UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

REQUEST FOR DIRECTED CERTIFICATION

The SAN LUIS OBISPO MOTHERS FOR PEACE, SCENIC SHORELINE PRESERVATION CONFERENCE, INC., ECOLOGY ACTION CLUB, SANDRA SILVER, GORDON SILVER, ELIZABETH APFELBERG, and JOHN J. FORSTER ("Joint Intervenors") hereby request that the United States Nuclear Regulatory Commission ("Commission") exercise its power of directed certification pursuant to 10 C.F.R. §2.718(i) to certify for its determination a question regarding application of the Commission's June 20, 1980 Statement of Policy, entitled "Further Commission Guidance for Power Reactor Operating Licenses," to the Diablo Canyon Nuclear Power Plant ("Diablo Canyon") licensing proceedings. This request arises out of the pending application of Pacific Gas and Electric Company ("PGandE") for a license to load fuel and conduct low power testing at the Diablo Canyon facility. In

D S03 S 1/1

opposition to that license application, Joint Intervenors seek to submit certain contentions which, although beyond the scope of requirements contained in NUREG-0694, "TMI-Related Requirements for New Operating Licenses," bear directly upon the fundamental question of safety of operation of the Diablo Canyon facility and upon the Commission's obligation to protect the health and safety of the public. Atomic Energy Act of 1954 ("AEA"), 42 U.S.C. §2133(d); 10 C.F.R. §50.57(a)(3) and (6).

Although in its June 20, 1980 Statement of Policy the Commission appeared to limit admissible contentions to those relevant to requirements encompassed in NUREG-0694, the Commission has given several indications since that statement was issued that it was intended not as a binding norm but simply as general guidance. Indeed, several members of the Commission have stated explicitly that in appropriate cases the Commission would consider the admissibility of contentions going beyond NUREG-0694 and reply on the merits. (See Point I infra.)

Joint Intervenors submit that this is such a case and hence that a determination by the Commission is both warranted and necessary as to the admissibility of certain contentions which they seek to litigate with respect to PGandE's pending low power testing application. Accordingly, based upon the above-described statements of the Commission members and in the interest of assuring the health and safety of the public, Joint Intervenors hereby request that the Commission direct certification of the following question for its consideration:

> Whether the following issues, in addition to those based on requirements encompassed in NUREG-0694, "TMI-Related Requirements for New Operating

Licenses," should be admitted as contentions with respect to PGandE's motion for an operating license to load fuel and conduct low power tests at the Diablo Canyon Nuclear Power Plant:

> 1. Numerous studies arising out of the accident at TMI recognized the necessity of upgrading emergency response planning. Based upon these studies, the Commission has promulgated revised emergency planning regulations, effective November 3, 1980. The Applicant has failed to demonstrate that the combined Applicant, state and local emergency response plans for Diablo Canyon comply with those revised regulations ("Final Regulations on Emergency Planning," 45 Fed. Reg. 55402 (August 19, 1980)).
>
> 2. Neither the Applicant nor the NRC staff has presented an accurate assessment of the risks posed by operation of Diablo Canyon, contrary to the requirements of 10 C.F.R. 51.20(a) and 51.20(d). The design of Diablo Canyon does not provide protection against so-called "Class 9" accidents. There is no basis for concluding that such accidents are not credible. Indeed, the staff has conceded that the accident at TMI-2 falls within that classification. Therefore, there is not reasonable assurance that Diablo Canyon can be operated without endangering the health and safety of the public.
>
> 3. The Applicant has failed to demonstrate compliance at Diablo Canyon with 10 C.F.R. Part 50, Appendix B, regarding quality assurance.

The basis for this request is set forth below.

I

IN VIEW OF THE EXCEPTIONAL CIRCUMSTANCES OF THIS CASE, RELEVANT SAFETY ISSUES NOT ENCOMPASSED IN NUREG-0694 SHOULD BE ADMITTED AS CONTENTIONS WITH RESPECT TO PGandE'S MOTION FOR A LICENSE TO LOAD FUEL AND CONDUCT LOW POWER TESTS

The compelling nature of the special circumstances surrounding the Diablo Canyon Nuclear Power Plant -- namely, the

confirmation, after construction had begun, of the existence of the Hosgri fault offshore and running within only a few miles of the plant -- renders the requirements listed in NUREG-0694, "TMI-Related Requirements for New Operating Licenses," insufficient to assure the safety of operation of the Diablo Canyon facility at either low or full power. Although the Commission, in its June 20, 1980 Policy Statement, 45 Fed.Reg. 41738, entitled "Further Commission Guidance for Power Reactor Operating Licenses," has deemed those requirements a "necessary and sufficient" response to the March 1979 accident at TMI, the Commission has explicity acknowledged in recent months that it will broaden the scope of permissible contentions in appropriate cases. In a letter dated June 30, 1980 to Congressman Morris Udall, Chairman of the House Committee on Interior and Insular Affairs, NRC Chairman Ahearne stated that the Commission's Policy Statement "does not in any way diminish intervenors' present rights to litigate TMI-related issues" before the Licensing Boards, but, in fact, effects a change "in the direction of permitting parties to raise more issues, not fewer." In order to allay fears that the rights of a party to raise relevant contentions would be improperly limited, the Chairman concluded:

> The Commission recognizes that a policy statement does not have the force and effect of law but merely indicates a policy which the Commission intends to apply in the future. In the future should any question be raised before the Commission itself under Appendix B regarding the validity of any part of the policy statement as applied to a particular case, the Commission recognizes its obligation to consider the question and reply on the state of the record before it.

