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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 Plant,)
Units 1 and 2))

Docket Nos. 50-275 OL
50-323 OL

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NRC STAFF RESPONSE TO LICENSING BOARD'S
ORDER FOR STATUS OF REQUEST TO DEFER RULING

INTRODUCTION

In response to a motion filed in this proceeding by San Luis Obispo Mothers for Peace, Scenic Shoreline Preservation Conference, Inc., Ecology Action Club, Sandra Silver, Gordon Silver, Elizabeth Apfelberg, and John J. Forster (hereinafter referred to as "Joint Intervenors") on May 9, 1979, the NRC Staff filed a response on May 24, 1979 requesting this Board to defer ruling pending completion of the Staff inquiry and report as to the effects of the TMI accident on the Diablo Canyon proceeding. In an Order dated June 5, 1979, the Board deferred ruling pending receipt of the Staff's report. On December 17, 1980, following a number of developments which will be discussed infra, the Board issued an Order directing the Staff to inform the Board if the Staff position continues to be for the Board to defer ruling on the motion. For the reasons indicated below, the Staff believes that the Board is now able to take further action in this proceeding on the motion to reopen and TMI-related matters.

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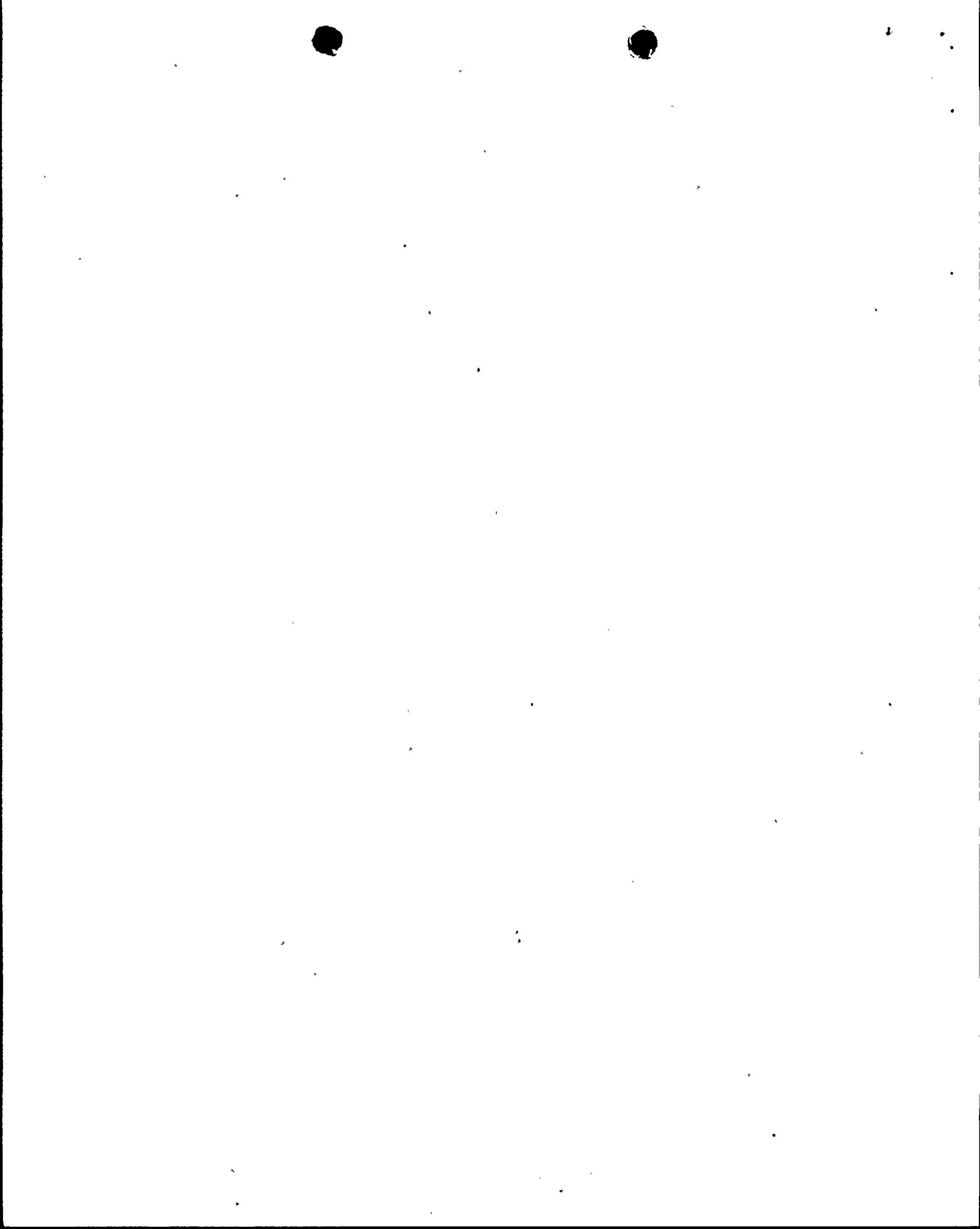
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II. DISCUSSION

