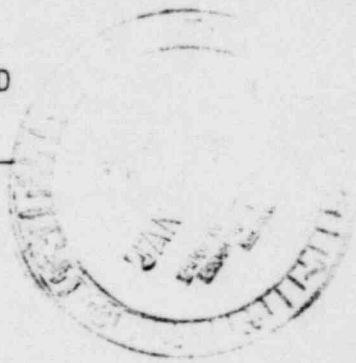
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

NRC STAFF MOTION TO WAIVE 10 CFR §2.762(c) AND RESPONSE TO INTERVENOR'S SAN LUIS OBISPO MOTHERS FOR PEACE PETITION FOR DIRECTED CERTIFICATION DATED DECEMBER 31, 1978 AND SUPPLEMENT DATED JANUARY 11, 1979



Marc R. Staenberg
Counsel for NRC Staff

January 18, 1979

1/18/79

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.
	)	50-323 O.L.
(Diablo Canyon Nuclear Power Plant Units 1 and 2)	)	

NRC STAFF MOTION TO WAIVE 10 CFR §2.762(c) AND RESPONSE TO INTERVENOR'S SAN LUIS OBISPO MOTHERS FOR PEACE PETITION FOR DIRECTED CERTIFICATION DATED DECEMBER 31, 1978 AND SUPPLEMENT DATED JANUARY 11, 1979

I. Introduction

By Petition dated December 31, 1978, Intervenor, San Luis Obispo Mothers for Peace ("SLOMFP"), seeks to appeal the Atomic Safety and Licensing Board ("ASLB" or "Licensing Board") Order dated December 8, 1978 and, following reconsideration, its Order of January 5, 1979, relative to issuance by the Licensing Board of subpoenas to two consultants to the Advisory Committee on Reactor Safeguards ("ACRS"). By Supplement to the above Petition, Intervenor also seeks to appeal the portion of the January 5, 1979 Order which removed Board Exhibit Number 2 from the record. The NRC Staff opposes the instant petition and supplement on procedural and other grounds.

By the instant petition, which is an interlocutory appeal, Intervenor SLOMFP requests the Appeal Board to substitute its judgment on a factual matter, i.e., a finding of "exceptional circumstances", for that of the

Licensing Board. The Intervenor has not only failed to meet the test of showing "exceptional circumstances" before the Licensing Board but has completely failed to present any showing of "exceptional circumstances" in the instant petition, as supplemented, before the Appeal Board.

II. Statement of Issues

The following issues are presented by this appeal:

1. Whether Intervenor's Petition should be dismissed as interlocutory?
2. Whether Intervenor's Petition is defective for failure to adequately address the standards of 10 CFR §2.720 and the recent interpretative statement?
3. Whether Intervenor should be denied the alternative relief sought by the supplement to the original petition?

III. Statement of the Case

On September 1, 1978, Intervenor SLOMFP requested that subpoenas be issued for experts whom it wanted to appear at the upcoming Operating License hearing in the captioned proceeding.[1/] Among the persons whom Intervenor wanted subpoenaed were two consultants to the ACRS, Dr. Enrique Luco and Dr. Mihailo Trifunac. The central reason given for requesting the subpoenas for those two ACRS consultants was that they would not testify as Intervenor's witnesses.

1/ The current phase of the OL hearing commenced on December 4, 1978 and is currently in session in San Luis Obispo, California.

On September 21, 1978, the NRC Staff opposed the issuance of these subpoenas as contrary to Part 2 of the NRC Rules of Practice, 10 CFR §2.720(h)(1) and §2.720(h)(2)(i). The rule proscribes the issuance of subpoenas to certain persons as follows:

2.720(h)(1):

> The provisions of paragraphs (a) through (g) of this section are not applicable to the attendance and testimony of the Commissioners or NRC personnel, or to the production of records or documents in the custody thereof.