More recently, in In Re Statement of Policy: Further Commission Guidance for Power Reactor Operating Licenses, ___ N.R.C. ___ (Nov. 3, 1980), Commissioners Ahearne and Hendrie reiterated this position, stating that "[t]o the extent that intervenors present sound reasons for the Commission to address the merits of their contentions . . . the Commission should consider all relevant matters -- e.g., the pleadings before it, NUREG-0694, etc. -- in determining whether the contention should be litigated." Id. at n.5. Commissioners Gilinsky and Bradford filed separate views in which they restated their opinions that any limitation of contentions based on NUREG-0694 and the June 20, 1980 Policy Statement would be not only unfair and unwise, but illegal.

Further consideration by the Commission is appropriate in this case. The unique potential for earthquake damage stemming from seismic activity of significant magnitude at the plant site mandates special attention to design and safety which other plants in less seismically active areas might not require. In ALAB-519, ___ N.R.C. ___ (January 23, 1979), the Appeal Board in this case recognized the exceptional nature of the circumstances surrounding Diablo Canyon:

> We have here a nuclear plant designed and largely built on one set of seismic assumptions, an intervening discovery that those assumptions underestimated the magnitude of potential earthquakes, a re-analysis of the plant to take the new estimates into account, and a post hoc conclusion that the plant is essentially satisfactory as is -- but on theoretical bases partly untested and previously unused for those purposes. We do not have to reach the merits of those findings to conclude that the circumstances surrounding the need to make them are

exceptional in every sense of that word.
(Id. at 12.) (Emphasis added.)

The significance of these circumstances must not be underestimated. Due to the extraordinary potential fcr earthquake damage to the plant and the area surrounding the site, this is not a case where safety issues can be neatly divided and separately considered for low and full power licensing as NUREG-0694 has been set up to accomplish. Although Joint Intervenors certainly do not dispute the Commission's finding that compliance with the requirements of NUREG-0694 prior to licensing is necessary. they submit that the public health and safety can be assured only if licensing of the facility is denied until the various Commission Boards have considered and resolved a number of safety related issues which Joint Intervenors seek to litigate as contentions in this proceeding. Accordingly, Joint Intervenors seek a determination by the Commission that these issues -- specifically relating to emergency response planning, Class 9 accident analysis, and quality assurance -- be admitted as contentions with respect to PGandE's motion for an operating license to load fuel and conduct low power testing. (The proposed contentions are set forth supra at 3.)

Chairman Ahearne's letter to Congressman Udall and the statements filed by Commissioners Ahearne, Hendrie, Gilinsky, and Bradford in In Re Statement of Policy etc., cited supra, indicate the Commission's understanding and intention that the June 20, 1980 Statement of Policy not be interpreted inflexibly or applied as a "binding limitation" on issues to be raised

in operating license proceedings. As Ahearne and Hendrie recognized in their statement of separate views in In Re Policy Statement, at 4:

> [W]e do not believe that . . . the Statement of Policy is likely to be viewed as having . . . "the same effect as that of a rule or regulation." The Statement of Policy is only an "announcement of what the agency seeks to establish as policy. A policy statement announces the agency's tentative intentions for the future." Pacific Gas & Electric Co. v. FPC, 506 F.2d 33, 38 (D.C. Cir. 1974). The Commission has changed nothing by the Statement of Policy itself, for it is a "pronouncement which acts prospectively . . ." American Bus Ass'n v. U.S., ___ F.2d ___ (D.C. Cir. No. 70-1207, June 25, 1980), slip op. at 9. The Statement of Policy genuinely leaves the agency free to exercise discretion. Regular Common Carrier Conference v. U.S., ___ F.2d ___ (D.C. Cir. No. 79-1249, June 30, 1980).

The failure of the Commission to submit the Statement of Policy for notice and comment as required by the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 553 et seq., clearly precludes its application as a substantive rule. Pacific Gas and Company v. Federal Power Commission, 506 F.2d 33, 38-39 (D.C. Cir. 1974); Guardian Federal Savings and Loan v. Federal Savings and Loan Insurance Corporation, 589 F.2d 658, 666 (D.C. Cir. 1978); Brown Express Inc. v. United States, 607 F.2d 695, 701 (5th Cir. 1979). To the extent that it might be interpreted to effect a change in the standard by which the Commission adjudicates substantive rights, it is invalid. Joseph v. United States Civil Service Commission, 554 F.2d 1140, 1153-54 (D.C. Cir. 1977); American Iron and Steel Institute v. Environmental Protection Agency, 568 F.2d 284, 292 (3d Cir. 1977); Dow Chemical, USA v. Consumer

Product Safety Commission, 459 F.Supp. 378, 390 (W.D. La. 1978); Crown Zellerbach Corp. v. Marshall, 441 F.Supp. 1110, 1119 (E.D. La. 1977); National Retired Teachers Ass'n v. United States Postal Service, 430 F.Supp. 141, 148 (D.D.C. 1977), aff'd, 593 F.2d 1360 (D.C. Cir. 1979); United States v. Daniels, 418 F.Supp. 1074, 1079 (D.S.D. 1976); Cerro Metal Products v. Marshall, 467 F.Supp. 869, 882 (E.D. Pa. 1979).