A. Background

This Board issued an Order dated June 5, 1979 deferring its ruling on Joint Intervenors' motion to reopen the proceeding on "class 9" and emergency planning issues until it received the Staff's report on the effects of the Three Mile Island accident on the Diablo Canyon operating license application. A year later, the Nuclear Regulatory Commission issued a "Statement of Policy for Further Commission Guidance for Power Reactor Operating Licenses" dated June 20, 1980. That policy statement referenced a document dated June 1980 entitled "TMI-Related Requirements for New Operating Licenses" (NUREG-0694). Subsequently, the Applicant filed a motion dated July 14, 1980 requesting authorization from this Board for fuel loading and low power testing pursuant to 10 C.F.R. 50.57(c) and the Commission's Policy Statement. In its August 6, 1980 response to the motion, the Staff suggested that the Board and the parties should begin the process of examining the adequacy of the Applicant's proposal. (Staff Response p. 3) Accompanying the Staff's response was its SER Supplement Number 10 which addressed the status of Applicant's compliance with NUREG-0694 and the Commission's Policy statement insofar as low power test requirements were concerned. As indicated at p. 6 of the Staff's response, the Staff deems Supplement 10 to be a sufficient basis for this Board to go forward on the low-power test application. As such the report serves as the Staff's report on the effects of the Three Mile Island accident on the Diablo Canyon fuel load and low power test operating license application. Therefore the Board can rule on the Intervenor's motion to reopen in so far as it is relevant to low-power test



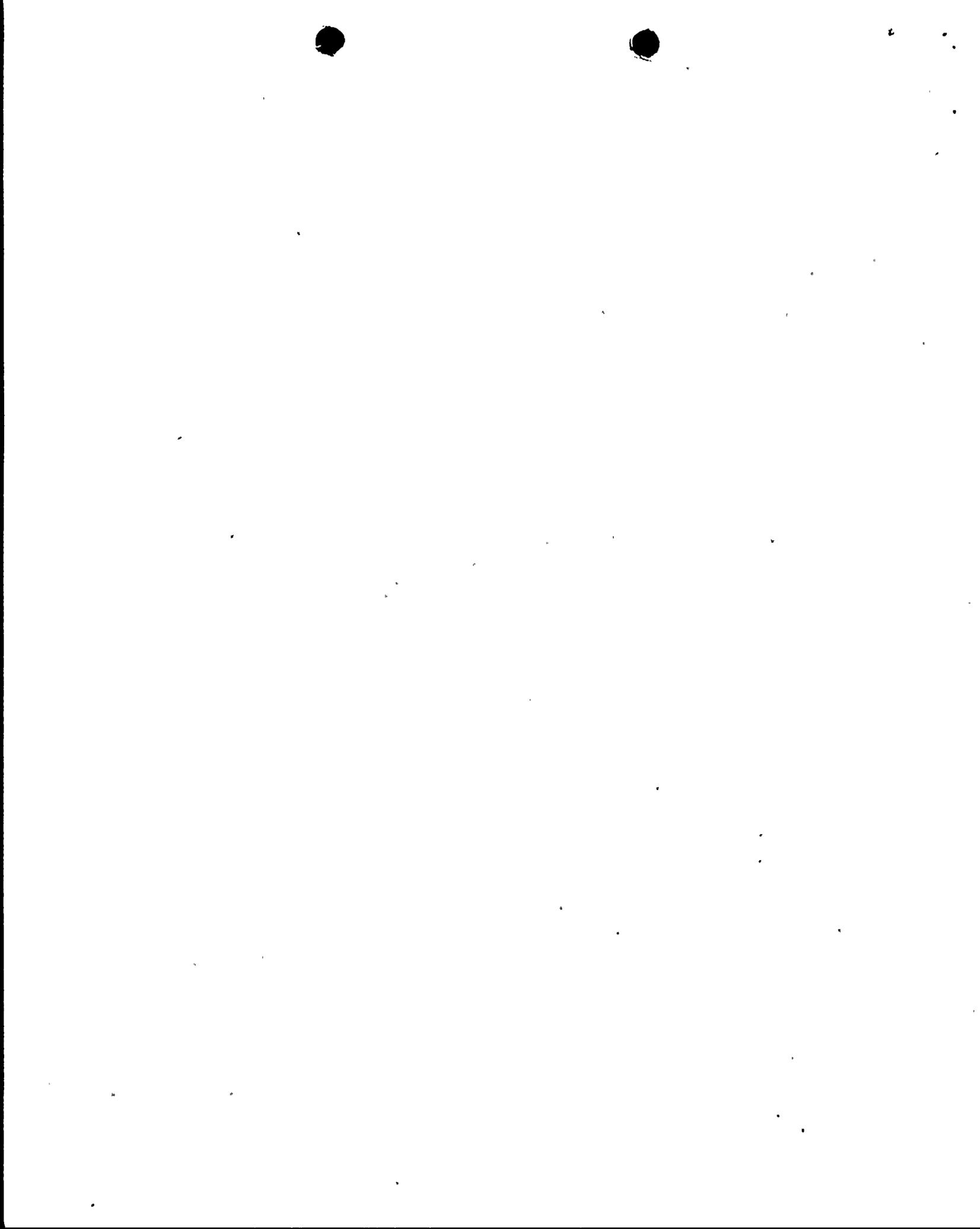
requirements. The Board's ruling, of course, should be in accordance with the Commission's Revised Policy Statement. Therefore, a discussion of the status of the Commission's policy statements on licensing requirements relevant to the Three Mile Island accident is necessary.