Section 2.720(h)(2)(i) provides further:

> In a proceeding in which the NRC is a party, the NRC staff will make available one or more witnesses designated by the Executive Director for Operations, as appropriate, or by their designees, for oral examination at the hearing or on deposition regarding any matter, not privileged, which is relevant to the issues in the proceeding. The attendance and testimony of the Commissioners and named NRC personnel at a hearing or on deposition may not be required by the presiding officer, by subpoena or otherwise: Provided, That the presiding officer may, upon a showing of exceptional circumstances, such as a case in which a particular named NRC employee has direct personal knowledge of a material fact not known to the witnesses made available by the Executive Director for Operations require the attendance and testimony of named NRC personnel.

Specifically, 10 CFR §2.720(h) was shown to proscribe the issuance of subpoenas to Commissioners or NRC personnel except where there exists "exceptional circumstances". This regulation has been understood to extend protection against subpoenas to members of and consultants to the ACRS. Hence, in as much as the Staff opposed the issuance of the subpoenas and without a showing of "exceptional circumstances", the Board was constrained against issuing the requested subpoenas.

The Licensing Board nevertheless deferred ruling on the motion pending the issuance of a policy statement by the Commission.

On November 29, 1978, James L. Kelley, Acting General Counsel, issued a memorandum to James R. Yore, Chairman of the Atomic Safety and Licensing Board panel, attaching an INTERPRETATIVE COMMISSION STATEMENT ON AMENABILITY TO SUBPOENA OF CONSULTANTS TO THE ADVISORY COMMITTEE ON REACTOR SAFEGUARDS UNDER 10 CFR 2.720. Mr. Kelley stated that the Licensing Board could proceed on the assumption that the statement represented the Commission's views. The statement indicates that the protection against subpoenas afforded by 10 CFR §2.720 is applicable to consultants to the ACRS in cases in which they served as consultants. It also stated that the "exceptional circumstances' test must be applied by the boards case-by-case in the exercise of their sound discretion".

On December 6, 1978, at the outset of the current OL hearings in the captioned proceeding, the Licensing Board heard oral argument on the subpoena request in light of the Interpretative Statement.[1/] On December 8, 1978, the Licensing Board found that "exceptional circumstances" had not been established and denied the Intervenor's request for subpoenas.[2/] Based upon the representations of Intervenor that it merely wanted the attendance of these two experts in order to get certain of their written material into the record,[3/] Applicant suggested that it would stipulate to the admission of the relevant documents.[4/] The Staff endorsed the approach.[5/]

1/ Tr. 4273-4333
2/ Tr. 4684
3/ Tr. 4302
4/ Tr. 4309
5/ Tr. 4332

Believing that it had the agreement (if not a formal stipulation) of all the parties, the Licensing Board incorporated the relevant written material into the record as Board Exhibit Number 2.[1/] This approach was not objected to by the Intervenor. It was thus understood by the other parties and the Board that inclusion of the written material of Drs. Luco and Trifunac into the record would satisfy the Intervenor's stated position that it simply wanted the views of these experts in the record.

On December 31, 1978, the Intervenor filed the instant petition requesting, in effect, that the Appeal Board reverse the Licensing Board decision and issue the subpoenas and thus abrogated the above understood arrangement. On January 4, 1979, the Appeal Board directed expedited responses by the parties.

On January 5, 1979, during a session of the hearing, the Applicant, joined by the NRC Staff, requested the Licensing Board to consider the recently filed subject petition as a motion for reconsideration.[2/] While clearly no "exceptional circumstances" had been put forth by Intervenor in the instant petition and none had been demonstrated theretofore, the Applicant and Staff were prepared to support Intervenor's earlier request that Drs. Luco and Trifunac be subpoened on the basis that it would be administratively efficient

---

1/ Tr. 4684
2/ Tr. 7420

and in the public interest. Intervenor would not join in the request to the Licensing Board and strenuously objected to the Licensing Board issuing the subpoenas without first finding "exceptional circumstances".[1/] Given this view and position by Intervenor, Applicant moved to have the material of Drs. Luco and Trifunac, which had earlier been incorporated into the record, removed from the record. After consideration, the Licensing Board ruled that (1) in light of disagreement among the parties and no showing by Intervenor of "exceptional circumstances", it was unable to find "exceptional circumstances" and therefore could not issue the subpoenas and (2) the record would be purged of the material included as Board Exhibit Number 2.[2/]

On January 11, 1978, Intervenor filed the instant supplement which is primarily directed at obtaining alternative relief in the event the Appeal Board ruled against it on the Petition; to wit, that the written material of Drs. Luco and Trifunac be readmitted into the record.