Thus, the law requires that Joint Intervenors be given an opportunity to challenge the Policy Statement to the extent that it proscribes contentions disputing the sufficiency for licensing purposes of the NUREG-0694 requirements. Such a limitation would plainly effect a significant change in the substantive rights of Joint Intervenors and other interested parties. The suggestion to the contrary by Commissioners Ahearne and Hendrie in In Re Statement of Policy, supra, that any limitation only restates existing policy established in Maine Yankee Atomic Power Co., ALAB-161, 6 AEC 1003, aff'd, 7 AEC 2 (1974), aff'd sub nom Citizens for Safe Power v. Nuclear Regulatory Commission, 524 F.2d 1291 (D.C. Cir. 1975), is a misstatement of the law. In Maine Yankee, the intervenors challenged the failure of the Licensing Board to make findings with respect to residual risks beyond the parameters of duly promulgated agency regulations and as to which, the Appeals Board found, "there has been an implicit Commission judgment that these risks are sufficiently low as not to represent a meaningful health and safety threat." The Court of Appeals affirmed the Licensing Board's issuance of an operating license and held that

> in the absence of some indication or showing on a case-by-case basis to the contrary, and subject to the weighing of risks-benefits under NEPA, it may be found that facilities complying with the rule[s] [automatically satisf[y] the 'reasonable assurance' and 'not inimical' tests]."

524 F.2d at 1299. Fundamental to this holding, however, was the court's finding that intervenors' failure to resort to the rule-making and amending procedures foreclosed their attack on the sufficiency of the regulations in an individual proceeding, absent a showing of special circumstances. Id. at 1300.

In this case, Joint Intervenors do not seek to litigate minimal residual risks beyond the scope of duly promulgated regulations. Quite the contrary, they seek to challenge the sufficiency of new TMI-related requirements with respect to which there has been no rulemaking and no opportunity to comment prior to their adoption by the Commission. In contrast to Maine Yankee, the issues in question here stem from the Class 9 accident at Three Mile Island and focus on the Commission's response to it. That event demonstrated graphically and irrefutably the inadequacy of existing Commission regulations and the need to establish additional, more stringent requirements, and it provided the impetus for numerous studies and reports which confirmed the urgent need for reform. In the face of lessons learned from TMI, any attempt by the Commission to rely upon existing regulations as a sufficient licensing standard would be ludicrous. As Commissioner Bradford stated recently in testimony concerning the Commission's Statement of Policy before the House Subcommittee on Environment, Energy and Natural

Resources, Committee on Government Operations:

> After Three Mile Island, the Kemeny Report, and other studies the Commission could not imaginably have continued to license on the basis of its pre-TMI regulations alone. It would have been jeered out of every legislative or judicial forum that it appeared before. Hence, its benign assertion that its policy statement is 'in the direction of permitting parties to raise more issues, not fewer' suggests nothing so much as the shopworn political adage that 'When you've got an angry mob after you, the thing to do is to walk a little faster and pretend you're leading a parade.'

In Re Statement of Policy, supra, Separate Views of Commissioner Bradford, n.1. The holding in Maine Yankee is in no way inconsistent with the right of interested parties to litigate the sufficiency of requirements as to which no notice and comment has been permitted.

Because the requirements embodied in NUREG-0694 and adopted by the Commission through its June 20, 1980 Statement of Policy alter the standard applicable to operating license applications by supplementing existing regulations, Joint Intervenors must be permitted to demonstrate the relevance of their contentions and are entitled to have them considered on their own merits by the Commission. Brown Express, Inc. v. United States, 607 F.2d at 701. For this reason, and recognizing the exceptional seismic danger associated with the Diablo Canyon plant, Joint Intervenors submit that the admission of relevant contentions beyond the requirements of NUREG-0694 is warranted.

II

ISSUES WHICH JOINT INTERVENORS SEEK TO RAISE AS CONTENTIONS IN THIS PROCEEDING ARE DIRECTLY RELEVANT TO THE SAFETY OF OPERATION OF THE DIABLO CANYON NUCLEAR POWER PLANT

The issues which Joint Intervenors seek to raise as contentions with respect to PGandE's motion to load fuel and conduct low power tests bear directly on the fundamental concern of safety of operation of the Diablo Canyon facility. As such, their adjuication prior to licensing of the plant at any level of power is essential. Power Reactor Development Company v. International Union of Electrical, Radio and Machine Workers, AFL-CIO, 367 U.S. 396, 397, 407-11, 81 S.Ct. 1529 (1961); In the Matter of Long Island Lighting Co. (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 844-45 (1973); 42 U.S.C. §2133(d); 10 C.F.R. §50.57(a)(3) and (6). These contentions (quoted supra at 3) focus on (1) the failure of PGandE to demonstrate compliance with the Commission's revised emergency planning regulations; (2) the failure of PGandE to demonstrate compliance with 10 C.F.R. Part 50, Appendix B, regarding quality assurance; and (3) the failure of of PGandE both to analyze the effects of a Class 9 accident at Diablo Canyon and to design the plant to withstand such an accident. Joint Intervenors submit that the failure to meet these contentions and resolve the safety issues with which they are concerned renders untenable the staff's basic conclusion in SER Supplement 10 (NUREG-0675) that PGandE has provided reasonable assurance that the Diablo Canyon facility can be operated safely

at low power. Moreover, as the discussion below indicates, the significance of these issues to plant safety has been recognized repeatedly in numerous reports and recommendations of responsible government agencies, particularly since the accident at TMI in March 1979. Because they are clearly relevant to safety, Joint Intervenors' contentions which are the subject of this application should be admitted in the Diablo Canyon low power testing proceeding.

A. Emergency Response Planning

The NRC staff's application of outdated and discredited emergency planning requirements to PGandE's request for an operating license to conduct low power tests is entirely inappropriate in this case. Three Mile Island demonstrated irrefutably the inadequacy of the emergency response planning requirements in effect at the time of that accident. Their inadequacy has been recognized as well by a number of government agencies and Commissions which have recommended significant changes. In December 1978, EPA and the NRC published a joint report to assist federal, state and local governments in formulating emergency response plans around nuclear plants. "Planning Basis for Development of State and Local Government Radiological Emergency Reserve Plants in Support of Light Water Nuclear Power Plants," NUREG-0396; EPA 520/1-78-016. In summary, the report concluded:

- A spectrum of accidents (not the source term from a single accident sequence) should be considered in developing a basis for emergency planning.