B. Commission Policy Statements

On December 3, 1980, a "Request for Directed Certification" ("Request") was filed before the Nuclear Regulatory Commission ("Commission") by the Joint Intervenors. The Joint Intervenors requested directed certification of the following question:

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 [Applicant's] motion for an operating license to load fuel and conduct low power tests at the Diablo Canyon Nuclear Power Plant....

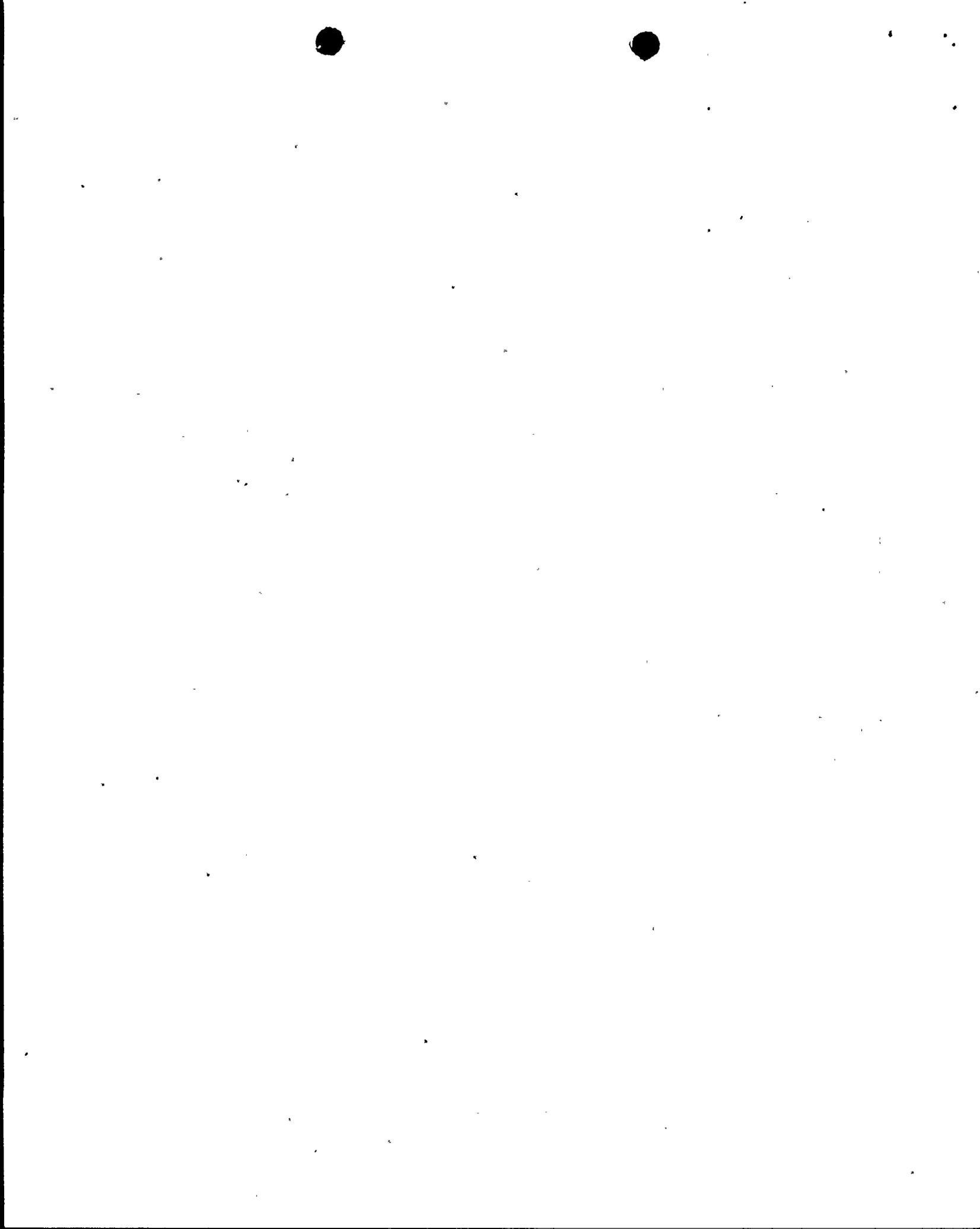
(Request, at 2-3). The issues identified by the Joint Intervenors consist of three contentions (relating to emergency planning, "Class 9" accidents, and quality assurance) alleged to be beyond the scope of requirements contained in NUREG-0694, "TMI-Related Requirements for New Operating Licenses" (Request, at 2). As is apparent, two of these contentions, emergency planning and "Class 9" are the same issues on which Joint Intervenors grounded their motion to reopen on which this Board has deferred ruling. The Joint Intervenors contended, in essence, that they were presently precluded from litigating these three contentions by the Commission's Statement of Policy dated June 20, 1980, entitled "Further Commission Guidance for Power Reactor Operating Licenses" (45 Fed. Reg. 41738) ("Statement of Policy") (Request, at 2, 27-28), and they requested that the Commission "(1) grant the certification applied



for ..., and (2) issue an order directing that the proposed contentions which are the subject of this request be admitted" in the low power test proceeding pending before the Licensing Board (Request, at 29).

