenor in this  
8 regard; Intervenors had the opportunity, at that point  
9 in time, to say, Wait a minute; we no longer have a witness  
10 qualified or unqualified. This tragic event has happened  
11 and we would request this board to give us continuance to  
12 seek out another witness.

13 And just on the side, the Intervenors have cast the  
14 licensing board in some sort of an evil shadow as if they  
15 were continually against the Intervenors. They fail to point  
16 out that the licensing board gave the Intervenors absolutely  
17 everything they wanted, initially, on the security plan; and  
18 it was the Applicant who appealed to this board saying, Wait  
19 a minute; we don't think that they are entitled to all of  
20 that. As a result of that, 410 came down.

21 Then, several witnesses were offered, the first of  
22 which was Dr. DeNike which this board had ruled in its ALAB 410  
23 decision was not qualified; they brought Dr. DeNike back before  
24 the licensing board with not one iota of new information re-  
25 garding his qualifications and clearly the licensing board

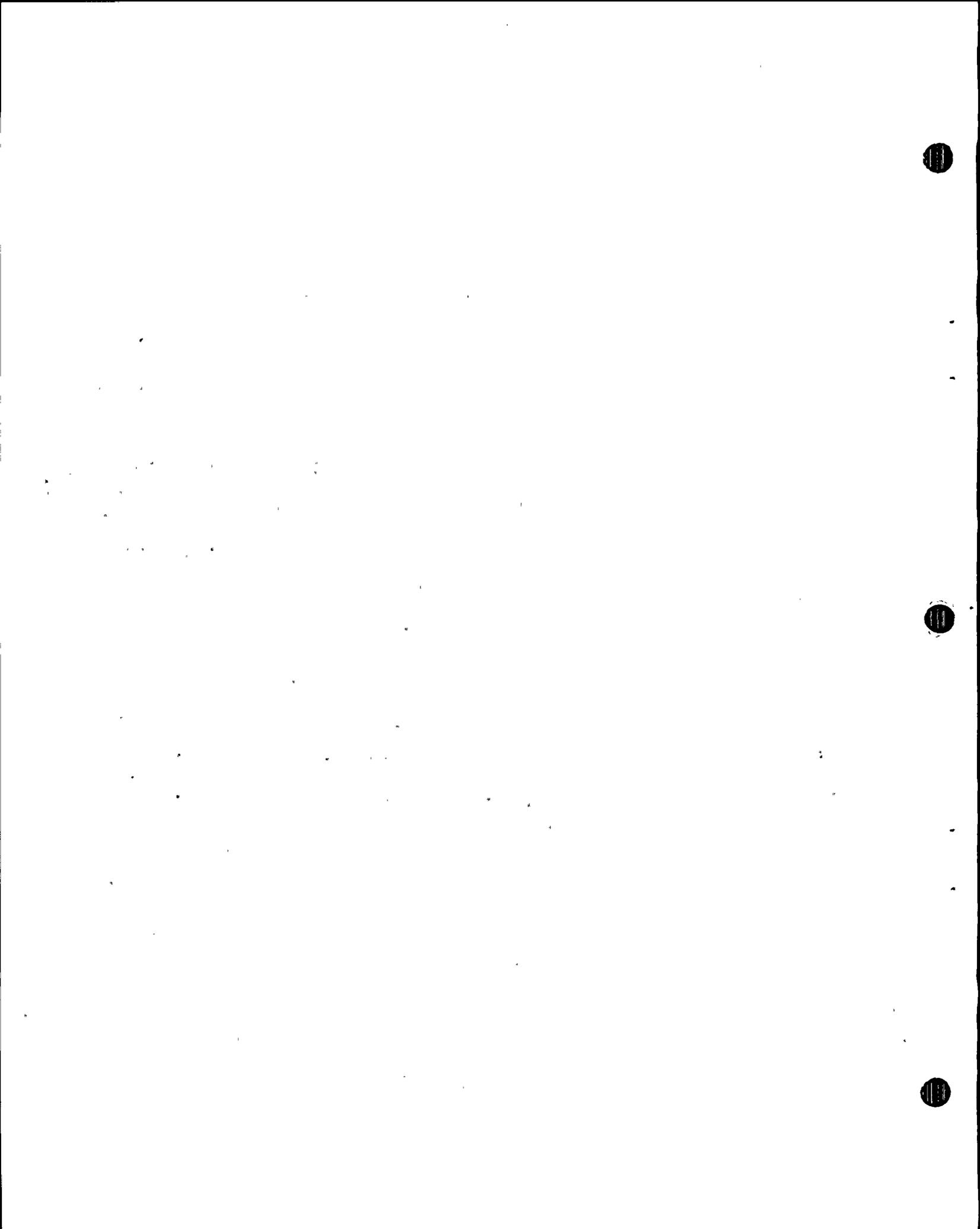


1 ruled he was unqualified pursuant to this board's prior  
2 ruling.

3 They then brought two other people, Dr. Welch and  
4 Mr. Hubbard; again, the licensing board ruled that they  
5 were unqualified and it's peculiar that Intervenors have not  
6 appealed any of those rulings. Mr. Valentine said this  
7 morning, Our four proposed witnesses, any one of which would  
8 qualify under ALAB 410. Well, then why haven't they appealed  
9 those witnesses, those other three? And in fact, this board  
10 has already ruled that Dr. DeNike was not qualified under  
11 the criteria ALAB 410. So, I would again disagree with  
12 Mr. Valentine about those witnesses.

13 But, getting back to the question of the continuance,  
14 I don't know whether the board would have granted a con-  
15 tinuance or not. If the so-called response of January 19, had  
16 been a motion for continuance for them to have time because  
17 of the untimely death of Mr. Comey to find another witness,  
18 I don't know how the board would have ruled; that's speculative  
19 on my part and I'm sure it's speculative on your part as to  
20 whether they would have granted that motion or not.

21 I can only point out that the board had granted  
22 an incredible amount of time to the Intervenor over the past  
23 two years to find witnesses. On several occasions, the  
24 Applicant moved for dismissal of the security contention  
25 because Intervenor had not come forth with a qualified witness.



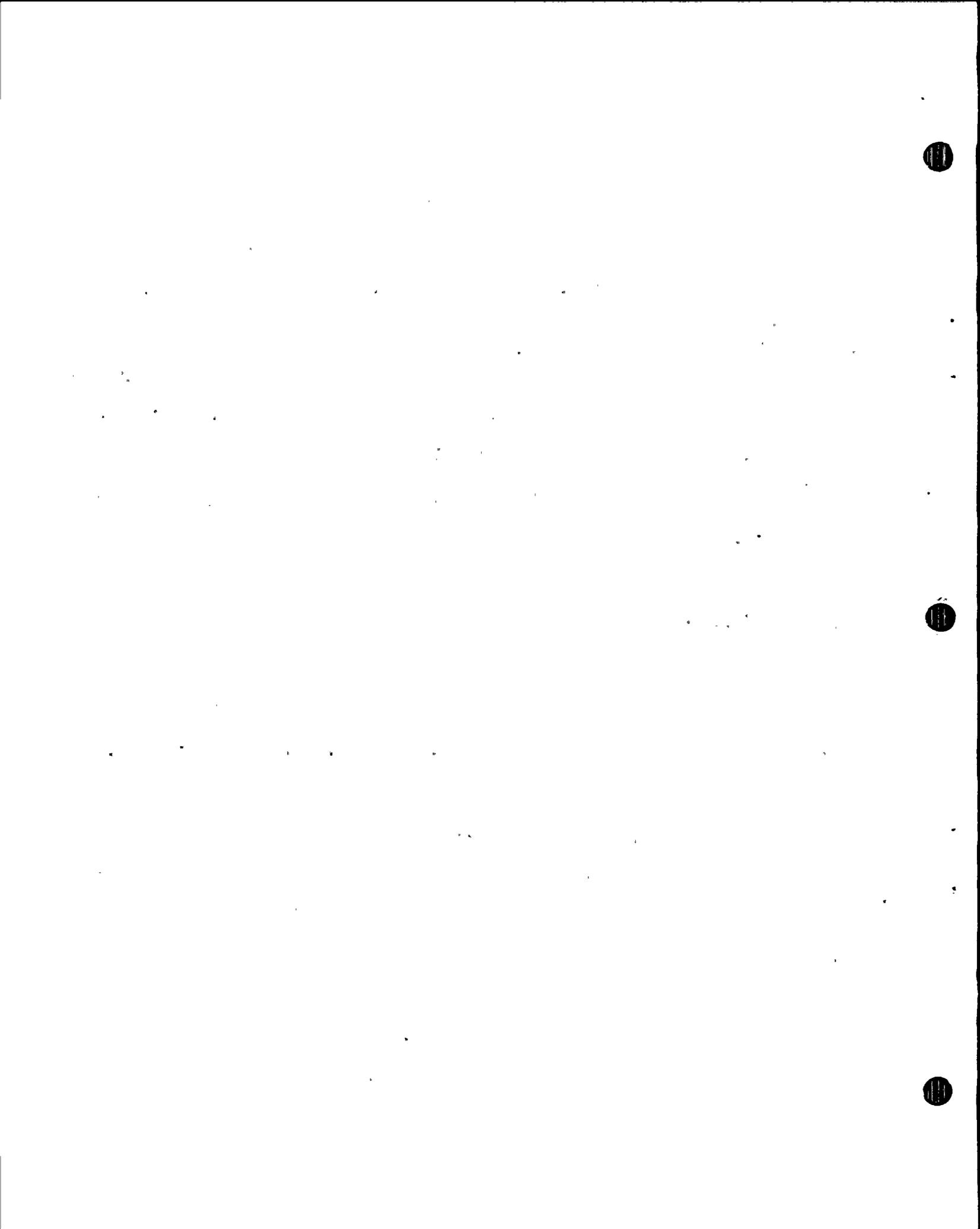
1 Those motions were denied, and on several occasions, the  
2 Intervenor asked the board for additional time to find a  
3 witness; those motions were granted.

4 So, again, I don't think it is fair of all of  
5 Intervenors to complain that the board was somehow prejudiced  
6 against them in this matter; on the contrary, the board's  
7 rulings, with the exception of the qualifications of Mr. Comey,  
8 very frequently went in favor of the Intervenor.

9 Had they filed for a motion of continuance and that  
10 motion had been denied, then they would have an appealable  
11 issue there, whether or not they would have a winning or losing  
12 appeal is a matter of speculation because it's not a question  
13 before the board. But, what did they do? I don't think  
14 there's any question that that letter of January 19, entitled  
15 a response, said, We're not going to participate: period.  
16 They didn't ask the board to do anything; they didn't say,  
17 Board, we would ask for continuance; Board, we would ask that  
18 you enter an order that we have the right to appeal; they  
19 didn't ask anything of the board. They simply announced to  
20 the world, to the board, and to the other parties that they  
21 were withdrawing and that they were not going to participate.

22 I think to argue that that letter means something  
23 else is folly; I think it just ignores the clear impact of  
24 the English language.

25 Now, there were several questions asked and several



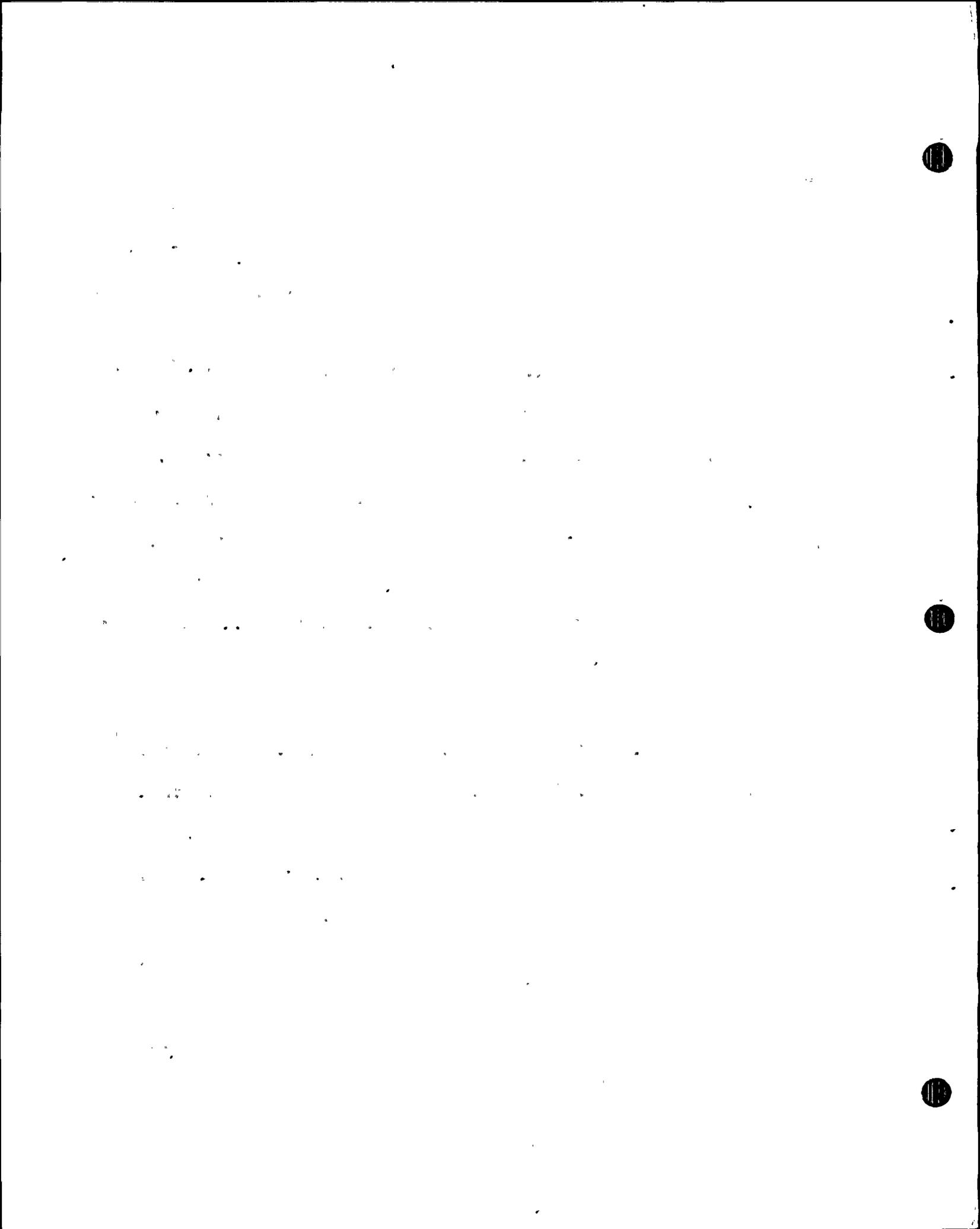
1 statements made both by Mr. Jones and Mr. Valentine that some-  
2 how Mr. Baldwin had special abilities or qualities somehow.  
3 I would only point out that a review of the transcript from  
4 9356 to 9377 when Mr. Baldwin argues his case, will show  
5 nothing was ever mentioned along those lines by Mr. Baldwin  
6 at all.

7 MR. SALZMAN: Mr. Norton, I'm a bit troubled by the  
8 basis that the board gave for its ruling. It said a voluntary  
9 default of the issue under 2.707, the board's right to enter  
10 voluntary default seems to turn on the parties not appearing  
11 at the hearing.

12 Now, Mr. Baldwin was indeed the Intervenor's counsel  
13 and he was indeed there, then they appeared. And how could  
14 you enter involuntary default in those circumstances?

15 MR. NORTON: I don't know that there was a voluntary  
16 default in the technical sense of the word. This is, like all  
17 appeals, a unique set of facts.

18 What happened was, they withdrew from the proceed-  
19 ings; there can be no question about that as of the 19th of  
20 January. As a matter of fact, the idea of a board tour of  
21 the security facilities of the specific security devices, of  
22 which I am totally unfamiliar I did not go on the tour, was  
23 arrived at at the suggestion of the Applicant some time during  
24 the course of the proceedings; it was decided that in addition  
25 to the testimony of the in camera proceeding, the questions



1 were asked by counsel for Staff and the Applicant was  
2 Mr. Crane at that hearing, the in camera hearing, the board  
3 would also ask questions; but in addition to that, it would  
4 be helpful if the board would go out and review the-actual  
5 physical measures and ask any questions they might want about  
6 that.

7 And it's interesting that Mr. Baldwin's telegram  
8 contrary to what he stated this morning didn't say I'm going  
9 to come and participate in the in camera hearings; not at all.  
10 No word was mentioned about the hearings; he said, I'm going  
11 on the security tour Monday. It's also interesting to note  
12 that Mr. Baldwin never asked anything, Mr. Baldwin told people  
13 what he was going to do; he told the board in his telegram  
14 that he was going to the security tour on Monday. Not one  
15 word about the hearings.

16 Out position at that time, and frankly we had never  
17 heard of Mr. Baldwin despite Mr. Baldwin's statements that  
18 he's very familiar to PG&E, he may well be but he's not  
19 familiar to me nor was he to Mr. Crane nor Mr. Furbush, who  
20 was counsel for PG&E who were at the table at the time the  
21 telegram was received. I was informed by management of PG&E  
22 that no one was going on any security tour of the plant on  
23 Monday that didn't have any prior clearance; no way in the  
24 world was anybody going to go out there. And, I think it's  
25 only common sense that any security plant would have as part



1 of it, some sort of clearance level for people who are going to  
2 go out and inspect the physical plant itself.

3 DR. JOHNSON: Let me ask a question at this point.  
4 9082 of the transcript, the Chairman of the licensing board  
5 I believe asked if Mr. Valentine, had he been there, would be  
6 able to go on the tour and the answer that she got to that  
7 question was not very clear; but, I don't understand what  
8 you're talking about right now when you refer to clearances.  
9 Mr. Baldwin had indicated his belief that all that has to  
10 happen is that an attorney of the Intervenor be a member of  
11 the Bar and sign a protective order.

12 The answer that Applicant gave to Ms. Bowers did  
13 not seem too clear as to whether or not even Mr. Valentine  
14 was going to be afforded the opportunity to go on the tour and  
15 to participate in the in camera hearing.

16 What is your -- if Mr. Baldwin had shown up on  
17 Monday morning, excuse me, Mr. Valentine has shown up on  
18 Monday morning and advanced the four factors for resurrecting  
19 a contention, would the Applicant freely allowed him to go  
20 on the tour and participate in the in camera hearing?

21 MR. NORTON: Probably the reason the answer to that  
22 question was not clear in the transcript is for the same  
23 reason it's not going to be clear this morning: I don't know.  
24 I am not in charge of the security plan; I have never re-  
25 viewed the security plan; I don't want to know anything about



1 the security plan; and I don't know what's required for some-  
2 one to view the physical security systems. I don't know  
3 whether anything had ever been done with regard to  
4 Mr. Valentine, because Mr. Valentine had withdrawn; I still  
5 don't know whether anything had ever been done.

6 DR. JOHNSON: Well, let the -- the February 12 hear-  
7 ing was scheduled, to my understanding, prior to the 19th of  
8 January, so that the Applicant --

9 MR. NORTON: The in camera session was; I'm not at  
10 all sure that that's true of the plant tour of the security  
11 systems. I suspect, I don't know, but what may well have  
12 happened is after they withdrew, someone might have said,  
13 Well, gee, as long as it's just the licensing board, we can  
14 show them the physical security. But, the security plan  
15 might well say you don't show anyone your nuts and bolts of  
16 your system, including your inhouse lawyers and so on.

17 Again, I don't know. All I know is that I was in-  
18 formed by management that there was no way that someone, any-  
19 one, who had not been previously cleared was going to the  
20 tour of the physical systems on Monday morning.

21 MR. SALZMAN: I'm curious about this, sir. What do  
22 you mean by cleared?

23 MR. NORTON: I assume that means they find out who  
24 the person is. I would beg to differ with the regulations  
25 when it comes to a security plan and a tour of the physical



1 systems for security of a nuclear plant. I don't think anyone  
2 can walk in and say, Hey, I'm a lawyer; show me all the nuts  
3 and bolts of the hardware. I, frankly, don't agree with that  
4 and I would think an Applicant would have the right to have  
5 a hearing to show that this person, whoever he might be,  
6 should not be allowed to see the systems, for whatever reason  
7 if there were a reason.

8 And, I would assume that that would be ruled on by  
9 a licensing board and if the ruling were, well, it would  
10 obviously be unfavorable to one party or the other --

11 MR. SALZMAN: What kind of reason could you put for-  
12 ward?

13 MR. NORTON: Well, for example, and you just asked  
14 me out of the blue, so I'll make up an example out of the blue.

15 I can imagine a lawyer taking the position of an  
16 anti-nuclear stance and saying that it is his goal in life,  
17 and I don't care if I am a member of the Bar or not, it's my  
18 goal in life to blow up a nuclear power plant. Lawyers aren't  
19 all sane.

20 And, if we found such a thing; if we found that some-  
21 body made those kinds of comments --

22 MR. SALZMAN: Mr. Norton, how would you find out  
23 about that?

24 MR. NORTON: I don't know; I'm not in the security  
25 business.



1 MR. SALZMAN: Well, Mr. Norton, you are in the  
2 legal business and you have told the licensing board that the  
3 utility would be committing a criminal act to investigate  
4 someone.

5 MR. NORTON: Well, now, wait a minute. If  
6 Mr. Baldwin, on Page 9359 of the transcript stated, It is my  
7 objective to go out there and look at the physical security  
8 systems so that I can tell some people how to get in there  
9 and do some sabotage, I wouldn't have to do any investigation  
10 whatsoever. I would immediately go to the Commission and  
11 say, there is no way this man can go out there and look at  
12 that. And, I would hope that the Commission would agree  
13 with me.

14 MR. SALZMAN: Are you representing to the licensing  
15 board that the utility has no authority to investigate any-  
16 body and that it's illegal in California?

17 Not at this particular hearing, but I recall your  
18 recollection to the transcript involving Mr. DeNike. I  
19 show you the transcript. Refresh your recollection. When  
20 you're finished, please show it to the other counsel.

21 My point is simply this: if that represents the  
22 accurate state of the California law, there would be no way  
23 that your utility could ever check on a lawyer. And you would  
24 in effect be saying, You can never come into our plant. No?

25 MR. NORTON: I'm sorry. I couldn't hear the last



1 part.

2 MR. SALZMAN: Well, my problem is, if you say, we're  
3 not going to let you in without a check, and you say it's  
4 also illegal for the lawyer of the utility to check, how does  
5 he get it?

6 MR. NORTON: That's an interesting Catch-22 question.

7 MR. SALZMAN: Well, you're the one who brought it  
8 up; I didn't, sir. I have only given you your statement.

9 MR. NORTON: Again, I do not know the details of the  
10 security plan or what is done in terms of --

11 MR. SALZMAN: No, no. Please answer my question.

12 MR. NORTON: I'm trying to.

13 MR. SALZMAN: You represented to the licensing board  
14 that a utility could not legally investigate the background  
15 of Dr. DeNike.

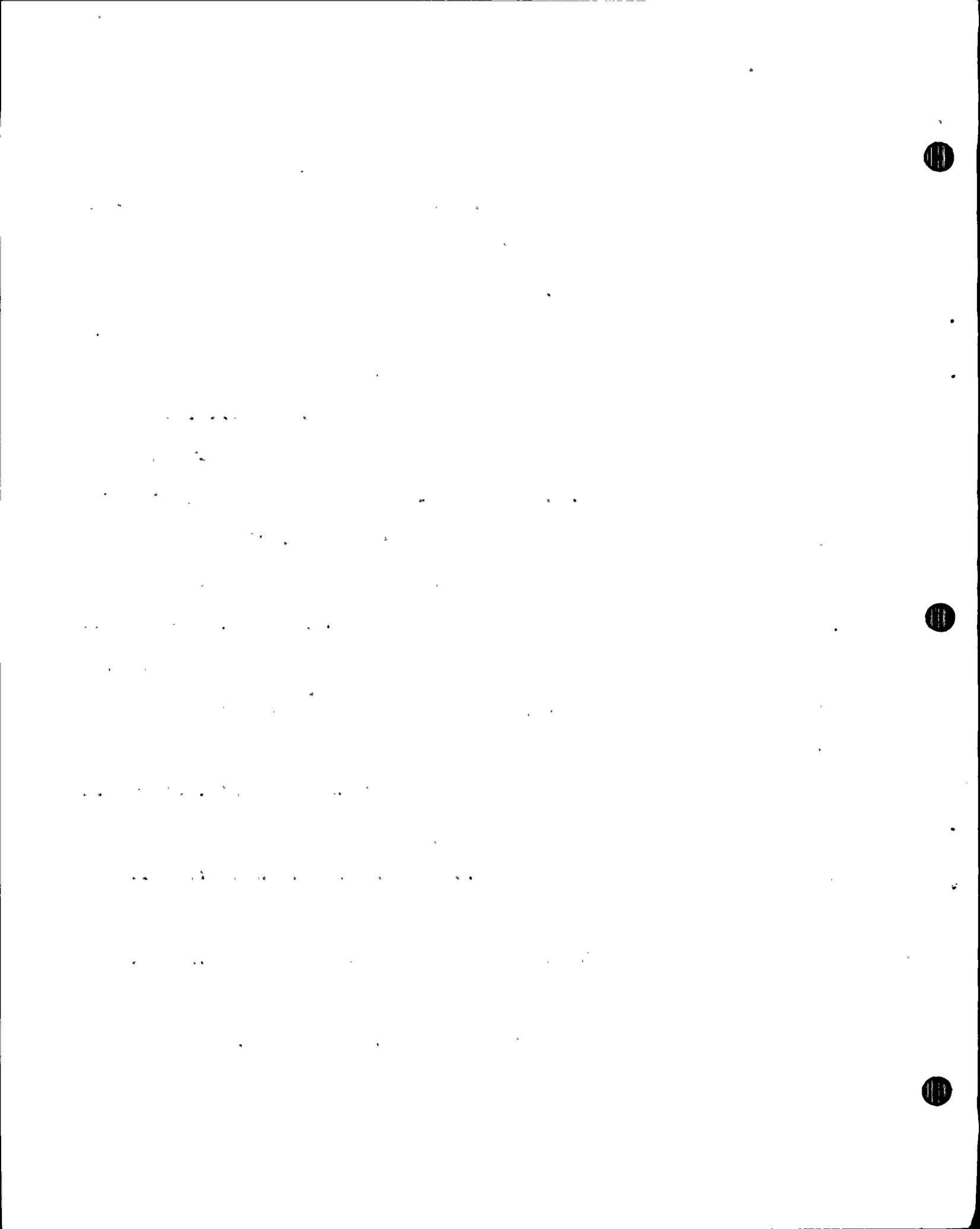
16 MR. NORTON: Yes, I understand.

17 MR. SALZMAN: Well, then, how could it investigate  
18 the background of Mr. Baldwin?

19 MR. NORTON: Again, I am not sure what the security  
20 plan calls for in terms of, quote, clearance, end quote. I  
21 don't know whether one has to have a certain security level,  
22 whether one has to sign a certain document; I don't know  
23 what the nuts and bolts are. I cannot answer your question.

24 I do know that the management of --

25 MR. SALZMAN: Mr. Norton, you're avoiding my



1 question. You represented to the licensing board that under  
2 California law; and the NRC does not write California law,  
3 it would be a criminal act for PG&E to investigate Dr. DeNike;  
4 that's not in the security plan. How does that differ when  
5 it comes to investigating Mr. Baldwin?

6 MR. NORTON: And I am saying that I do not know the  
7 answer to that question. I'm not avoiding it.

8 MR. SALZMAN: Well, does the California law apply  
9 to Mr. Baldwin? Would the utility be creating a criminal act  
10 to investigate Mr. Baldwin in the same way it would be commit-  
11 ting a criminal act to investigate Dr. DeNike?

12 MR. NORTON: I can only answer that by saying that  
13 I think the utility would be committing a criminal act if it  
14 allowed somebody to go in and inspect the physical security  
15 systems of a nuclear power plant without having any idea who  
16 that person is.

17 MR. SALZMAN: If you don't think you can answer the  
18 question, then say so.

19 MR. NORTON: I did; I said I cannot answer your  
20 question.

21 MR. SALZMAN: All right, then. I take it that you  
22 must have reconsidered the California law then, sir, because  
23 of the flat representation from you that you couldn't invest-  
24 igate DeNike and I cannot see how you can say here today that  
25 we are just not going to let in Mr. Baldwin when you can't



1 investigate him either.

2 MR. NORTON: I simply said that no one knew who  
3 Mr. Baldwin was. Thursday afternoon, at 4 o'clock or whenever  
4 it was that that telegram arrived; no one had ever heard of  
5 Mr. Baldwin.

6 MR. SALZMAN: Suppose you had three weeks; what  
7 then?

8 MR. NORTON: I would turn it over to the security  
9 people and say, Can this person be allowed to do this? We  
10 would get an answer back.

11 MR. SALZMAN: And what could your client do?

12 MR. NORTON: I do not know that answer to that.

13 MR. SALZMAN: Commit a criminal act, I suppose?

14 MR. NORTON: Pardon?

15 MR. SALZMAN: Either it would commit a criminal act  
16 or you may have misunderstood the California law; one or the  
17 other.

18 MR. NORTON: That's correct. I'm not a California  
19 lawyer. I'm an Arizona lawyer and not familiar with California  
20 criminal law and I remember that we had that discussion at  
21 the last oral argument and Mr. Valentine came up and identified  
22 that for the board; I was unable to do so on California  
23 criminal law.

24 I simply do know that common sense dictates that  
25 you don't just let anyone walk into a plant and examine the



1 entire physical security system and have it explained to them  
2 at the same time. I mean, that's just obviously nonsense.  
3 That can't be the law; it cannot be. And, I say to you it is  
4 not the law.

5 I think there are some problems with 410. For  
6 example, 410 says that you turn over the plan to an attorney.  
7 I think it's got to be more than an attorney; I think there  
8 has to be some level of looking at it. But, what if someone  
9 represents themselves? What if they are pro se? I don't  
10 think that 410 addresses that.

11 MR. SALZMAN: But, we don't have that in this case.

12 MR. NORTON: I appreciate that, but 410 doesn't  
13 address that and I think one can interpret 410 as allowing  
14 someone to represent themselves and go in and say, Give me  
15 the security plan; I don't think you meant that, but I think  
16 that's the argument that can be made.

17 MR. SALZMAN: When that case comes to us, I'm sure  
18 we can say what we meant.

19 DR. JOHNSON: If the Applicant had those difficulties  
20 with 410 which I believe the idea was restated in 507, didn't  
21 the Applicant have and since the question was still before  
22 the Applicant, didn't the Applicant, or it would seem to me  
23 that the Applicant would have had a responsibility to take  
24 this question before and ask that this question be taken  
25 before the Commission? If an appeal board decision says that



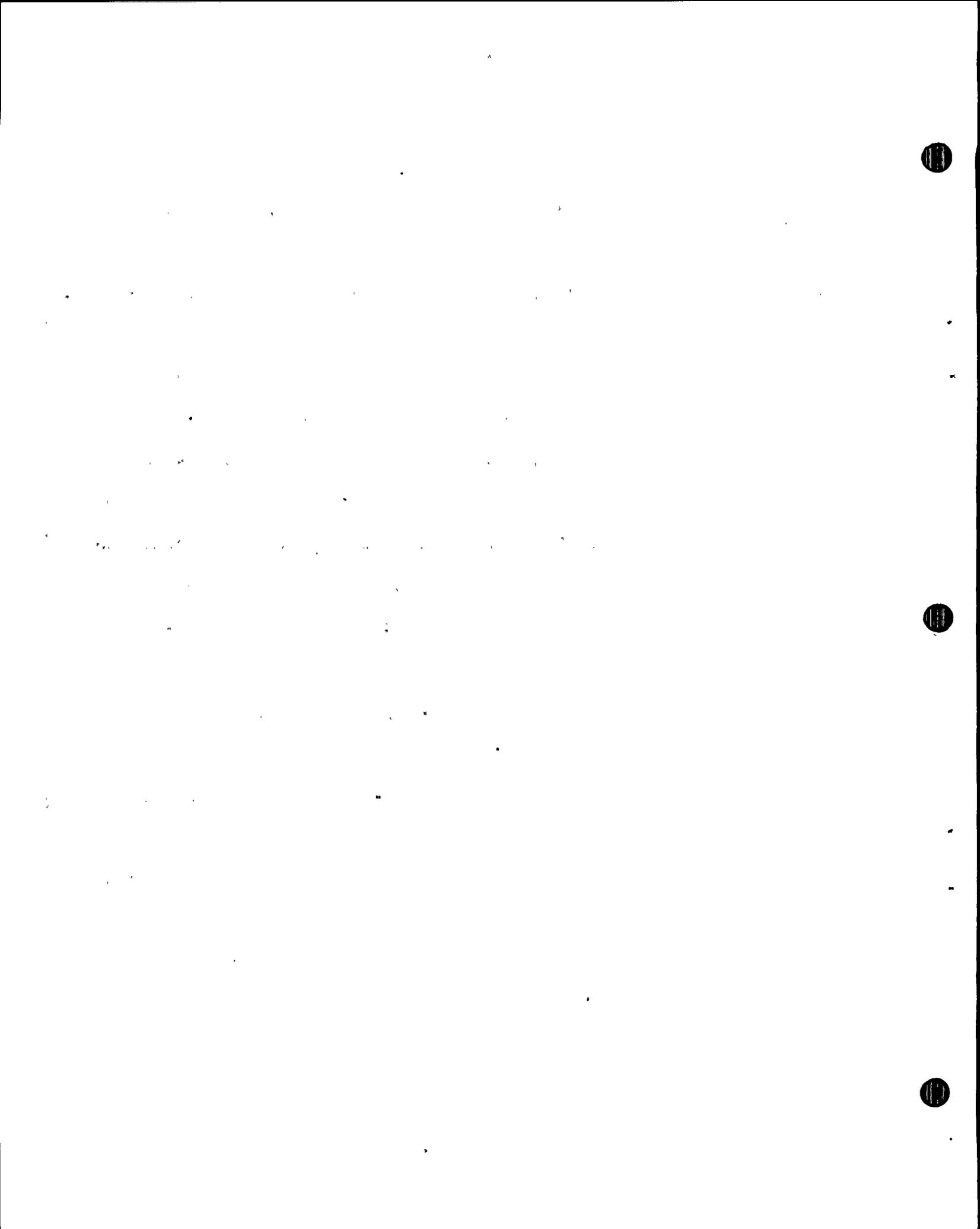
1 the attorney has the right to view the security plan and to  
2 participate in the in camera hearing, and you now are saying  
3 that you don't believe that this right is lawful or makes  
4 sense, why didn't the Applicant request a review of ALAB 410?

5 MR. NORTON: Well, Dr. Johnson, a lawyer looks at  
6 a decision in many different ways. I have never seen a  
7 decision, well, I guess in a jury trial if you win it's all  
8 good, but in terms of an appellate decision, I've never seen  
9 one that I was totally happy with and I've never seen one  
10 that I was totally unhappy with; you win or you lose. ALAB 410  
11 frankly, both sides won some and lost some. It's a decision.  
12 that's a well-reasoned decision, there are some parts of it  
13 that I think are excellent and there are some parts of it that  
14 I choose to disagree with. But, that does not necessarily  
15 mean that you appeal it just because you disagree with one  
16 little part, because you may appeal it and lose a lot you've  
17 gained in the other part of the decision.