- The establishment of Emergency Planning Zones of about 10 miles for the plume exposure pathway and about 50 miles for the ingestion pathway is sufficient to scope the areas in which planning for the initiation of predetermined protective action is warranted for any given nuclear power plant.
- The establishment of time frames and radiological characteristics of releases provides supporting information for planning and preparedness.

Id. at 24. This joint task force report was endorsed by the Commission on October 23, 1979 (44 Fed.Reg. 61123).

On March 30, 1979, the General Accounting Office published a report entitled "Areas Around Nuclear Facilities Should Be Prepared for Radiological Emergencies," EMD-78-110. That report made the following recommendations to the NRC:

- Allow nuclear power plants to begin operation only where state and local emergency response plans contain all the Commission's essential planning elements. In addition, the Commission should require license applicants to make agreements with state and local agencies assuring their full participation in annual emergency drills over the life of the facility.
- Establish an emergency planning zone of about 10 miles around all nuclear power plants as recommended by the Environmental Protection Agency/Nuclear Regulatory Commission task force, and require licensees to modify their emergency plans accordingly.

Id. at V.

More recently, several major reports -- the "TMI-2 Lessons Learned Task Force Short Term Recommendations" (NUREG-0578), the "Report of the President's Commission on the Accident at Three Mile Island," and the Rogovin "Report to the Commissioners and to the Public on Three Mile Island" -- have identified emergency planning as an area in need of significant improvement. As a result, the NRC has promulgated new regulations -- effective November 3, 1980 -- for emergency planning in Appendix E of 10 C.F.R. Part 50. (45 Fed.Reg. 55402 (Aug. 19, 1980).) According to the preamble to the final regulations, the Commission instituted the reconsideration "in recognition of the need for more effective emergency planning and in response to the TMI accident and to reports issued by responsible offices of government and the NRC's oversight committees." Id. The preamble continues:

> In response to and guided by the various reports and public comments, as well as its own determination on the significance of emergency preparedness, the Commission has therefore concluded that adequate emergency preparedness is an essential aspect in the protection of the public health and safety.

Id. at 55404 (emphasis added). The introduction to Appendix E states that it "establishes minimum requirements for emergency plans for use in attaining an acceptable state of emergency preparedness." Id. at 55411 (emphasis added).

The NRC has informed operators and applicants that they must meet the new requirements. In a November 13, 1980 letter, the Director of the Office of Nuclear Reactor Regulation Division of Licensing, Darrell Eisenhut, notified operating

license applicants that

> Applicants should submit their radiological emergency response plans with their Final Safety Analysis Report and should submit their implementing procedures 180 days prior to scheduled issuance of an operating license. For applicants already at the operating license review stage, these plans should be submitted with sufficient lead time for staff review prior to the issuance of the Safety Evaluation Report supporting the NRC review of the application for operating license.
>
> The state of preparedness at and around your site will be determined by a review of your plan against the standards listed in 50.47(b), the requirements of 10 CFR 50, Appendix E issued in August 1980 and effective November 3, 1980, and the guidance found in the joint NRC/FEMA report, NUREG-0654/FEMA-REP-1, "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants," of January 1980.

According to an NRC News Release dated August 18, 1980, even owners of research or test reactors of 500 kilowatts or more -- only one percent of the low power test level proposed for Diablo Canyon -- will have to submit emergency plans complying with the revised rules. (6 NRC News Release #31, at 5 (August 18, 1980).)

In the face of this obvious consensus among concerned government agencies, the Commission's adoption of the outdated, discredited, and plainly inadequate requirements contained in NUREG-0694 as the standard to be applied to licensing for fuel loading and low power testing is completely inappropriate. Ignoring the lessons learned from TMI, NUREG-0694 requires compliance only with Reg. Guide 1.101 and the old version of Appendix E, both of which have been superceded, and on that basis the

staff, in SER Supplement 10, has concluded that PGandE's emergency plan provides sufficient assurance of safety for purposes of low power testing.

Those outdated requirements are materially deficient in that they do not require that state and local emergency plans be approved by the NRC prior to licensing. Thus, under NUREG-0694, a low power testing license may be issued without state and local plans having been prepared at all. Although the theoretical basis for the staff's conclusion that the requirements are adequate may be the belief that off-site emissions from a plant accident at low power will be minimal, no support for that premise has been supplied. Notwithstanding this, however, it ignores the very likely dangers which, in the event of a serious accident, may be posed to the public as a result of widespread panic or fear that substantial emissions from the disabled plant are unavoidable. Certainly, effective and tested emergency plans at the state and local levels are as essential in that case as they would be in the event of an accident at full power. Although the emissions themselves might pose a lesser hazard at low power, the public perception of danger may require equally effective emergency procedures. In addition, the dangers to workers on-site from a serious low power accident would in any event be substantial enough to require that all workers be evacuated as quickly as possible. Local plans would be critical in such a case.

Most important, the earthquake dangers associated with Diablo Canyon necessitate more stringent emergency procedures

staff, in SER Supplement 10, has concluded that PGandE's emergency plan provides sufficient assurance of safety for purposes of low power testing.