IV. Intervenor's Appeal is Interlocutory and Inappropriate For Appeal Board Review at This Time

The Intervenor is seeking a review by the Appeal Board of whether, as a factual matter, "exceptional circumstances" as provided in 10 CFR §2.720(h) exist to allow subpoenas to be issued to two ACRS consultants, Drs. Luco

---

1/ Tr. 7437, 7496-7499
2/ Tr. 7518

and Trifunac. Inasmuch as Commission practice bars interlocutory appeals as a matter of right, Toledo Edison Co. et al. (Davis-Besse), ALAB-300, 2 NRC 752, 758 (1975) and 10 CFR §2.730(f), a party may request that the Appeal Board exercise its discretionary pr ·r to direct certification pursuant to 10 CFR §2.718(i). Public Service Co. of New Hampshire (Seabrook Units 1 and 2), ALAB-271, 1 NRC 478, 482-483 (1975). In order to warrant certification, however, truly exceptional circumstances must exist. Pittsburgh-Des Moines Steel Co. (ALAB-441) 6 NRC 725, 726 (1977); Seabrook, supra, at 483; Public Service Co. of New Hampshire (Seabrook Units 1 and 2), ALAB-295, 2 NRC 668, 670 (1975). A petitioner must convince the Appeal Board that, at the very least, a prompt decision is now needed to prevent detriment to the public interest or to avoid unnecessary delay or expense. Davis-Besse, supra, at 759.

In the instant case, Intervenor has failed to demonstrate that it is necessary that the Appeal Board take this matter up at this time. SLOMFP asserts that a prompt decision is needed to prevent detriment to the public interest and to avoid unnecessary delay and expense (Petition, p. 18-20). SLOMFP argues the public interest requires the physical presence of Drs. Trifunic and Luco to insure their written comments are not misinterpreted (Petition p. 19). Secondly, it is argued that if the Appeal Board does not consid_r the matter now, it will likely face the issue later, thus requiring substantial time and expense which could have been saved by early resolution. Intervenor's position on the public interest aspect of the test is simply not in accord with accepted administrative practice. Direct testimony is normally submitted in writing in NRC

proceedings. In oral argument before the Licensing Board SLOMFP represented that, based on conversations with Drs. Trifunac and Luco, it was unaware of any information that either consultant had which would provide any additional information for the record beyond that contained in their written comments (Tr. 4333). Absent a desire to further question the consultants by the parties, the Licensing Board properly concluded that it should not exercise its discretion to issue subpoenas.

On the question of unnecessary delay and expense, this Intervenor is before the Appeal Board to request that subpoenas issue to ACRS consultants while taking a diametrically opposite position recently before the Licensing Board upon that Board's reconsideration of the matter on January 5, 1979. In essence, the Staff and Applicant, by urging the Licensing Boad to treat this interlocutory appeal as a motion for reconsideration[1/], were conceding that the factual issue involved was a close one, given the fact that the written material of Drs. Trifunac and Luco was in conflict with the collegial opinion of the ACRS and with the Staff's testimony of record. Thus, in the public interest and in order to avoid unnecessary expense and delay, the Staff urged reconsideration. (Tr. 7421-31). Intervenor, however, objected and refused to support issuance of a subpoena on those grounds. Intervenors, in essence, wanted a precedent set for the proposition that any time an ACRS consultant disagrees with the collegial

---

1/ Public Service of Oklahoma (Black Fox, Units 1 and 2), ALAB-370, 5 NRC 131 (1977).