Shortly after the Joint Intervenors filed their request for directed certification, the Commission issued a "Revised Statement of Policy", entitled "In re Statement of Policy: Further Commission Guidance for Power Reactor Operating Licenses," CLI-80-42, _____ NRC _____ (Dec. 18, 1980), 45 Fed. Reg. 41738. Immediately following the issuance of the revised policy statement, the Commission acted on Joint Intervenors' request in an order dated December 19, 1980. The Commission denied the request for directed certification and stated that the Licensing Board now has the authority to rule on the matters raised by Joint Intervenors in view of the revised statement of policy.

The Staff does not concur in the Joint Intervenors' statement in their request for directed certification that the Commission's June 20, 1980 Statement of Policy necessarily precludes the litigation of the subjects that Joint Intervenors identified. In fact, in a document captioned "Joint Intervenors' Response to Governor Brown's Motion to Stay Proceeding" dated December 18, 1980, Joint Intervenors state a contrary position at page 5. However, the Revised Statement of Policy removes any basis for the Joint Intervenors' Request, in that it is now clear that the Commission's Revised Statement of Policy does not preclude the litigation of such contentions, if the Joint Intervenors are able to make the showings required by the Commission's regulations concerning the admissibility of contentions.



On October 2, 1980, after responses to the Applicant's Motion had been filed, the Licensing Board issued its "Order Relative to PG and E's Motion for Low Power Testing" ("Order"). In its Order, the Licensing Board determined that the Applicant's Motion met "the minimal requirements to commence the proceeding" and that "the Licensing Board need not wait until the Appeal Boards have issued their decisions on the security and seismic issues before proceeding with preliminary matters as well as the hearing on fuel loading and low power testing" (Order, at 1). Also, the Licensing Board approved the Staff's identification of "the issues to be considered,"^{1/} and concurred with the Staff's suggestion "to defer considering Class 9 accidents until the Appeal Board reaches a conclusion on the seismic issue" (*id.*). Contentions "relative to fuel loading and low power testing" were directed to be filed by October 27, 1980 (*id.*, at 2); the deadline for the filing of contentions was subsequently extended to December 3, 1980.^{2/}

In accordance with the Licensing Board's Order, and simultaneously with their filing of their Request for Directed Certification, on December 3,

^{1/} The Staff had identified the relevant issues as those matters in controversy which are "already in issue in the full power application plus any contentions submitted concerning the low power test requirements set forth in NUREG-0694 ... which the Commission has noted in its Statement of Policy are 'necessary and sufficient for responding to the TMI-2 accident.'" "NRC Staff Response to Licensing Board's Order for Supplemental Positions on PG&E's Motion for Low Power Testing," dated September 25, 1980, at 6. Further, the Staff identified matters other than NUREG-0694 which affect this low power application, as "those pending matters as to which findings are still required for Diablo Canyon," including "the seismic issue, the security issue, the radon or Table S-3 issue, the emergency planning issue, the Class 9 issue, and quality assurance" (*id.*, at 10; footnotes omitted).

^{2/} "Order Granting Additional Time for Contentions Relative to Full Loading and Low Power Testing," dated October 24, 1980, at 2.



1980, the Joint Intervenors filed with the Licensing Board their "Statement of Contentions." In their Statement of Contentions, the Joint Intervenors set forth 27 separate contentions, including the three contentions as to which they sought "directed certification". Those three contentions are as follows:

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)) (Statement of Contentions, Contention 4, pp. 2-3).
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 CFR 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 (Statement of Contentions, Contention 19, p.8).
3. The Applicant has failed to demonstrate compliance at Diablo Canyon with 10 C.F.R. Part 50, Appendix B, regarding quality assurance. (Statement of Contentions, Contention 3, p.2).

(Request, at 3).^{1/} As discussed supra at p. 3, the Joint Intervenors' Request for Directed Certification was premised exclusively on the belief that the