18 That's a legal decision one has to make, and I  
19 just can't imagine a lawyer being 100 percent happy with any  
20 decision on an appellate level.

21 DR. JOHNSON: But, you've just told us that you  
22 think, I think you used the word nonsense, to think that a  
23 lawyer should have the right to review the security plan.

24 MR. NORTON: I didn't say a lawyer; I said any  
25 person, okay? And lawyers are people and I wasn't being



1 specific, certainly in this case about any of the counsel  
2 because it was not at all being specific.

3 But, I think it is nonsense to arrive at an ultimate  
4 conclusion that all someone has to do is say, I'm a lawyer  
5 therefore, I can go in there and look at the nuts and bolts of  
6 your security system.

7 DR. JOHNSON: But, doesn't 410 say that on its face?

8 MR. NORTON: I'm afraid it does; I'm afraid the  
9 argument is there that it does. And, I'm afraid I would  
10 appeal a specific instance where it was the opinion of the  
11 company that this lawyer, under no circumstances, should see  
12 the nuts and bolts of the securtiy system, then I would take  
13 that to the appeal board and to the Commission and get a  
14 specific ruling in a specific case.

15 We don't have that here, incidentally.

16 MR. SALZMAN: Mr. Norton, I have a question. Why  
17 don't you have it here? Suppose we disagree with the licensing  
18 board and conclude that there really was no withdrawal, that  
19 in fact, they had changed their mind in a timely fashion and  
20 Baldwin showed up and he's their lawyer.

21 Are you suggesting we ought to affirm the decision  
22 on the alternate ground that you weren't given enough time  
23 to check out Mr. Baldwin?

24 MR. NORTON: Well, let me go a little bit beyond  
25 that, okay? First of all, they withdrew. I don't think



1 there's any question about that. If this board -- you asked  
 2 me what I would do if this board ruled that way, I would appeal  
 3 if you ruled that they did not withdraw, because I think the  
 4 plain English language of their letter is that they withdrew.

5 They then came back on the 8th of February with a  
 6 telegram saying, I'm going on the tour: period. I'm a lawyer  
 7 and I'm going on the tour: period.

8 They then came and argued the morning of the tour  
 9 in hearing and in that argument, you will not find one iota  
 10 of evidence or statements to the effect of good cause to be  
 11 put back into the proceedings. It's on that basis that this  
 12 board should affirm the ruling of the licensing board. There  
 13 is no showing of good cause for them to be reinserted.

14 Now, let's get to the timing of this thing.

15 MR. SALZMAN: Were you prejudiced by the reappearance  
 16 supposing it had been Mr. Valentine who had appeared and not  
 17 Mr. Baldwin; what prejudice would there have been to your  
 18 client?

19 MR. NORTON: Had Mr. Valentine appeared, we would  
 20 have an entirely different ballgame then we've got; we're  
 21 doing an awful lot of speculating here. You're asking me if  
 22 the kit-facts were different --

23 MR. SALZMAN: No, no. I'm asking you if -- what  
 24 prejudice to your client is there if Mr. Baldwin appears as  
 25 compared to Mr. Valentine's appearance?

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1 MR. NORTON: If Mr. Valentine had come there on  
2 the 8th or the 9th and said, We want to be back in and these  
3 are the reasons why and showed good cause, I presume the  
4 licensing board would have properly let him back in.

5 But, that isn't what happened. A new attorney came  
6 in and said, I disagree with Mr. Valentine: period. Let me  
7 go on the tour.

8 MR. SALZMAN: Wasn't he speaking for Intervenors?

9 MR. NORTON: Well, he was speaking for just about  
10 anybody he could get to speak for, frankly; he spoke for four  
11 or five different people: Friends of the Earth, San Luis  
12 Obispo Mothers for Peace, Mrs. Applebird. He tried everything  
13 he could.

14 MR. SALZMAN: Well, counsel, let me ask you this:  
15 there are no Commission rules on substitution for counsel.  
16 The Commission rules are not models of clarity, I am prepared  
17 to agree. But of what the rules provide, for additional  
18 counsel in San Francisco District Court, I mean, a lot of times  
19 corporations are represented by firms and a new body appears  
20 and they say, Who are you? And they say, I'm lawyer number  
21 804 with some firm.

22 MR. NORTON: Let me get to that a little bit; that  
23 was kind of the tail end of some of the remarks I had.

24 First of all, this is a proceeding that's being  
25 conducted by a board that's 3,000 miles away from home. The



1 witnesses in the main, in fact, the witnesses for the security  
 2 plan from the Staff were there, on Sunday; they arrived on  
 3 the weekend to testify on Monday. Unfortunately, Dr. Newmark,  
 4 who was from Illinois, didn't finish up on Friday with  
 5 cross-examination and had to finish that up the morning of  
 6 the 12th; he was there.

7 Other witnesses, in fact, Intervenor's witnesses,  
 8 Mr. Fleishacher's witnesses, Dr. Gramm and Dr. Hall from  
 9 UCLA were there waiting in the wings to testify Tuesday.  
 10 In fact, they came up Monday night to testify Tuesday.

11 But, they never asked for a continuance. It would  
 12 have been, I think, improper to grant a continuance. Here  
 13 you have witnesses from all over the United States there; you  
 14 are trying to coordinate a very difficult thing; witnesses  
 15 for the Intervenors, witnesses for the Staff, witnesses for --  
 16 at the time it was Intervenors and Staff -- but, we had  
 17 Applicant witnesses there for the security issues.

18 It's very difficult to all of a sudden say, Oh, okay,  
 19 we'll continue this for three weeks or a month or two days  
 20 or whatever; it's very difficult under the circumstances.  
 21 And this board, I think, did an excellent job of administrating  
 22 that hearing. There were witnesses from all over; literally  
 23 we had witnesses in Europe that got back to this hearing, in  
 24 fact, Dr. Hall, the man that was there that Tuesday. He was  
 25 in Europe and couldn't appear in December.

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1           But, they didn't ask for a continuance. They weren't  
2 denied a continuance; they never asked anything. They de-  
3 manded a number of things. They never asked anything.

4           MR. MOORE: What was your objection, Mr. Norton,  
5 to their appearing in the in camera proceeding?

6           MR. NORTON: When you say they, are you talking about  
7 Mr. Baldwin?

8           MR. MOORE: Intervenor's counsel.

9           MR. NORTON: Well, frankly, the testimony, let me  
10 explain --

11           MR. MOORE: You didn't really object, did you? You  
12 just said they aren't getting into the plant.

13           MR. NORTON: I said they are not getting into the  
14 plant on the tour; that's correct. Because they hadn't asked  
15 to be in the hearing in that telegram of the 8th. But, don't  
16 let me mislead you; we assume he probably meant that, too.  
17 I mean as I sat there as a lawyer, I figured --

18           MR. MOORE: What was your objection? Was it the  
19 lack of a protective order? You didn't raise that, did you?

20           MR. NORTON: Let me tell you what the objection was.  
21 The testimony had been prepared. If you look back at ALAB 410  
22 you talk about sanitized versions, you talk about giving a  
23 lawyer a sanitized version, you talk about the lawyer going  
24 over that with an expert if he has one, coming back and saying,  
25 Well, gee, in addition to the sanitized version, you're



1 supposed to give an outline of what you've left out. And they  
2 come back and say, Well, gee, we'd like to see this and if  
3 you can't agree on that, then the board decides whether or  
4 not they should see it and that sort of thing.

5 In this instance, Mr. Valentine had never asked for  
6 the sanitized version of the security plan after ALAB 410.  
7 Nobody ever bothered to ask for it. Mr. Valentine's reason  
8 is that he doesn't think he can do anything with it until such  
9 time as he has a qualified expert, and that's his opinion.

10 And incidentally along those lines, the case  
11 Mr. Salzman cites in 410 was a case where the lawyer did the,  
12 quote, probing cross-examination, end quote, which greatly  
13 assisted the board in the security plan issues. No expert:  
14 the lawyer.

15 But, Mr. Valentine and Mr. Jones, for whatever  
16 their reasons were choose not to ask for the security plan  
17 until they had a qualified witness; they never got there.  
18 So, getting back to the final answer to your question, our  
19 testimony was based on the fact that Intervenors weren't  
20 going to be there; they had withdrawn. There was no sanitiz-  
21 ation of the testimony. In fact, we were taking the board to  
22 the plant and showing the nuts and bolts and answering any  
23 questions they might have and have a free and open discussion.

24 That would not have been the case under ALAB 410.  
25 ALAB 410 says, you show the Intervenor those portions of the



1 plan which are specifically germane to their contentions.  
2 And that has never been established by the Intervenors in  
3 this case. They have never particularized their demands, and  
4 they have never asked since 410 for the sanitized version of  
5 the security plan.

6 So, yes, we would definitely have objected; we  
7 would have had to say, Well, wait a minute. If you're going  
8 to let them in, let us go back to the drawing board and check  
9 over our testimony and see what's in there and make sure we  
10 aren't divulging nuts and bolts that we don't have to divulge.

11 DR. JOHNSON: Was the testimony offered prior to  
12 January 19?

13 MR. NORTON: Testimony offered -- on the security  
14 plan, the prepared security plan testimony was offered at the  
15 time of the hearing. It was not mailed out, of course, with  
16 the others.

17 MR. MOORE: When was the in camera security hearing  
18 scheduled?

19 MR. NORTON: When was it? Well, you all know it  
20 was the twelfth, so you're asking me when it was scheduled  
21 for the twelfth? I honestly can't remember the date. It was  
22 a sliding thing, if my memory serves me correctly, and  
23 Mr. Tourtellotte can probably help me on that; it was a sliding  
24 thing because of all this witness business from all over the  
25 Country. And, it was tentatively scheduled for the first week



1 of February. And I think we were going to have it, if I  
2 remember correctly, earlier than when it was but because  
3 Dr. Newmarks testimony carried over, it slid over to the 12th,  
4 Monday the 12th. I think it was initially scheduled for the  
5 previous week, but because of witness conflicts, it slid over.  
6 So, that was kind of a sliding thing.

7 DR. JOHNSON: But according to the Intervenor's  
8 response, it had to be scheduled for the first week in February  
9 prior to the writing of the response because the response  
10 refers to it as being in the first week of February.

11 MR. NORTON: I believe that's correct. There were  
12 occasions during the course of the hearing in December and/or  
13 January where that was discussed in bench conference and of  
14 course, Mr. Valentine was not there. Mr. Fleishacher was and  
15 we would call Mr. Valentine as to when it would be appropriate  
16 and so on and so forth. And those dates were arrived at in  
17 kind of a loose-knit fashion as to the convenience to all of  
18 the parties and so on.

19 But, it clearly was the first week of February, prior  
20 to their withdrawal; I would agree with you.

21 MR. MOORE: If we have problems on a  
22 review of your security plan, how should we proceed?

23 MR. NORTON: I'm not sure I understand the import  
24 of your question. In other words, you're saying that you look  
25 at the plan and you don't agree with the board's findings, is



1 that what you're saying?

2 MR. MOORE: If we have problems with the security  
3 plan --

4 MR. NORTON: I guess you remand it to the board with  
5 your reasons why.

6 MR. MOORE: And, if that's the case, then what type  
7 of proceeding should the licensing board have to answer our  
8 concerns?

9 MR. NORTON: Interesting question. Obviously in  
10 camera. And the import of your question is would then  
11 Intervenor's counsel be allowed to participate.

12 MR. MOORE: Well, more than that. Would Intervenor  
13 be given an opportunity to qualify as an expert?

14 MR. NORTON: I think that answer is no. I think  
15 Northern State's Power handles that situation.

16 MR. MOORE: You mean that portion of Northern State's  
17 Power that says you can't come in in the revolving door --

18 MR. NORTON: They're out and just because this board  
19 has a concern about some portion, I assume it's just a portion  
20 as opposed to the totality, they can't suddenly jump back in  
21 and so I would say no.

22 MR. MOORE: Would, at that point, Intervenor's  
23 counsel be permitted to under the protective order --

24 MR. NORTON: No, they have withdrawn.

25 MR. MOORE: To see the plan.



1 MR. NORTON: That's correct.

2 MR. MOORE: Absent their withdrawal, what would  
3 the answer to that question be?

4 MR. NORTON: Well, if they hadn't withdrawn, we'd  
5 have a whole different ballgame again.

6 MR. MOORE: Assume for the moment they have not  
7 withdrawn and we have problems with it and send it back.

8 MR. NORTON: They haven't withdrawn if they par-  
9 ticipated as a party all along, which is not the fact, then  
10 they are still a party, obviously, on a remand; clearly.

11 MR. MOORE: But, you're not contesting the pro-  
12 position that Intervenor's counsel, under an appropriate  
13 protective order, has the right to see the security if he's  
14 involved in the security contentions.

15 MR. NORTON: That's correct. I think that's clear  
16 under 410. But, where I would disagree with 410 is if in-  
17 formation became available to the Applicant that this dis-  
18 closure was security risk, they would clearly have that right  
19 to bring it up to the board.

20 MR. MOORE: I believe 410 says that.

21 MR. NORTON: Well, does it specifically say it as  
22 to attorneys? I don't think it does.

23 MR. MOORE: It says any representative.

24 MR. NORTON: Okay. I got the impresssion that was  
25 directed at experts as opposed to attorneys because later in



1 the opinion, there's a pretty flat statement about attorneys.

2 MR. MOORE: When Mr. Baldwin announced his appearance  
3 on February 8, by telegram, it was either on the 8th or the  
4 9th or on the 12th, well, yes, on the 12th, were there any  
5 of the members of the Intervenor present?

6 MR. NORTON: Again, I believe Mrs. Silver, who is  
7 sitting there in the blue blouse was present on one of those  
8 occasions. Now, on the 12th, clearly there were members of  
9 the Intervenors, Mothers for Peace, sitting in the audience.

10 MR. SALZMAN: Mrs. Silver if with the Mothers for  
11 Peace?

12 MR. NORTON: Yes. And Mrs. Silver was there, I  
13 believe, it was the Friday as opposed to the Thursday, but it  
14 may not have been. I just really don't have that specific  
15 a recollection.

16 MR. MOORE: So on the 9th, you had an opportunity  
17 without any difficulty of checking the bona fides of Inter-  
18 venor's counsel, Mr. Baldwin, at that point.

19 MR. NORTON: You know, I would be misleading this  
20 board if I said I doubted Mr. Baldwin to be a member of the  
21 California Bar. It never crossed my mind to doubt that he was.  
22 A man stands up and says -- or sends a telegram to a board  
23 saying, I'm a member of the Bar representing Friends of the  
24 Earth; I have no reason to doubt that. It never crossed my  
25 mind to say, Hey, we haven't had a chance to find out if he's



1 a lawyer. I could have called the Bar --

2 MR. MOORE: And you had no doubt that he, in fact,  
3 was representing Intervenor?

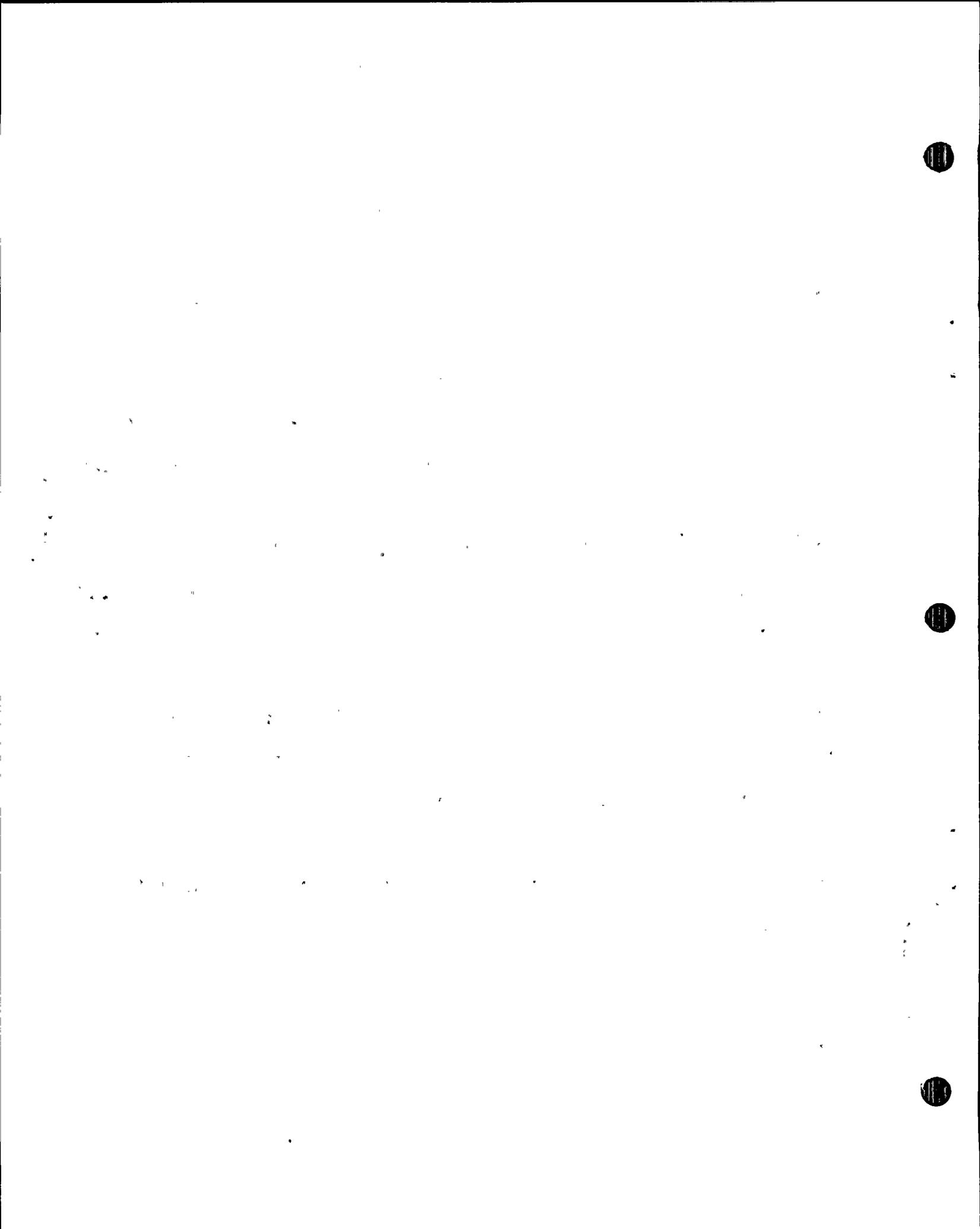
4 MR. NORTON: Yes, I still have some doubt about that.  
5 There was a lot of games going on. He was there around  
6 Wednesday or Tuesday representing Friends of the Earth --

7 MR. MOORE: Isn't there a general presumption that  
8 when an attorney, a member of the Bar announces that he's  
9 representing a client that indeed he is and is it not the  
10 burden of anybody contesting that to come forth with clear  
11 and convincing evidence to the contrary?

12 MR. NORTON: You just asked me a question of what  
13 I thought. I didn't argue that he didn't represent the  
14 Mothers for Peace. You just asked me what I thought and I  
15 told you. He clearly said he represented the Mothers for  
16 Peace. It was only his later actions when he started re-  
17 presenting anyone else in the room he could find that I began  
18 to wonder who he really represented.

19 MR. SALZMAN: Well, in a way, you've answered my  
20 question. But, I gather you're not familiar with any special  
21 court rules about substitution of counsel.

22 MR. NORTON: Clearly, a party has the right to sub-  
23 stitute counsel. What a party doesn't have the right to do is  
24 to come in after they've withdrawn from a particular portion  
25 of a proceeding, to come into the twelfth hour and sub-



1 stitute counsel, even if it had been Mr. Valentine, if he had  
2 not shown good cause on the morning of the 12th, he should  
3 then have been allowed to step back into the proceedings, even  
4 if it had been Mr. Valentine; but it wasn't. It was  
5 Mr. Baldwin who was totally new to everyone in the room and  
6 we weren't talking about anything, just any old issue. We  
7 were talking about the physical security of the facility.

8 MR. MOORE: Would it have prejudiced your testimony  
9 to allow the Intervenor to participate in the in camera hear-  
10 ing?

11 MR. NORTON: It may well have. We had prepared  
12 testimony that was prepared in anticipation, as did the Staff,  
13 prepared with the anticipation that only the board was going  
14 to be there.

15 MR. MOORE: Now, we're talking strictly about the  
16 presence of Intervenor's counsel under a protective order.  
17 He's entitled to see the plan.

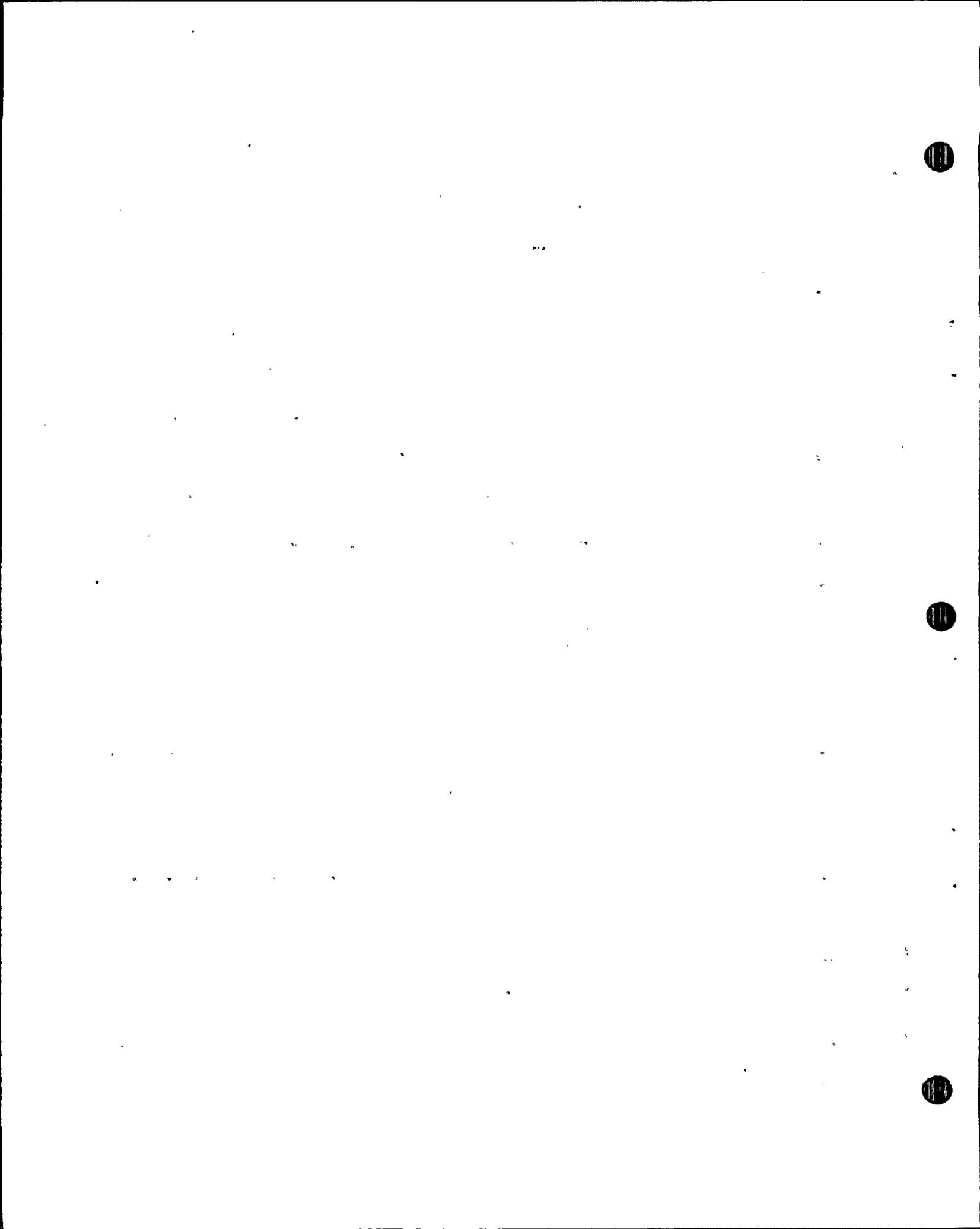
18 MR. NORTON: Oh, no. No, no. He's not entitled to  
19 see the nuts and bolts of the plan. That's what ALAB 410  
20 says.

21 MR. MOORE: That's your position on that.

22 MR. NORTON: That's correct.

23 DR. JOHNSON: But, you have --

24 MR. NORTON: Yes, let me make that perfectly clear.  
25 Mr. Valentine had asked us the day after 410 came down to give



1 him the entire security plan in its entirety, we would have  
2 refused. If he had asked to see a sanitized version to get  
3 his bearings to find out what areas of concern he had and an  
4 outline as to what he wasn't given, we would have complied  
5 under 410.

6 MR. MOORE: Can you point to me the language in  
7 410 which you are referring to that says that?

8 MR. NORTON: I believe it's -- I'll have to find  
9 the decision for you; just a moment. It's a rather lengthy  
10 decision so give me a moment so I can find it quickly.

11 1405, 1406, citing of course, to 5NRC1398. That  
12 1405 and 1506, Paragraph A at the bottom of 1405 about two-  
13 thirds of the way through, we talk about gory details, san-  
14 itized version of the plan, the Intervenor recognizes that it  
15 does not require every detail, but that it is not willing to  
16 accept the disjuncture of the Applicant's view of what details  
17 are relevant to its contention. The Applicant might be  
18 directed to provide, quote, sanitized, unquote, version plan  
19 to the Intervenor's attorney and its qualified expert or ex-  
20 perts together with a general description of the types of  
21 information omitted from each section of the plan from which  
22 information has been deleted and so on.

23 And, that is what we were operating under. But, we  
24 never got any request from Mr. Valentine; sanitized, full-  
25 blown, or whatever. I just want to make it clear, though,



1 that we would have refused a request for everything.

2 DR. JOHNSON: What I want to have made clear, that  
3 prior to the November, excuse me, the January 19, letter from  
4 Intervenor's counsel, it was assumed that there would be an  
5 in camera hearing in the first week of February.

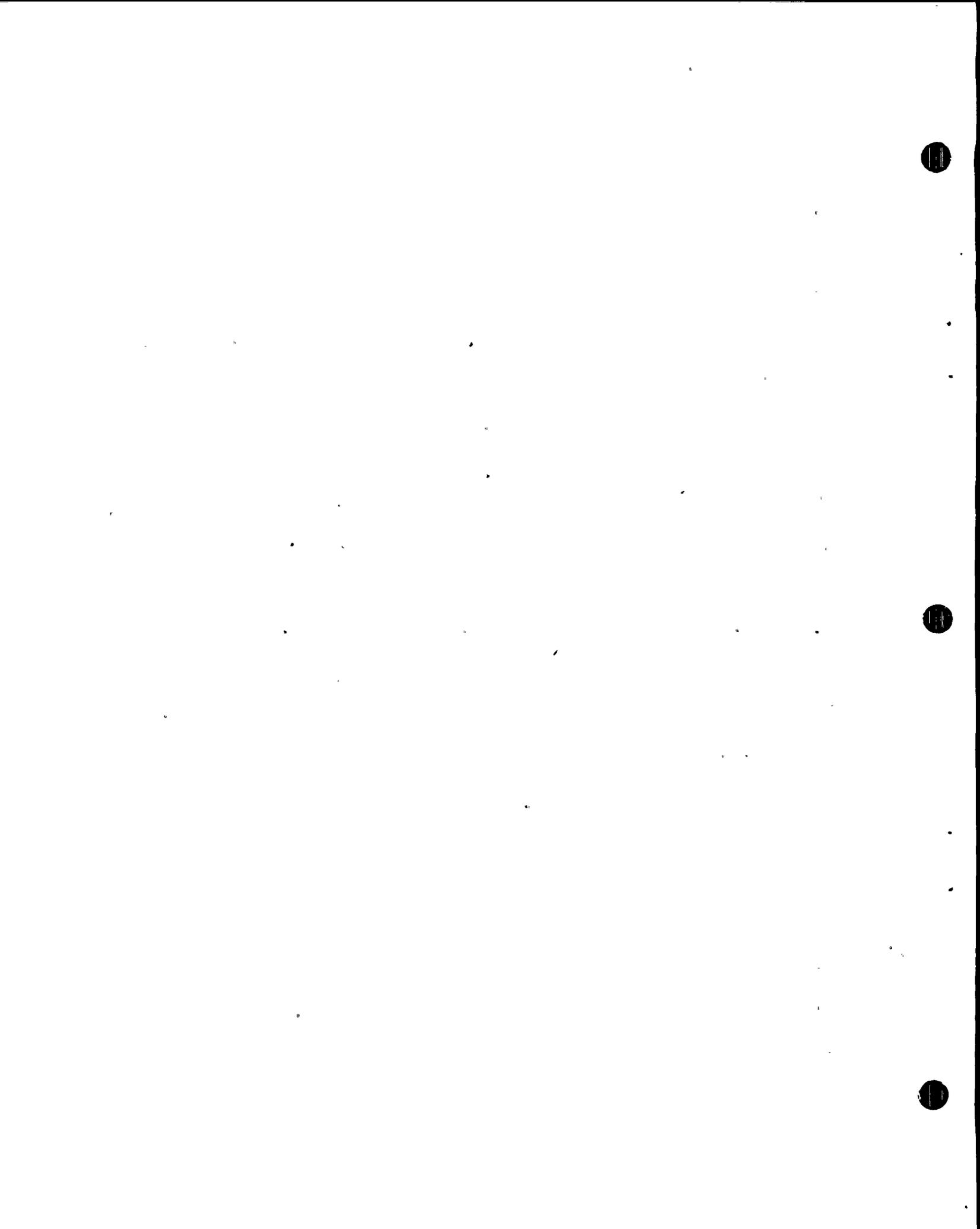
6 MR. NORTON: Yes.

7 DR. JOHNSON: Are you saying that the testimony that  
8 was to be presented at that hearing had not been prepared at  
9 that time, at the time the hearing was scheduled and that it  
10 was prepared subsequent to receiving the January 19, notifi-  
11 cation and therefore, that testimony had things in it that  
12 would not have been in it had not Mr. Valentine written his  
13 letter; do you understand the question?

14 MR. NORTON: I understand what you're driving at and  
15 I think rather than giving you a yes or no answer, because  
16 I don't think I can, I will explain the situation a little  
17 more fully.

18 I do not know when the testimony was specifically  
19 prepared. It was being worked on as was an incredible amount  
20 of testimony prior to the hearing. I do not know specifically  
21 when our testimony was written. I have absolutely no idea  
22 when the Staff's testimony was written.

23 I do know that upon Mr. Comey's death, we assumed  
24 based on Mr. Valentine's representations prior to that, that  
25 we have had with him about his ability without an expert, that



1 they indeed would withdraw and indeed we had conversations with  
2 Mr. Valentine that he said that he didn't know what he was  
3 going to do, but he thought he might. And, so, we operate  
4 on things that are out of the record, too. We had feelings  
5 as to what was going to happen and indeed, it did happen. We  
6 were hoping that Mr. Valentine would do exactly what he did  
7 do, based on his prior representations that he could not  
8 proceed without an expert. And that's exactly what he did.  
9 He withdrew; he didn't ask for a continuance.

10 If he asked for a continuance, we would have had a  
11 problem. I don't know how the board would have handled it.  
12 At that time, it would have been prejudicial from a timing  
13 standpoint. As it turned out, it would not have been  
14 prejudicial, but looking at it at that point in time, certainly  
15 we would have argued that it would have been prejudicial from  
16 a timing standpoint. But, as it turned out, it wouldn't have  
17 been, but no one can foresee the future.

18 Thank you. I have a feeling that I took more than I  
19 should have.

20 MR. TOURTELLOTTE: What I would like to do in perhaps  
21 the most orderly way, to proceed would be to take any questions  
22 that the board has and if the board has no question, what I  
23 would propose to do is proceed with straight recitation of  
24 the presentation of the Intervenors and then an affirmative  
25 presentation of the Staff.



1           Would you prefer that I start with the --

2           MR. MOORE:   Why don't you just make your presentation  
3 and we'll ask those questions which we feel appropriate.

4           MR. TOURTELLOTTE:   Very well.

5           The first Intervenor, Mr. Valentine, the first  
6 Intervenor's counsel, Mr. Valentine, made the point that the  
7 mootness applied to Comey's participation but not to the  
8 standards involved.  And, it seems to me that this is the  
9 first time that this point has been made clear to the Staff.

10           But, it seems to me that there are reasons to rule  
11 against considering even the procedures at this point.  I  
12 know the question was asked of, just recently, of Mr. Norton  
13 as to what would be the effect of reviewing procedures even  
14 now and indeed could the board not do that.  And, certainly  
15 I believe that the board has the power to do that.  Whether  
16 it is a wise thing to do or not, I'm not certain.  As a matter  
17 of fact, it seems to me that it would be an unwise thing.

18           Mootness in the case of a person who has prepared  
19 testimony or is to appear in a particular proceeding and  
20 then is followed by the death of that person, presents very  
21 special and unique circumstances.

22           If you game-out the situation of reviewing the  
23 standards, the only way to review the standards for proceeding  
24 in the case, would be to measure those standards against the  
25 merits of Mr. Comey's participation in the proceeding.  In



1 order to do that, you would have to have Mr. Comey around to  
2 ask questions in the event that any of the parties should  
3 find -- should see fit to inquire in the event that some matter  
4 is left, some stone is left unturned.

5 And Mr. Comey is simply not here to answer those  
6 questions.

7 DR.. JOHNSON: Well, I'm quite aware of that. The  
8 point is that this board established standards in ALAB 410  
9 and it would certainly seem to me that having before it an  
10 example of, assuming we decide it this way, the improper use  
11 of those standards by a licensing board that it would be  
12 incumbent upon this board to clarify that meaning of 410 in  
13 light of what, again we would assume to be improper utilization  
14 of those standards, by a licensing board.

15 And, it would seem to me that we would want to take  
16 the first opportunity presented to us to do that.

17 MR. TOURTELLOTTE: I understand that point. What  
18 I'm simply saying is that that point is not without a consid-  
19 erable difficulty because if you're going to clarify the  
20 standards, and those standards are binding not only upon the  
21 licensee, but upon the Staff and on all future Intervenors as  
22 well.

23 It seems to me that it's inherently unfair to try  
24 and review those standards in light of fact and circumstances  
25 which may require further inquiry of the person for whom it's



1 impossible to inquire any further.

2 For instance, if we game it out and we just get to  
3 a point where we say, Well, now, we've looked at the deposition  
4 of Mr. Comey, which is in the record, and we're not really  
5 certain what Mr. Comey meant when he answered this question  
6 this way. We cannot go back and ask Mr. Comey what he really  
7 meant, nor can we inquire further.

8 And, on the other hand, if you're going to draw some  
9 conclusion about the standards on the basis of what is re-  
10 presented in that deposition and that deposition alone, and  
11 yet you have in the back of your mind a question about what  
12 he really meant, then it seems to me that it's impossible to come  
13 out with what is a well-established and rational conclusion  
14 about that.