ACRS opinion and/or the Staff, exceptional circumstances sufficient to justify a subpoena must be found. The Staff simply cannot support such a position and believes Intervenor is estopped by its position before the Licensing Board from pursuing an interlocutory appeal since it cannot meet the exceptional circumstance test required for such an appeal.

In its supplemental filing, Intervenors argue that the Licensing Board could not have issued a subpoena pursuant to stipulation since it would lack a finding of exceptional circumstances required by 10 CFR §2.720(h). (Supplemental Petition, p. 3.) Intervenor also notes that the NRC Staff might have sought agreement with the ACRS to produce the consultants. This argument will be addressed later in this brief on the merits. It is important to note, however, that this argument does not help Intervenor meet the exceptional circumstances test required for an interlocutory appeal. First, the argument assumes that someone would have sought to quash the subpoena by successfully demonstrating that the regulation had not been met. Second, Intervenor is in the anamolous position of arguing a sophisticated procedural position which is contrary to the object which it seeks to achieve. Intervenor goes on to suggest that, under the immediately effective rule (10 CFR §2.764), an OL might issue without "due consideration having been given to the opinion of (these) two experts, who are as knowledgeable as anyone on the critical safety issue facing this facility". (Petition, p. 19).[1/]

1/ To the contrary, testimony was adduced during the current session of the OL hearing that indeed the views of Drs. Luco and Trifunac were considered by the NRC Staff during the course of their review. Tr. 8407-8417, 8460-8462

Finally, Intervenor fails to distinguish this situation from all the other proceedings in which a license issues while parties pursue avenues of appeal. Indeed, Intervenor has not shown why -- should they ultimately prevail on appeal of an initial decision -- the matter cannot be adequately addressed on remand. As the Davis-Besse Appeal Board stated:

> In the last analysis, the potential for an appellate reversal is always present whenever a licensing board (or any other trial body) decides significant procedural questions adversely to one of the parties' claim. The Commission must be presumed to have been aware of that fact when it chose to proscribe interlocutory appeals (10 CFR 2.730(f)). That proscription thus may be taken as an at least implicit Commission judgment that, all factors considered, there is warrant to assume the risks which attend a deferral to the time of initial decision of the appellate review of procedural rulings made during the course of trial. Since a like practice obtains in the federal judicial system, that judgment can scarcely be deemed irrational. (3 NRC at 100).

There is simply nothing truly exceptional about the possibility that an Atomic Safety and Licensing Board decision will be reversed so as to require further proceedings. See also, Commonwealth Edison Co. (Zion Units 1 and 2), ALAB-116, 6 AEC 258, 259 (1973). In Zion, the Appeal Board noted that this possibility is one which all litigants -- be they in federal court or NRC proceedings -- assume. 6 AEC at 259. Nor has SLOMFP pointed out any overriding issue of law or policy which would justify the grant of certification at this time. Such sui generis factual determinations are not appropriate for reexamination by the Appeal Board. See Zion, supra, at 259; Davis-Besse (ALAB-314), 1 NRC at 99.

Since the Intervenor has no right of appeal of this matter at this time and since it has not met the tests for requesting the Appeal Board to exercise its discretionary power to direct certification, its petition should be denied.

V. Intervenor Has Failed to Meet the Test of 10 CFR §2.720 and the Recent Interpretative Statement

Beyond the procedural defects of requesting the Appeal Board to direct certification of this matter at this time, and inasmuch as the Intervenor is relying upon 10 CFR §2.720 and the Interpretative Statement, (supra), in seeking reversal of the Licensing Board's Orders of December 8, 1978 and January 5, 1979, it is worth noting that SLOMFP continues to fail to meet the test of demonstrating "exceptional circumstances" for the issuance of subpoenas. There is no argument that "exceptional circumstances" must be demonstrated in order to get beyond the proscription of 10 CFR §2.720(h) and to prevail upon a Board to issue subpoenas to ACRS consultants. It has consistently been the Staff and Applicant's view, as expressed in their written responses to Intervenor's September 1 Motion to Subpoena Witnesses and again in oral argument before the Licensing Board during several hearing sessions, that Intervenor has failed to demonstrate that "exceptional circumstances" exist to support overriding 10 CFR §2.720(h). By its Orders dated December 6, 1978 and January 5, 1979, the Licensing Board agreed. Incredibly, while now seeking to inject the Appeal Board into this factual matter by having it substitute itself for the Licensing Board in deciding whether "exceptional circumstances" exist,