Those outdated requirements are materially deficient in that they do not require that state and local emergency plans be approved by the NRC prior to licensing. Thus, under NUREG-0694, a low power testing license may be issued without state and local plans having been prepared at all. Although the theoretical basis for the staff's conclusion that the requirements are adequate may be the belief that off-site emissions from a plant accident at low power will be minimal, no support for that premise has been supplied. Notwithstanding this, however, it ignores the very likely dangers which, in the event of a serious accident, may be posed to the public as a result of widespread panic or fear that substantial emissions from the disabled plant are unavoidable. Certainly, effective and tested emergency plans at the state and local levels are as essential in that case as they would be in the event of an accident at full power. Although the emissions themselves might pose a lesser hazard at low power, the public perception of danger may require equally effective emergency procedures. In addition, the dangers to workers on-site from a serious low power accident would in any event be substantial enough to require that all workers be evacuated as quickly as possible. Local plans would be critical in such a case.

Most important, the earthquake dangers associated with Diablo Canyon necessitate more stringent emergency procedures

because of the increased potential for a breach of containment at the site and destruction of roads and facilities off-site. Diablo Canyon, because it is more vulnerable to earthquake damage than virtually any other nuclear plant in the United States, poses a correspondingly higher risk of serious emissions, and particular attention to the sufficiency of its emergency plans is warranted as a result. Certainly, the recently revised Commission regulations, characterized in the introduction to Appendix E as the "minimum requirements for emergency plans for use in attaining an acceptable state of emergency preparedness," are essential. 45 Fed.Reg. 55411.

Joint Intervenors submit that the emergency planning requirements contained in NUREG-0694 are inadequate to protect the health and safety of the public. Their emergency response planning contention should be admitted in this proceeding with respect to PGandE's pending low power testing application.

B. Class 9 Accident Analysis

Diablo Canyon SER Supplement 10 contains no discussion of the effects of a Class 9 accident at the facility occurring after fuel loading and commencement of low power testing. Indeed, the consequences of an accident of such severity have never been addressed by the applicant or the NRC staff in connection with PGandE's operating license applications for Diablo Canyon. Although the Commission has in the past excluded consideration of core melt accidents on the premise that they were of such low probability that neither NEPA nor the AEA required their con-

sideration, the recent accident at TMI destroyed that premise and demonstrated that Class 9 accidents are far more than a mere theoretical possibility.

As a result, on June 13, 1980 the Commission issued a Statement of Interim Policy entitled "Nuclear Power Plant Accident Considerations Under the National Environmental Policy Act of 1969" (45 Fed.Reg. 40101) in which it withdrew the proposed Appendix D to 10 C.F.R. Part 50 -- which provided that the environmental effects of Class 9 accidents need not be considered in individual licensing proceedings -- and adopted the position that environmental impact statements

> shall include coordination of the site-specific environmental impacts attributable to accident sequences that lead to releases of radiation and/or radioactive materials, including sequences that can result in inadequate cooling of reactor fuel and to melting of the reactor core.

Id. This significant turnaround in policy was due not only to the TMI accident but also to the Commission's discovery that the accident probability estimates utilized in WASH-1400 on which it had previously based its Class 9 policy were greatly understated. Id. at 40102.

Last year the President's Council on Environmental Quality ("CEQ") initiated a study of the Commission's regulations and policy regarding the consideration of core melt accidents and their environmental consequences in its environmental impact statements. In a March 20, 1980 letter to Commission Chairman Ahearne, CEQ Chairman Speth described the Council's "very disturbing" findings that "[t]he discussion in these statements of potential

accidents and their environmental consequences was . . . largely perfunctory, remarkably standardized, and uninformative to the public, [containing] essentially identical, boilerplate language written in an unvarying format." The Council noted that Class 9 accidents, "which have the potential for greatest environmental harm and which have led to the greatest public concern," are not even considered, and it recommended that the Commission adopt a new policy "based on the sensible approach of discussing the environmental and other consequences of the full range of accidents that might occur at nuclear reactors, including accidents classified as Class 9."

On August 14, 1980, the CEQ Chairman again wrote Chairman Ahearne applauding the Commission's Statement of Interim Policy issued June 13, 1980 (discussed supra), but indicating the Council's strong disapproval of the Commission majority's assertion in the Interim Policy Statement that such new NEPA reviews "will lead to conclusions regarding the environmental risks of accidents similar to those that would be reached by a continuation of current practices. . . ." 45 Fed.Reg. 40103. This statement, Speth continued, "inappropriately prejudges the NEPA analysis yet to be performed on a site-by-site basis by staff [and is] contrary to the purposes of the NEPA to provide information which serves as a guide to the decision maker . . . ." The CEQ Chairman recommended that supplemental impact statements be prepared on the Class 9 issue and that these should "occur to the maximum extent possible where there is still time to correct earlier decisions based on the Commission's 'former erroneous

position on Class 9 accidents' (45 Fed.Reg. at 40103.)"

The foregoing recommendations of CEQ and the June 13, 1980 repudiation by the Commission of its "prior erroneous policy" on Class 9 accidents demonstrate plainly the need for (1) a thorough analysis of the consequences of such an accident at Diablo Canyon, and (2) redesign or modification of the facility where necessary prior to licensing for operations at either low or full power. This conclusion is mandated not only by the TMI accident and the consequent re-evaluation by government agencies of their official policies on the need for such studies, but, most importantly, by the special circumstances surrounding the Diablo Canyon plant itself (discussed supra). In view of the recognized danger of significant seismic activity in the vicinity of the Diablo Canyon site, the need for Class 9 accident analysis prior to licensing is more compelling with respect to Diablo Canyon than perhaps to any other comparable facility in the United States.