15 DR. JOHNSON: We were dealing with standards against  
16 which we would measure an Intervenor's expert witness, and I  
17 do not see why that question has to be addressed in terms of  
18 any one particular individual. But, let me ask you another  
19 question.

20 Do you believe that the qualifications of individuals  
21 who might appear as witnesses for the Staff and Applicant on  
22 this issue might provide the board with some indication of  
23 what the qualifications of Intervenor's witnesses should look  
24 like?

25 In other words, do we establish a higher standard



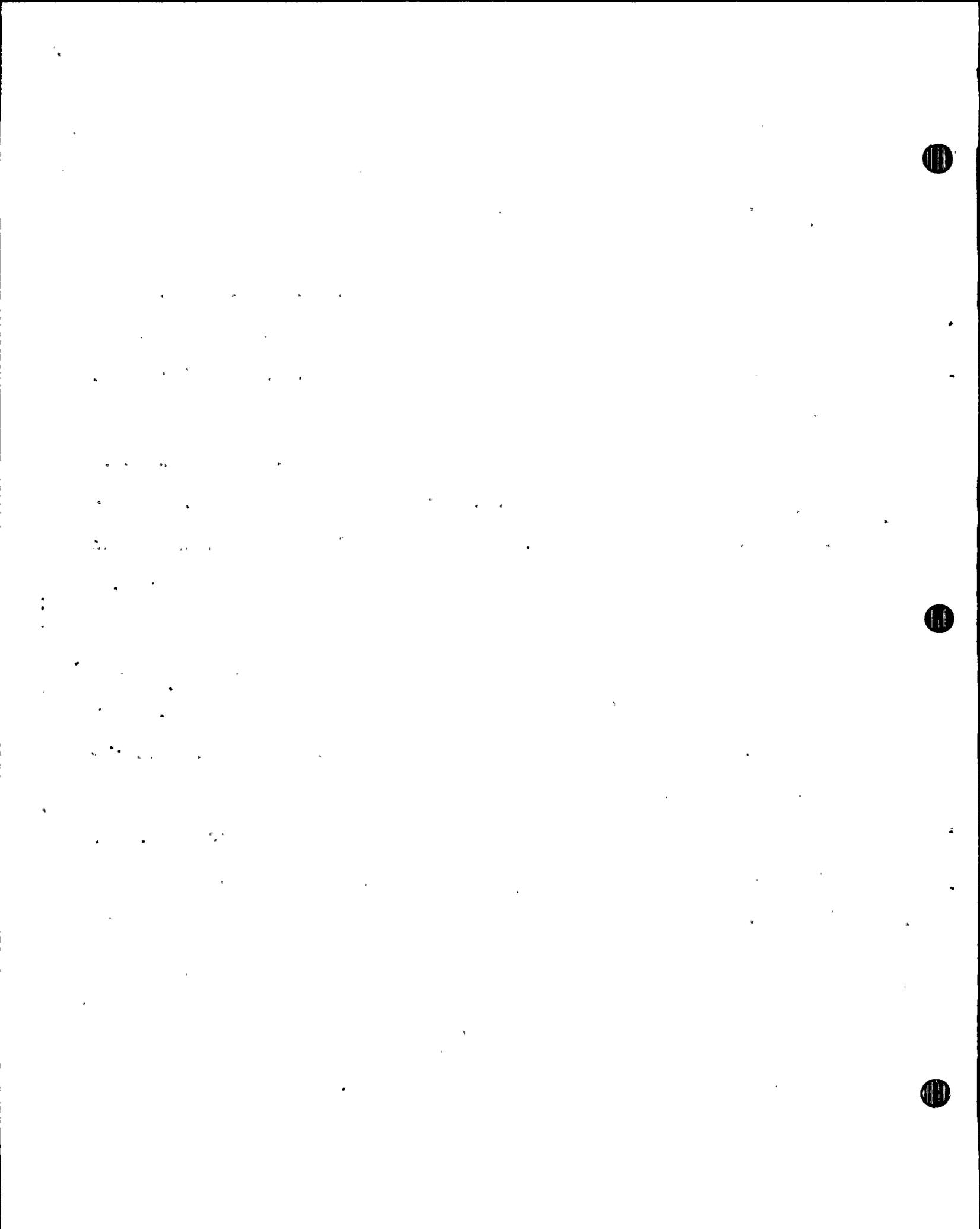
1 for Intervenor witnesses or a different standard for Inter-  
2 venor witnesses than we apply for Staff and Applicant wit-  
3 nesses, or is there a standard for Staff and Applicant wit-  
4 nesses?

5 MR. TOURTELLOTT: Certainly, I don't believe that  
6 there's any different standard for the Intervenors, for the  
7 Applicants, nor is there one for the Intervenors.

8 The standards, in my view, the standards that are  
9 set out in 410 are fairly clear. Now, you can't come out  
10 with a list, it seems to me, a meaningful list of things that  
11 a given expert is to meet in every case. And, certainly,  
12 there are some experts who are going to be far more competent  
13 than other experts. But, that is a matter that is brought out  
14 during the course of voir dire examination.

15 And, it is not a matter, it seems to me, that is --  
16 lends itself very well to the standards. Now, let me say  
17 this: I do believe that if this board chose to, that they  
18 could elaborate or in some way try to clarify what they per-  
19 ceive to be a misconception about the interpretation of ALAB  
20 410.

21 The only problem as I see it, and the point that I  
22 wanted to make, is that you run into serious difficulty if  
23 you do that, trying to measure that against the merits of  
24 Mr. Comey's qualifications, whatever they were. I would say  
25 also, that it seems to me that in this case, I don't see any



1 particular abuse of digression on the part of the board, and  
2 I think that was abundantly clear in our response of August the  
3 14th, 1978. It was again made clear by the licensing board's  
4 further elaboration after ALAB 504 and it seems to be that if  
5 there had been serious, extremely serious problems with  
6 Mr. Comey's qualification, then certainly the appeal board  
7 should have taken that up in ALAB 514 and clarified the stand-  
8 ards at that time.

9 But, it seems to me that the simple act that the  
10 appeal board did not see fit to do so at that time, also to  
11 some extent confirms my belief that there was not an adequate  
12 showing on the part of Mr. Comey that he was qualified as an  
13 expert in this area.

14 MR. SALZMAN: I hope you aren't passing that thought  
15 along, the decision not to grant digressory review. It  
16 turns out a great many things rather than the fact that they  
17 agree with the merits.

18 The one thing it does not turn on is the merits of  
19 the case. I would suggest that if you're drawing that  
20 inference, you're wrong, sir. There are no grounds for that  
21 at all.

22 MR. TOURTELLOTT: Well, I'm certainly not drawing  
23 that inference.

24 Did you have any other question on that matter?

25 DR. JOHNSON: No.



1 MR. SALZMAN: I have a question, sir.

2 MR. TOURTELLOTTE: Yes.

3 MR. SALZMAN: Do you read 410 as Mr. Norton does  
4 that the Applicant's counsel is entitled to see only a san-  
5 itized version of the plan or is counsel entitled to see it  
6 all?

7 MR. TOURTELLOTTE: No, I'm afraid that I have a --  
8 I depart from the view of the Applicant on this matter. The  
9 question, I think, was posed by Dr. Johnson earlier, that if  
10 Mr. Valentine had appeared and met the four factors, would  
11 he have been allowed to participate in the proceedings.

12 Mr. Norton seemed fairly uncertain about that, and  
13 then expressed several different views. My view is that there  
14 are a couple of things upon which this case really turns. I  
15 think, basically, whether there was or was not a withdrawal.  
16 The Staff's view is that there was a withdrawal; that with-  
17 drawal was self-executing. The board's comments about default  
18 under 2.707 are really not germane in this case. And there  
19 was either a self-executing withdrawal or there was not a  
20 self-executing withdrawal. And that is, of course, in your  
21 judgment, the way it has to be.

22 If there is not a self-executing withdrawal, then  
23 we might get to the question of whether the board had the  
24 authority to hold an Intervenor in default prospectively on  
25 the basis of a representation made by the Intervenor that they



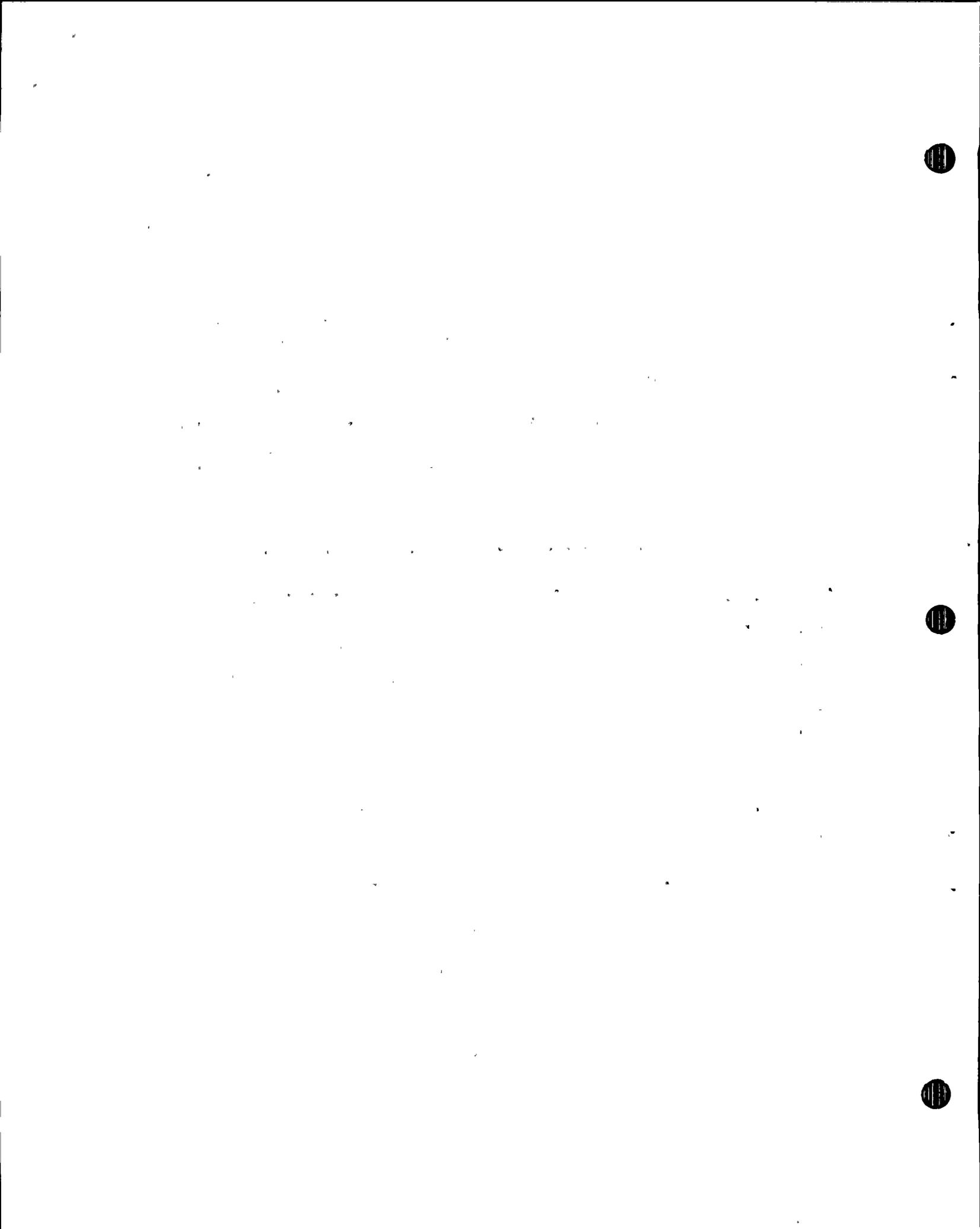
1 would not participate in the proceeding.

2 But, I choose not to get to that issue, because I  
3 really think the issue is whether there is a self-executing  
4 withdrawal or not.

5 MR. SALZMAN: I think you missed the point. I was  
6 asking -- what I really wanted to know is do you read 410 as  
7 saying if Mr. Valentine had asked for it, he would have been  
8 entitled to see, under a suitable protective order and under  
9 appropriate conditions, the complete security plan?

10 MR. TOURTELLOTTE: My view is that if he has signed  
11 the protective order, and this is the Staff view, if he has  
12 signed the protective order and he represents the Intervenors,  
13 that he is not in a withdrawn status, then he can see that  
14 entire plan and he can review the security plan and he can make  
15 a tour of those facilities as he deems necessary to adequately  
16 represent his client.

17 The problem in this case that we have is we have the  
18 withdrawal, the self-executing withdrawal; we have the  
19 general principle, the revolving door principle of Northern  
20 State's Power; and so, the real question is when you get to  
21 Mr. Baldwin, what position is Mr. Baldwin in? Mr. Baldwin  
22 can be in no better position than the position of Mr. Valentine  
23 and Mr. Jones, because those are the people that he chose to  
24 associate with in representing the Intervenor on the security  
25 matter. Mr. Jones and Mr. Valentine, if the board agrees with



1 the Staff, that this was a self-executing withdrawal, then  
2 they had withdrawn. And the only way that Mr. Baldwin could  
3 get back into the proceeding, would be to meet the require-  
4 ments of 2.714 (a), and he did not do that. Not only did  
5 he not do that, he made no attempt to do that.

6 MR. SALZMAN: Mr. Tourtellotte, suppose this board  
7 were to disagree and conclude that there had been no with-  
8 drawal and you have to face the problem of Mr. Baldwin, are  
9 you telling us that we must reverse, if we find there's no  
10 withdrawal?

11 MR. TOURTELLOTTE: I'm not convinced that even then  
12 that the board needs to reverse and particularly because of  
13 what I perceive to be something that perhaps was overlooked in  
14 our brief and perhaps it's something that simply is not often  
15 considered by attorneys.

16 We talk about the right to cross-examine quite a  
17 bit in judicial and administrative proceedings. We seldom  
18 talk about the responsibility of cross-examination. And, it's  
19 my view that there is a responsibility that attends the right  
20 for cross-examination. That responsibility is to the client  
21 and it's to the tryer of fact and it's to the other parties  
22 in the proceeding.

23 Cross-examination, contrary to some common belief,  
24 is not a time when an attorney simply walks into a proceeding  
25 and starts asking questions. It is a very rigorous under-



1 taking and it requires a number of things.

2 It requires, first, meaningful preparation and this  
3 has, what I consider four sub-parts. First you must devise  
4 a strategy that requires a study of the parties and the issues  
5 and the facts. Second, you must devise tactics. Third, you  
6 must set your objectives. And, fourth, you must develop a line  
7 of questions to reach each individual objective.

8 MR. SALZMAN: Mr. Tourtellotte, let me interrupt  
9 right here. You may be quite right as to what counsel ought  
10 to do if he's going to do a good job on cross-examination, but  
11 isn't that between attorney and client?

12 In this case, the client apparently got what attorney  
13 he could and the board has the absolute right and you certainly  
14 can object to a irrelevant or repetitious cross-examination,  
15 but can you say in advance that so-and-so hasn't prepared  
16 adequately, could not prepare adequately, and we're not going  
17 to let him in?

18 MR. TOURTELLOTTE: No, I'm not suggesting that.  
19 What I am suggesting is that there are responsibilities con-  
20 nected with cross-examination which -- and as I -- yes?

21 MR. SALZMAN: Mr. Tourtellotte, the problem is  
22 I asked you if we are -- if the board holds that there was  
23 no withdrawal, must we reverse and apparently the suggestion  
24 that we don't have to reverse because it was painted that  
25 Mr. Baldwin was incompetent and nothing was lost by his not



1 appearing, or he was unprepared, or both. Is that really the  
2 ground you want us to turn this case on?

3 MR. TOURTELLOTTE: No, I guess the point that I  
4 was reaching on my argument is that in order to get into the  
5 proceeding, Mr. Baldwin would have to establish on the  
6 record that he could, in some way, meaningfully help develop  
7 the record.

8 Now, develop the record doesn't simply mean putting  
9 words into the record. Develop the record means presentation  
10 of reliable and probative evidence.

11 MR. SALZMAN: But, are you relying on a rule of the  
12 Commission?

13 MR. TOURTELLOTTE: I beg your pardon?

14 MR. SALZMAN: Are you relying on a Commission rule?

15 MR. TOURTELLOTTE: I'm relying upon the general  
16 rules of adjudicatory bodies and administrative bodies every-  
17 where, that the evidence is elicited for the record.

18 MR. SALZMAN: Yes, but what about -- that doesn't  
19 mean you throw the lawyer out, it merely means that you don't  
20 let him continue the cross-examination.

21 I mean, Mr. Tourtellotte, if counsel for the hearing  
22 does a poor job, presumably the judge will cut him off or the  
23 opposing counsel will object, but you don't throw counsel out  
24 of the courtroom; I've never heard of that anywhere.

25 MR. TOURTELLOTTE: But, your question assumes that



1 he's in the courtroom in the first place, and the point that  
2 I'm getting to is that the board acted properly in not letting  
3 him in in the first place.

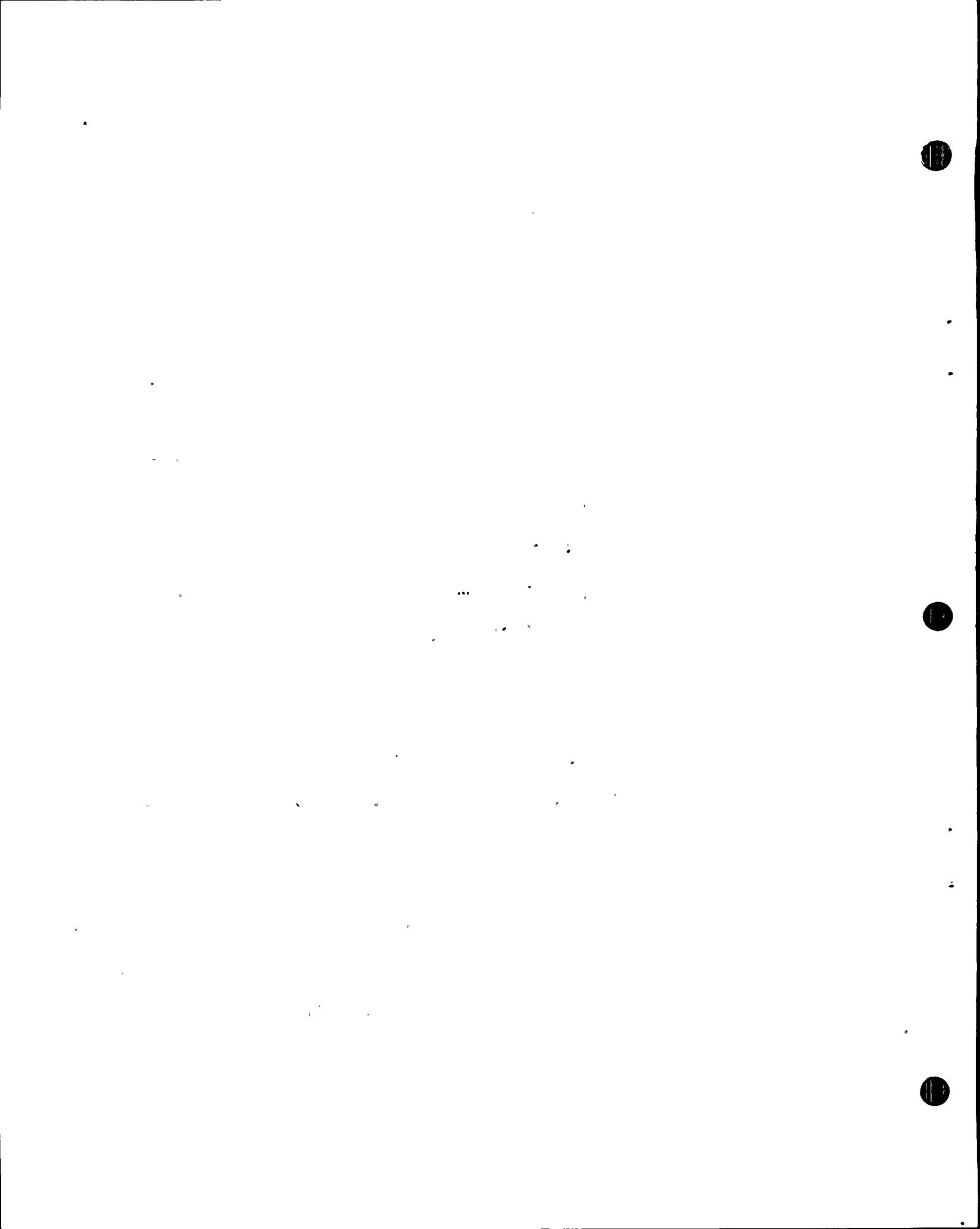
4 MR. SALZMAN: The board, as I understand you to say,  
5 that the licensing board of the Nuclear Regulatory Commission,  
6 excluding counsel --

7 MR. TOURTELLOTTE: Excuse me. I in my own mind was  
8 making the assumption that isn't there because I was assuming  
9 that the withdrawal was in effect. So, the withdrawal is out  
10 of the way, so, Mr. Baldwin has the right to come in and  
11 conduct cross-examination.

12 MR. SALZMAN: But, I take it if there's no withdrawal  
13 we must reverse?

14 MR. TOURTELLOTTE: Except for the one question about  
15 the precipitous nature of Mr. Baldwin's inquiry into the  
16 proceeding.

17 It seems to me that if there -- you see, it's very  
18 difficult for me to imagine that there is no withdrawal. But  
19 assuming that there is no withdrawal, then we still would not  
20 be anticipating anybody would be in attendance. As a matter  
21 of fact, while I was listening to the question about whether  
22 there was testimony filed or there was not testimony filed,  
23 it occurred to me that it was at the time that Mr. Comey died,  
24 which I believe was on January 5, and certainly, it was by  
25 January the 6th that we knew about this, and from that point



1 on, we did not think in terms of filing any testimony at all  
2 in the case.

3 And, so you have to understand that the context of  
4 the whole proceeding was -- yes?

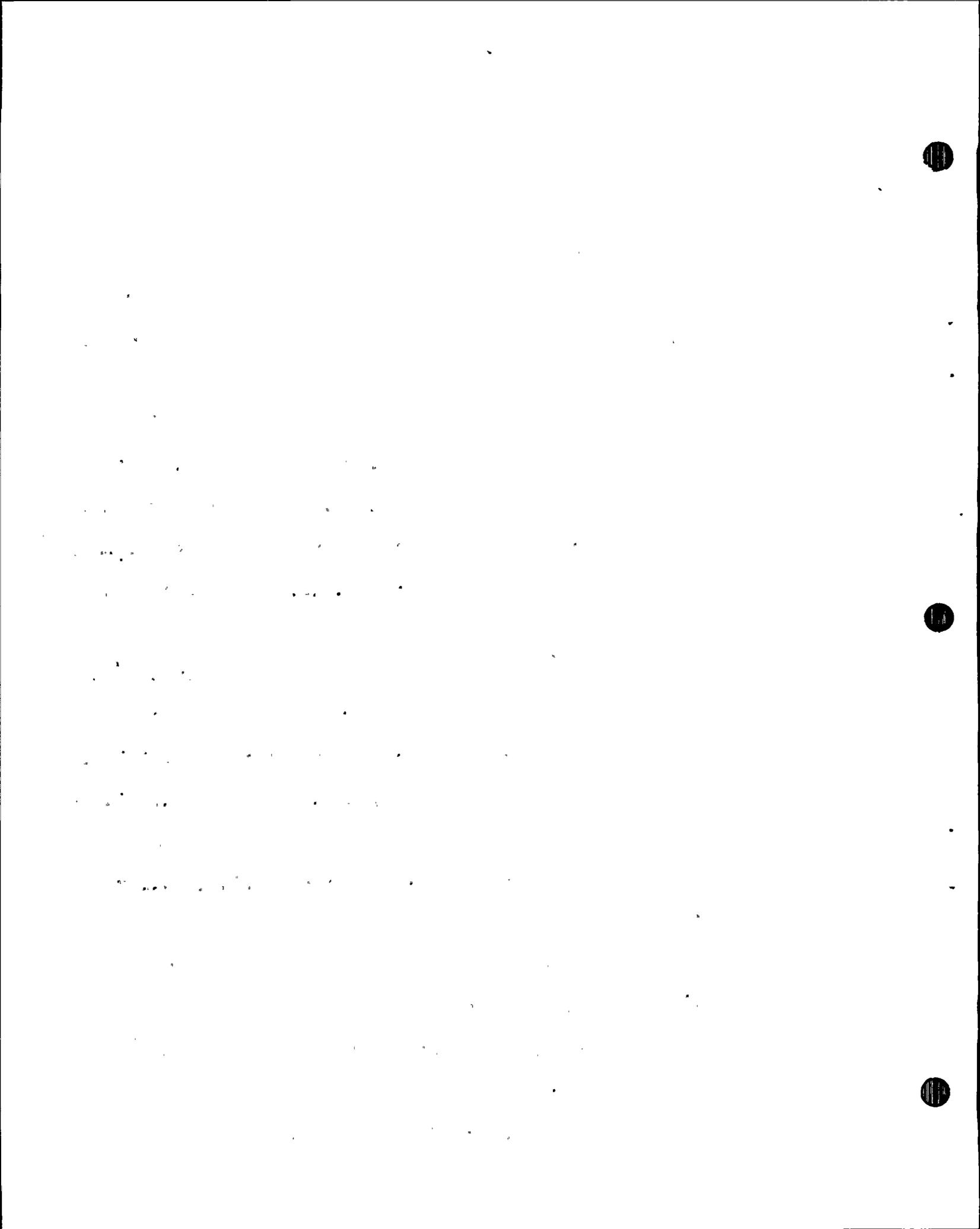
5 MR. SALZMAN: Well, Mr. Tourtellotte, that may be  
6 your assumption, but a good lawyer would have to be prepared to  
7 say that there's been no withdrawal, there's a hearing  
8 scheduled and somebody might show up.

9 DR. JOHNSON: Can I follow that, because I don't  
10 understand that at all, because there was a hearing scheduled  
11 for the first week in February, and you must have been planning  
12 to file something. Mr. Comey was already disqualified and the  
13 only thing going for Mr. Comey prior to January 5, was a re-  
14 view by the Commission of the board's act and the appeal  
15 board's action.

16 But, there was a hearing scheduled for early  
17 February so the Staff must have had something in mind for  
18 testimony for that hearing.

19 MR. TOURTELLOTTE: Yes, we certainly did, but you  
20 have to understand, too, that just as Mr. Norton pointed out,  
21 we had spoken with Mr. Valentine before this time that we  
22 had set a date for the first week in February which was  
23 well -- it just a little bit over a month after Mr. Comey's  
24 demise.

25 And, that we were in the process of preparing



1 testimony. And, I don't know that whether on the 6th we had  
2 all of our testimony prepared or not. I know that on the 6th  
3 when we found out that Mr. Comey had passed away, we tried  
4 to inquire of Mr. Valentine as to what he was going to do at  
5 the proceeding. And, I assumed that the response, since there  
6 was no other filing, that that response was an answer to our  
7 general inquiry as to what he was going to do about it.

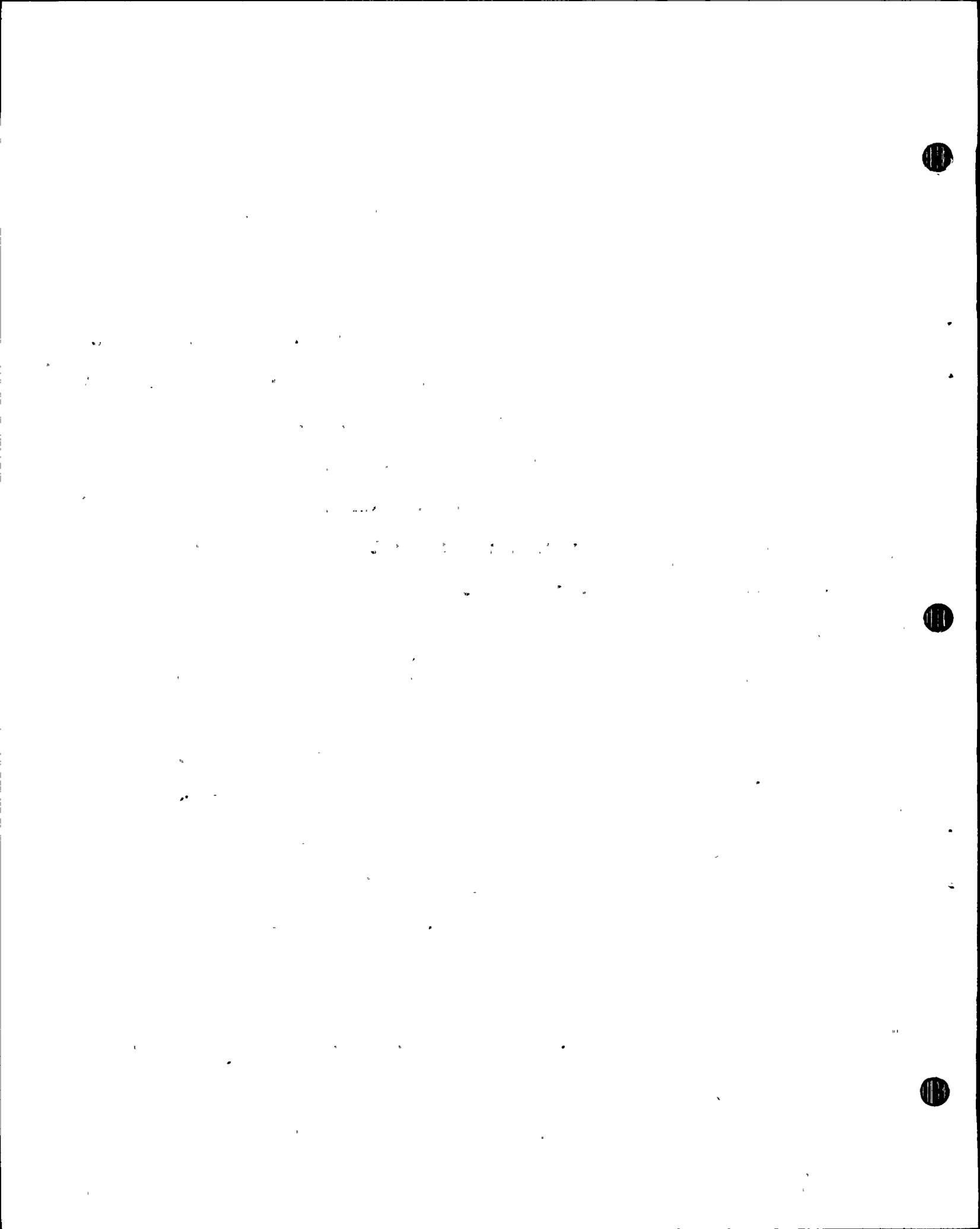
8 Well, from that point on, we were simply thinking  
9 about what we were going to do in terms of meeting the board's  
10 requirement of presenting information to them. Now, we did,  
11 in fact, have documents and testimony prepared for the board,  
12 but we were not planning to prepare testimony in an adversary  
13 type proceeding.

14 MR. SALZMAN: Mr. Tourtellotte, my problem is this:  
15 if we disagree that there was a withdrawal, you give us no  
16 grounds for reverse. You've indicated to me that Mr. Baldwin  
17 should have been allowed to appear, at least at the hearing,  
18 and he wasn't. That leaves us no choice but to reverse.

19 MR. TOURTELLOTTE: Yes, I think that's probably  
20 true.

21 MR. SALZMAN: The question then, what about  
22 Mr. Baldwin's right to participate in the tour? Was the  
23 company entitled to say, No, he can't come in until we in-  
24 vestigate him further?

25 MR. TOURTELLOTTE: Well, again that completely turns



1 on the question of whether there was or was not a withdrawal.

2 And as I indicated earlier, if there is not with-  
3 drawal, if there is a right of an attorney, in my view under  
4 security plans, to participate in every aspect, to see the plan,  
5 to make the tour.

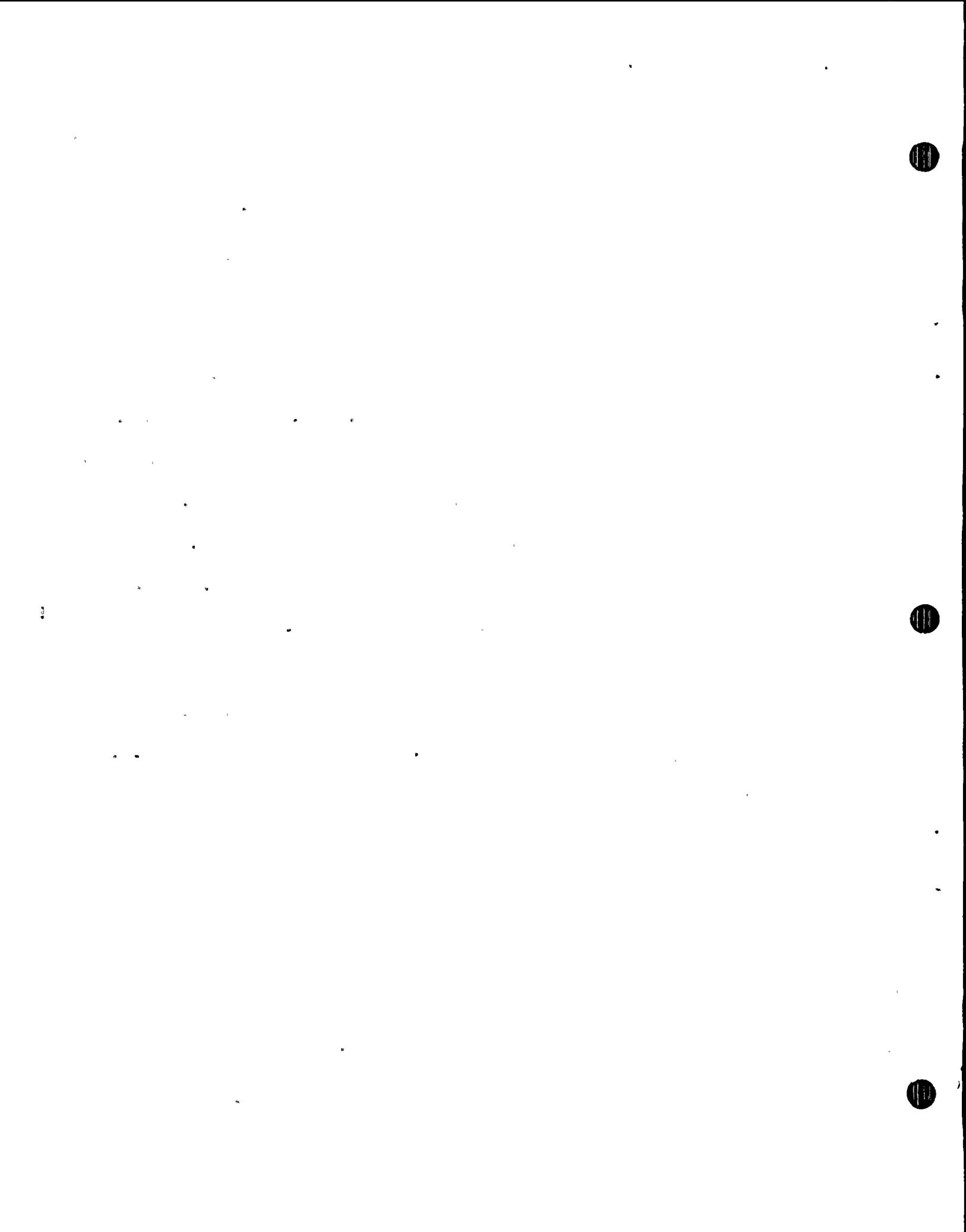
6 MR. SALZMAN: I agree with you there. But, I think  
7 what Mr. Norton said, That's right, that may be the case with  
8 someone they know; but they do not know Mr. Baldwin.