the Intervenor has not offered a scintilla of additional reasons or arguments which, factually, might cause a different result. Indeed, Intervenor offers nothing in the instant petition to indicate what it considers to be the "exceptional circumstances" warranting the issuance of subpoenas.

In the December 31, 1978 Motion for Directed Certification, SLOMFP indicates that the arguments compelling a decision to subpoena Drs. Trifunac and Luco are that: 1) analysis justifying a decision to issue an operating license must demonstrate that the as-built plant can withstand an earthquake substantially larger than the one for which the plant was originally designed; 2) Drs. Trifunac and Luco are both intimately familiar with the facts surrounding the DNCPP seismic issue and are both acknowledged experts in earthquake engineering; 3) Drs. Trifunac and Luco have criticized the methods and assumptions essential to a decision to license the facility; and 4) assuring the adequacy of the DCNPP seismic design is extremely important. (Motion, p. 20.)

SLOMFP argues that the Licensing Board's decision to receive the written comments of Drs. Trifunac and Luco in evidence was insufficient because "...each party has its own interpretation as to the meaning of the Trifunac and Luco comments". (Motion, p. 19.) SLOMFP does not explain how this situation is any different from that which exists with regard to any evidence. Parties are always free to argue how evidence should be interpreted. It is interesting to note that SLOMFP admitted during the course of oral

argument before the Licensing Board on this issue that they had talked to both Drs. Trifunac and Luco (Tr. 4327-28) and that SLOMFP was unaware of any information that either consultant had which would provide any additional information for the record beyond that contained in their written comments. (Tr. 4333).

SLOMFP conceded during argument before the Licensing Board that neither Dr. Trifunac nor Dr. Luco had unique possession of material facts. (Tr. 4320.) SLOMFP, however, argued a different test could be applied in determining what constitutes "exceptional circumstances". In oral argument, SLOMFP stated that three factors demonstrated exceptional circumstances in this case:

1. There exist differences in opinion on engineering assumptions which have the effect of reducing earthquake input.
2. There exist differences in opinion on engineering assumptions which are without extensive observation and analysis to support them.
3. There exist differences or opinion on matters critical to safety rather than on matters tangentially related to safety. (Tr. 4325)

In essence, SLOMFP is not able to describe any circumstance, let alone an exceptional circumstance, which compels the conclusion that a subpoena should issue. All of the matters suggested by SLOMFP would have been of record had it not been for their own objections and actions. SLOMFP has not offered one additional matter which would be forthcoming on the record if subpoenas were issued. No one has challenged the expertise of

Drs. Trifunac or Luco. No one has suggested that their views are misrepresented. No one has argued that their views are not fully developed in the materials originally produced by SLOMFP. Thus, the only thing conceivably to be gained by issuance of subpoenas is the presentation of the consultants' views orally rather than in writing. Administrative decision-making on written records is too firmly established to seriously suggest that an oral presentation not involving demeanor or credibility is entitled to more weight than a written one. Yet, on the current record, that is evidently all that could be gained by the subpoena sought by SLOMFP.

Considering Intervenor's lengthy discussion of how the views of Drs. Luco and Trifunac differed from the ACRS as a whole on the seismic issues in the Diablo Canyon case, it may be implied that it is this disagreement alone that Intervenor believes is an "exceptional circumstance".[1/] Intervenor has failed to draw the nexus between disagreement among members of a collegial body and the "exceptional circumstances" test of 10 CFR §2.720(h). Opinions of experts in the course of deliberation on technical issues are expected to be and often are divergent. It is precisely the obtaining of a wide spectrum of views that is the cornerstone of the ACRS activity and the deliberate purpose for it seeking the input of consultants. There is truly nothing "exceptional" about individual opinions of experts being at variance with other experts, or even a majority of expert opinion.