The Commission has a continuing obligation under the AEA and NEPA to review information which may indicate a need to reconsider or modify a construction permit or an operating license. 42 U.S.C. §2232(a); 40 C.F.R. §1502.9(c); Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission, 449 F.2d 1109, 1112 (D.C. Cir. 1971), cert. denied, 404 U.S. 942 (1972); Public Service Co. of New Hampshire v. Nuclear Regulatory Commission, 582 F.2d 77 (1st Cir. 1978), cert. denied, 439 U.S. 1046 (1979); Ft. Pierce Utilities Authority of the City of Fort Pierce v. United States Nuclear Regulatory Commission, ___ F.2d ___, ___ (D.C. Cir. 1979). Recognizing the Commission's

responsibility and the significance of the new developments arising out of the accident at TMI, Joint Intervenors submit that the special circumstances surrounding the Diablo Canyon facility warrant Class 9 analysis and, if necessary, plant modification prior to licensing of the plant. Accordingly, their Class 9 contention should be admitted in this proceeding and considered by the Licensing Board in opposition to PGandE's motion for a low power testing license.

C. Quality Assurance

NUREG-0694 is seriously deficient in that it inadequately addresses the issue of quality assurance. This deficiency is particularly significant in this case not only because of the additional level of stress to which piping and other plant components may be subjected as a result of increased seismic activity, but also because the Licensing Board has yet to issue any findings with respect to PGandE's compliance at the Diablo Canyon Nuclear Power Plant with the requirements of 10 C.F.R. Part 50, Appendix B, regarding quality assurance. Indeed, when Joint Intervenors sought to submit a contention in April 1977 challenging the adequacy of PGandE's quality assurance program at Diablo Canyon, the Licensing Board denied the motion, ruling instead that only those aspects of the quality assurance contention which related to seismic design could be raised. (Licensing Board Order, May 25, 1977.) Although the Board, on its own motion, requested that the NRC Staff and PGandE present evidence on the quality assurance program at the facility, its Partial

Initial Decision, issued on September 27, 1979, explicitly stated that "[i]t is not now known how the Lessons Learned from Three Mile Island-2 will impact on . . . Quality Assurance so [this] matter will be deferred and [is] not a part of this Partial Initial Decision." Id. at 9; 10 NRC at 459. Based on the Board's deferral of decision on this issue, even the NRC Staff has acknowledged that "a contention may be submitted as to how quality assurance experience from TMI will affect the low power testing application." "NRC Staff Response to Licensing Board's Order for Supplemental Positions on PGandE's Motion for Low Power Testing," September 25, 1980, at 15.

Since the Partial Initial Decision was issued in September 1979, there have been several significant developments which bear directly not only on PGandE's compliance with Appendix B of Part 50, but also on the adequacy of the Appendix B requirements generally. Arising out of the accident at TMI, numerous government reports have addressed the need for improvements in quality assurance programs. See, e.g., "Report of the President's Commission on the Accident at Three Mile Island";"Three Mile Island, A Report to the Commission and to the Public" (NUREG/CR-1250); "Report of Special Review Group, Office of Inspection and Enforcement, on Lessons Learned from Three Mile Island"(NUREG-0616); "TMI Action Plan" (NUREG-0660). For example, the "TMI Action Plan," which incorporates the findings of many of the studies conducted post-TMI, states the following quality assurance objective in Section I.F:

> Improve the quality assurance program for design, construction, and operations to provide greater assurance that plant design, construction, and operational activities are conducted in a manner commensurate with their imporatnce to safety.

In recognition of the need for increased attention to quality assurance, the Action Plan lists two categories of actions to be taken by the NRC: (1) expansion of the quality assurance lists, and (2) development of more detailed quality assurance criteria. These recommendations, as well as those of other studies, are virtually ignored by NUREG-0694 in its fuel loading and low power testing requirements.

The adequacy of PGandE's program at Diablo Canyon is brought into question by several other recent developments. First, in an April 17, 1980 letter to R. H. Engelken, Director of the NRC's Office of Inspection and Enforcement, Region Five, Richard Locke (PGandE) stated that a recent "as-built" audit conducted to "verify that actual configurations of safety-related piping agree with the models used to seismically analyze them" had uncovered a number of significant discrepancies. Specifically, Locke stated:

> The following types of discrepancies are typical of those found, in order of frequency of occurrence: valve weights not correct; weights of valve flanges not modelled; center of gravity of valve operator not adequately considered; support location differences of greater than one pipe diameter; supports missing or extra; presence of high density lead form or grout in penetrations; differences in pipe geometry; invalid assumptions in modeling of analysis endpoints; differences in insulation thickness and pipe diameter. It was decided that 49 of the 192 large diameter analyses and 8 of the 30 small diameter analyses had differences significant enough that the results were not obviously

> conservative and that they should be reanalyzed. This amounted to approximately a 26 percent reanalysis rate. In addition, there were 10 large diameter and 4 small diameter analyses for which differences were resolved by a field hardware change.

These discrepancies cast serious doubt upon the analyses conducted by both the NRC Staff and PGandE with respect to seismic design of the plant, and they represent a significant breakdown in PGandE's quality assurance program. At a minimum, it undercuts the finding of the Licensing Board in its September 27, 1979 Partial Initial Decision, at 92, that the "Staff review of the seismic design of the Diablo Canyon plant was the most extensive ever undertaken by the Staff of the NRC . . . [and] [t]he Applicant's review was also extraordinarily thorough."