9 Was the company entitled at the time to check  
10 Mr. Baldwin out? In other words, was the company not right to  
11 say, Just one moment; this Mr. Baldwin may be a bad  
12 Mr. Baldwin and I want to look further.

13 MR. TOURTELLOTTE: Well, I think there's probably  
14 some right to, if you would call it a right, I'm not certain  
15 that that's a good term or not, but there is some right to  
16 insure that people who are going to participate in security  
17 review will keep the confidence up of the protective order.

18 MR. SALZMAN: Not only that so much, I'm talking  
19 about the right to walk on their private property.

20 MR. TOURTELLOTTE: Yes, as a matter of fact, I would  
21 invite your attention to 7355, Subparagraph D-7, where it says  
22 that access to vital areas shall be limited to individuals who  
23 are authorized access to vital equipment and who shall require  
24 such access to perform their duties. It goes on to say that  
25 access to vital areas for the purpose of general familiar-



1     ization and other non-work related activities shall not be  
2     authorized except for good cause shown to the licensee.

3             So, the licensee in our regulation has the authority  
4     to inquire into good cause.

5             MR. SALZMAN: Let me offer this scenario to you,  
6     Mr. Tourtellotte: at the last minute, Intervenor decides  
7     that it is going to participate albeit through a new counsel.  
8     The licensee knows not Mr. Baldwin and the licensee is there-  
9     fore, within it's rights, as I suggest, not to let Mr. Baldwin  
10    on its property without checking further. But, Mr. Baldwin  
11    points out that the hearing can't go on because if the  
12    licensing board goes on the property and sees the plan,  
13    Mr. Baldwin is entitled to accompany them.

14            The question then comes down to, does it not,  
15    whether the board should have delayed the hearing in order  
16    to let them check out Mr. Baldwin or the board was entitled  
17    to say, You     have waited too long; the hearing is set.  
18    We are going on without you; you have brought this on your-  
19    self.

20            MR. TOURTELLOTTE: In that case, I think the board  
21    is entitled to say, You waited too long. And I guess that  
22    gets back to the general point that I said a while ago, that  
23    the precipitous action of Mr. Baldwin in this case, deserves  
24    some attention.

25            MR. SALZMAN: The question I have for you though is



1 did that board say that? They didn't say that, did they?

2 MR. TOURTELLOTTE: No, they did not say that because  
3 they were working on a different assumption.

4 MR. SALZMAN: Assuming, however, that there is  
5 grounds for it, can we affirm on that ground that they just  
6 came too late and therefore, there was nothing else that could  
7 be done?

8 MR. TOURTELLOTTE: I think it's a matter of dis-  
9 gression. to the board. If the board would perceive that there  
10 is no withdrawal, then I think that it is within your dis-  
11 gression also to say whether you view this as reasonable or  
12 unreasonable conduct on Mr. Baldwin's part.

13 And, if you, obviously, if you don't think that it  
14 would pose too much of a problem in your judgment, then you're  
15 going to make a decision that's consistent with that judgment.

16 If you think that it is unreasonable, then certainly  
17 you would go ahead and affirm the licensing board anyway, re-  
18 gardless of whether they stated that or not because you have  
19 extraordinary powers.

20 MR. MOORE: What's the legal standard under which  
21 the licensing board's ruling should be viewed, abuse of  
22 disgression?

23 MR. TOURTELLOTTE: You say abuse of disgression?

24 MR. MOORE: Abuse of disgression. Is that the legal  
25 standard under which the board ruling should be reviewed?



1 MR. TOURTELLOTTE: I'm not sure that I understand  
2 with regard to what point. Are you talking about the over-  
3 all --

4 MR. MOORE: No, excluding Mr. Baldwin from participa-  
5 ting.

6 MR. TOURTELLOTTE: Well, whether it was or was not  
7 an abuse of digression to abuse --

8 MR. MOORE: Is that the correct legal standard under  
9 which it should be used?

10 MR. TOURTELLOTTE: Well, if you assume that there was  
11 a withdrawal, that there was no withdrawal, excuse me, then  
12 you would get to that point. If you rule that there was a  
13 self-effecting withdrawal, then you never get to that point.

14 MR. MOORE: I understand that. Then, you agree that  
15 an abuse of digression is the proper legal standard under  
16 which the action should be viewed.

17 If we, on our own, suisponte (?) review of the  
18 security plan have problems with it, what course of action  
19 should we follow?

20 MR. TOURTELLOTTE: This, I take it, is similar to  
21 the question you asked Mr. Norton as to whether you should --  
22 well, in my view, it brings up three points.

23 First, it seems to me that the revolving door con-  
24 cept of Northern State's Power --

25 MR. MOORE: No, no. I am inquiring whether if we,



1 this appeal board, on its suisponte (?) review of the security  
2 plan of Diablo Canyon, finds questions which aren't answered  
3 in the record, how should we proceed?

4 MR. TOURTELLOTTE: Well, more directly to that  
5 question, then I think you should proceed to have your own  
6 hearing and you should exclude the Intervenors.

7 And the reason I believe that you should exclude the  
8 Intervenors is because the revolving door principle dictates  
9 against it and moreover, if you choose not to exclude the  
10 Intervenors, that is if you either distinguish a way or hold  
11 Northern State's Power to in absente, then I think that the  
12 Intervenor should be required to show good cause why they  
13 should be allowed to proceed.

14 And, once again, I would say that if there is no  
15 withdrawal, then certainly they can participate.

16 DR. JOHNSON: Let me ask you a question on that,  
17 Mr. Tourtellotte: if the Intervenor perceives that the  
18 licensing board had used in improper standard to deny them  
19 the use of witnesses and they further perceive that it was  
20 impossible for them to carry on a meaningful examination of  
21 the security plan and a meaningful participation in the  
22 security plan hearing without an expert witness, does --  
23 would that justify their withdrawal and also give them grounds  
24 to ask to come back in albeit late, because the only time that  
25 they were able to get to the question of the improper stand-



1     ard was on this appeal. This board denied them the right to  
2 discuss the merits of Mr. Comey's qualifications in ALAB 507  
3 or whatever it was. And, therefore, this is the first opportu-  
4 nity that Intervenor had, I think, to appeal the disqualification  
5 of not only Mr. Comey, but a number of other of their technical  
6 witnesses, proposed technical witnesses.

7             MR. TOURTELLOTTE: I'm not sure that I understand  
8 the question.

9             DR. JOHNSON: Well, you said that if we for some  
10 reason wanted to take this question up again, the question of  
11 the validity of the security plan, the adequacy of the security  
12 plan, the question that was put into contention by the  
13 Intervenor, you said the Intervenor should be excluded on the  
14 basis of the revolving door concept expressed in -- whatever  
15 it was.

16             I'm suggesting that the Intervenor might have good  
17 cause now to come in and say, Look, we appeared to withdraw  
18 back on January of 1979. The reason we withdrew is because  
19 we couldn't get an expert witness qualified; and the reason  
20 we couldn't was that we believed that the licensing board was  
21 using an improper standard to judge these technical witnesses.  
22 We were unable to appeal the use of that standard by the  
23 licensing board until this time; therefore, this is the first  
24 time when we felt that we could meaningfully participate in  
25 the security hearing.



1 MR. TOURTELLOTTE: Well, there are two points about  
2 that.

3 One is, my view is, that an attorney has the duty  
4 to pursue its case no matter what adverse rulings he receives.  
5 And the simple fact that they received an adverse ruling  
6 upon the qualification of an expert witness is no reason not  
7 to show up and participate at a proceeding.

8 In association with this, I would point out that I  
9 had conversations with Mr. Valentine and I think Mr. Valentine  
10 verified today that he knew he had the right to come and to  
11 ask questions. I told him that he had, in my view, that he  
12 had the right to review the security plans and to develop  
13 cross-examination; he declined to do that.

14 And, the problem that you get into in terms of the  
15 precedent with the revolving door concept is think of it in  
16 terms of if we had another proceeding; and if we had not one,  
17 but say ten Intervenors and each Intervenor had, say, ten  
18 issues; then we would have a hundred different issues. And  
19 Intervenors started saying, Well, I'm not going to participate  
20 on this issue; I'm not going to participate on this issue;  
21 and then showing up four days before it's to go into a pro-  
22 ceeding and say, Oh, yes, I want to participate on this issue;  
23 Yes, I want to participate on this. We would never be able to  
24 schedule proceedings and we would never be able to proceed  
25 in a very reasonable fashion.



1 DR. JOHNSON: Well, every party here has noted  
2 that this is a somewhat unusual issue; the security issue is  
3 not the same type of issue that is dealt with in reactor  
4 licensing hearings as a rule. The fact that it would be held  
5 in camera; the fact that this board has established conditions  
6 for participation on the part of the Intervenor; it's not  
7 your ten issues and ten Intervenor type thing. It's special  
8 circumstances; this argument has been used by the Applicant  
9 to justify the board's action. This is a special circumstance.

10 So, I don't think it's particularly relevant to bring  
11 up ten Intervenor, ten questions; this is a special type of  
12 consideration.

13 MR. TOURTELLOTTE: The other point is that in order  
14 to get to that point, you're also going to have to review  
15 the standards question. And in order for them to show good  
16 cause, they are going to have to make a case on the standards  
17 and you're going to have to agree that that issue would be  
18 reviewable at this time.

19 I simply don't believe that it should be.

20 DR. JOHNSON: Have they not already attempted to  
21 make the case on standards to a certain extent? Well, that's  
22 neither here nor there.

23 MR. SALZMAN: Mr. Tourtellotte, I have one question:  
24 Mr. Norton said that his client would have been prejudiced if  
25 Mr. Baldwin had been permitted to attend the in camera hearing



1 session, because apparently their testimony would have been  
2 cast differently.

3 Do you agree with that position, sir?

4 MR. TOURTELLOTTE: No.

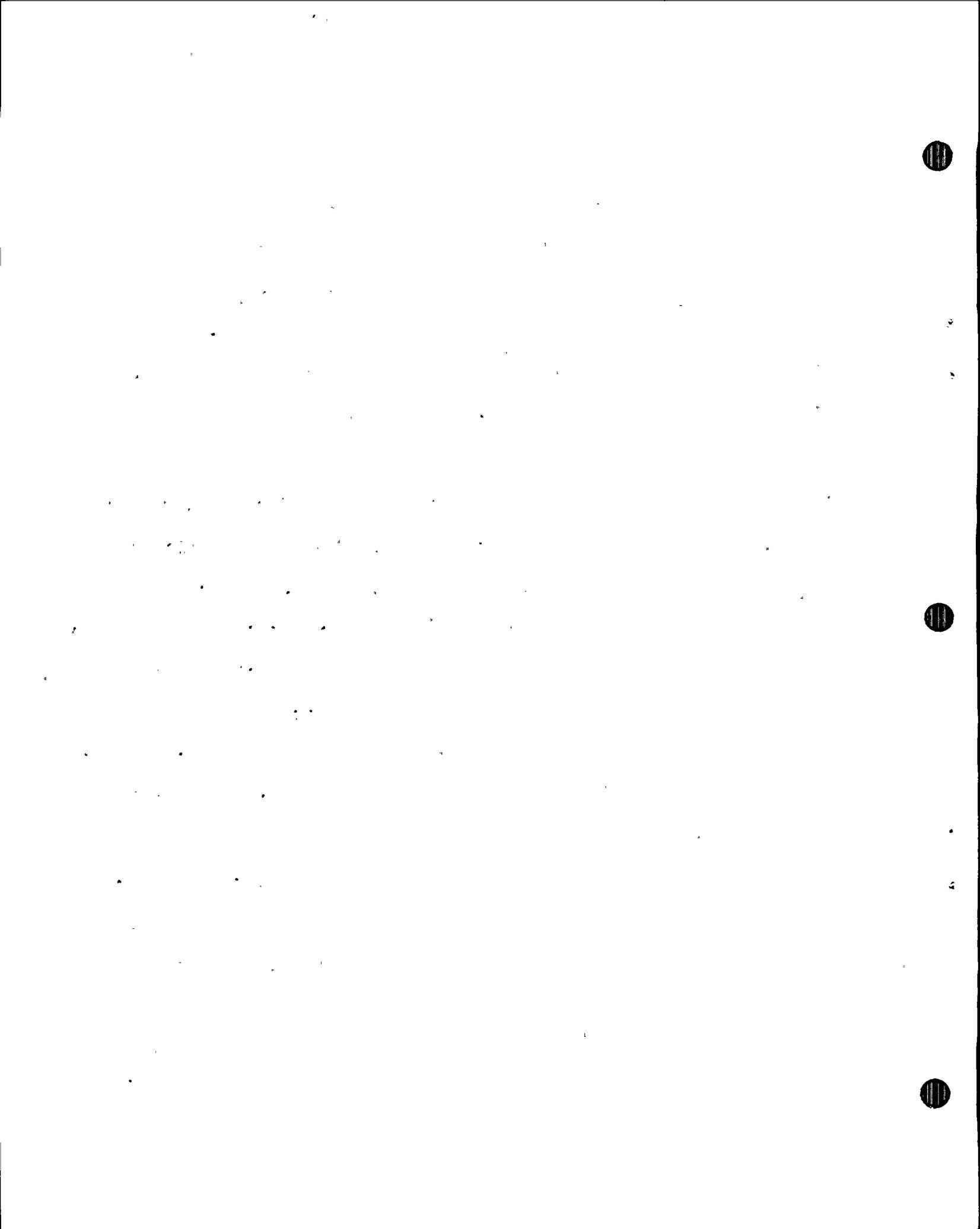
5 MR. SALZMAN: Why not?

6 MR. TOURTELLOTTE: Well, because a case is -- has  
7 to address all of the issues and it has to be full and complete.  
8 I don't care whether Mr. Baldwin is in there or not; my case  
9 is going to be complete. And, our case to the licensing board  
10 was complete without Mr. Baldwin and our case has been complete  
11 with Mr. Baldwin. I don't think we would have changed any-  
12 thing one iota. The only thing that would be different is  
13 that I would have prepared my witnesses for cross-examination.

14 MR. SALZMAN: All right. Let me ask you then, would  
15 you have been prejudiced then; are you suggesting that you  
16 would not have prepared your witnesses for cross-examination  
17 in this case. And then Mr. Baldwin shows up at the last  
18 minute, was that unfair?

19 MR. TOURTELLOTTE: I can't honestly say; we did  
20 prepare, of course, for board questions which is essentially  
21 cross-examination, although it's not usually that much of  
22 an adversary type thing.

23 We try not to think of them as an adversary, al-  
24 though sometimes it's not entirely clear. But, no, I don't  
25 believe that we would have been prejudiced if any for that



1 reason; for other reasons, I don't believe that Mr. Baldwin  
2 should have been allowed to participate.

3 MR. MOORE: Your time is fast expiring.

4 MR. TOURTELLOTTE: Fast dwindling away? I never did  
5 get around to the point of refuting point by point, but  
6 that's really not any surprise to me; it's happened before.

7 Let me briefly run down Mr. Baldwin's position and  
8 then I have about three points and then I'll be through.

9 One is that Mr. Baldwin opened by saying that the  
10 question here was his right to appear. I don't think that  
11 his appearance was ever questioned. The real question here is  
12 what do you have to do; what do you have the right to do of  
13 representing a client whose other attorney has withdrawn them  
14 from the case. And the question was the extent of his  
15 participation and not his initial appearance.

16 He claimed that he was willing to sign a protective  
17 order and that he made that clear. But, I think if you'll  
18 examine that transcript on Page 9362, Lines 8 through 11, you  
19 will see that Mr. Baldwin left that in considerable doubt.

20 As a matter of fact, I think he said words to the effect that  
21 he would respond to the question of protective order when we  
22 get around to that point. So, he didn't make any -- not only  
23 did not make an affirmative offer to sign a protective order,  
24 but he, in fact, left that whole issue clouded.

25 On Page 9359, Lines 5 through 17 and especially



1 14 through 17, indicated that Intervenor was being represented  
2 that has, in fact, two different minds and two different points  
3 of view. And it seems to me that if you're going to have  
4 counsel in a case and if you're going to allow counsel to  
5 appear, that they should express only one view so that the  
6 other parties and the licensing board are not confused.

7 Finally, I think the important thing that he said  
8 that really has no validity is that no one has the right to  
9 restrict participation of an attorney in this case. I don't  
10 know whether it even bears comment or not, but certainly  
11 there are several restrictions on the conduct of attorneys  
12 in litigations; those appear in regulations, they appear in  
13 case law, and they appear in general practice. And, you're not  
14 going to go into a Federal courtroom, I know, and tell a  
15 Federal judge that you're going to participate in any way that  
16 you see fit, because that judge is going go make certain that  
17 you participate in a way that it contributes to the reliability  
18 and probative value of the record.

19 And, the thing that was missing -- the key point  
20 that was missing from Mr. Baldwin's offering in this case was  
21 to show that in any way, he could participate meaningfully;  
22 that he could help develop a meaningful record, that he could  
23 conduct meaningful cross-examination. And, if you view it in  
24 context of his appearing on the 7th of February as a limited  
25 appearee with no mention at all of the fact that he was going



1 to be an attorney and the very next day that he was going to  
2 be an attorney to appear in a case four days hence, and  
3 contribute meaningfully, I don't see how you can come to the  
4 conclusion that he could fulfill that responsibility as an  
5 attorney.

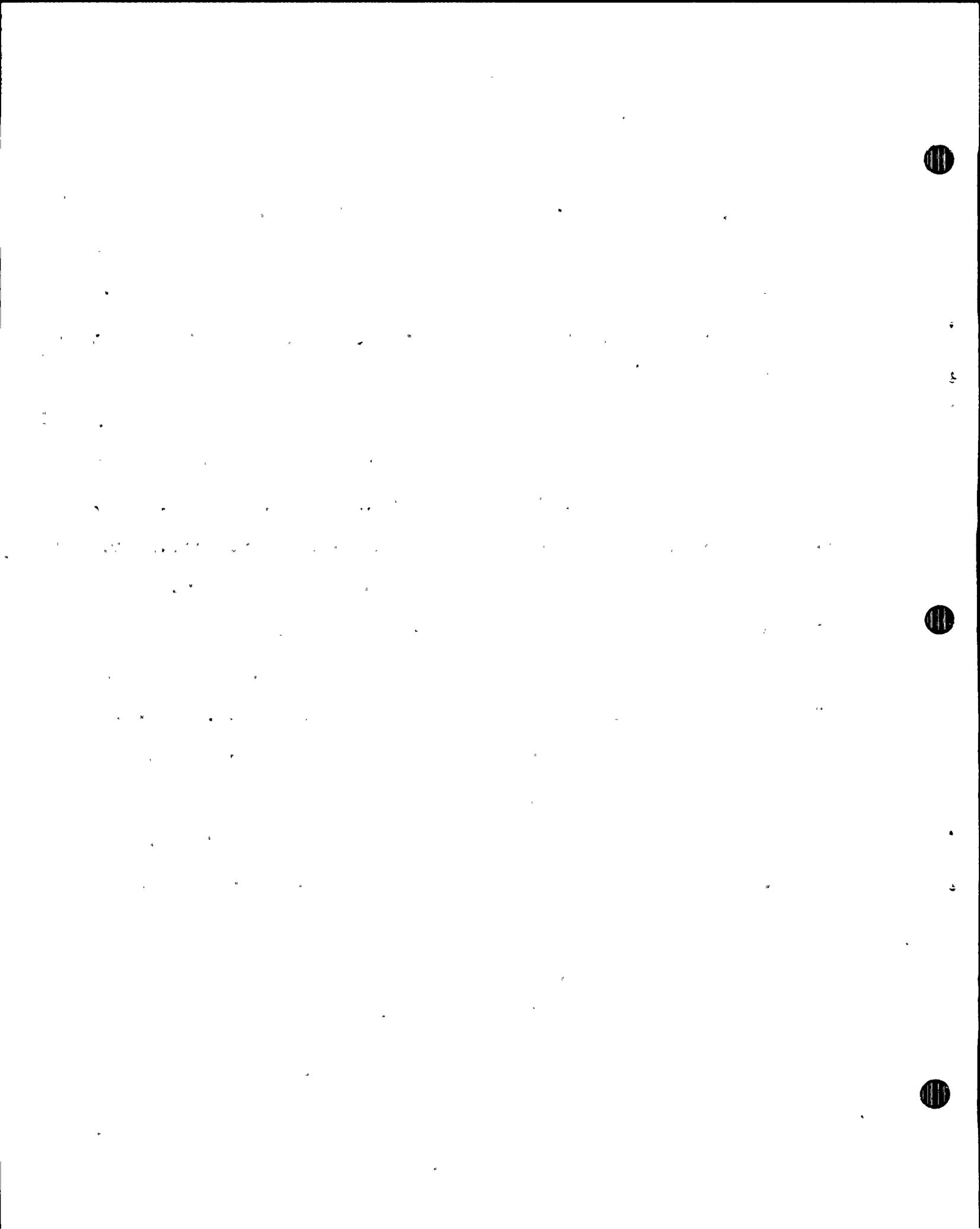
6 MR. MOORE: Thank you.

7 MR. TOURTELLOTTE: Let me say one final thing about  
8 the context, and I think this is important. There are three  
9 points.

10 The context of this whole thing is that somehow the  
11 licensing board and the Staff have oppressed the Intervenor;  
12 and that simply isn't that case. Mr. Valentine was --

13 MR. MOORE: I think Mr. Norton made that point  
14 adequately. We'd appreciate now hearing from the Intervenor's  
15 counsel although we would like you to limit your rebuttal to  
16 counsel for about 8 minutes if that would be all right.

17 MR. VALENTINE: Gentlemen, I think that what we would  
18 like most to do in rebuttal is to respond to any further  
19 questions that you have. There are several questions that have  
20 been raised, but I think the key question is what is most  
21 specifically is that we're asking this appeal panel to do.  
22 The question of withdrawal; I think it is necessary to make a  
23 determination as to whether or not there was a withdrawal by  
24 the Intervenor; we are talking about the parties here and not  
25 the questions about what the attorneys said to one another.



1 It's the right of the Intervenor to be a part of these pro-  
2 ceedings.

3 The Intervenor was present at the hearing when  
4 Mr. Baldwin appeared and of course, a party cannot choose to  
5 associate and retain counsel for whatever purpose it chooses.  
6 I do think that this panel has to make a decision on the with-  
7 drawal.

8 My position on the withdrawal is simply that there  
9 was none and I think that is best shown by the fact that the  
10 contentions within which this case was tried. We, in fact,  
11 did not know when we pleaded this case for this appeal whether  
12 or not the hearing was held in secret, in camera, as it should  
13 have been was tried against the contentions that we filed on  
14 the security plan and against PG&E's contentions. We have  
15 learned from the briefing from the parties that it was, in  
16 fact, tried against the contentions. I have no reason to  
17 doubt that that's not the case.

18 But, we also would doubt seriously that there was  
19 any kind of significant cross-examination or testing as to the  
20 questions that were raised. And I think that one of the points  
21 raised was whether or not there really had been a particular-  
22 ization of the challenge to the security plan. And, I want  
23 to submit that the contentions that we submitted do reach  
24 that level and that the attempts that we made to establish  
25 the qualifications of an expert do fit within what we believe



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1 are the issues against which the security plan should be  
2 evaluated and the determination of adequacy made.

3 Now, what are the possibilities for this panel? That  
4 question has come up several times and it seems to us that it  
5 should work as follows: I think that it's extremely important  
6 that this panel take adequate consideration of the way in  
7 which the licensing board has chosen to implement the guidance  
8 that this panel has previously given it.

9 And that in looking at the reconsideration of the  
10 licensing board, it cannot permit that decision to stand; and  
11 it cannot stand in the evaluation of the facts before it, which  
12 are Mr. Comey's facts, his life history. Those are the elements  
13 of making a standard, a statement of standards. Of course,  
14 as we have said so many times, the obvious: they cannot order  
15 him back to testify. But, but those qualifications do set the  
16 standard against which this licensing board should make a  
17 determination as to what kind of an expert is required to  
18 evaluate that plan.

19 There are two areas that are particularly -- that  
20 require clarification. One is a security expert must go beyond  
21 the nuts and bolts and the intricacies of the equipment in  
22 a security plan. And, he must be a security thinker and the  
23 regulations are clear that we are talking about some decision  
24 as to the integrity and sanctity of a plan and whether or not  
25 it can withstand internal and external espionage and whether



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1 or not there can be strike forces determined.

2 A man doesn't have to know how a video recorder  
3 works to understand that and in fact, very often there are  
4 different qualities and characteristics; that must be made  
5 clear.

6 And, secondly, I believe that it should be clear to  
7 the licensing board that the decision as to expertise must  
8 be framed within the context of the contentions that are made.  
9 The licensing board doesn't even mention the regulations of the  
10 contentions; they don't even cite it. It's as if it's an ex-  
11 pert for some reason, who knows what, but not with respect  
12 of the contentions that are being offered in a particular  
13 case.

14 And I would submit that that would not be the stand-  
15 ard applied either by this board or under the Federal rules.

16 And, finally, as to the relief. We believe that the  
17 hearing should be reversed and remanded for further hearing.  
18 If the Intervenor should be given a period of 90 days to  
19 qualify an expert, and at the end of that period or as soon as  
20 that's done, the Intervenor should have the right of dis-  
21 covery of the experts who have testified in that proceeding.  
22 That the testimony that is already a matter of record on that  
23 plan should serve as a direct testimony of those witnesses.  
24 And it may be that the direct testimony may or may not need  
25 to be augmented. I believe that the hearing board should be



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1 given that right to provide supplemental directive in the  
2 course of discovery that should become necessary.

3 I do believe that Intervenor should be able to pro-  
4 vide additional evidence should that become necessary after  
5 having reviewed the plan and the transcript of the in camera  
6 proceeding. It's hard to tell, but the chances are that the  
7 Intervenor's expert would want to testify, both with an  
8 affirmative case and to provide additional cross-examination.

9 I believe that this method is consistent with the  
10 procedure that is evolving in the Federal Courts for expedited  
11 procedure; that there is a tendency toward pre-filing direct  
12 testimony; there is a method of expediting hearings and I  
13 think the fact that this prior hearing would greatly reduce  
14 the burden on the licensing board.

15 I do not believe that there is any substantial  
16 prejudice as to the time required to do this and I think the  
17 stakes are far too great for this board to let pass what's  
18 happened here. I believe that taken in the context of the  
19 significance of of security issues, this proceeding and what's  
20 going on in this Country with respect to the integrity of  
21 the licensing process, this plant cannot license without some  
22 independent evaluation of that security plan.

23 And as it stands now, the only people who have seen  
24 that plan are the people who drew it and the staff; and that  
25 cannot be permitted to stand.



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DR. JOHNSON: And presumably the licensing board.

MR. VALENTINE: Yes, and the board.

DR. JOHNSON: Which, I believe, is considered to be an independent body, is it not?

MR. VALENTINE: Yes, sir.

MR. MOORE: We have no further questions. Thank you very much. We'll take the matter under advisement.

(Whereupon, the hearing was adjourned at 12:40 p.m.)



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1                   This is to certify that the attached proceedings  
2 before the Nuclear Regulatory Commission in the matter of:  
3                   Pacific Gas and Electric Company (Diablo Canyon),  
4 Docket No. 50-275 and 50-323. Courtroom 12, 450 Golden Gate  
5 Avenue, San Francisco, California, Wednesday, January 23, 1980,  
6 were held as herein appears, and that this is the original  
7 transcript thereof for the file of the Commission.  
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*Janice R. Smith*  
Janice R. Smith  
Official Reporter



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of )  
PACIFIC GAS AND ELECTRIC COMPANY ) Docket Nos. 50-275 O.D.  
(Diablo Canyon Nuclear Power ) 50-323 O.L.  
Plant, Units No. 1 and 2 )

APPLICANT PACIFIC GAS AND ELECTRIC COMPANY'S  
BRIEF IN RESPONSE TO INTERVENORS' BRIEFS IN SUPPORT  
OF EXCEPTIONS TO PART III OF INITIAL DECISION

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January 11, 1980



TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . .	-i-
I. STATUS OF PROCEEDINGS . . . . .	1
II. INTRODUCTION . . . . .	5
III. OVERVIEW . . . . .	14
IV. THE ASSIGNMENT OF A 7.5 MAGNITUDE CAPABILITY TO THE HOSGRI FAULT IS VERY CONSERVATIVE . . . . .	16
V. THE CHOICE OF A 0.75g DESIGN SPECTRA FOR REANALYSIS OF THE HOSGRI EVENT IS APPROPRIATE . . . . .	20
VI. SEISMIC REANALYSIS OF THE DIABLO CANYON NUCLEAR POWER PLANT WAS CORRECTLY DONE AND CLEARLY SUPPORTS THE FINDING THAT THE FACILITY CAN WITHSTAND THE MAXIMUM CREDIBLE EARTHQUAKE ON THE HOSGRI FAULT . . . . .	32
A. TAU . . . . .	34
B. DAMPING . . . . .	37
C. ACTUAL MATERIAL VALUES . . . . .	39
D. INELASTIC RESPONSE . . . . .	40
VII. THE USE OF AN OBE OF 0.2g DOES NOT IMPAIR THE SAFETY OF THE FACILITY AND IS CONSISTENT WITH THE REGULATIONS . . . . .	42
VIII. CONCLUSION . . . . .	43

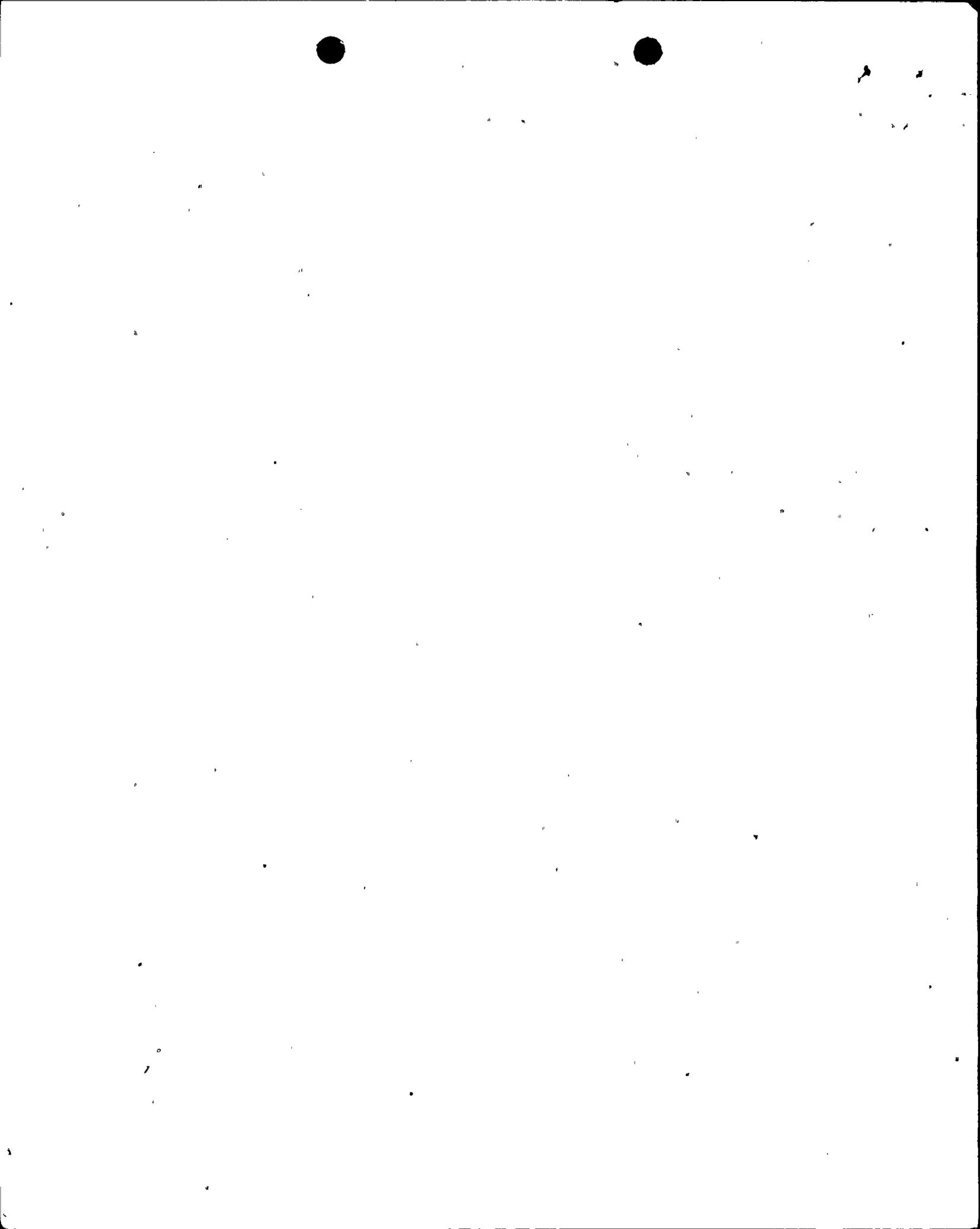
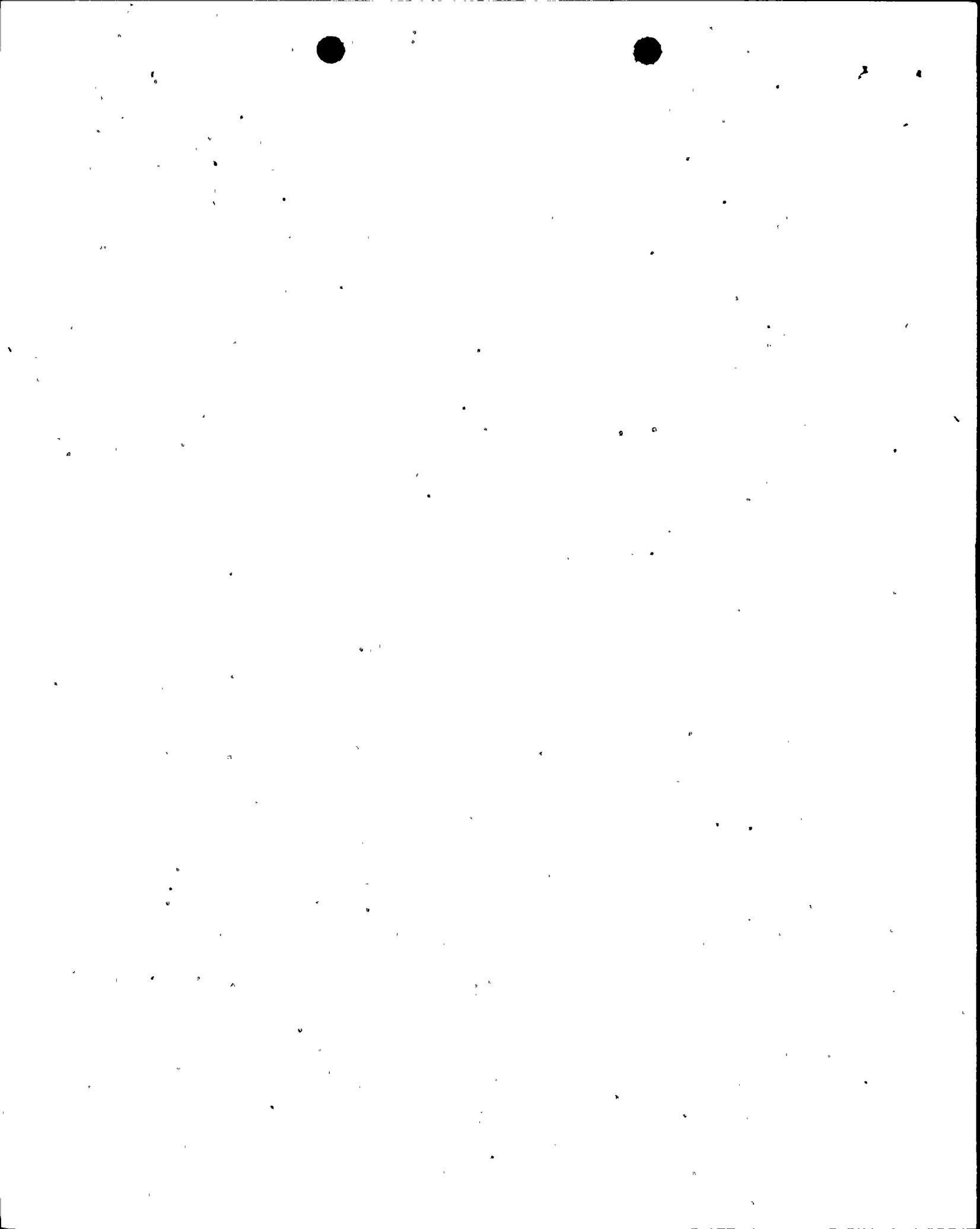