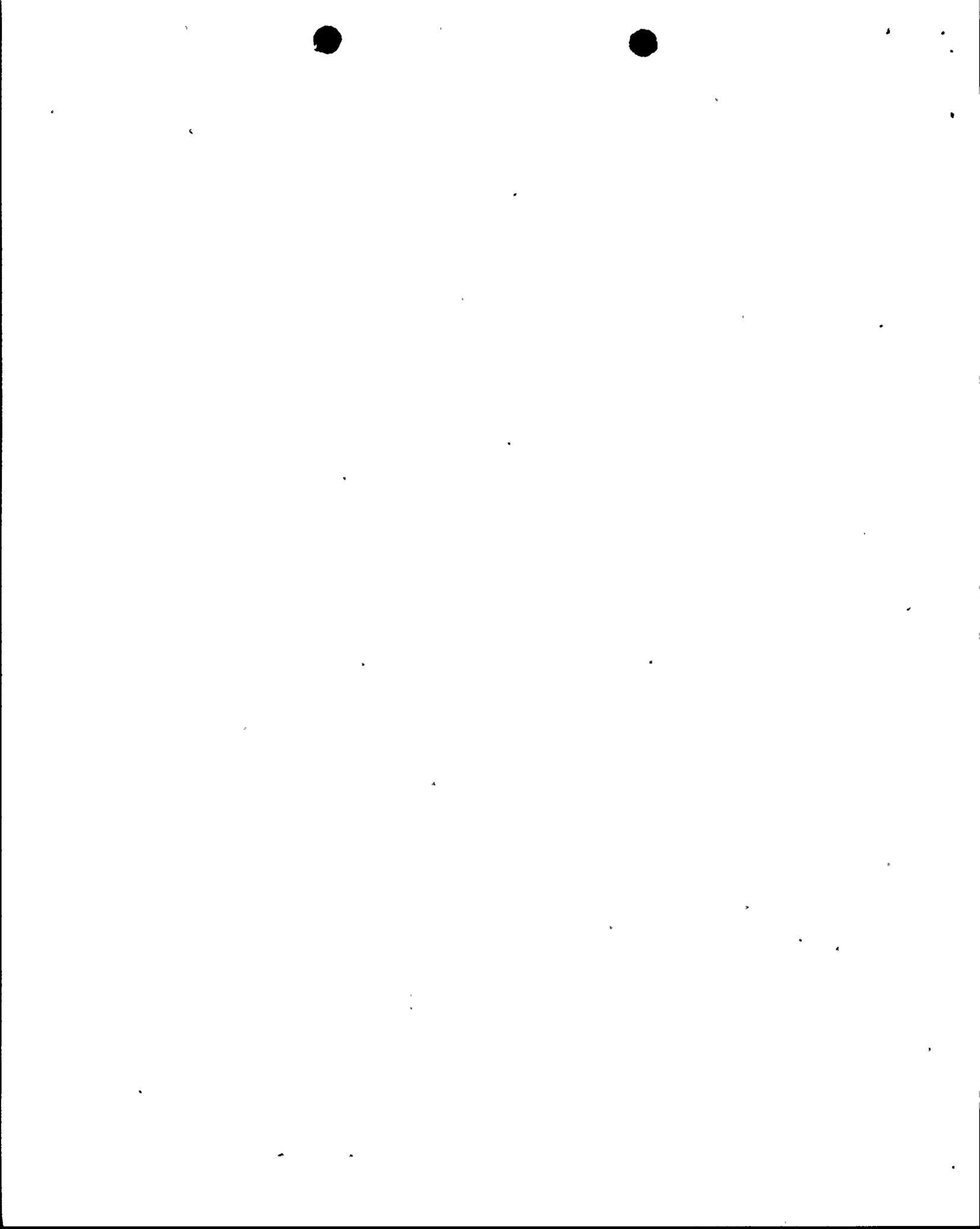
^{1/} The Staff filed with the Licensing Board its response to the Joint Intervenors' Statement of Contentions. "NRC Staff's Response to Intervenors' Statement of Contentions Relative to Fuel Loading and Low Power Testing," on December 23, 1980. Upon a review of the three contentions which are the subject of the Joint Intervenors' Request, it is not clear to Staff that they seek to impose requirements beyond those imposed by NUREG-0694. See discussion infra, at _____.



Commission's June 20, 1980 Statement of Policy might preclude the Licensing Board from considering the three contentions which are the subject of their Request (Request, at 2, 8, 28). That Statement of Policy, in pertinent part, had provided that Licensing Boards "may not entertain contentions asserting that additional supplementation is required" beyond the supplemental requirements contained in NUREG-0694.

On December 18, 1980, the Statement of Policy -- which formed the basis for the Joint Intervenors' Request -- was revised, resulting in a clarification of the issues which may be addressed in proceedings before the Licensing Boards. Thus, the Revised Statement of Policy notes that the Commission has "approved a 'Clarification of TMI Action Plan Requirements', now contained in NUREG-0737, which supersedes NUREG-0694" (Revised Statement of Policy, at 5; emphasis added). The Commission determined that "the list of TMI-related requirements for new operating licenses found in NUREG-0737 can provide a basis for responding to the TMI-2 accident" (id., at 6), and that litigation over the sufficiency or necessity of those requirements is to be permitted by the Licensing Boards, as to both (1) requirements that "interpret, refine or quantify the general language of existing regulations" and (2) requirements that "supplement the existing regulations by imposing requirements in addition to specific ones already contained therein" (id., at 7):

Insofar as the first category--refinement of existing regulations--is concerned, the parties may challenge the requirements as unnecessary on the one hand or insufficient on the other within the limits of existing regulations. Insofar as the second category--supplementation of existing regulations--is concerned, the parties may challenge either the necessity for or sufficiency of such requirements. (Id., at 7-8).