Equally as significant, on August 28, 1980 PGandE submitted Amendment 85 to the FSAR which completely revised Chapter 17, regarding quality assurance. Due to the extensiveness of the changes, PGandE omitted vertical change bars normally included to identify less substantial revisions. This new chapter, together with the revelations contained in Locke's letter cited supra, renders of questionable validity any findings which the Licensing Board may ultimately issue based on the limited hearing conducted several years ago and demonstrates plainly the need for a closer and more thorough examination of PGandE's quality assurance program at Diablo Canyon. Certainly, PGandE should be required to demonstrate that its revised program complies with the requirements of Appendix B.

Several Atomic Licensing Appeals Boards have emphasized the prime importance of compliance with the Commission's quality assurance standards. For example, in Consumers Power Company (Midland Plant Units 1 and 2), ALAB-106, 6 AEC 182 (March 26, 1972), the appeals panel noted, "One of the most significant elements of the Commission's 'defense-in-depth' approach to nuclear safety is its emphasis upon quality assurance and quality control in the construction of nuclear power plants." Id. at 183. Another Appeals Board, in Duke Power Company (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-128, 6 AEC 399 (June 13, 1973), observed, "In an area as significant as quality assurance, the record should leave no doubt as to whether the applicant is in full compliance with applicable criteria and, if not, the basis upon which the regulatory staff authorizes any departure from such criteria." Id. at 410.

If a Licensing Loard is not reasonably assured that proper quality assurance practices have been or will be followed, it must act firmly to rectify the situation. In fact, the Appeals Board in Consumers Power Company, supra, stated that inadequate assurances regarding proper quality assurance practices provide grounds for an outright denial of a license. 6 AEC at 184. Significantly, the appeals panel in Duke Power Company, supra, stayed the Licensing Board's initial decision until the applicant clarified the quality assurance and other potentially conflicting responsibilities of the principal engineer.

Furthermore, when doubts arise regarding the quality assurance of certain design features, the Commission's boards are typically satisfied with the safety of the design feature only when the applicant does additional work to requalify the features in question to proper standards. For example, the Licensing Board in Consumers Power Company (Midland Plant Units 1 and 2), LBP 74-1, 8 AEC 584 (September 25, 1974), found that past quality assurance deficiencies regarding cadwelds did not justify revoking or suspending a construction license only because the applicant had requalified all prior cadwelds and implemented an extensive quality assurance program for all future cadwelds. Id. at 597-600. Similarly, in Commonwealth Edison Company (Zion Units 1 and 2), LBP-73-35, 6 AEC 861 (October 5, 1973), the Licensing Board found that a faulty quality assurance program for pipe welding no longer gave grounds for denying or staying an operating license, but only because the applicant and NRC staff had inspected most of the pipe welds in the plant, both visually and by magnetic particle methods, and had repaired the 121 welds that did not meet design specifications. Id. at 896.

These decisions recognize the importance of quality assurance in construction of a nuclear power plant and the necessity for requiring that the applicant demonstrate the adequacy of its program prior to licensing of a plant for operation. No such demonstration has been made in this case. Joint Intervenors submit that the unique seismic dangers surrounding the Diablo Canyon facility magnify the significance of quality

assurance and require that PGandE demonstrate compliance with Appendix B, prior to issuance of either a low power testing license or a full term operating license. Given the obvious relevance of this issue to the fundamental question of the plant's safety and considering the developments discussed above which have occurred since the brief hearings were held in late 1977, Joint Intervenors should be permitted to raise quality assurance as a contention in opposition to PGandE's motion for a low power testing license.

III

DIRECTED CERTIFICATION IS APPROPRIATE AND NECESSARY IN THIS INSTANCE

Directed certification is specifically authorized in 10 C.F.R. §2.718(i) which provides that questions may be certified to the Commission "on direction of the Commission." Exercise of that authority is particularly appropriate in this case for several independent reasons. First, subsequent to issuance of the Commission's June 20, 1980 Statement of Policy, each of the Commissioners has recognized his obligation and intention to consider on the merits the admissibility of relevant contentions challenging the sufficiency of the requirements of NUREG-0694. (See discussion supra at Point I.) In so doing, they gave notice that, although the Policy Statement will provide general guidance for the various Commission boards, intervenors have a right in appropriate proceedings to demonstrate to the Commission the soundness of their reasons for contending

that NUREG-0694 does not impose a sufficiently high standard of safety. Directed certification is a proper method to obtain an expeditious ruling from the Commission concerning matters as to which it has reserved the sole right of adjudication.

Second, no purpose would be served by pursuing the normal route of appeal because the Commission made plain in its June 20 Statement of Policy that while the boards may entertain contentions that the NUREG-0694 requirements are unnecessary, "they may not entertain contentions asserting that additional supplementation is required." Thus, neither the Licensing Board nor the Appeal Board is authorized to broaden the ambit of permissible contentions. Because an application by an intervenor seeking such a ruling would be futile unless made to the Commission itself, directed certification to the Commission is the only available course which can provide a meaningful opportunity to be heard.

Third, administrative efficiency and economy favor a prompt resolution of the question to be certified prior to commencement of the low power testing proceedings. If a determination is postponed until after discovery, a hearing, and appeals have been completed with respect to NUREG-0694 contentions, there exists a real risk that repetition of the entire process may be necessary to consider other contentions going beyond NUREG-0694 in the event that the Commission should ultimately find them admissible. Such duplication of proceedings

would needlessly waste both the time and resources of all parties and the NRC boards, and it would impose a particular strain on intervenors, whose financial resources are typically insufficient even in the normal case. In addition, the public's interest in health and safety will best be served by a prompt determination because the contentions in question bear directly on the fundamental question of plant safety. (See discussion supra at Point II.)