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<u>Cases</u>	<u>Page</u>
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<u>Equilease Corporation v. United States Fidelity and Guaranty Company</u> , 565 S.W.2d 125, 127 (Ark. 1978) . . . . .	12
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Page

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(November 10, 1972) . . . . . 6

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10 CFR §2.715 . . . . . 10

10 CFR §2.760a . . . . . 5

10 CFR §2.762 . . . . . 10

10 CFR §2.785 . . . . . 6

10 CFR §50.55a . . . . . 39

10 CFR Part 100, Appendix A . . . . . 40, 42



APPLICANT PACIFIC GAS AND ELECTRIC COMPANY'S  
BRIEF IN RESPONSE TO INTERVENORS' BRIEFS IN SUPPORT  
OF EXCEPTIONS TO PART III OF INITIAL DECISION

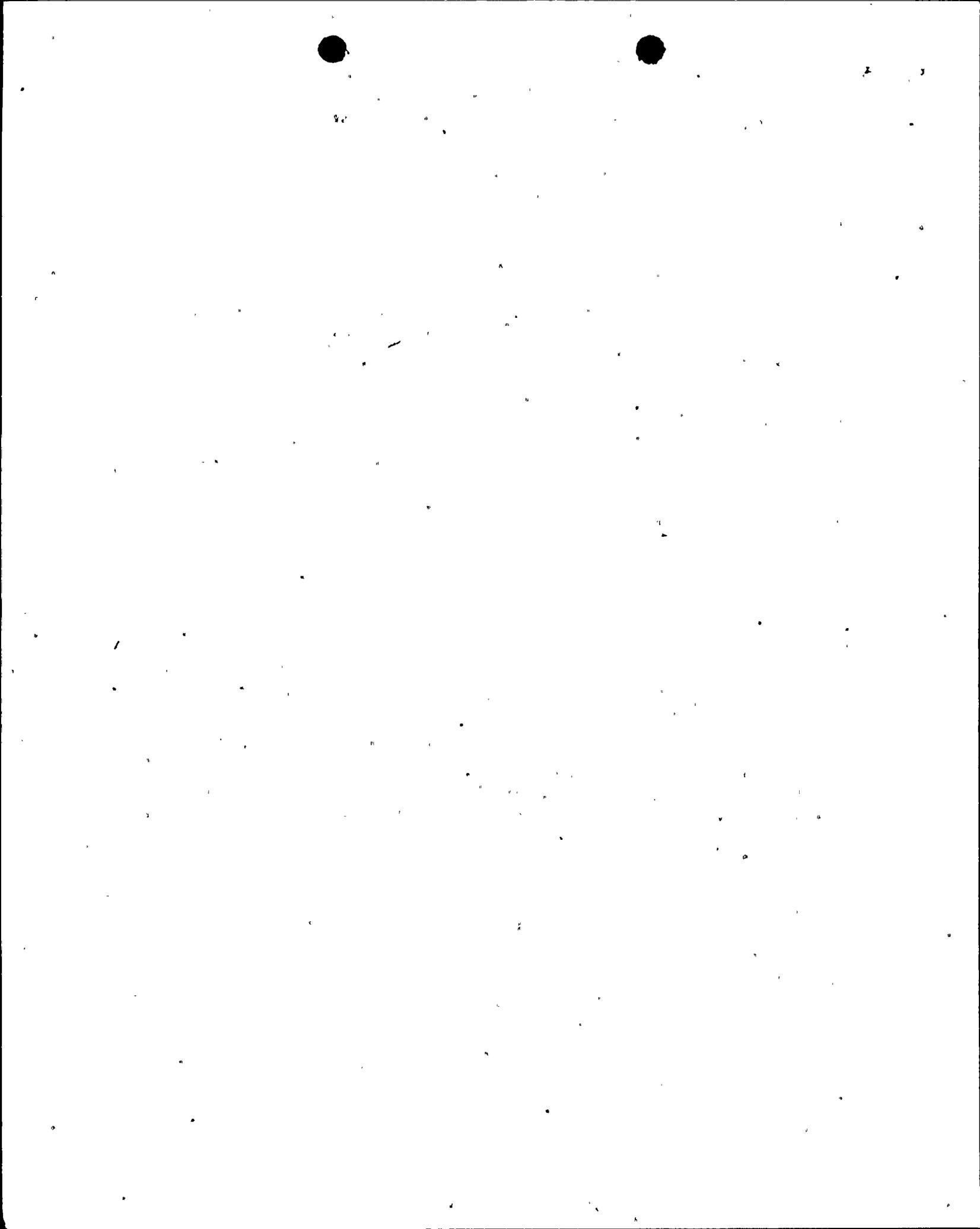
I

STATUS OF PROCEEDINGS

On October 10, 1973, the Atomic Energy Commission issued a notice of opportunity for hearing in connection with Pacific Gas and Electric Company's ("Applicant") application for licenses to authorize the operation of the Diablo Canyon Nuclear Power Plant, Units 1 and 2. The evidentiary hearings on the environmental phase of the operating license proceedings were held December 7-10, and 13-17, 1976, in San Luis Obispo, California. A partial initial decision on environmental matters was issued by the Licensing Board on June 12, 1978. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-78-19, 7 NRC 989. The Licensing Board stated that it was issuing the partial initial decision only because of the inordinate delay due to the seismic issue. (Id. at 1036, n. 17.) The background associated with that issue is as follows.

The construction permits for Units 1 and 2 of the Diablo Canyon Nuclear Power Plant were issued by the Atomic Energy Commission in 1968 and 1970, respectively. The seismic design criteria for the site included consideration of four postulated earthquakes:

1. Magnitude 8-1/2 along the San Andreas fault 48 miles from the site.



2. Magnitude 7-1/4 along the Nacimiento fault 20 miles from the site.
3. Magnitude 7-1/2 along the offshore extension of the Santa Ynez fault 50 miles from the site.
4. Magnitude 6-3/4 aftershock centered anywhere at the site at a depth of 6 miles (ten kilometers).

1 Seismic Evaluation for Postulated 7.5M Hosgri Earthquake (Units 1 and 2, Diablo Canyon Site)  
2-2 (hereinafter "Hosgri Seismic Evaluation").

The seismic design criteria originally proposed for the site were approved by the Atomic Energy Commission during the construction permit review. (SER, Supp. 7 at 1-2.) In 1971, after the plant design had become final and construction was well underway, two geologists (Hoskins and Griffith) published a report which indicated a zone of offshore faulting passing within a few miles of the plant. Extensive offshore seismic profiling work was conducted independently by the Applicant and the U. S. Geological Survey ("USGS"). The most significant finding of the work was the existence of the Hosgri fault zone (named after the two geologists) about three miles offshore from the plant site.

In 1976, following a series of seismic evaluations of the plant, the Nuclear Regulatory Commission Staff completed its review of the Hosgri fault's earthquake potential and adopted the recommendation of the USGS. The USGS' 1975 recommendation was to postulate a magnitude 7.5 earthquake on the Hosgri fault and to consider ground motion for near-site events, as set forth in USGS Circular 672. (SER, Supp. 7 at 1-3.) Following the



Staff's adoption of the recommendation, Applicant proceeded with the development of detailed criteria and re-evaluation of the plant's seismic capabilities. The Staff, through its consultant, Dr. Nathan Newmark, developed its own detailed criteria.

In a letter to the Licensing Board dated April 24, 1978, counsel for the NRC Staff set forth the final language of the seismic contentions agreed to by the parties. For purposes of reference the stipulated seismic contentions are set out as follows:

The seismic design for the Category I structures, systems, and components of the Diablo Canyon Nuclear Power Plant (Unit 1) fails to provide the margin of safety required by 10 CFR Part 50 and 10 CFR Part 100 in that:

1. The Applicant has failed to conduct investigations of the Hosgri Fault system to determine adequately (i) the length of the fault; (ii) the relationship of the fault to regional tectonic structures; and (iii) the nature, amount, and geologic history of displacements along the fault, including particularly the estimated amount of the maximum Quaternary displacement related to any one earthquake along the fault.
2. A 7.5 magnitude earthquake is not an appropriate value for the safe shutdown earthquake.
3. A .75g acceleration assigned to the safe shutdown earthquake is not an appropriate value for the maximum vibratory acceleration that could occur at the site.
4. The maximum vibratory acceleration of .2g for the operating basis earthquake is not 1/2 of the maximum vibratory acceleration of the safe shutdown earthquake.
5. The Applicant has failed to demonstrate, through the use of either appropriate dynamic analysis or qualification tests (or equivalent static load



method where appropriate), that Category I structures, systems, and components will perform as required during the seismic load of the safe shutdown earthquake, including aftershocks and applicable concurrent functional and accident-induced loads, and that Category I structures, systems and components will be adequate to assure:

- a) the integrity of the reactor coolant pressure boundary,
  - b) the capability to shut down the reactor and maintain it in a safe condition, or
  - c) the capability to prevent or mitigate the consequences of accidents which could result in excessive offsite exposure.
6. The Applicant has failed to demonstrate through the use of either appropriate dynamic analysis or qualification tests (or equivalent static load method where appropriate), that all structures, systems and components of the nuclear power plant necessary for continued operation without undue risk to the health and safety of the public will remain functional and within applicable stress and deformation limits when subjected to the effects of vibratory motion of the operating basis earthquake in combination with normal operating loads.
7. The Applicant has failed to demonstrate adequately that necessary safety functions are maintained during the safe, shutdown earthquake, where, in safety-related structures, systems, and components, the design for strain limits is in excess of the yield strain.

An evidentiary hearing on non-seismic health and safety issues, other than the security plan, was held on October 18-19, 1977. The remaining health and safety issues were heard on December 4-23, 1978, January 3-16, 1979, and February 7-15, 1979. On September 27, 1979, the Licensing Board issued a partial initial decision covering seismic, potential aircraft or missile crashes, and security plan issues. Pacific Gas and



Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-79-26, \_\_\_\_\_ NRC \_\_\_\_\_. A decision on the remaining health and safety issues was postponed pending completion of an analysis by the Staff as to the effects of the Three Mile Island accident on the Diablo Canyon proceeding.

Exceptions to the Licensing Board's findings respecting the security plan were filed by Intervenor San Luis Obispo Mothers for Peace. Exceptions to the findings of the Licensing Board respecting the seismic issues were filed by Joint Intervenors ("Intervenors"). A brief in support of these exceptions was filed on or about December 7, 1979. On or about that same date, Edmund G. Brown, Jr. ("Brown"), as a representative of an interested state, submitted a brief in support of Exception No. 45 filed by Intervenors.

## II

### INTRODUCTION

In the case of a contested proceeding on an application for an operating license, the Atomic Safety and Licensing Board is to make findings of fact and conclusions of law on the matters put into controversy by the parties, and on any other serious safety, environmental, or common defense and security matter determined by the board to exist. 10 CFR §2.760a; see Consolidated Edison Company (Indian Point, Units 1, 2, & 3), ALAB-319, NRCI-76/3 188 (March 16, 1976). The substance of the exceptions briefed by Intervenors is that the Licensing Board erred in its findings respecting the contentions placed into



controversy by Intervenors. In general terms the issues raised by these contentions relate to the ability of the Diablo Canyon Nuclear Power Plant to withstand an earthquake that can reasonably be expected to occur on the Hosgri fault.

Intervenors thus have called upon the Appeal Board to review the findings made by the Licensing Board. The Appeal Board has had several occasions in the past to consider its role in such a review. In Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-355, NRCI-76/10 397 (October 29, 1976), the Appeal Board observed that in reviewing licensing board decisions, it possesses all the powers which the Commission has in making the initial decision, and thus has the authority to substitute its judgment for that of the licensing board. NRCI-76/10 at 403-04; see 10 CFR §2.785. However, the Appeal Board has stressed that it will not modify or reject findings of licensing boards lightly. In an early decision the Appeal Board stated:

"Obviously, an essential element of [our] review in a particular case is an inquiry into whether each of the essential findings of the Licensing Board is supported by reliable, probative and substantial evidence of record. But it scarcely follows that, even though we may be clothed with legal authority to do so, it is appropriate for us as a reviewing tribunal to substitute our judgment on purely factual matters for that of the Licensing Board. Specifically, while it is our duty to reject or modify factual determinations which we conclude are not well founded and rational, we see no justification for setting aside licensing board findings simply because, had we been the trier of fact, we might have found differently." Wisconsin Electric Power Company (Point Beach Nuclear Plant, Unit 2),



ALAB-78, 2 Atomic Energy Reporter (CCH)  
Para. 11,276.03 (November 10, 1972); quoted  
in Consolidated Edison Company (Indian Point  
Station, Unit No. 2), ALAB-188, RAI-74-4  
323, 357 (April 4, 1974).

The test followed by the Appeal Board permits a licensing board's findings to be rejected or modified "if, after giving its decision the probative force it intrinsically commands, we are convinced that the record compels a different result." Niagara Mohawk Power Corporation (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, NRCI-75/4R 347, 357 (April 8, 1975); see Universal Camera Corporation v. National Labor Relations Board, 340 U.S. 474, 495, 95 L.Ed. 456, 471 (1951); Northern Indiana Public Service Company (Bailly Generating Station, Nuclear 1), ALAB-303, NRCI-75/12 858, 867 (December 17, 1975). And as stated in Duke Power Company, supra:

"[T]hough we have the right to reject or modify the findings of the licensing boards, we have stressed before that we would not do so lightly, and where the credibility of evidence turns on the demeanor of a witness, we give the judgment of the trial board which saw and heard his testimony great deference. Again, the decision below is 'part of the record'; we may, indeed must, attach significance to a licensing board's evaluation of the evidence and to its disposition of the issues. And in practice we do so. Those boards are manned by individuals not necessarily less qualified or experienced than ourselves." NRCI-76/10 at 404 (footnotes omitted).

Tested by the Appeal Board's own standard, Applicant submits that the Licensing Board's decision must stand. As discussed throughout the remainder of this brief, the Board's findings



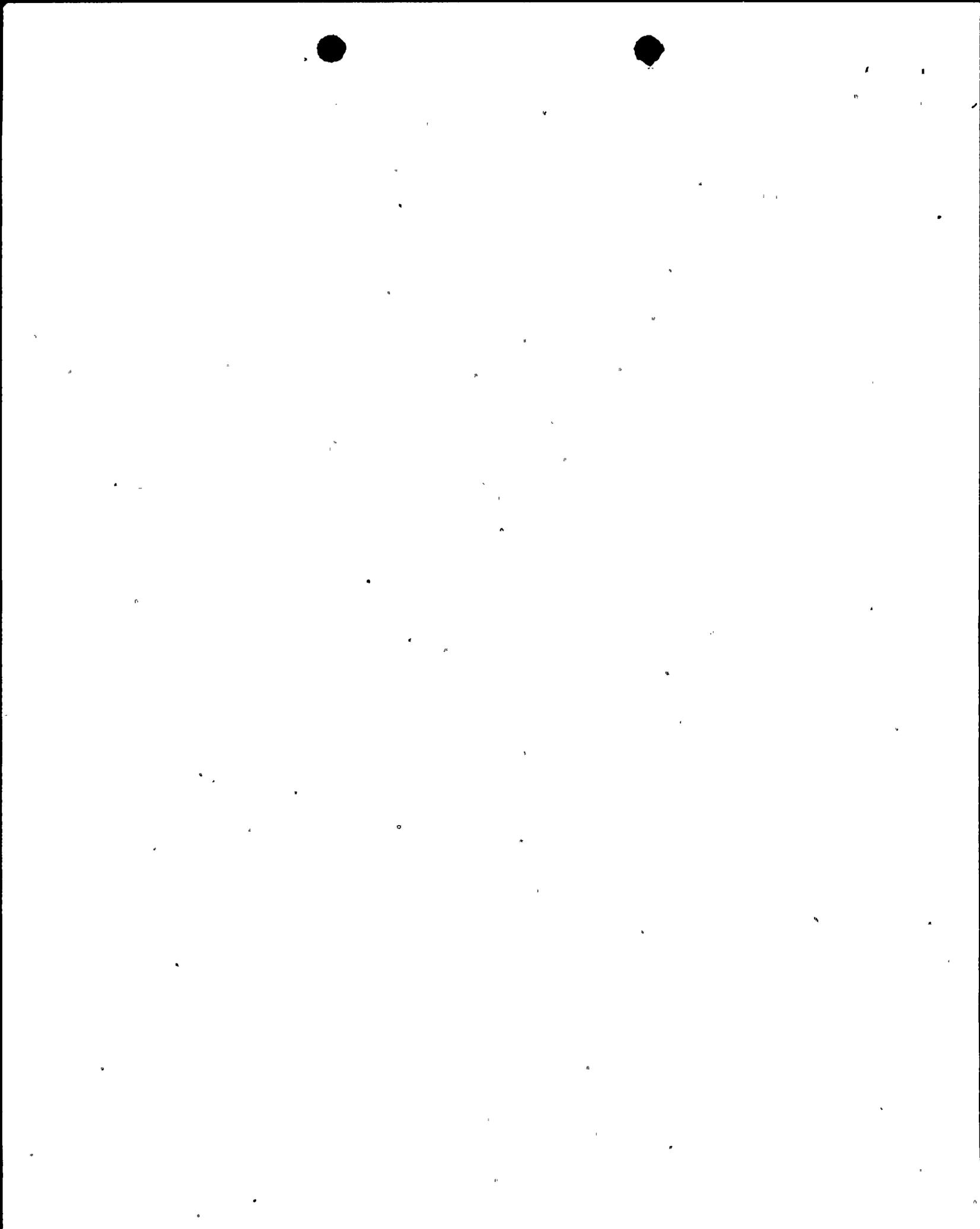
fairly and clearly reflect the great weight of evidence presented. There is adequate explication of the basis for its findings, as well as of the reasons why it did not find Intervenors' evidence compelling or controlling. The Licensing Board's conclusions are rational and supported by reliable, probative and substantial evidence of record; there is no justification for its findings to be set aside.

In addition to arguing that the Commission's regulations have not been met, Intervenors allege that the Licensing Board (1) cloaked Applicant's case "with a presumption of validity, and [placed] the burden on the Intervenor[s] to prove that the plant is unsafe," (Int. Br. at 11),<sup>1/</sup> and (2) "failed to confront the facts and provide a reasoned basis for the conclusions drawn." (Id.) These allegations are without merit.

With respect to the burden of proof allegation, Intervenors state: "In every case the conflict between the testimony of Intervenor witnesses (including ACRS experts) and that of Staff or Applicant, are resolved favorable [sic] to the Applicant and Staff." (Int. Br. at 10-11.) There simply does not exist a conflict in the evidence of the magnitude

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<sup>1/</sup>Citations in this brief shall be as follows: Intervenors' Brief ("Int. Br."); Brown Brief ("Brn. Br."); Initial Decision, Part III ("Dec."); Written Testimony ("W.T."); Following transcript at ("ff. Tr. at \_\_\_\_\_"); Transcript ("Tr."); Applicant's Exhibits ("App. Ex."); Board Exhibits ("Bd. Ex."); Staff Exhibits ("Stf. Ex."); Intervenors Exhibits ("Int. Ex."); Safety Evaluation Report ("SER"); Final Safety Analysis Report ("FSAR").



that Intervenor would have this Appeal Board believe. Where there is a conflict, the overwhelming weight of the evidence, both qualitatively and quantitatively, favors the finding of the Licensing Board. For example, as pointed out by the Licensing Board in its decision, Intervenor's witness Hall, in order to support his allegations respecting the Hosgri fault, resorted to moving land across the fault, a geologic and physical impossibility. (Dec. at 40-41; see Tr. at 10,037, 10,038.)

Clearly, the trier of fact has the right and perhaps even the duty to discount other testimony of such a witness. As noted by the Commission, the credibility of witnesses is an area where a reviewing body's fact-in-finding power is limited.

Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-78-1, 7 NRC 1, 29 (1978); see Duke Power Company, NRCI-76/10 at 404.

With respect to Intervenor's allegations that the Licensing Board failed to provide a reasoned basis for its conclusions, Intervenor again attempts to make truth out of a shibboleth by constantly repeating their allegation with no proof. In the one instance where Intervenor is specific in this allegation (Int. Br. at 51-52) they are simply wrong. They state that the Licensing Board dismissed Dr. Brune's testimony "without providing an adequate reason for doing so." (Id. at 51.) A review of the Board's decision at page 61 reveals at least five reasons from Dr. Brune's own testimony for arriving at the conclusion that Dr. Brune's postulations were not of design or analytical significance for the Diablo plant. It is



respectfully submitted that it is the Licensing Board's decision on the matter and not the absence of reasons therefore of which Intervenors complain.

This Appeal Board has also been presented with a brief filed by Edmund G. Brown, Jr., as a representative of an interested state, in support of Exception No. 45 filed by Intervenors. This brief has been titled "Brief in Support of Exception or, in the Alternative, Brief Amicus Curiae." Applicant submits that Brown's appeal is not cognizable by this Board. In Gulf States Utilities Company (River Bend Station, Units 1 and 2), ALAB-317, NRCI-76/3 175 (March 4, 1976), the Appeal Board considered whether a state which had intervened in an NRC licensing proceeding under 10 CFR §2.715(c) was to be treated as a "party" for purposes of the appellate rights conferred by 10 CFR §2.762(a). On the facts presented, the Appeal Board ruled that the State of Louisiana could appeal the licensing board's initial decision, even though the State was participating as an interested state under 10 CFR §2.715(c) and not as a party under 10 CFR §2.714. However, what was crucial to the Appeal Board's decision was the fact that Louisiana had actively participated in the hearings before the Licensing Board. As stated by the Appeal Board:

"There is, of course, every good reason not to permit one who had remained on the side-lines while the record was being developed to inject himself into the proceeding for the first time on the appellate level should the Licensing Board's decision prove not to his liking. But those reasons have no readily perceptible application in the case of a



state which, although having chosen to pursue the Section 2.715(c) rather than the Section 2.714 route for entry into the proceeding, nonetheless assumed an active role in the hearing." NRCI-76/3 at 177. (Emphasis added.)

It seems clear to Applicant that the Appeal Board's decision in Gulf States Utilities Company would have been otherwise had Louisiana not participated during any portion of the hearing. Brown's posture leaves even more to be desired for not only did he not participate during any portion of the proceeding, he had not even petitioned to become a participant until the proceeding reached the appellate stage. Because Brown had chosen not to seek participation until well after the seismic hearings had concluded, there is no basis upon which he can be granted appellate rights.

Brown requests in the alternative that should the Appeal Board rule that 10 CFR §2.715(c) and 10 CFR §2.762 not authorize appellate rights in his case, his brief be accepted as amicus curiae under 10 CFR §2.715(d). An amicus curiae is not a party to an action, but is merely a "friend of the court" whose sole function is to aid and act for the personal benefit of the adjudicatory tribunal. Clark v. Sandusky, 205 F.2d 915, 917 (7th Cir. 1953); Kline v. Weaver, 348 S.W.2d 379, 380 (Tex. Ct. Civ. App. 1961). He has no control over the case, and no right to institute any proceedings therein. In re Columbia Real-Estate Company, 101 F. 965, 970 (D.C. Ind. 1900). Thus, he must accept the case as he finds it, and is bound to the issues made



by the parties. Equilease Corporation v. United States Fidelity and Guaranty Company, 565 S.W.2d 125, 127 (Ark. 1978); Pratt v. Coast Trucking, Inc., 39 Cal. Rptr. 332, 334-35, 228 C.A.2d 139 (1964).

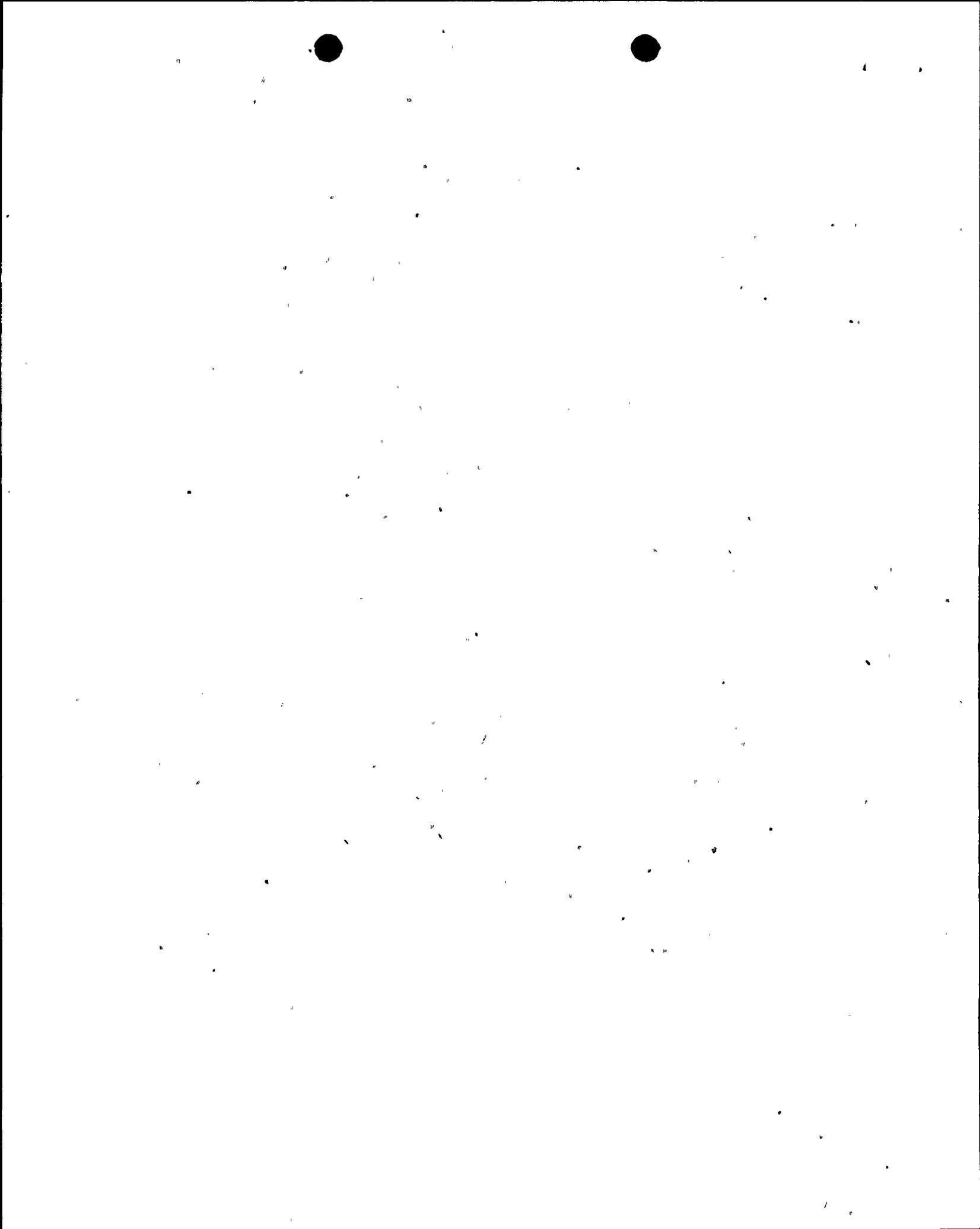
An examination of Brown's Brief reveals that he is portraying facts to the Appeal Board in a manner far different from what one would expect from an amicus curiae. For example, Brown states: "At the Diablo Canyon nuclear plant, seismic focusing and high stress drop could be operative during a major seismic event (M 7.5), such as the Safe Shutdown Earthquake (SSE)." (Brn. Br. at 3.) Yet no citation of record supportive of this assertion is offered. Indeed, as discussed in Part V of this brief infra, the evidence presented to the Licensing Board respecting seismic focusing does not support his assertion.

More objectionable than his failure to provide record citations are certain of Brown's statements which ignore evidence presented to the Licensing Board. For instance, Brown alleges the following: "Other than Dr. Brune's statements, no testimony on seismic focusing was placed before the ACRS or ASLB. The presentation of the USGS, NRC Staff, and Applicant did not address this subject." (Id. at 6, footnotes omitted.) As shown in Part V, infra, this statement is completely false. Another example is Brown's allegation that "there is no evidence which would support the ASLB's conclusion that seismic



focusing and high stress drop effects 'are not of design or analytical significance for the Diablo Canyon Plant'." (Id. at 7.) This allegation is also totally false as shown in Part V, infra. Taken together, Brown's statements without citations and his false assertions raise serious questions about his sincerity in requesting to be a "friend" of this Appeal Board.

Brown has also requested that the Appeal Board remand the seismic proceedings for further hearing on focusing. It is urged by Brown that the State of California be allowed to perform an alleged "state-of-the-art" study of seismic focusing, even though this has never been done (Tr. at 8025) and it is stated that this study would take "approximately six months". (Brn. Br. at 9.) The witness on whom Brown is relying testified that he does not even know what to put into a model for such a study. (Tr. at 8056.) This request must be denied. First, for reasons already given by Applicant, Brown should not be considered a party for purposes of the seismic proceedings. As a non-party, he has have no legal standing for making such a request. Second, the Licensing Board admitted Brown as a participant on the condition that he take the record as he finds it. (Order Relative to the Petition of Governor Edmund G. Brown, Jr., at 2, November 16, 1979.) Finally, if Brown is accepted as amicus curiae for purposes of this appeal, he is limited to the case as he finds it and cannot attempt to control the proceeding by seeking a remand. It is therefore



respectfully requested that this Board enter its order denying all relief requested by amicus.

### III

#### OVERVIEW

There can be little doubt that Part III of the Licensing Board's Initial Decision is concerned with complex technical issues. As a result of the discovery of the Hosgri fault, a comprehensive study of that fault and a reanalysis of the facility in question were initiated. The subjects of the Initial Decision are the evaluation of the Hosgri fault, the seismic significance of the fault, the basic assumptions upon which the reanalysis was based, and the reanalysis of the Diablo Canyon facility.

The hearings involved many weeks of testimony and the record consists of over 10,000 pages of transcript, written testimony and exhibits, excluding the Final Safety Analysis Report. For any reviewer to meaningfully read the entire record on appeal would be a difficult, if not impossible, task. Anticipating the complexity of this matter, Applicant attempted in its written testimony to provide both general and specific technical definitions and conceptual information to provide the Licensing Board and eventual reviewers of fact a basis upon which to make informed decisions. It is respectfully submitted that the cited portions of written testimony in this overview should be studied carefully by any reviewer of the record in order to better



understand the arguments submitted to this Board on appeal.<sup>2/</sup>

The account of the Hosgri fault, as well as that of other significant geologic features of California, is contained in the written testimony of Drs. Jahns and Hamilton. (W.T., 1-132, ff. Tr. at 4457.) The specifics of the Hosgri fault zone are covered at pages 106 through 132 of that testimony.

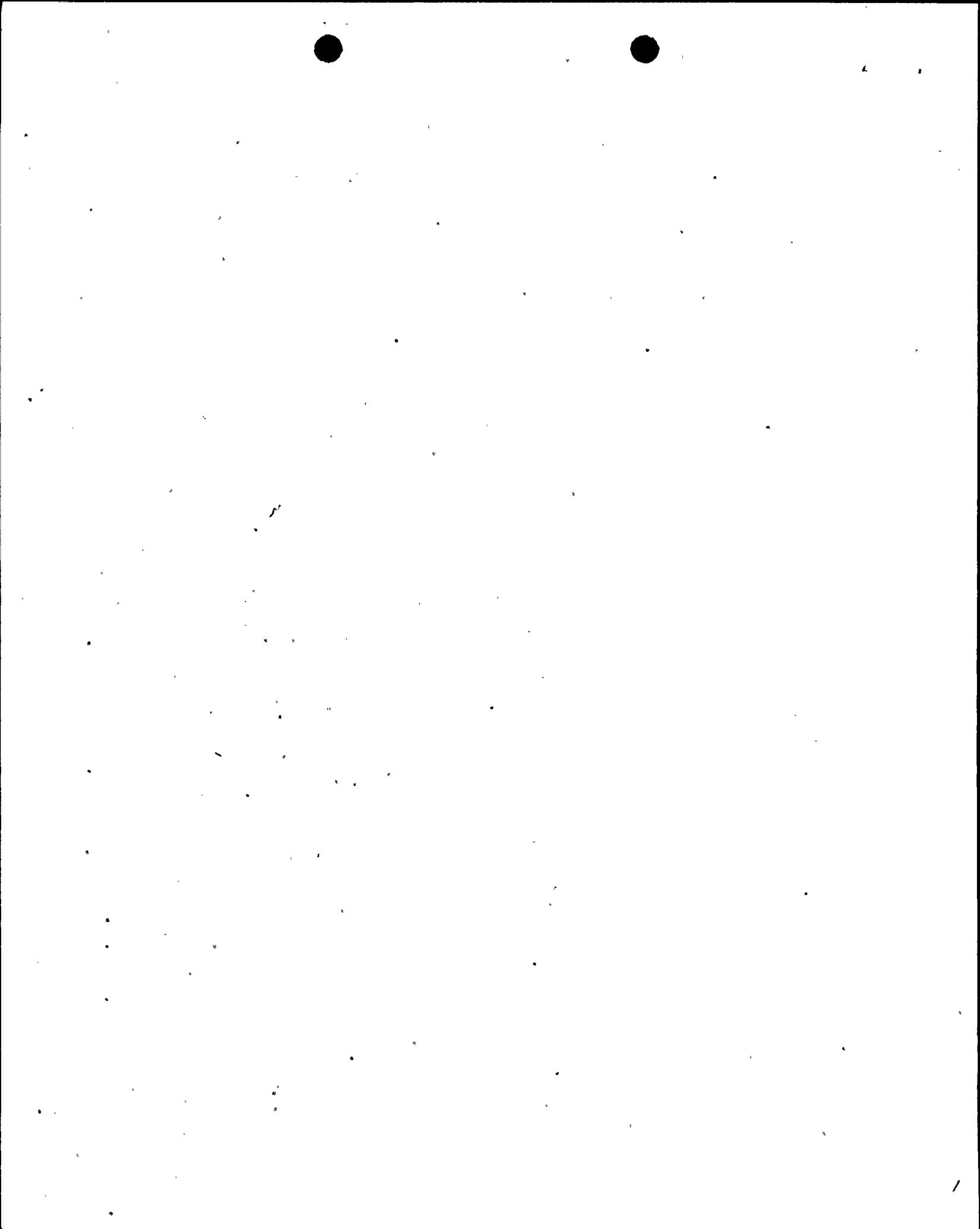
Following the geologic description of the Hosgri fault it is necessary to understand the fault's seismological significance.<sup>3/</sup> It is within the province of the seismologists to take the data supplied by the geologists and then make determinations as to ground motion that might be expected as a result of any given earthquake. The history of the seismic evaluation for Diablo Canyon, as well as many specific definitions and concepts of seismology, is contained in the written testimony of Dr. Stewart Smith. (W.T., 1-29, ff. Tr. at 5490.)