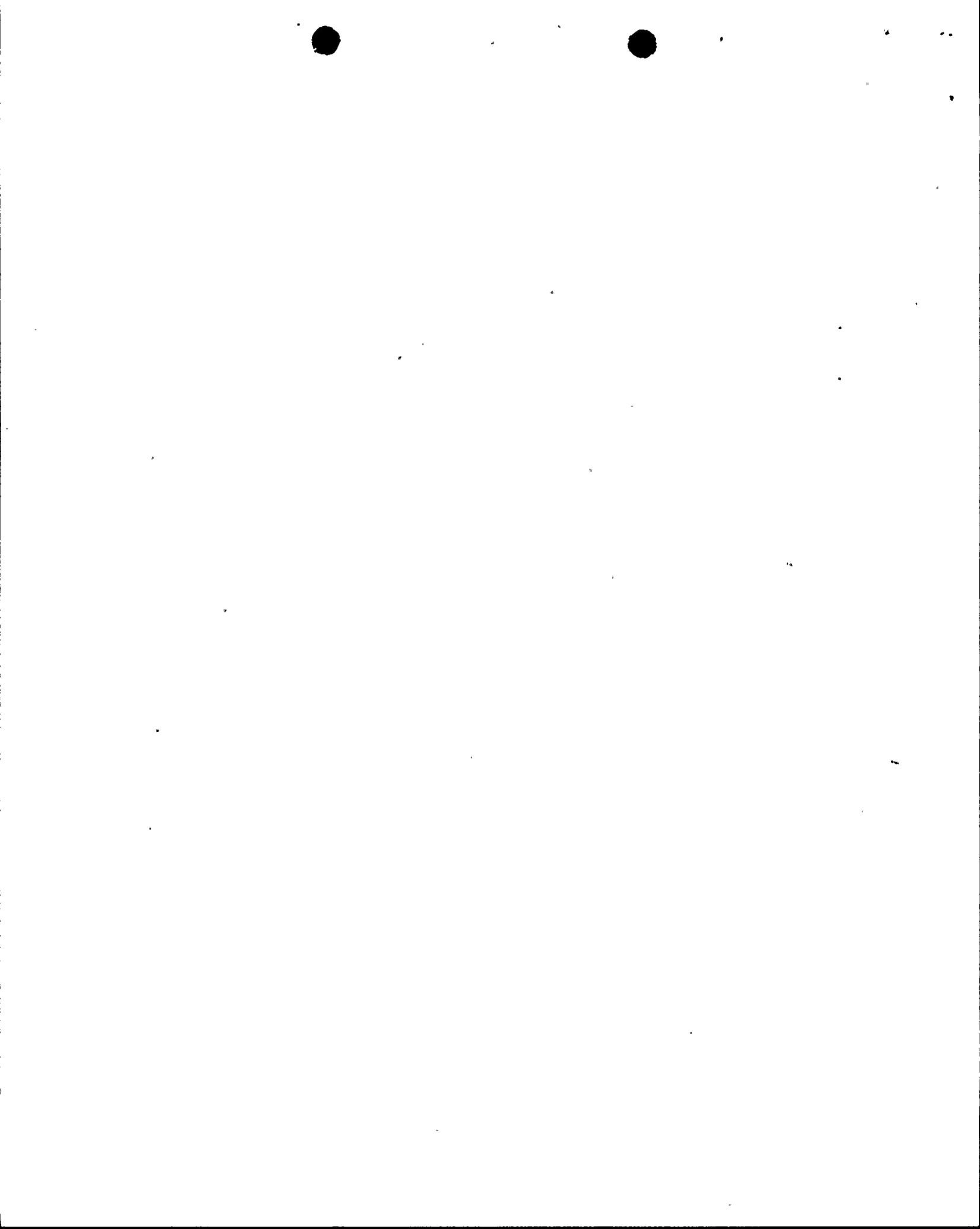


In the Staff's view, the Commission's recent promulgation of the Revised Statement of Policy would permit the Licensing Board to accept the Joint Intervenors' three contentions for litigation--notwithstanding the Commission's former Statement of Policy--in the event that the Licensing Board determines that those contentions are otherwise admissible for litigation pursuant to 10 CFR §§ 2.714 and 50.57(c).^{7/}

C. The Joint Intervenors' Contentions

Since the Board is now clearly directed by the Commission's revised statement of policy to consider TMI-related issues and their relationship to issues in the Diablo proceeding, the Staff believes that the Board properly determined to treat the Joint Intervenors' motion to reopen the proceeding on "Class 9" and emergency planning issues as part of the Board's consideration of recently filed responses to PG&E's motion for low power test authorization. First, as to the Joint Intervenors' "Class 9" contention, the Staff is of the view that the contention is wholly unaffected by the Commission's Revised Statement of Policy, in that it does not assert the need for any requirement beyond those raised in NUREG-0694 (now superseded by NUREG-0737), nor does it challenge the sufficiency of the post-TMI requirements imposed by the Commission. Rather, the "Class 9" contention at issue here is governed by another pronouncement--the Commission's "Statement of Interim Policy",

^{7/} The Licensing Board has not yet had an opportunity to determine whether and to what extent the Joint Intervenors' contentions are litigable under existing regulations and Commission policy. In our view, the Commission's existing regulations, NUREG-0737, and the Revised Statement of Policy provide the Licensing Board with adequate guidance in these matters.



"Nuclear Power Plant Accident Considerations Under the National Environmental Policy Act of 1969," 45 Fed. Reg. 40101 (June 13, 1980). Pursuant to the Commission's Statement of Interim Policy, where, as here, the Staff has already issued a Final Environmental Impact Statement,^{1/} the Statement of Interim Policy is not to be relied upon "absent a showing of ... special circumstances, as a basis for opening, reopening, or expanding any previous or ongoing proceeding." As a consequence, any showing of special circumstances or site-specific issues sufficient to warrant consideration of Class 9 accidents should be made pursuant to the interim policy statement. As the Staff indicated in its response to contentions, it does not believe Joint Intervenors have made such a showing at this time. The Licensing Board's October 2, 1980 decision to defer ruling on any special circumstances showing until the Appeal Board issues a decision on seismic issues should control disposition of this matter.