Finally, although any Commission decision regarding the admissibility of contentions will be made on a case-by-case basis, resolution of the question submitted for certification here will have certain precedential value of a more general nature as well in that it may provide further clarification of the June 20 Statement of Policy as applied by the Commission. This clarification would be instructive to parties in other proceedings in which similar issues have arisen.

Accordingly, Joint Intervenors submit that certification in this case is proper and should be directed by the Commission.

IV

CONCLUSION

For the reasons stated herein, Joint Intervenors request that the Commission (1) grant the certification applied for herein, and (2) issue an order directing that the proposed contentions which are the subject of this request be admitted

in the Diablo Canyon proceedings in opposition to PGandE's application for a license to load fuel and conduct low power testing.

Dated: December 3, 1980

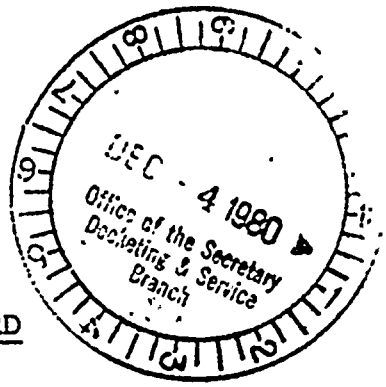
Respectfully submitted,

DAVID S. FLEISCHAKER, ESQ.
1735 Eye Street, N.W.
Washington, D.C. 20006
(202) 638-6070

JOHN R. PHILLIPS, ESQ.
JOEL R. REYNOLDS, ESQ.
Center for Law in the
Public Interest
10203 Santa Monica Boulevard
Fifth Floor
Los Angeles, CA 90067
(213) 827-5588

By 
JOEL R. REYNOLDS

Attorneys for Intervenors
SAN LUIS OBISPO MOTHERS FOR PEACE
SCENIC SHORELINE PRESERVATION CONFERENCE, INC.
ECOLOGY ACTION CLUB
SANDRA SILVER
GORDON SILVER
ELIZABETH APFELBERG
JOHN J. FORSTER



UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of December, 1980, I have served copies of the foregoing REQUEST FOR DIRECTED CERTIFICATION, mailing them through the U.S. mails, first class, postage prepaid.

Joseph M. Hendrie,
Commissioner
U.S. Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D.C. 20555

Victor Gilinsky,
Commissioner
U.S. Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D.C. 20555

Peter A. Bradford,
Commissioner
U.S. Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D.C. 20555

John F. Ahearne,
Chairman
U.S. Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D.C. 20555

Richard S. Salzman,
Chairman
Atomic Safety & Licensing
Appeal Board
U.S.Nuclear Regulatory
Commission
4350 East West Highway
Bethesda, Maryland 20014

Dr. W. Reed Johnson
Atomic Safety & Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
4350 East West Highway
Bethesda, Maryland 20014

Dr. John H. Buck
Atomic Safety & Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
4350 East West Highway
Bethesda, Maryland 20014

Elizabeth S. Bowers, Esq.
Chairman
Atomic Safety & Licensing
Board
U.S. Nuclear Regulatory
Commission
Mail Drop East West 450
Washington, D.C. 20555

Glenn O. Bright
Atomic Safety & Licensing
Board
U.S. Nuclear Regulatory
Commission
Mail Drop East West 450
Washington, D.C. 20555

Dr. Jerry R. Kline
Atomic Safety & Licensing Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Docket & Service Branch
Office of the Secretary
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

William Olmstead, Esq.
Marc R. Staenberg, Esq.
Edward G. Ketchen, Esq.
Office of the Executive Legal
Director - BETH 042
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Mrs. Elizabeth Apfelberg
1415 Cozadero
San Luis Obispo, CA 93401

Mr. Fredrick Eissler
Scenic Shoreline Preservation
Conference, Inc.
4623 More Mesa Drive
Santa Barbara, CA 93105

Sandra A. Silver
1760 Alisal Street
San Luis Obispo, CA 93401

Gordon Silver
1760 Alisal Street
San Luis Obispo, CA 93401

David S. Fleischaker, Esq.
1735 Eye Street, N.W.
Washington, D.C. 20006

Bruce Norton, Esq.
3216 N. Third Street
Suite 202
Phoenix, Arizona 85012

Mr. Yale I. Jones, Esq.
100 Van Ness Avenue
19th Floor
San Francisco, CA 94102

Andrew Baldwin, Esq.
Friends of the Earth
124 Spear Street
San Francisco, CA 94105

Paul C. Valentine, Esq
321 Lytton Avenue
Palo Alto, CA 94302

Janice E. Kerr, Esq.
Lawrence Q. Garcia, Esq.
J. Calvin Simpson, Esq.
California Public Utilities Commission
5246 State Building
350 McAllister Street
San Francisco, CA 94102

Malcolm H. Furbush, Esq.
Vice President and General Counsel
Philip A. Crane, Esq.
Pacific Gas & Electric Company
P. O. Box 7442
San Francisco, CA 94106

Arthur C. Gehr, Esq.
Snell & Wilmer
3100 Valley Center
Phoenix, Arizona 85073

Mrs. Raye Fleming
1920 Mattie Road
Shell Beach, CA 93449

MHB Technical Associates
1723 Hamilton Avenue
Suite K
San Jose, CA 95125

Carl Nieburger
Telegram Tribune
P. O. Box 112
San Luis Obispo, CA 93402

Byron Georgious, Esq.
Legal Affairs Secretary to the Governor
State Capitol Building
Sacramento, CA 95814

Herbert H. Brown, Esq.
Hill, Christopher & Phillips
1900 M Street, N.W.
Washington, D.C. 20036

Joel R. Reynolds, Esq.