Following the derivation of instrumental ground motion, it is then necessary for "earthquake engineers" and/or structural engineers to make determinations as to what effect that ground motion will have on structures. It is in this area

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<sup>2/</sup>While the Applicant cannot speak for either Intervenor or Staff, it would seem reasonably safe to say that there were no significant differences of opinion as respects the technical definitions and concepts as cited herein. Intervenor certainly disagreed with Applicant's application or use of certain concepts, but it is Applicant's desire in this section to simply provide the reader an opportunity to better understand the subject matter at issue.

<sup>3/</sup>An excellent general reference for both geology and seismology is Earthquakes, A Primer, by Dr. Bruce A. Bolt (1978) which was marked as Bd. Ex. 3. The book was used by Board members and counsel for all parties as a reference source and "quick study" during the course of the hearings.



that the terms, definitions, and concepts get, if possible, even more complex than in the areas of geology and seismology. A thorough review of those definitions and concepts, along with a detailed description of the seismic reanalysis applied at Diablo Canyon, is contained in the written testimony of Dr. John A. Blume. (W.T., 1-50, ff. Tr. at 6100.)

#### IV

##### THE ASSIGNMENT OF A 7.5 MAGNITUDE CAPABILITY TO THE HOSGRI FAULT IS VERY CONSERVATIVE

Intervenor has stated that "all parties on the Licensing Board agree that the assignment of a 7.5 magnitude ("M7.5") earthquake to the Hosgri fault is acceptably conservative". (Emphasis added.) (Int. Br. at 13.) While Applicant has made no exceptions to the Board's findings,<sup>4/</sup> it has always been Applicant's position that the Hosgri fault zone is capable of no more than a 6.5 magnitude earthquake and that the assignment of a M7.5 is grossly conservative. (W.T., 1-6, ff. Tr. at 5490; Tr. at 5692.) This opinion was shared by certain Staff witnesses (Tr. at 8539) and even one of Intervenor's witnesses. (Tr. at 8971.)

The Hosgri fault was initially discovered by two Shell Oil Company geologists in the mid-1960's. (W.T., 108, ff. Tr. at 4457.) That information was not made public until January, 1971, when the data was published in a geological technical paper. The information was discovered by Applicant and

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<sup>4/</sup>The Licensing Board found "that a 7.5 magnitude earthquake is a very conservative value for the safe shutdown earthquake." (Emphasis added.) (Dec. at 55.)



extensive investigation of the Hosgri fault was undertaken by the Applicant. The information gathered was furnished to the Nuclear Regulatory Commission Staff in 1973 (SER, Supp. 4 at 2-2) and the Staff then requested Applicant to provide further information regarding the earthquake potential of the Hosgri fault while at the same time requesting the United States Geological Survey ("USGS") to provide an independent assessment of the fault and data presented by Applicant. (SER, Supp. 4 at 2-2.) The USGS took the position in 1975 that the Hosgri fault could be capable of a M7.5 earthquake, a position arrived at principally on the basis that the 1927 Lompoc earthquake (7.3 magnitude) could have occurred on the Hosgri fault. (W.T., 22, ff. Tr. at 5490.) Despite the collection of a multitude of data respecting the Hosgri fault and subsequent studies of the 1927 event showing that it did not occur on the Hosgri fault (W.T., 22-25, ff. Tr. at 5490; Tr. at 5483-84, 5635-45; App. Ex. 45), the USGS never changed its "assignment" of a 7.5 magnitude. The USGS witnesses at the hearing, Messrs. Devine and McKeown, would only concede that the M7.5 was a "conservative opinion". (Tr. at 8349.)

Applicant's experts did intensive field work regarding the Hosgri fault, spending thousands of man-hours (Tr. at 5415-A) over a five to seven year period (Tr. at 5412, 5415) and have accumulated and reviewed from 2,500 to 3,000 miles of "sparker"



data<sup>5/</sup> that go directly across the Hosgri fault itself (Tr. at 5410) and some 8,000 to 9,000 miles of data that are concerned with the so-called San Gregorio-San Simeon-Hosgri fault system. (Tr. at 5411.)

Intervenors' presented three witnesses regarding the Hosgri fault: Graham, Silver and Hall. Dr. Hall's credibility as a witness was seriously eroded, if not annulled, by his testimony which required the transfer of a land mass across a fault (Tr. at 9668), a physical and geological impossibility. (Tr. at 10,037-38.) Dr. Graham admitted that his view of the Hosgri was only theory (Tr. at 6233) based on possible movement more than five million years ago (Tr. at 6364) and that he had no opinion as to the present capability of the Hosgri fault, either as to seismic rate or magnitude. (Tr. at 6364.) Likewise, Dr. Silver could not state within a reasonable degree of geologic certainty whether the Hosgri had ever produced even a 6.5 magnitude or if it ever would. (Tr. at 6333.) Similarly, even Dr. Hall admitted that he had no opinion as to the present rate of movement on the Hosgri fault and none regarding its capability. (Tr. at 9693-94.) It is against this backdrop of testimony that Intervenors complain that "[i]n almost every case where there was a conflict in testimony between

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<sup>5/</sup> Three techniques were applied in exploration of the Hosgri fault which underlies the ocean floor in its entirety. (W.T., 111, ff. Tr. at 4457.) Two of these, magnetic field mapping (Id. at 114) and gravity field mapping (Id. at 115) are general in approach. The third consists of seismic-acoustic reflection techniques which result in "sparker" data. Within this third category are three types, all involving receiving and recording energy reflected from the sea floor and from various horizons beneath the sea floor. The three systems are generally described as single-channel, multi-channel and shallow high-resolution. (Id. at 111-112.)



the Joint Intervenors' witnesses and the Applicant or Staff witnesses, the Licensing Board resolved the question of fact against the Intervenor [sic]." (Int. Br. at 14.) One must only compare testimony offered by other geologists and seismologists to see that Intervenors' complaint is without merit.

Dr. Jahns stated within a reasonable degree of geologic certainty (Tr. at 4423) that the Hosgri is a fault or fault zone which is a part of the San Gregorio-San Simeon-Hosgri fault system and that the Hosgri fault, having a length of 145 kilometers (Tr. at 4418), is not in any way physically connected to the San Gregorio or San Simeon faults. (Tr. at 4421-22.) The Staff witness on geology, Dr. Carl Stepp, upon review of investigations conducted by the Applicant, USGS and others, concluded that the data developed:

" . . . provides a basis for making a reasonable and conservative interpretation as to the length of the Hosgri Fault zone, its relationship to other regional tectonic structures, and the nature, amounts, and geologic history of displacements on the fault." (W.T., 11, ff. Tr. at 8484.)

Dr. Stepp stated it was very conservative to assume a M7.5 earthquake on the Hosgri fault (W.T., 31-32, ff. Tr. at 8484) and another Staff geologist, Renner B. Hofmann, concluded that the assignment of a M7.5 earthquake was extremely or ultra-conservative. (Tr. at 8539.)

Dr. Stewart Smith stated that he could conclude within a reasonable degree of seismological certainty that the assignment of a M7.5 earthquake must be classified as grossly conservative



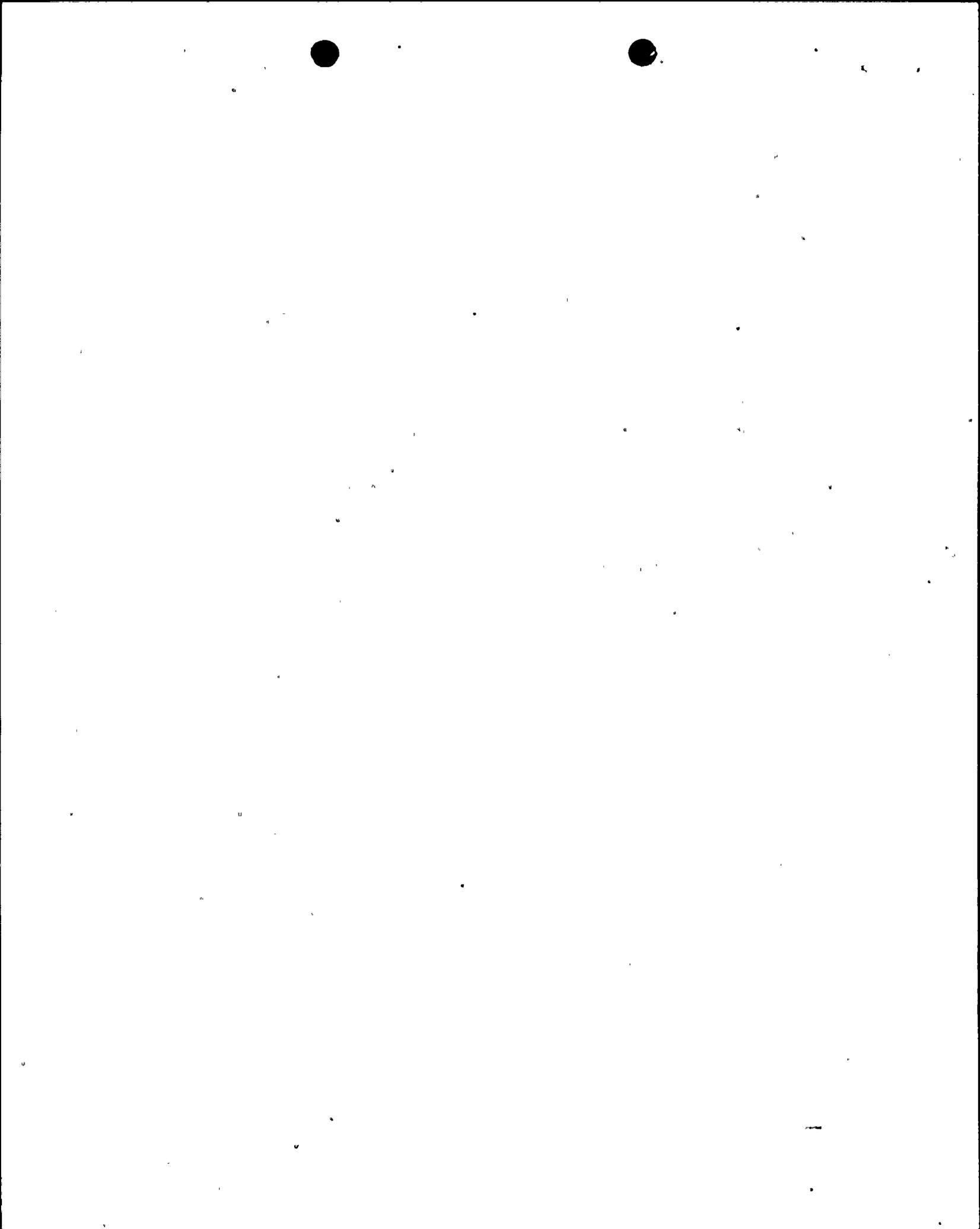
(W.T., 28-29, ff. Tr. at 5490). This statement was adopted as his own by Dr. Bruce Bolt (Tr. at 5447) and likewise by Dr. Gerald Frazier (Tr. at 5448). Even Dr. Trifunac, Intervenor's witness, testified that a M7.5 is not appropriate for the Hosgri, but rather, a 6.5 magnitude would be more appropriate. (Tr. at 8971.)

In summary, Intervenor's complaint regarding the Licensing Board's findings on geology is simply without merit. The overwhelming weight of evidence is indeed that the assignment of a 7.5 magnitude earthquake to the Hosgri fault is, at least, very conservative.

.V

THE CHOICE OF 0.75g DESIGN SPECTRA FOR  
REANALYSIS OF THE HOSGRI EVENT IS APPROPRIATE

As discussed above, the maximum credible earthquake for design consideration at the Diablo Canyon facility was very conservatively selected as a magnitude 7.5 ("M7.5") on the Hosgri fault. The next step in the seismic reanalysis procedure was to establish a design spectrum appropriate for this postulated earthquake. The NRC Staff took the position recommended by USGS, namely that USGS Circular 672 be used to define free field ground motion parameters and then to derive an effective acceleration to define the appropriate design spectrum. (Stepp, Tr. at 8492; Devine, Tr. at 8331.) Effective acceleration is a technique to consider the engineering response of the facility (Devine, Tr. at 8331) and accounts for the substantial differences between observed damage and instrumental



recordings. (Newmark, Tr. at 8638-39, 8581, 9278, 9326, 9346; Stepp, W.T., 34, ff. Tr. at 8484; Blume, W.T., 19-25, ff. Tr. at 6101.) Dr. Newmark, for the NRC Staff, established a design spectrum anchored at 0.75g using USGS Circular 672 and other appropriate data. (Tr. at 9337.) Independently, Dr. Blume, for the Applicant, established a design spectrum considering effective acceleration. (Blume, W.T., 15, et seq., ff. Tr. at 6100.) The NRC Staff required the Applicant to use both sets of spectra in analysis with the most conservative for any structure or element governing. (Blume, W.T., 39, ff. Tr. at 6100; Tr. at 6071.)

A review of each of three types of approaches (i.e., Newmark, Blume and Seed/Bolt/Smith/Frazier) taken to establish a design spectrum for the Hosgri event is informative. In each case the conclusion is that the 0.75g response spectrum selected was conservative. In the one case (Blume) effective acceleration was explicitly considered, and in the other two cases (Newmark and Seed, et al.) design spectrum without reduction due to effective acceleration were derived.

Dr. Newmark's procedure for developing a design spectrum relied upon all data available to him including USGS Circular 672. (Tr. at 9337.) After considering various alternatives, Dr. Newmark selected the Pacoima Dam record as the only available record of time history in the proper frequency ranges descriptive of ground motion where 1.2g was instrumentally recorded. (Tr. at 9322.) He then constructed a bounding response spectrum (as to the Pacoima record) anchored



at .75g. (W.T., p. 3, ff. Tr. at 8552.) Dr. Newmark chose the Pacoima Dam record to construct the design spectra even though much evidence was presented as to the anomalously high recordings of this record (Blume, Tr. at 10,086; Hofmann, Tr. at 8528; Smith, Tr. at 5469) due to topographic amplification, focusing and high stress drop. These effects are unique at Pacoima Dam and would not exist at Diablo Canyon. (Smith, W.T., 11, ff. Tr. at 5490; Tr. at 5829-30; Tr. at 8528.) Instead of recognizing the conservatism in the derivation of a response spectrum from this anomalously high 1.2g time history, the Intervenor argues that it represents a magnitude 6.5 earthquake and not a M7.5. (Int. Br. at 53.) What it in fact represents is a 1.2g peak instrumental recording which is slightly higher (more conservative) than the 1.15g contained in USGS Circular 672 for a M7.5. The record is clear that peak motion in the near field is essentially independent of magnitude, i.e., there are no significant differences in peak motion between 6.5 and 7.5 magnitude. (Smith, W.T., 26-28, ff. Tr. at 5490; Tr. at 5470, 5889-90, 5892, 5895-97; Brune, Tr. at 7928; Seed, Tr. at 10,105; App. Ex. 61; Int. Ex. 47.)

Dr. Newmark believes a further reduction is possible to include effective acceleration effects (Tr. at 9285, 9276) and if included would result in a reduction from .75g to "something between .5 and .6g" (Tr. at 9321), a value at least more conservative than that independently arrived at by Applicant using Circular 672 and effective acceleration. (Blume, Tr. at 6697.) Therefore, it is clear that Dr. Newmark never

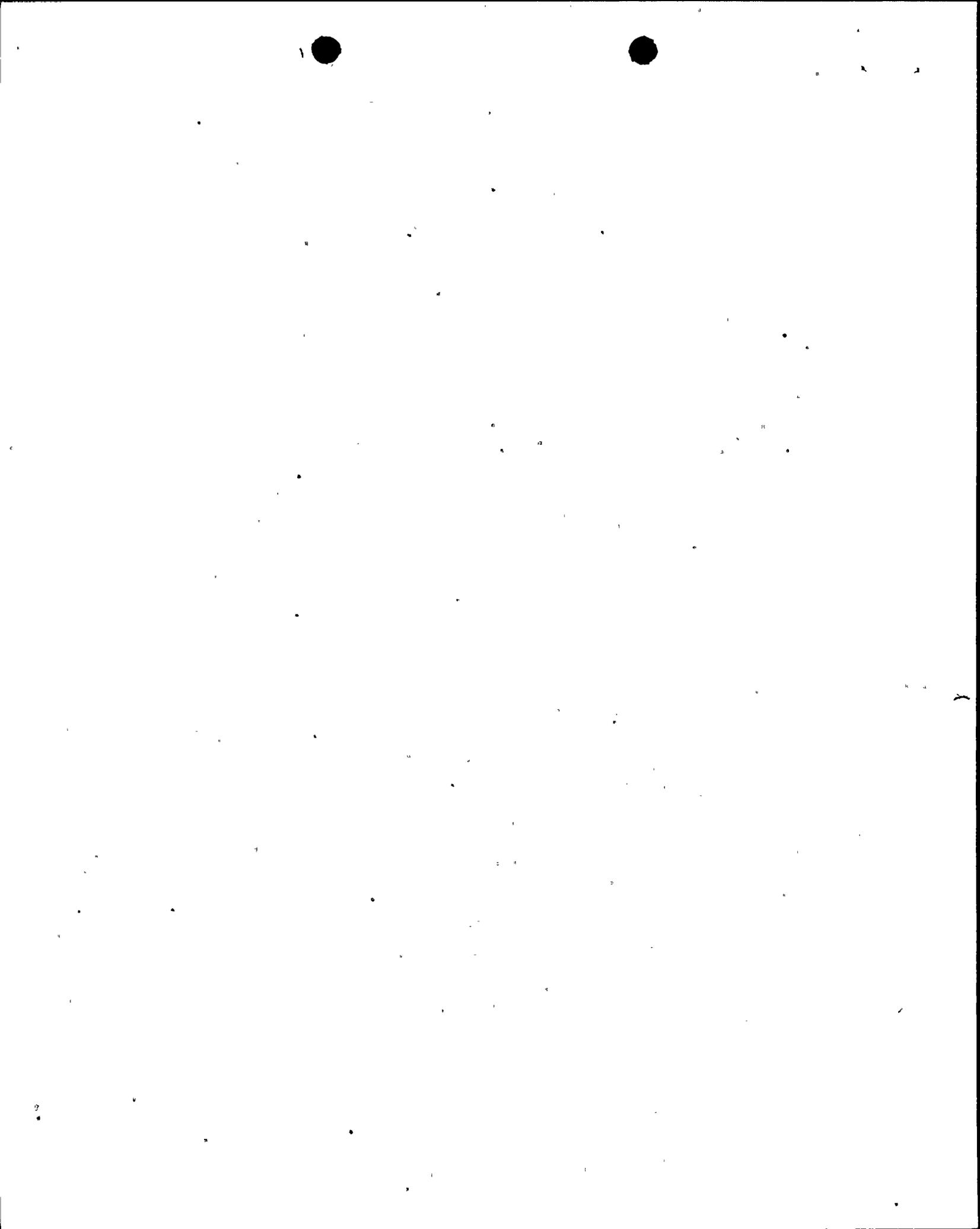


"jettisoned the concept of effective acceleration" as alleged by Intervenor (Int. Br. at 53), but wished to be conservative by neglecting this factor. (Tr. at 9338.) Dr. Newmark specifically considered the approach advocated by Intervenor, i.e., a 1.15g zero period anchor point for response spectrum (Tr. at 9124), and rejected it as inappropriate for design. (W.T., Reference B, p. 2, ff. Tr. at 8581; Tr. at 9297.)

As summarized above, the Applicant (Blume) based its proposed seismic design on the procedures set forth in USGS Circular 672. These procedures, as applied to a near-field M7.5 earthquake, entail:

1. Selection of the appropriate earthquake magnitude;
2. Specification of the free field instrumental ground motion; and
3. Selection of an appropriate effective acceleration by the earthquake engineers.

A key element of these procedures is the adjustment of the free field ground motion to the effective acceleration. (Blume, W.T., 19, et seq., ff. Tr. at 6100.) There was substantial written and oral testimony on this concept that amply provides the scientific basis for the use of effective acceleration. (Newmark, W.T., 6-9, 2B, 4B, ff. Tr. at 8552; Tr. at 8639; Tr. at 9278; Stepp, W.T. 34; ff. Tr. at 8484; Tr. at 8492-01; Devine, Tr. at 8331; Blume, W.T., 19-23; ff. Tr. at 6100; Tr. at 6085-87.) For the M7.5 earthquake on the Hosgri, the procedures in USGS Circular 672 result in the specification



of a free-field instrumental peak ground acceleration of 1.15g. Newmark (Tr. at 9288), Bolt (Tr. at 5845-7), and Smith (Tr. at 5845) testified as to the extreme conservatisms contained in Circular 672 but, nevertheless, the Applicant was required to use this acceleration within the procedural framework of Circular 672 (e.g. Tr. at 9071). Using effective acceleration as directed by Circular 672, Dr. Blume arrived at a zero period acceleration of .6g for a M7.5 earthquake. (Tr. at 6697.) The Applicant was required however, to adopt the Staff recommendation of a zero period acceleration of 0.75g for its response spectrum which was arrived at by Newmark without effective acceleration. (Newmark, Tr. at 9275.) As stated previously, both the Newmark and Blume spectra were used in all of the reanalysis and whichever was the most conservative in each instance governed.

Independent approaches to the zero period of acceleration for design were advanced at hearing by other Applicant consultants, Drs. Smith, Bolt, Frazier and Seed. These approaches, which were endorsed by the NRC Staff (Stepp, Tr. at 8502-13), were based on analyses of the rapidly increasing data base of near field ground motions from earthquakes. The objective of these approaches was to predict a mean free field instrumental acceleration from the data and then to relate this acceleration to 0.75g which was used in the reanalysis. In 1976, two USGS seismologists, Drs. Hanks and Johnson, collected all the near field earthquake acceleration data available to them and inferred certain trends in the data on the basis of physics

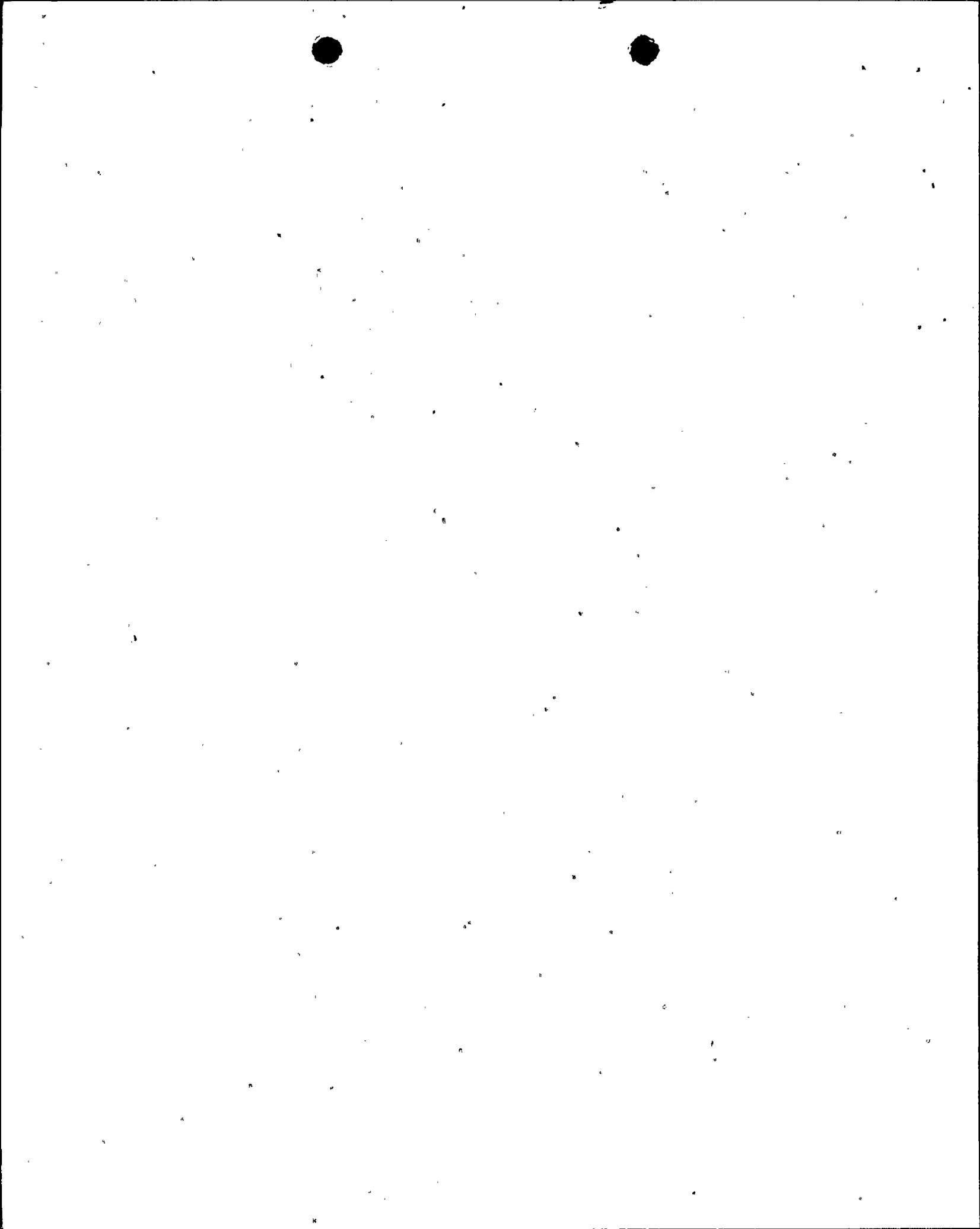


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and statistics. (Int. Ex. 47.) A central conclusion of their analysis was that accelerations within 10 kilometers of an earthquake are virtually independent of magnitude for magnitudes greater than about 4.5. (Int. Ex. 47; Smith, Tr. at 5892.) Dr. Smith extended their data base with data from recent large earthquakes and concluded that 0.5g was an appropriate mean acceleration for a M7.5 earthquake on the Hosgri. (Tr. at 5468-70.)

Dr. Seed arrived at a similar value (.6g) for mean acceleration from a M7.5 earthquake. (Tr. at 10,105.) Since it is standard NRC practice to anchor design spectrum to the mean peak ground acceleration, Dr. Seed concluded that the 0.75g design spectra for Diablo Canyon is conservative without any reduction for effective acceleration. (Tr. at 10,108.) Additionally, Dr. Seed averaged the four strongest records ever recorded from four separate earthquakes (Naghan, San Fernando [the Pacoima record], Koyna, and Gazli); noting that the average acceleration derived from those four strongest records was roughly 0.8g. His conclusion was that since this value was based on the four strongest, then the mean must clearly be less than 0.8g. (Tr. at 10,107.)

While Dr. Frazier did not personally perform such analyses as those performed by Drs. Smith and Seed, his testimony indicates that he was familiar with a similar, but much more elaborate, analysis being performed by "some colleagues". His testimony indicated that the preliminary results from this

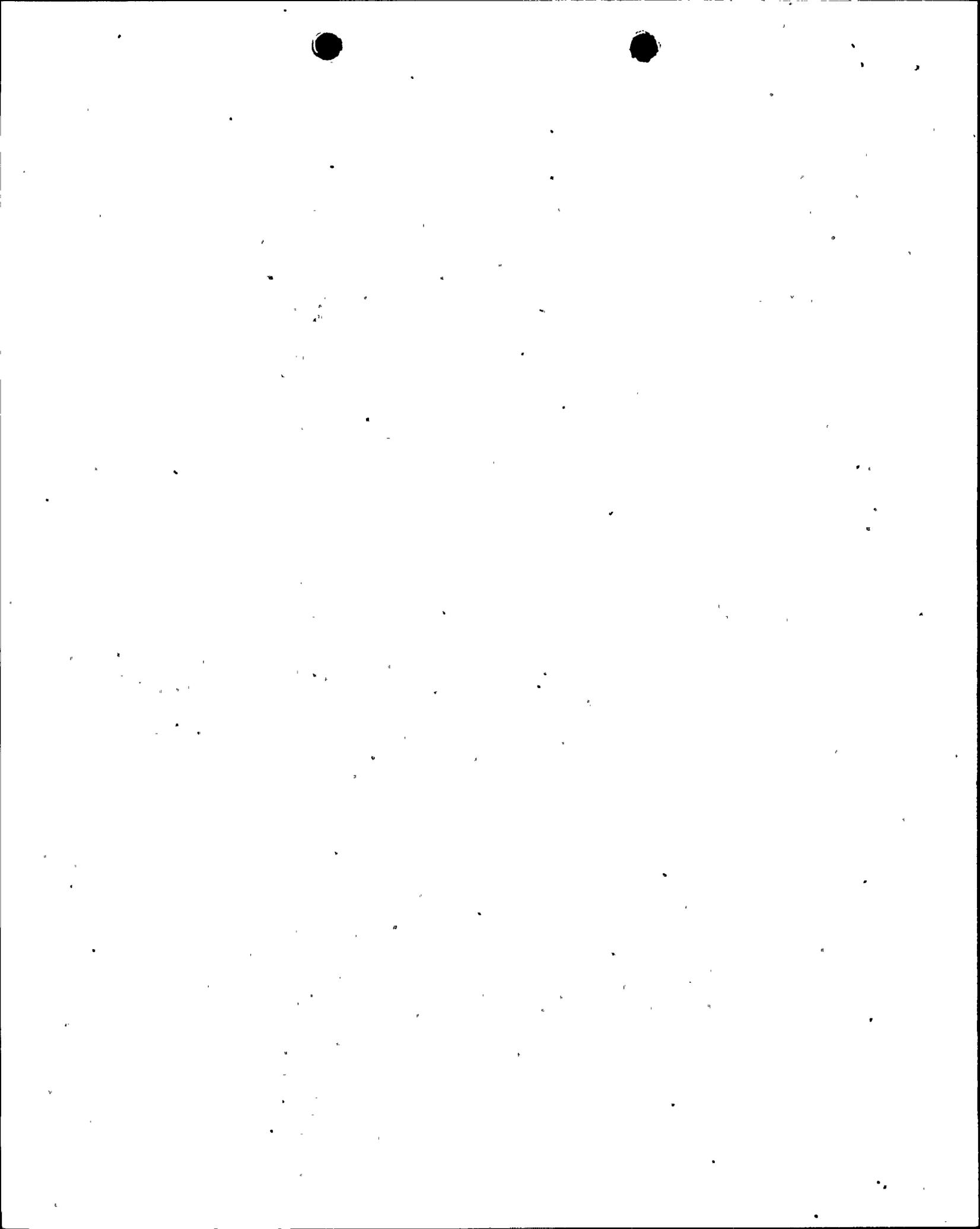


project were very consistent with the judgments of Drs. Smith and Seed. (Tr. at 10,116.)

There is additional independent evidence in the record on mean peak instrumental accelerations expected in the near field from a M7.5 on the Hosgri. This evidence is based on techniques different than the Hanks and Johnson type analyses and was presented by Mr. Hofmann of the NRC Staff. As the record shows (Tr. at 8530-32), Mr. Hofmann analyzed relevant earthquake intensity data and based on correlations published by Dr. Trifunac, he concluded that 0.54g was a very conservative representation of the mean acceleration for a M7.5 earthquake. Indirect evidence can be inferred from the testimony of Dr. Trifunac who concluded that the mean acceleration at the site from a magnitude 6.5 on the Hosgri "could be as little as 0.4g." (Tr. at 8984.) This estimate is consistent with the comparable estimates provided by others and is, therefore, consistent with 0.5-0.7g mean accelerations from a M7.5.

The above results can be used directly to independently assess the conservativeness of the 0.75g design acceleration. Such an assessment might best be presented by examining Dr. Seed's testimony:

"It is NRC practice, as I understand it, and I've seen a lot of plants and worked on a lot of plants which I passed through the review by NRC, to select a conservative earthquake from which to set ground motion design criteria, to select for this earthquake a mean value of peak acceleration that it could produce at the site, and then to use this acceleration as the anchor point for a very conservative response spectrum shape.



"For a magnitude 7.5 earthquake on the Hosgri fault, the mean peak acceleration developed at the site would not be expected to exceed 0.75g. Accordingly, there is no need to introduce the concept of an effective peak acceleration since this is the value already being used." (Tr. at 10,108.)

In addition, the consistency of these independent estimates confirms the notion that USGS Circular 672 is excessively conservative. There was substantial testimony that indicated the conservative nature of the Circular. Dr. Newmark indicated that the authors of the Circular ignored the large amount of low acceleration data and instead always picked the highest value. (Tr. at 9288.) Dr. Bolt also testified on the conservative bias in the Circular, citing the data from Tabaz, Iran, as additional strong evidence. (Tr. at 5845-7.) Dr. Bolt further testified that most of the conservatism at higher magnitudes resulted from the unjustified straight line extrapolation above magnitude 6.5. (Tr. at 5872-4.) Dr. Smith also concluded that the Circular was conservative based ". . . on the body of strong motion data . . .". (Tr. at 5845.) The record shows that the authors of Circular 672 were aware of such scientific conservatisms (Tr. at 9288) and therefore directed the use of effective acceleration for design purposes and provided substantial additional seismological data (ten peaks of acceleration and several peaks of velocity and peak displacement), in order to give designers sufficient flexibility. (Tr. at 9288-89.)