To the extent that Joint Intervenors' emergency planning and quality assurance contentions would impose requirements beyond those contained in NUREG-0694 (now superseded by NUREG-0737), pursuant to 10 CFR § 50.57(c), the Licensing Board should review those contentions and determine, a priori, whether and to what extent the contentions raise matters relevant to the

^{10/} U.S. Atomic Energy Commission, Directorate of Licensing, "Final Environmental Statement Related to the Nuclear Generating Station, Diablo Canyon Units 1 and 2" (May 30, 1973) (38 Fed. Reg. 14183), as supplemented by U.S. Nuclear Regulatory Commission, Office of Nuclear Reactor Regulation, "Addendum to the Final Environmental Statement for the Operation of the Diablo Canyon Nuclear Plant Units 1 and 2" (May 28, 1976) (41 Fed. Reg. 22895). A Partial Initial Decision on environmental issues was issued by the Licensing Board on June 12, 1978. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-78-19, 7 NRC 989 (1978).



motion for low power testing. Thus, 10 CFR § 50.57(c) provides that, in an operating license proceeding where the applicant has moved for authorization of low power testing, the following procedure shall be employed:

Action on such a motion by the presiding officer shall be taken with due regard to the rights of the parties to the proceeding, including the right of any party to be heard to the extent that his contentions are relevant to the activity to be authorized. Prior to taking any action on such a motion which any party opposes, the presiding officer shall make findings on the matters specified in paragraph (a) of this section as to which there is a controversy, in the form of an initial decision with respect to the contested activity sought to be authorized.

10 CFR § 50.57(c) (emphasis added).

Accordingly, it is clear that a preliminary determination must be made by the Licensing Board as to whether and to what extent the Joint Intervenors' contentions are relevant to the motion seeking low power testing authorization. That determination must rest upon the parties' responses now in the Board's hand concerning the proposed contentions in connection with the limited authorization sought by the Applicant.

D. Status of Staff Reports

As the Staff indicated in its August 6, 1980 "Response to PG&E's Request for Low Power Test License and Comments on Intervenors' Motion to Reopen Record on Class-9 and Emergency Planning Issues", the SER Supplement Number 10 is not the final Staff review of TMI matters. However, it does represent the Staff's position on the status of matters required by the Commission's Revised Policy Statement to be taken into consideration when



considering fuel loading and low power test issues. The Staff still plans to issue a SER supplement in March which will document the Staff's review of all TMI-related matters on which consideration is required in connection with the Diablo Canyon full-term operating license. The Staff noted its view in its response that action on emergency planning issues as requested in the Joint Intervenors' motion to reopen was not ripe since the Applicant had met the NUREG-0694 (now NUREG-0737) requirements for low power authorization and that the consideration sought by Joint Intervenors was not appropriate until full power issues were under consideration. (Staff Response p. 9.) However, Joint Intervenors and the Governor have filed contentions on the low power application which involve emergency planning which will require Board action pursuant to the Revised Policy Statement and NUREG-0737.

On Class 9 issues, the Staff cited the Commission's Statement of Interim Policy on Class 9 Accidents and noted that special circumstances would have to be demonstrated by Joint Intervenors before the Class 9 record could be litigated in this proceeding. (Staff Response pp. 9-10) In its Response to Licensing Board's Order for Supplemental Positions on PG&E's Motion for Low Power Testing" dated September 25, 1980, the Staff further suggested, however, that since resolution of the seismic issues was still pending before the Appeal Board, the issue of special circumstances should be left open temporarily pending resolution of the reopened seismic hearings before the Appeal Board. (Supplemental Response pp. 14-15)