Intervenors contend that the Licensing Board erred in finding that Dr. Brune's speculated higher values (of peak



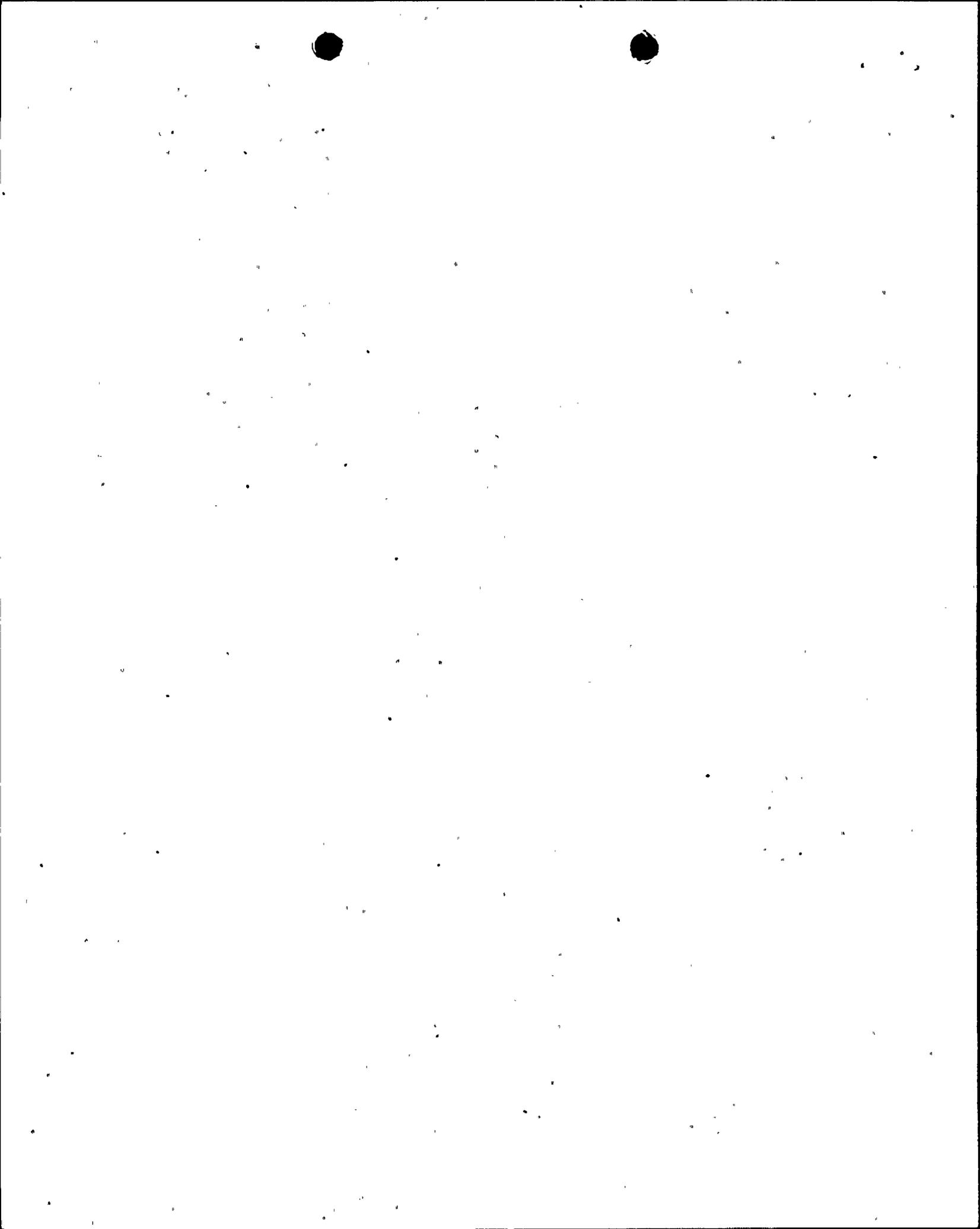
instrumental ground motion) are not of design or analytical significance for the Diablo Canyon facility. (Int. Br. at 52.)

Intervenors go to some length to paraphrase and quote out of context Dr. Brune's testimony to convince this Board of the merit of their argument. The quotations and paraphrases are contrary to with the total context of Dr. Brune's testimony which cites generic earthquake phenomena that could possibly result in unusually large ground motions under particularly adverse circumstances. (Tr. at 8012, 8045, 8051-55.) ". . . I say what I said in my testimony, that the phenomena has been demonstrated to exist in ruptures. And we don't know exactly how effective it is in the real world." (Tr. at 7912.) At no time did Dr. Brune testify that such adverse circumstances are present, or even reasonably possible, in the vicinity of Diablo Canyon. Dr. Brune stated ". . . What I'm not certain about is when you put it [factor of two increase in peak acceleration] in the context of, you know, the real earth, like Diablo Canyon . . .". (Tr. at 8054.)

Regarding the likelihood of unusually large ground motions as the result of high stress drop, Dr. Brune's written testimony provides a generic appraisal.

"The probability of such high stress drops occurring over large volume at shallow depth is not known, and thus the possibility exists that such high stress drops could lead to unexpectedly large accelerations and velocities." (Int. Ex. 3-3; Tr. at 7924.)

Again, Dr. Brune does not suggest that high stress drops are plausible for the Hosgri fault; whereas Dr. Smith clearly ruled



out that possibility in his testimony:

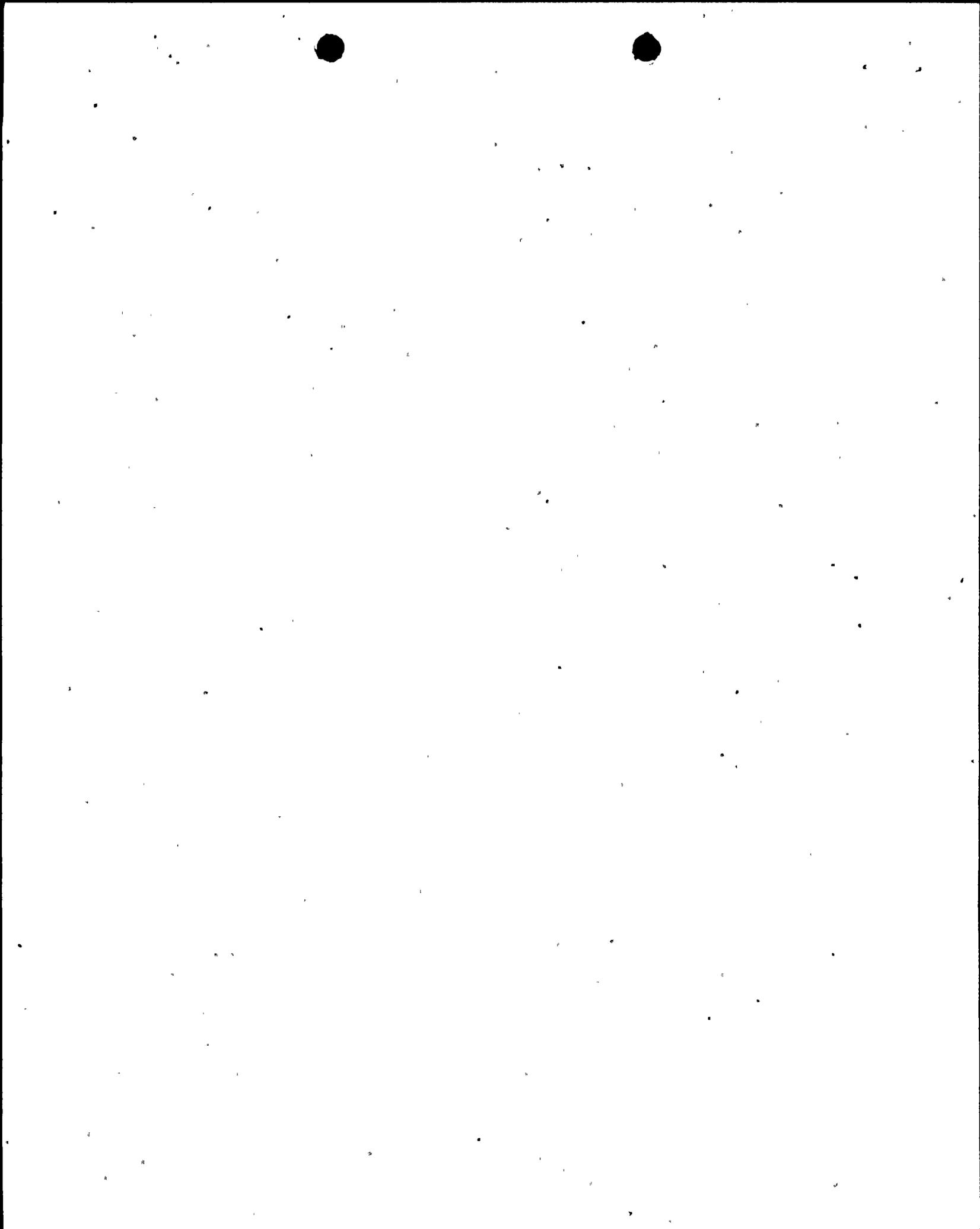
"The local stress conditions for the Hosgri would thus be expected to be intermediate between normal faulting and strike slip faulting, that is, significantly less than those expected for compressional regimes." (W.T., 11, ff. Tr. at 5491.)

Drs. Frazier and Bolt provided additional evidence for moderate to low stress drop along the Hosgri fault. (Tr. at 5829-41.) There is simply no evidence provided by Brune or any other witness that is contrary to the testimony of Applicant witnesses that high stress drops are not a problem at the Diablo Canyon site.

In addition to stress drop, Brune also stated that focusing could, under particular circumstances, lead to high ground motions within "a sector of about 5° from the direction of fault propagation." (Int. Ex. 66, 3-2; Tr. at 7924.) However, Brune stated that, even based on an extended definition of near field out to 20 kilometers<sup>6/</sup>, the Diablo Canyon site would not be within the near field of any focusing phenomena from the Hosgri (Tr. at 8025) and that, in fact, any focusing would have to result from a rupture more than 33 kilometers from the site. (Tr. at 8048.) Furthermore, when asked what is the probability that maximally focused rupture along the Hosgri could produce peak instrumental accelerations

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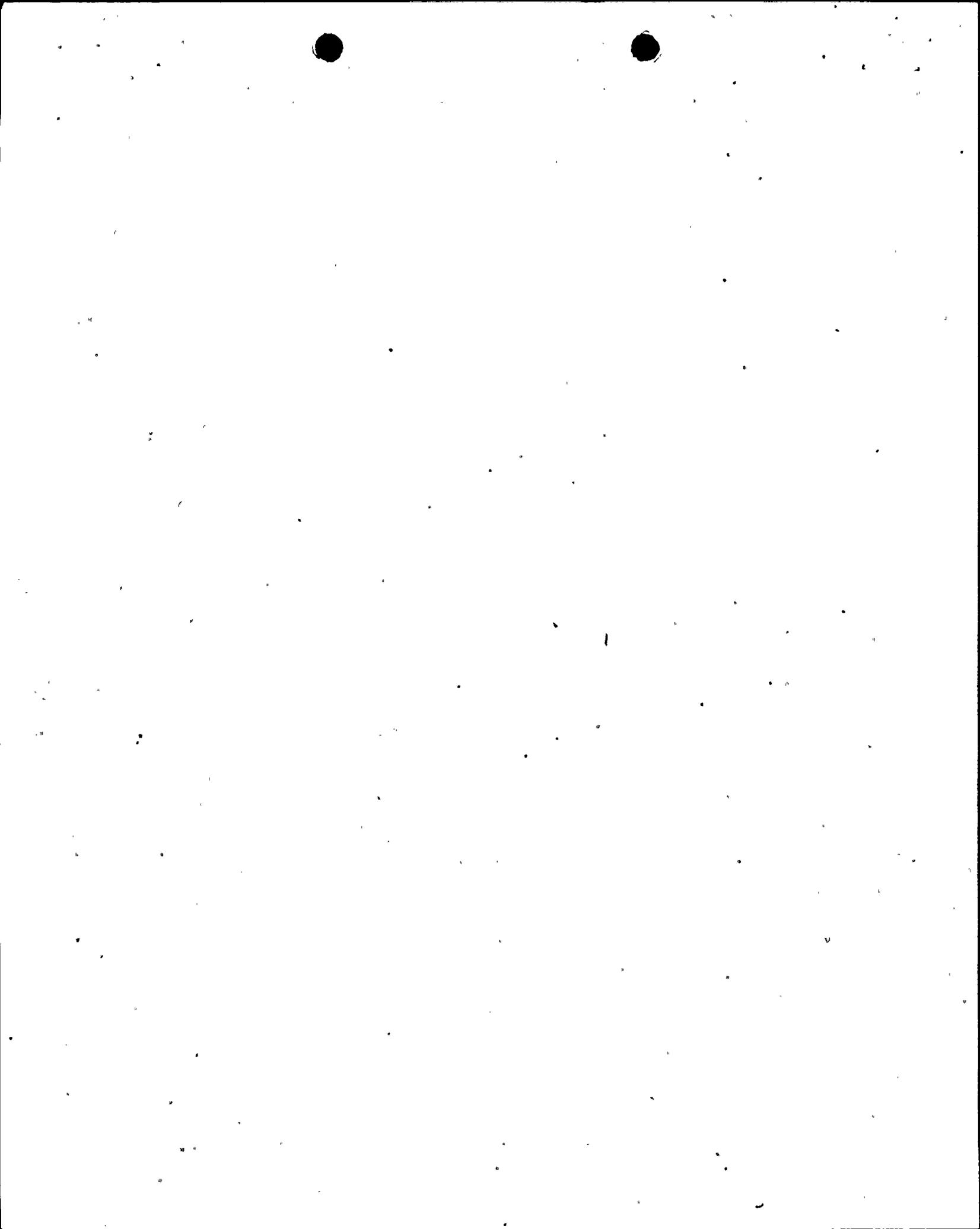
<sup>6/</sup>Brune defined "near source" as within 10 kilometers of the epicenter in his written testimony. (Int. Ex. 66, 3-18.)



greater than 1.0g at the Diablo site, Brune responded, "I don't know what the exact probabilities are, but I think it would probably be low." (Tr. at 8049.) The Licensing Board is indeed proper in ruling that the generic possibility of unusually high accelerations referred to in Dr. Brune's testimony is not of "design or analytical significance for the Diablo Canyon Plant." (Dec. at 61.)

Intervenors and Brown both refer to studies "recommended by Dr. Brune". Dr. Brune stated that deterministic studies have not been performed at the Diablo Canyon site to quantitatively assess the consequences of focusing and stress drop on potential ground motions and that such studies might be useful. (Tr. at 8013.) However, he went on to say "As I think I've explained quite a number of times, we really don't know that much about how to model faults, to know exactly what to put into them [models]." (Tr. at 8056.) In discussions about the theoretical Kostrov model used by him in his written testimony, he stated that the model results in unrealistically large stresses at the crack tip (Tr. at 8027) and then, under redirect by Mr. Fleischaker, Dr. Brune stated:

" . . . I wouldn't claim that the Kostrov model is a reliable model for any particular type of faulting, it's one possible physical model . . . so I'm not trying to say that . . . that should be the level of our computations at the present time for trying to predict strong ground motions, I think we should do things more realistic."  
(Tr. at 8135-36.)



Dr. Brune, while saying such a study might be useful, admitted that he was not aware of any such deterministic study ever having been done before. (Tr. at 8025.)

In summary, Dr. Brune testified about generic possibilities. He never stated that the Diablo Canyon site was subject to the theoretical numbers he was postulating generically. In fact, his conclusion that the probability of the site "seeing" a peak instrumental acceleration in excess of 1.0g was low is supportive of Applicant and Staff's usage of the USGS Circular 672 1.15g peak instrumental acceleration from which a design basis acceleration of .75g was derived.

The Brown brief states that "other than Dr. Brune's statement, no testimony on seismic focusing was placed before the ACRS or the ASLB. . . . Accordingly, Dr. Brune's testimony stands unrebutted in the records upon which the ASLB issued its decision." (Brn. Br. at 6.) This allegation is false. First, as cited above, they are misconstruing Dr. Brune's testimony; Dr. Brune himself states that he doesn't think that focusing along the Hosgri is likely to produce peak instrumental ground motion in excess of 1.0g at the site. (Tr. at 8025.) Second, considerable other evidence and testimony was presented regarding the phenomena of focusing and stress drop at the Diablo Canyon site. Dr. Smith provided written and verbal testimony on focusing. (W.T., 26, ff. Tr. at 5491; Tr. at 4917; Tr. at 5939; Tr at 5468-69.) Additional testimony on the effects of focusing was provided by Drs. Frazier and Bolt. (Tr. at 5878-81, 5883-87, 5993.) Similarly, stress drop was considered at length



by the Applicant (W.T., 9, 11, ff. Tr. at 5491, Tr. at 5829-41, 5931, 5685), and the Staff (W.T., 33, ff. Tr. 8484; Tr. at 8526, 8617, 8626-30). From all of the preceding, one can only conclude, as stated in the Introduction, supra, that the Brown Brief is of no value to this Board or these proceedings.

In conclusion, all NRC Staff witnesses concluded that 0.75g design spectrum was appropriate for reanalysis. (Stepp, Tr. at 8492; Hofmann, Tr. at 8530; and Newmark, Tr. at 9285-86). Additionally, Dr. Trifunac, witness for Intervenor, concluded the 0.75 design spectrum was acceptable for those aspects of design within his area of expertise. (Tr. at 9263.) The Applicant's witnesses, Drs. Blume, Seed, Cornell and Frazier, all stated within a reasonable degree of earthquake engineering certainty that given the postulated Hosgri event and the other earthquake possibilities that have been considered in the design, the anchoring of the response spectra at .75g was conservative. (Tr. at 6860.) The findings of the Board in this respect are indeed supported by the evidence.

## VI

SEISMIC REANALYSIS OF THE DIABLO CANYON  
NUCLEAR POWER PLANT WAS CORRECTLY DONE AND  
CLEARLY SUPPORTS THE FINDING THAT THE FACILITY  
CAN WITHSTAND A MAXIMUM CREDIBLE EARTHQUAKE  
ON THE HOSGRI FAULT

The evidence discussed in the preceding sections establishes the conservative nature of the 0.75g design spectrum for the Diablo Canyon Nuclear Plant seismic reanalysis. The discussion that follows summarizes the evidence relating to the



actual reanalysis of the Diablo Canyon facility. It is important to note here that what is at issue is not the seismic design for a new plant, but the reanalysis of an already constructed facility for a postulated seismic event. As such, several points are important: one, more information was available in the reanalysis effort than for a typical design analysis (e.g., detailed construction drawings and actual material properties); two, the Diablo Canyon initial seismic design criteria were substantial (i.e., a magnitude 6.75 earthquake within 20 kilometers of the site, including directly under the facility was assumed) which Applicant submits was sufficient even in light of the Hosgri fault (Blume, W.T., 15, ff. Tr. at 6100); and three, even though the plant was already constructed, the level of reanalysis was equivalent to that for a new plant. While it is never stated, it can certainly be inferred from Intervenor's arguments that the site would never have been selected had knowledge of the Hosgri fault existed at the time of site selection. Such is not the case. Dr. Newmark, who had previously rejected a nuclear plant site proposed by Applicant due to seismic reasons, states:

"Dr. Newmark, didn't you at one time evaluate a site called Mendicino?"

"A. I reviewed the preliminary reports on that site."

"Q. All right. That was the site proposed by Pacific Gas and Electric for a nuclear plant, is that correct?"

"A. Correct."



"Q. And what was your recommendation?

"A. I recommended that that application be rejected.

"Q. And you recommended that a nuclear facility not be built there for seismic reasons, is that right?

"A. Correct.

"Q. All right. And you were not working for the PG&E, but working for the NRC or ACRS at that time, correct?

"A. I never worked for ACRS.

"Q. NRC?

"A. NRC or AEC.

"Q. All right. And if you were now asked to evaluate the Diablo Canyon site, would you recommend that that site be rejected as a site for the Diablo Canyon Nuclear facility, or would you recommend that the plant be built?

"A. I would have no hesitency [sic] about recommending that the Diablo Canyon Plant be built at the site where it is located."  
(Tr. at 9307-08.)

What follows is discussion regarding four issues raised by Intervenors on Appeal: reduction of the 0.75g design spectrum due to effects of the structures (the Tau factor), use of measured material properties, use of 7% damping for reinforced concrete structures and possible inelastic behavior in three local areas of the Diablo Canyon facility.

A. TAU

The Intervenors contend that the evidence fails to demonstrate that tau reductions in the range of 20% to 30% are



appropriate and conservative. (Int. Br. at 55.) As described by the Intervenors (Int. Br. at 36-44), substantial evidence is provided by the Applicant and Staff regarding the degree of conservatism associated with tau reductions. The evidence ranges from observational data of reductions up to a factor of two (SER, Supp. 5 at C-32 and 33, Figures 10, 11, 14 and 15; Tr. at 9276-77; Tr. 8642-50) to varying degrees of engineering approximations (see for example, Dr. Newmarks' rationale; SER Supp. 5 at C-14-16) and Dr. Seed's rationale (Tr. at 10,151-67). Dr. Blume testified that the calculations of the tau effect were conservative because no credit was taken for the plant-foundation area as a whole, and because no credit was taken for foundation embedment. Both of these mitigating factors would have led to additional reductions. (Tr. at 10,125-26.) Dr. Seed stated:

"I don't really call soil-structure interaction a tau effect, but since there is no SSI being included in the analysis that is being made for Diablo Canyon, it seems to me legitimate to include it as a tau effect in this case. And so the total sum of the 20% for SSI plus two ten percents for non-verticality of waves, and non-homogeneity of foundations adds up to about 40% (for tau) altogether." (Tr. at 10,167.)

The Intervenors' Brief misconstrues the testimony of Drs. Trifunac and Luco in a blatant effort to shed doubt on the technical bases for the tau effect. In their Brief, they characterize Drs. Luco and Trifunac as having little or no support for the calculations of the tau phenomenon. In fact,



the witnesses expressed concern due to the inadequacy of state-of-the-art computational methods. Dr. Luco stated in direct testimony:

"I think that the reductions calculated by the Applicant are sufficiently accurate. They do not have an exact solution for the problem, but for all practical purposes are sufficiently accurate if we assume that we have horizontally propagating waves so that the key issue there is do we have that situation or not." (Tr. at 8881.)

Subsequently, Intervenor's counsel asked Luco if one were to have vertically incident waves, would he expect reductions of the magnitude as that incorporated by the Applicant and Dr. Newmark and Dr. Luco responded: "Yes". (Tr. at 8883.) Luco then continued with "when I said that there would be some reductions, I am not stating the magnitude of the reductions." (Tr. at 8883.)

Intervenor's also assert that, in the event of an earthquake, seismic waves would vertically impinge on the site. (Int. Br. at 45-47.) In contrast, Dr. Frazier testified that ". . . for frequencies greater than 2 Hz, the majority of the waves come in at angles steeper than 45 degrees. I call that steeply emerging waves." (Tr. at 10,128-29.) And later, in describing effects due to actual complexities, Frazier stated: "So what would happen due to the heterogeneities in the earth, I think the waves would come in all kinds of directions, and arrive at different times and from different directions." (Tr. at 10,132.)



The evidence clearly shows that computations for the response of the large structural foundations is not an exact science (Tr. 10,124); consequently, different methods were used by Drs. Blume (Tr. at 10,124-26), Seed (Tr. at 10,151-67), and Newmark (SER, Supp. 5). Not only were the various methods conservative, but the Applicant was required to use the most conservative values derived for additional conservatism in the analysis.

B. DAMPING

The only evidence against the use of 7% damping for reinforced concrete structures is a "preference" shown by Drs. Trifunac and Luco (Tr. at 8895 and 8970) for the lower value of 5%; the value used in the initial seismic design of Diablo Canyon. Applicant utilized the higher value, 7%, in the reanalysis since the regulatory standard (Regulatory Guide 1.61) had been revised to that value since the time of initial design. (Blume, W.T., 14-15.) Dr. Trifunac indicated "there is no generally accepted method that would allow us to go back to all the data and say what will be a modification of their data so that we might use it for design of Diablo." (Tr. at 8979.) Dr. Luco indicates a lack of "good experimental data to indicate precisely what values of damping we should use." (Tr. at 8895.) When asked for any data which indicates 7% is not a proper damping value, Dr. Luco "cannot draw any definite conclusion", other than the strains will probably be too low to reach the yield level. (Tr. at 9066.) On the point of being more conservative just for the sake of conservatism, Dr. Newmark



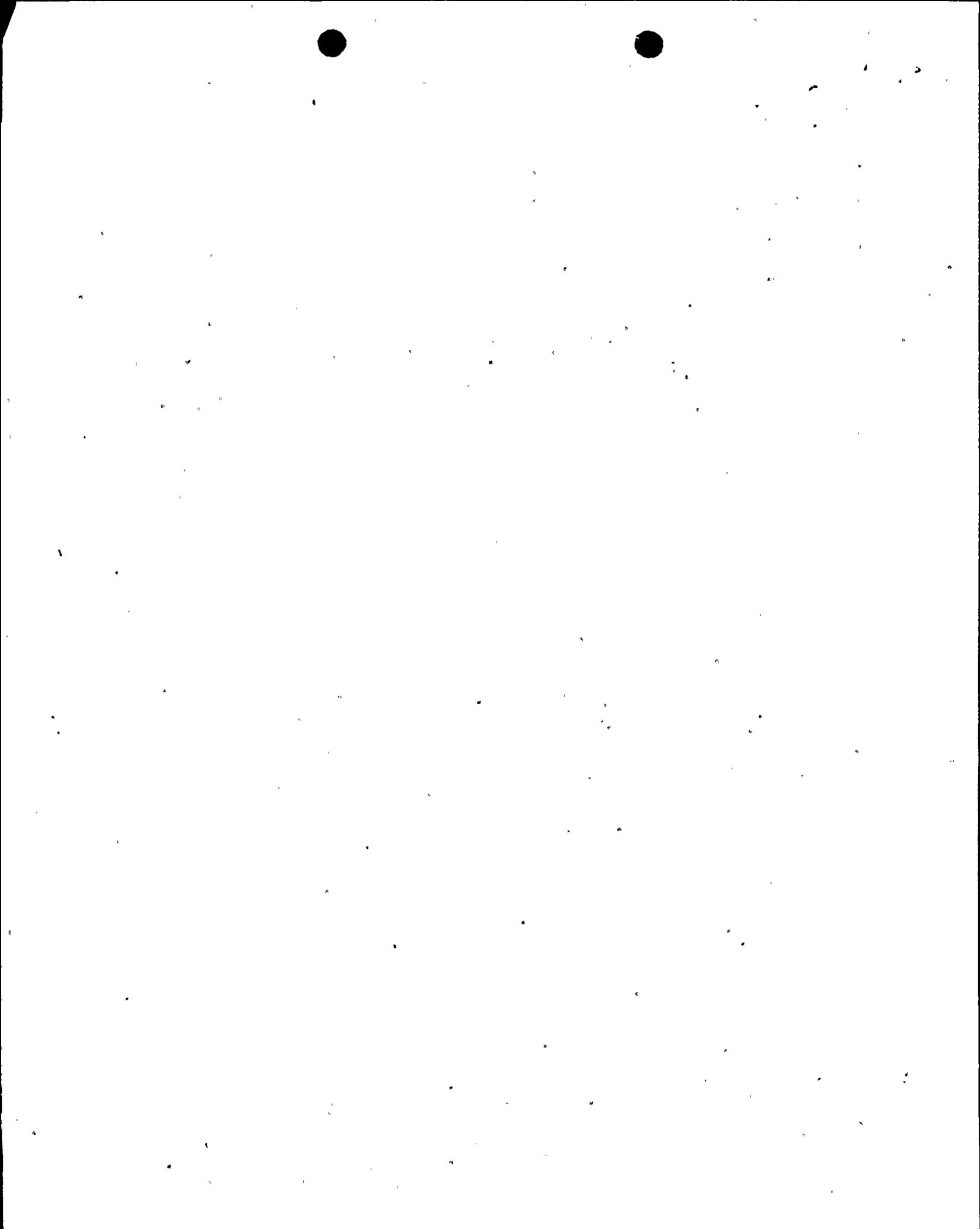
(Tr. at 9290-99) indicates that a trade off between strength and energy absorbing capability exists and "that the bigger you make reinforced concrete members, the bigger they are, the less ductility they have. There's a lesser capability of absorbing energy." (Tr. at 9291.) Dr. Blume discussed the damping values prescribed in NRC Regulatory Guide 1.61 (7% for structures) and the additional data developed because these values had been questioned. He emphasized that two facts were particularly important: elements with friction between parts, such as bolted steel joints or concrete with minor cracks, have considerably greater damping at a given strain level than where such friction is not possible, as for example in welded joints or in uncracked concrete; damping increases with strain or deformation. Another important consideration is that a structure not only receives energy from the moving ground but returns some of it to the ground, which is often termed radiation damping. No credit for this type of damping was taken for the Diablo units. Another point, often misunderstood, he said, is that it is not necessary to develop high strain levels throughout an entire structure to develop high damping levels; local high strain levels can be quite effective in absorbing the kinetic energy of motion, as shown by test results presented by Dr. Blume. Based upon all of this, Dr. Blume concluded that 7% of critical damping was conservative for the Diablo Canyon structures subjected to the hypothetical Hosgri earthquake, and that the value could be as high as 8% to 10% for the postulated Hosgri event. (W.T., at



47-49, ff. Tr. at 6100.) Supporting Applicant's position, Staff witness Newmark stated that the seven percent value recommended is a conservative value. (Tr. at 9299.) Therefore, the Board decision not to require use of 5% for the sole reason of additional conservatism is well founded.

C. ACTUAL MATERIAL VALUES

On page 58 of Intervenors' Brief, they allege that use of "average actual values" of material properties is inconsistent with certain Codes (American Concrete Institute Standard Building Code and American Institute of Steel Construction), therefore requiring exemption under 10 CFR §50.55(a). While this regulation does address certain codes (e.g., ASME and IEEE), it does not address either of the codes referenced by Intervenors. More importantly, however, Intervenors misinterpret the intent of the Codes and the significance of Applicant's use of actual material properties. Substantial evidence was presented (W.T., 26-27, ff. Tr. at 6100; Tr. at 7194, 9820; Hosgri Seismic Evaluation Appendix D-LL6) as to the basis for the use of average actual material properties. For example, for concrete, the small dispersion from the mean of the measured concrete strengths (maximum of 9.5% coefficient of variation) and the substantial increase, since the tests in the past 6 to 10 years (20 to 60 percent), and, for steel, the substantial reserve margin that the minimum ultimate strength has above the minimum yield strength (greater than 50 percent) provided even further conservatisms. (Hosgri



Seismic Evaluation, Vol. IV.) Additionally, as outlined in the beginning of this section, the seismic reanalysis was performed on a constructed facility, not for design of a facility. The Codes cited by Intervenors provide guidance for the designer who does not have measured material properties available and those standards dealing with material properties are not relevant to the reanalysis of an existing structure. (Tr. at 6944.)

D. INELASTIC RESPONSE

The Intervenors indicate that both Drs. Trifunac and Luco recommend that an inelastic analysis be performed for the Diablo Canyon structures. First it should be noted that the Hosgri seismic evaluation indicated that stresses go beyond the yield point in only a very limited number of locations in the Diablo Canyon structures. (Tr. 6874.) Section VI(a)(1) of Appendix A to 10 CFR Part 100 states: "It is permissible to design for strain limits in excess of yield strain in some of these safety-related structures, systems, and components during the Safe Shutdown Earthquake and under the postulated concurrent conditions, provided that the necessary safety functions are maintained". The evidence in the record shows that for the Diablo Canyon structures, the acceptance criteria employed in the Hosgri seismic evaluation allowed stresses or strains beyond yield only in very limited situations and under conditions where such yielding could not affect the performance of necessary safety functions. The associated deformations have been carefully evaluated to assure that all necessary safety functions are maintained. (W.T.; Tr. 22; ff. Tr. at 6879.)



With regard to the Intervenor's recommendations for an inelastic analysis, it appears that they were made as a means of investigating structural response to free field ground motions without called for reductions for effective acceleration and tau effects. According to Dr. Luco, "If we consider a 7.5 magnitude earthquake with a peak acceleration at the site on the order of 1.15g and . . . [further] we assume that the effects of soil structure interaction and the tau effect are not applicable, then what we find is that the structures could go into the inelastic range. If they do go into the inelastic range, the type of analysis you have to use is different from the one that has been employed". (Tr. at 8869-70.) When Dr. Trifunac was asked if the structures within the complex of the plant were reasonably designed to withstand a reasonable earthquake along the Hosgri fault, he responded, "yes; as long as you . . . refer to structures only." (Tr. at 9199.) Both witnesses limited their testimony to structures, exclusive of equipment, based on their lack of expertise on equipment.

Dr. Newmark clearly stated his opinion about the wisdom of with an inelastic analysis: "It would be completely out of the question economically to make designs based on inelastic analysis. It just is not appropriate, not feasible, not meaningful. And there has been no major structure yet designed using inelastic analysis as a base." (Tr. at 9284-85.) In summary, an inelastic analysis is neither necessary for the Diablo facility nor would it be of any value.



VII

THE USE OF AN OBE OF 0.2g DOES NOT IMPAIR THE  
SAFETY OF THE FACILITY AND IS CONSISTENT  
WITH THE REGULATIONS

Intervenors argue (Int. Br. at 70) "that use of an operating basis earthquake of 0.20g violates the regulatory requirements." The NRC Staff (Allison) and Applicant (Hoch) witnesses disagreed. (W.T., 18-21, ff. Tr. 6879; Tr. 8423-8426, 8471, 8472.) Intervenors' case is based upon use of the word "shall" in the text of Appendix A (Int. Br. at 69 and 73) and argues "it is not suggested by either the statement of consideration or the text of Appendix A". (Id.) The NRC Staff (Tr. at 8471-75) and Licensing Board (Tr. at 64) "believe that considerations offer a firm foundation for relief, in the instant case, under the provisions of 10 CFR Part 100, Appendix A." The operative portions of that regulation being:

"If an applicant believes that the particular seismology and geology of a site indicate that some of these criteria, or portions thereof, need not be satisfied the specifications of these criteria should be identified in the license application, and supporting data to justify clearly such departures should be presented."

Applicant has complied fully with this regulation as the record demonstrates. (W.T., 9-21, ff. Tr. at 6879; Tr. at 8471-72.) Intervenors incorrectly state that Diablo Canyon site is "in an area of high seismicity" thereby suggesting a higher OBE is appropriate. (Int. Br. at 80.) On the contrary, the



evidence is uncontroverted that the Diablo Canyon site is in an area of low seismicity, e.g., Intervenor's own witness, Dr. Silver (Tr. at 6329) and Applicants' witness Dr. Smith (W.T., 14, ff. Tr. at 5490).

The OBE is primarily of economic significance and any safety significance is only indirect. (Knight, W.T., 6, ff. Tr. at 8707-09.) The lack of current requirements for post-OBE inspection (Int. Br. at 79) does not indicate any safety significance as implied by Intervenor's, but is an economic issue. The plant will require shutdown while such requirements are established and satisfied which would be true no matter what the OBE level should an OBE earthquake be experienced. In any event, the Applicant has specified procedures in its operations manuals for such an inspection. (Tr. at 7457, 7477-78.)