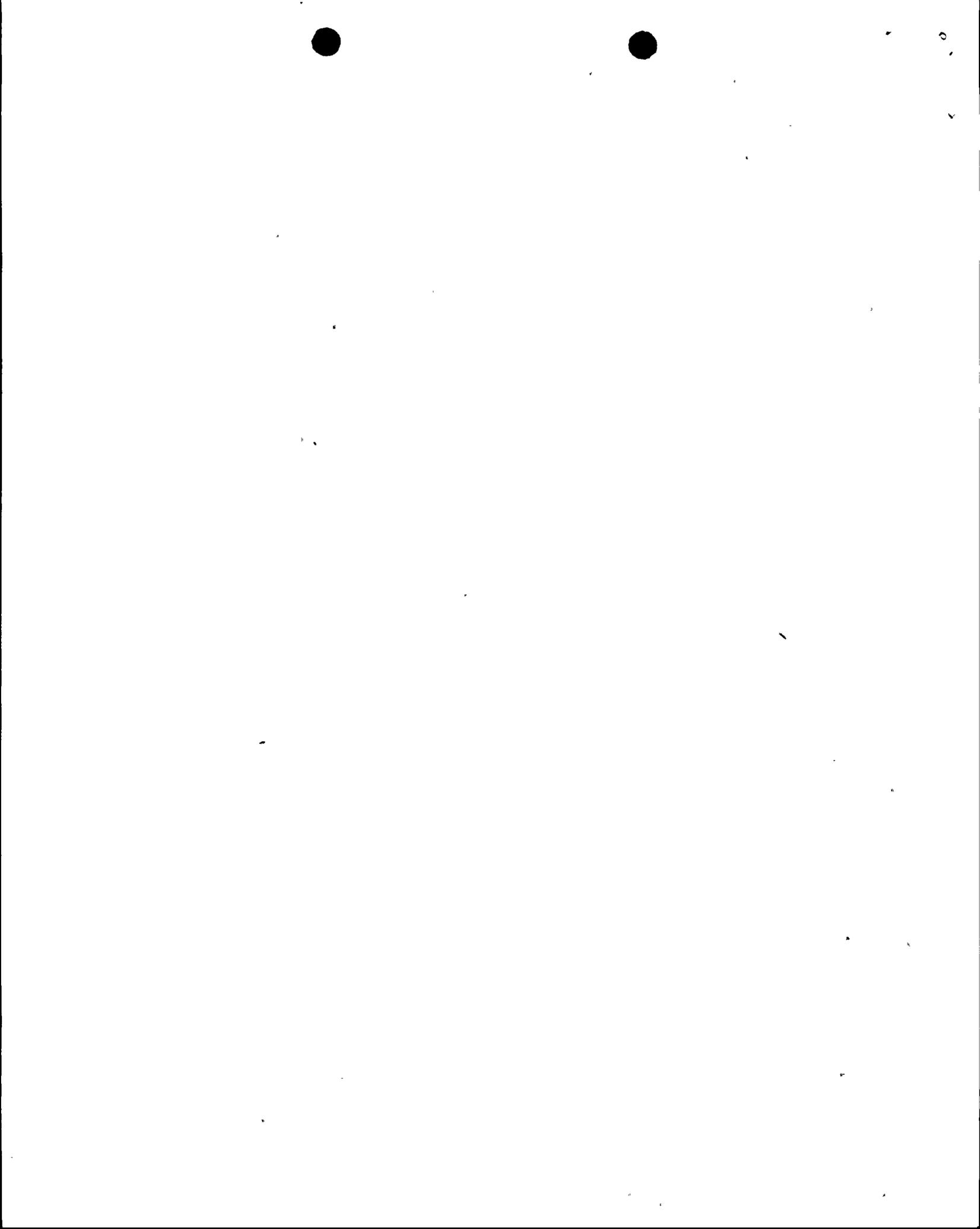
In its October 2, 1980 "Order Relative to PG and E's Motion for Low Power Testing" the Board approved the Staff's identification of the issues to be considered and concurred with the Staff's suggestion to defer consid-



eration of the Class 9 portion of Joint Intervenors' motion to reopen until the Appeal Board reached a decision on seismic issues.

In summary, the Board, by approving the statement of issues as set forth by the Staff has agreed that the portion of Joint Intervenors' motion to reopen on emergency planning issues not relevant to those items in NUREG-0737 designated for accomplishment prior to fuel load should be ruled upon at the time the Operating License issues required to be addressed by NUREG-0737 are before it. The Board has deferred ruling on the Class 9 portion of the motion until after the Appeal Board has acted on seismic issues. The consequence of these events is that the Board has acted further on Joint Intervenors' motion to reopen, although it has yet to decide the motion finally. All of these activities have been pursued by the Staff and the Board in accordance with the Commission's previous Policy Statement.

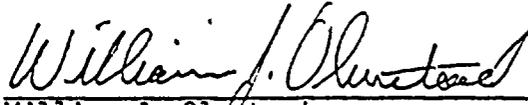
The Board should consider the current contentions before it in light of the Commission's Revised Statement of Policy. In this regard, while the parties are free to challenge the necessity or sufficiency of the Commission's requirements as set forth in NUREG-0737, they must do so pursuant to the Commission's Revised Statement of Policy. Consequently, Joint Intervenors effort to challenge the sufficiency of the NUREG-0737 requirements should include a statement demonstrating (1) the nexus of the issue to the TMI-2 accident, (2) the significance of the issue, and, (3) any difference between their position and the rationale underlying the Commission consideration of additional TMI-related requirements. The Staff does not believe the Joint Intervenors have made a sufficient showing on Class-9 accidents or emergency planning to justify a departure from the Board's earlier rulings concerning these matters with regard to PG&E's low power testing motion.



III. CONCLUSION

In view of the foregoing discussion, the Staff believes the Board has made additional rulings relevant to Joint Intervenors' Motion to Reopen and that those rulings are consistent with the Commission's Policy Statement. The Board has decided to defer ruling finally on Joint Intervenors' motion on Class-9 issues until issuance of the Appeal Board's decision on seismic matters. The Board also agreed with the Staff's position that emergency planning issues should be considered in light of the requirements identified in NUREG-0737 (formerly NUREG-0694). At present no emergency planning contentions have been admitted concerning requirements which must be litigated prior to acting on Applicant's low power test motion. The Board, of course, must consider this latter issue in light of the Commission's Revised Statement of Policy when the Board rules on Joint Intervenors' recent contentions. The Staff's position, therefore, is that its request to defer has been modified by its subsequent filings and associated Board rulings but that a final ruling on Joint Intervenors' motion is not yet possible and should continue to be deferred.

Respectfully submitted.



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Dated at Bethesda, Maryland
this 12th day of January, 1981.





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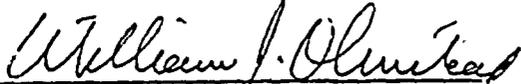
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