Applicant has identified the specifications regarding the OBE and data has been supplied in the record by both Applicant and Staff to justify the use of an OBE of .2g at the Diablo facility. The Regulations of the Commission have been complied with and no impairment of safety to the public is at question.

## VIII

### CONCLUSION

Intervenor's have indeed failed to meet their burden on appeal. In sum and substance their complaint is a disagreement with the basic findings of the Licensing Board as respects the capability of the Hosgri fault, the ground motion expected from the Hosgri event, the reanalysis design spectrum, and the



reanalysis of the facility itself. Their brief cites evidence which in many instances is supportive of the Licensing Board's findings. The evidence they cite to the contrary is often paraphrased and/or quoted out of context and, when not, is overwhelmingly met by more competent evidence which compels a decision contrary to the Intervenors' wishes. The record favoring the Licensing Board's decision is substantial, if not overwhelming. It is respectfully submitted that the decision should be upheld.

Respectfully submitted,

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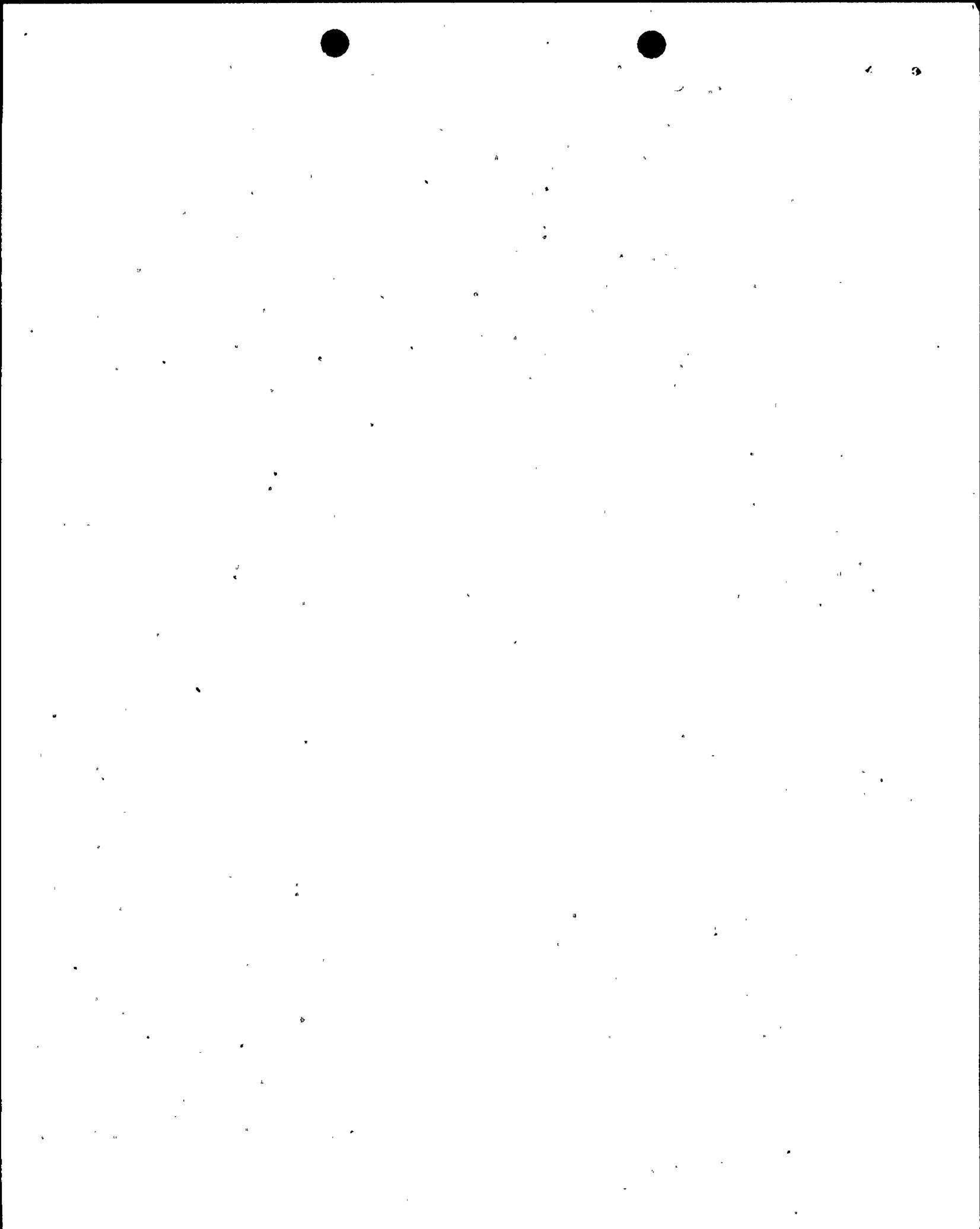
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DATED: January 11, 1980.



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of )  
PACIFIC GAS AND ELECTRIC COMPANY ) Docket Nos. 50-275 O.L.  
(Diablo Canyon Nuclear Power ) 50-323 O.L.  
Plant, Units No. 1 and 2) )

CERTIFICATE OF SERVICE

I hereby certify that copies of "APPLICANT PACIFIC GAS AND ELECTRIC COMPANY'S BRIEF IN RESPONSE TO INTERVENOR'S BRIEFS IN SUPPORT OF EXCEPTIONS TO PART III OF INITIAL DECISION", dated January 11, 1980, have been served on the following by deposit in the United States mail, this 11th day of January, 1980:

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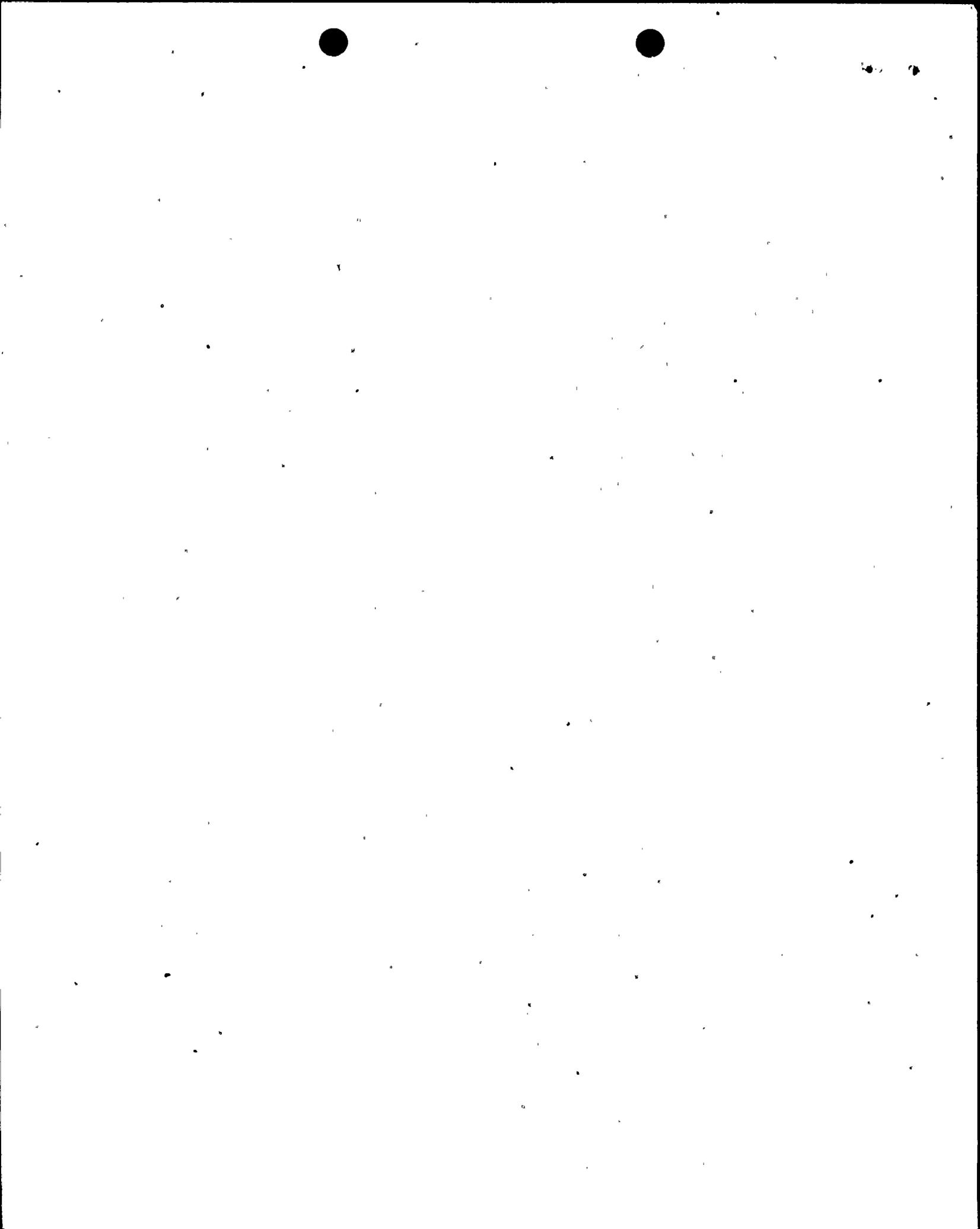
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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

3/28/80

In the Matter of: )

PACIFIC GAS & ELECTRIC )  
COMPANY )  
(Diablo Canyon Nuclear )  
Power Plant, Units 1 & 2) )

Docket Nos. 50-275 O.L.  
50-323 O.L.

JOINT INTERVENORS'  
MOTION TO REOPEN

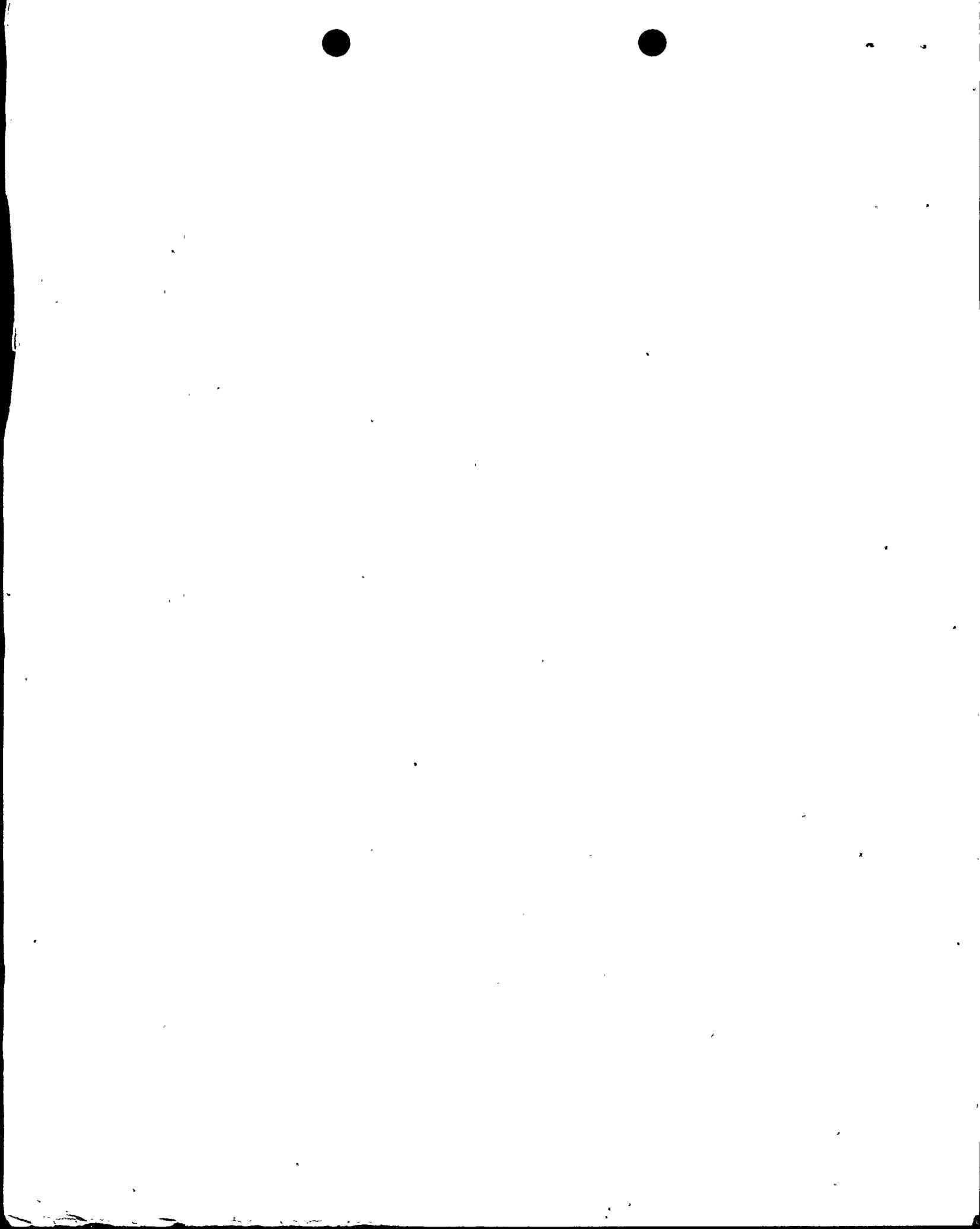
Introduction

The SAN LUIS OBISPO MOTHERS FOR PEACE, SCENIC SHORELINE PRESERVATION CONFERENCE, INC., ECOLOGY ACTION CLUB, SANDRA SILVER, GORDON SILVER, ELIZABETH APFELBERG, JOHN J. FORSTER ("Joint Intervenors") request the Atomic Safety and Licensing Appeal Board ("Appeal Board") to reopen the record in order to receive new information material to the resolution of the seismic issues and the issue of environmental qualification of the safety-related equipment. The new information is described in the attached affidavits of Dr. James Neil Brune, Mr. Robin Bruce Leslie, Mr. Richard Burton Hubbard, accompanying documents and in documents furnished recently by the NRC Staff to parties and to the Appeal Board. <sup>1/</sup>

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<sup>1/</sup> Board Notification - USGS Strong-Motion Record (BN-79-43), December 17, 1979 (cited hereinafter as BN-79-43); Board Notification - Recent Offshore Seismic Reflection Data And Its Significance To The Diablo Canyon Site (BN-80-6), February 11, 1980 (cited hereinafter as BN-80-6).

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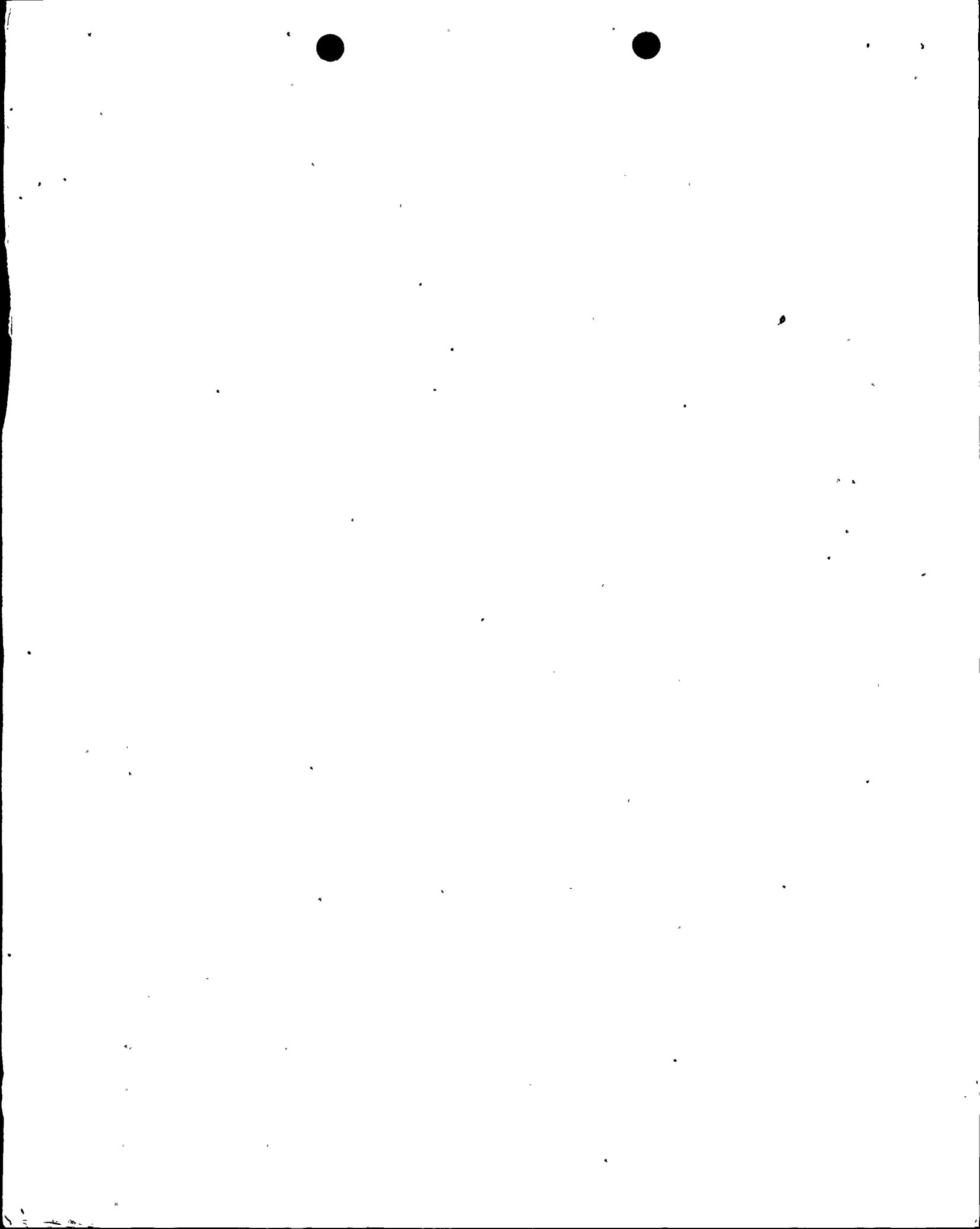
ARGUMENT

I. THE MOTION TO REOPEN THE RECORD ON THE SEISMIC REANALYSIS SHOULD BE GRANTED

A motion to reopen the record in order to receive new information should be granted if (1) it concerns information pertinent to significant safety issues; (2) it raises a triable issue that will affect the outcome of the proceeding; and (3) it is timely. Kansas Gas & Electric Co. et al. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 328 (1978); Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973); Id., ALAB-167, 6 AEC 1151-2 (1973). The new information discussed below satisfies all three tests and, accordingly, the Appeal Board should order the record to be reopened.

A. The New Information Related To The Seismic Reanalysis Is Significant To Safety And Raises Triable Issues That Will Affect The Outcome Of The Proceeding.

No one disputes that the determination of whether the Diablo Canyon seismic reanalysis meets regulatory requirements is crucial to the public health and safety. The October 15, 1979 Imperial Valley earthquake provides compelling new information that the design criteria used in the reanalysis do not meet the requirements of 10 CFR §100, Appendix A (cited hereinafter as Appendix A). In addition, new seismic reflection data invalidates the Licensing Board's evaluation of the Hosgri fault.



1. New information from the October 15th Imperial Valley earthquake demonstrates that the seismic reanalysis fails to meet regulatory requirements.

A recently completed evaluation of new data from the October 15, 1979 Imperial Valley earthquake demonstrates that the design criteria for the seismic reanalysis fail to meet regulatory requirements. The records from the recent earthquake are an unprecedented addition to the data base. They constitute the only extensive set of data for a single earthquake of magnitude 6.6 (M6.6) or greater, recorded at distances comparable to the distance from the Diablo Canyon site to the Hosgri fault.<sup>2/</sup> The evaluations demonstrate that the seismic reanalysis fails to meet regulatory requirements in two respects.

(a) The regulations require that the characterizations of the Safe Shutdown Earthquake - the free field response spectrum - include "the maximum vibratory accelerations at the site throughout the frequency range of interest . . . ." Appendix A V(a) (1) (iv). The 0.75g response spectrum

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<sup>2/</sup> A Staff memorandum included in the documents forwarded to the Board states "[B]ecause of the presence of an extensive strong-motion instrumentation array in close proximity to both the active fault and the earthquake epicenter, seismologists have acquired the best near-field data set available to date." BN-79-43, Memorandum, "Transmittal of USGS Strong-Motion Record and Staff Reconnaissance Report - Imperial Valley Earthquake," from Robert E. Jackson, Geosciences Branch, OSS, dated December 12, 1979.



used in the seismic reanalysis - the Newmark free field response spectrum - does not meet that requirement.<sup>3/</sup> The Newmark spectrum is based on a peak acceleration, velocity, and displacement equal to 0.75g, 61cm/sec, (24in/sec) and 20cm (8in.) respectively. SER, Supp. 5 at C-4. These values were exceeded by the Imperial Valley earthquake with a magnitude of only 6.6 at distances comparable to that of the plant site to the fault. (Brune Affidavit at ¶3 & ¶6). Response spectra from the Imperial Valley earthquake for close-in stations (distance less than 10 km) exceed the Newmark spectrum in almost all instances for the vertical acceleration and in some instances for the horizontal acceleration in the frequency range of interest (2-33 cps).<sup>4/</sup> Furthermore, earthquakes of M7.5 are expected to produce even higher peak accelerations. (Brune Affidavit at ¶5).

This is direct proof that the characterizations of the Safe Shutdown Earthquake do not meet regulatory requirements.

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3/ The Newmark "free field" response spectrum (2% damping and without tau reduction) is depicted at pages C-21 and C-22 in Supplement 5 to the Safety Evaluation Report.

4/ A detailed comparison of the Imperial Valley earthquake response spectra with the Newmark response spectrum is at Attachment 1 to this motion. The instrument location and the response spectrum of the Imperial Valley earthquake are at Attachment A and B to Dr. Brune's affidavit.



The response spectrum used in the reanalysis underestimates the free field maximum vibratory accelerations for the 7.5M Hosgri earthquake and, in fact, more closely represents a 6.5M earthquake.<sup>5/</sup>

(b) The regulations require that "[T]he vibratory ground motion produced by the Safe Shutdown Earthquake shall be defined by response spectra corresponding to the maximum vibratory acceleration at the elevations of the foundation of the nuclear power plant structures' . . . ." This requirement is violated by incorporating into the seismic reanalysis two assumptions contested by the Joint Intervenors. The new information confirms the Joint Intervenors' contention that the reliance on these two assumptions is unwarranted by the data and violates the regulations.

The first assumption is that vertical accelerations produced at the site will be equal to two-thirds the expected horizontal accelerations. The new data, as well as data

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<sup>5/</sup> The occurrence of "focusing" in three recent earthquakes (Santa Barbara, 1978; Gilroy, 1979; and Livermore, 1980) is further evidence that the response spectrum used in the reanalysis underestimates the maximum vibratory accelerations for a 7.5M Hosgri earthquake. Dr. Brune testified that focusing of earthquake energy, among other things, could result in maximum accelerations of 2g and velocities in excess of 200cm/sec at the Diablo Canyon site during a postulated 7.5M on the Hosgri fault. (Joint Intervenors' Exhibit 66 at 3-2 through 3-3). The Licensing Board improperly rejected Dr. Brune's testimony as "speculative." LBP-79-26, 10 NRC \_\_, \_\_ (September 27, 1979) (Slip. Op., Part III at 61).



from the Gazli earthquake, indicates that close to the fault (within 10 km) vertical accelerations may often exceed horizontal accelerations. (Brune Affidavit at ¶6). Vertical accelerations as high as .93g corresponding to recorded horizontal accelerations of .51g and .37g were obtained 5km from the fault during the Imperial Valley earthquake. (Brune Affidavit at ¶4).<sup>6/</sup>

The second assumption demonstrated to be incorrect by the new information is that free field maximum vibratory accelerations can be reduced on the basis that the large structures at the site will experience "less intensity" than small structures. This is the so-called tau reduction applied to the free field response spectrum to obtain design response spectra for the various structures. Records from the Imperial Valley earthquake confirm Joint Intervenors' contention that the tau reduction is not warranted by the data and violates regulatory requirements. Records from the Imperial County Services building and an adjacent recording reveal that accelerations recorded at the base of the building foundation were higher than those recorded in the "free

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<sup>6/</sup> In the case of the OBE analysis, nonconservative estimates of plant or equipment response are further exaggerated by the Applicant's assumption that vertical accelerations are constant when, in fact, they increase with building elevation. (Joint Intervenors' Brief On Exceptions at 78).



field" for both the east-west and the north-south components of motion.<sup>7/</sup> The Imperial County Services building, designed in 1968 in compliance with the Uniform Building Code (1967 edition) is a large structure, measuring 136ft. 10in. by 85ft. 4in.<sup>8/</sup> It was heavily damaged by the Imperial Valley earthquake.

The only set of data showing a reduction in foundation response from that recorded in the free field nearby has questionable application to the Diablo Canyon site. Both Drs. Luco and Trifunac testified that the conditions causing the reductions of the foundation response at the Hollywood Storage building were not present at Diablo Canyon. (Joint Intervenors' Brief On Exceptions at 44-45). Now the only other set of data permitting comparison of the foundation response of a large structure to nearby free field ground motion shows that accelerations may be amplified in the foundation. This raises such grave questions regarding the tau reduction that its use in the seismic reanalysis is totally unwarranted.

2. New seismic reflection data invalidates the Licensing Board's evaluation of the Hosgri fault.

New high resolution seismic profiles in the area of the postulated link-up of the Hosgri and San Simeon fault invalidates the Licensing Board's evaluation of the Hosgri fault.

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<sup>7/</sup> C. Rojahn and Ragsdale, J.D., "A Preliminary Report On The Strong-Motion Records From The Imperial County Services Building" at 7.

<sup>8/</sup> Id. at 2.



Previously no seismic reflection data existed for this area. Based on the new data, the researcher who conducted this survey concludes that the San Simeon and Hosgri fault zone represent a continuous and throughgoing fault system. (Affidavit of Robin Bruce Leslie at ¶7).

The Licensing Board's evaluation of the Hosgri fault's seismic potential is predicated in large part on findings that (1) the Hosgri and San Simeon faults are distinct, unconnected brakes; (2) the Hosgri has a length of 145 kilometers; and (3) the Hosgri fault is not throughgoing in the sense of connecting with other faults in a way that would permit transmission of tens of kilometers of lateral offset.<sup>9/</sup> The new information invalidates those findings as well as the conclusion the Licensing Board draws from them: the 7.5 magnitude earthquake is a very conservative value for the Safe Shutdown Earthquake.

Where, as here, the Applicant must demonstrate that the plant can safely withstand the 7.5 Hosgri earthquake in order to obtain an operating license. It should not matter whether the 7.5M is "very conservative" or simply "conservative." However, "extreme conservatism" in selection of the Safe Shutdown Earthquake has been asserted as a basis

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<sup>9/</sup> LBP-79-26, supra. (Slip. Op., Part III at 55); see also, Joint Intervenors' Exceptions at 6-16.



for permitting the Staff and Applicant to incorporate in the Diablo Canyon seismic reanalysis, engineering criteria and procedures that are largely untested, not conservative, and not previously permitted in the seismic analysis of any other nuclear power plant.<sup>10/</sup> Thus, the record must be reopened in order to receive the new evidence that invalidates the Licensing Board's evaluation of the Hosgri fault's seismic potential.<sup>11/</sup>

B. The New Information Is Timely.

The Joint Intervenors' submission of this information is timely. Dr. Brune's evaluation was completed in late February when he received the necessary data. However, due to some confusion, Attachments A and B were not received until March 27, 1980.

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<sup>10/</sup> As an example, the Advisory Committee on Reactor Safeguards reasoned that use in the seismic reanalysis of design bases and criteria less conservative than those that would be used for an original design choice was offset by the fact that "the Committee's consultants believe that the choice of magnitude 7.5 for the postulated Hosgri event is relatively more conservative than the values considered acceptable for other plants. Letter from Dr. Stephen Lawrowski, Chairman, ACRS, NRC, to Dr. Joseph Hendrie, Chairman, NRC, dated July 14, 1978, at 3.

<sup>11/</sup> The USGS evaluation of the Hosgri contrasts sharply with the Licensing Board's. The USGS states "a . . . earthquake with a magnitude of about 7.5 could occur in the future anywhere along the Hosgri fault." Further, while rejecting assignment of an even larger magnitude 8 earthquake to the Hosgri, the USGS states that "legitimate and serious questions exist as to whether the Hosgri-San Simeon-San Gregorio fault system is capable of a magnitude 8 earthquake." SER, Supp. 4, C-10 through 14.



Attorneys for the Joint Intervenors' became aware of Mr. Leslie's study in January 1980. Shortly thereafter, efforts were made to contact Mr. Leslie to determine his willingness to provide an affidavit describing his work. Joint Intervenors met with Mr. Leslie at the first available opportunity and obtained the enclosed affidavit on February 28.

The Rojahn and Ragsdale study, yet to be published, was received in late January 1980. In response to arguments that the Joint Intervenors have moved on this matter as expeditiously as permitted by the resources and by the need to be thorough and accurate. In any case, this Board has ruled that if a safety problem presents a sufficiently grave threat to the public, as is the case here, a board should reopen the record to consider information even if it is not newly discovered and could have been raised in a more timely fashion. Vermont Yankee, ALAB-138, supra.

II. THE MOTION TO REOPEN THE RECORD ON THE ENVIRONMENTAL QUALIFICATION OF SAFETY-RELATED EQUIPMENT SHOULD BE GRANTED

A. The New Information Related To The Environmental Qualification Of Safety-Related Equipment Is Significant To Safety And Raises Triable Issues That Will Affect The Outcome Of The Proceeding.

The environmental qualification of equipment to assure that aging will not impair the proper function of safety-related equipment is one of the crucial factors upon which



the safety finding depends. New information indicates that the Licensing Board's approval of the Applicant's environmental qualification program was not warranted. The program failed (a) to identify all Diablo Canyon safety-related equipment for which environmental qualification is required; and (b) to evaluate as part of the environmental qualification, the effect of "aging" on the ability of equipment to perform its safety functions.

The Licensing Board's approval of the Applicant's program hinges on the Staff's position that, despite these deficiencies, the program is adequate.<sup>12/</sup> The new information described in full in Mr. Hubbard's affidavit reveals that the Staff, in a 180° turn-around has now requested the Applicant (a) to identify the safety-related equipment evaluated in the environmental qualification program; and (b) evaluate the effects of aging on safety-related equipment. (Affidavit of Richard Burton Hubbard at ¶7-14). This requires that the Licensing Board's decision on this matter be vacated and that the record be reopened to examine the adequacy of the Applicant's environmental qualification program.

B. The New Information Is Timely.

The motion to reopen on the Licensing Board's approval of the Applicant's environmental qualification program is

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<sup>12/</sup> LBP-79-26, supra., (Slip. Op., Part III at 89-92).



timely. The change in the Staff's position was first suggested by correspondence to the Applicant, dated November 2, 1979. However, it wasn't until the February 5, 1980 correspondence that the Staff's turn-around became fully apparent.

#### CONCLUSION

For the reasons set forth above, the Joint Intervenors request the Appeal Board to reopen the record in order to receive new information material to the resolution of the seismic issues and the issue of environmental qualification of the safety-related equipment.



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MARCH 28, 1980



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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Power Plant, Units 1 & 2) )  
\_\_\_\_\_)

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of March, 1980, I have served copies of the foregoing JOINT INTERVENORS' MOTION TO REOPEN, and accompanying documents, mailing them through the U.S. Mails, first-class, postage prepaid, by Express Mail, and hand-delivery to those parties designated by an asterisk.

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COMPARISON OF IMPERIAL VALLEY AND NEWMARK RESPONSE SPECTRA

(2% DAMPING)

1. El Centro Station 7 (1 km) \*/

- a) Imperial spectra exceeds out to 0.10 seconds period (above 10 cps) and also around 5 seconds (0.2 cps). \*\*/
- b) Imperial spectra exceeds at 0.8 seconds (1.2 cps) and between 2 and 10 seconds (0.5 cps to 0.1 cps). \*\*\*/
- c) Spectra's close between 3 and 6 seconds (0.3 cps to 0.2 cps) \*\*\*\*/

2. El Centro Station 6 (1 km)

- a) Imperial exceeds out to 0.25 seconds (above 4 cps) and between 3 and 6 seconds (0.3 cps to 0.2 cps).
- b) Spectra are close out to 0.10 seconds (above 10 cps) and Imperial exceeds between 2 and 20 seconds (0.5 cps to 0.05 cps).
- c) Spectra are close at 0.06 seconds (16 cps) and Imperial exceeds between 2 and 6 seconds (0.5 to 0.2 cps).

3. Bonds Corner (3 km)

- a) Imperial exceeds out to 0.10 seconds (above 10 cps).
- b) Spectra are close out to 0.15 seconds (above 6.7 cps). Imperial exceeds between 0.15 and 0.60 seconds (6.7 cps to 1.7 cps).
- c) Spectra are close at 0.13, 0.40, and 0.80 seconds (7.7 cps, 2.5 cps, 1.3 cps). Imperial exceeds between 8 and 9 seconds (0.1 cps).

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\* Distance to the nearest point on the 1940 Imperial Fault trace.

\*\* Vertical.

\*\*\* Horizontal - perpendicular to the fault.

\*\*\*\* Horizontal - parallel to the fault.



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4. El Centro Station 8 (4 km)

- a) No records available.
- b) Spectra close out to 0.13 seconds (above 8 cps), and Imperial exceeds between 3 and 8 seconds.
- c) Spectra close at 0.07 and 0.12 seconds. Imperial exceeds between 4 and 8 seconds.

5. El Centro Station 5 (4 km)

- a) Imperial exceeds the spectra out to 0.12 seconds, and both spectra touch at 5 seconds.
- b) Imperial exceeds between 2 and 20 seconds.
- c) Imperial exceeds between 2.5 and 10 seconds.

6. El Centro Differential Array (5 km)

- a) Imperial exceeds out to 0.10 seconds and between 4 and 6 seconds.
- b) Curves touch at 0.16 seconds. Imperial exceeds between 3 and 8 seconds.
- c) Spectra close at 0.15 seconds and curves touch at 6 seconds.

7. El Centro Station 4 (7 km)

- a) Imperial exceeds between 0.04 and 0.06 seconds, and again between 3 and 7 seconds.
- b) Imperial exceeds between 2 and 10 seconds.
- c) Spectra touch at 7 seconds.

8. Brawley Airport (7 km)

- a) Almost touches curve at 0.09 seconds.
- b) Exceeds between 3 and 6 seconds.
- c) Almost touches at 5 seconds.



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9. Holtville Post Office (8 km)

- a) Imperial exceeds between 0.04 to 0.08, approaches (touches) curve at 5 seconds.
- b) Exceeds between 7 and 8 seconds.
- c) Exceeds between 3 and 6 seconds.

10. El Centro Station 10 (9 km)

- a) Imperial slightly exceeds at 3 to 4 seconds.
- b) Exceeds between 3 and 8 seconds.
- c) Close between  $1\frac{1}{2}$  and 3 seconds, exceeds between 3 and 9 seconds.



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