1/ Petition, pp. 5-17; See also, Tr. 4280-4301. Their views are also in conflict with the Staff's position of record.

Intervenor, however, rejected the Applicant's and Staff's effort to obtain reconsideration of this matter.[1/] The position then taken by the Staff and Applicant was that upon agreement of the parties in order to expedite the proceeding to avoid the possibility of appeal on this matter, and in the public interest, Staff and Applicant would support issuance of the subpoena. These latter considerations, coupled with the conflict between the consultants and the ACRS and NRC Staff positions, might have been considered sufficient to tip the exceptional circumstances test. Upon the Licensing Board taking the matter up, the Intervenor strongly opposed issuance of the subpoenas which it had earlier requested and is now before the Appeal Board. The reason given by the Intervenor for its obstinance was that Applicant and Staff, and presumably the Licensing Board, would not concede that the "exceptional circumstances" urged by SLOMFP were sufficient standing alone to justify issuance of subpoenas.

Given this situation of the Intervenor requesting something and then rejecting an opportunity to get it, it seems disingenuous for the Intervenor to pursue the matter before the Appeal Board.[2/] The Appeal Board should not sanction such action.

1/ Tr. 9437, 7496-7499.

2/ c.f. Young v. Brashears, 560 F.2d 1337 (7th Cir. 1977); Travick v. Manhattan Life Insurance Co. of New York, 484 F.2d 535 (5th Cir. 1973); Geehan v. Monahan, 382 F.2d 111 (7th Cir. 1967). While the principle of invited error may not be directly applicable here, courts have long rejected appeals from orders which parties have directly induced by their conduct before the trial body.

The Intervenor's argument, that strict adherence to the regulations is not what initiated their opposition, is without foundation. Intervenor never made a finding of "exceptional circumstances" a condition precedent to its request for the Licensing Board issuing the two subpoenas. While demonstration and finding of "exceptional circumstances" is required, the NRC Rules of Practice recognize that stipulations among parties are to be encouraged (10 CFR §2.753). Clearly, parties often stipulate on matters and procedures when not to do so would result in inefficiency or unproductive argument over an issue which could be construed otherwise. In fact, such a stipulation could provide the additional circumstance necessary for a Licensing Board to make the required findings whether implied or stated.

Furthermore, it is clear that the issuance of subpoenas is a matter within the discretion of the Licensing Board. It need not issue a subpoena if no "exceptional circumstances" are found. But where, as here, a party requests such subpoenas and the other parties come to the view of supporting such a request, the Board has the discretion necessary to make the findings required to issue the subpoenas.

Nevertheless, the situation has again changed. In light of the Intervenor's rejection of the proposed stipulation among the parties to support the request for subpoenas and its insistence that subpoenas not issue unless an explicit finding is made of "exceptional circumstances" on the grounds urged by Intervenors, and since the Staff believes those circumstances standing alone are not "exceptional", the Staff must now oppose the issuance of the subpoenas.

The Appeal Board is being called upon, in effect, to grant an appeal on a matter which could have been resolved but for the action of the very party requesting the appeal. The reasons given by Intervenor for rejecting such resolution are not the ones it argued before the Appeal Board. All it wanted from this Appeal Board was for two ACRS consultants to be compelled to appear. Intervenor should not now be permitted to have an interlocutory appeal of a Licensing Board decision due in major part to its inconsistent positions before the Licensing Board and the one it pursues here.

VI. Intervenor Is Not Entitled to the Relief Sought By the Supplement

Assuming, arguendo, that the Appeal Board chooses not to issue the requested subpoenas and turns its consideration to the relief sought by the supplement, it is the Staff's view that it too should be denied as an inappropriate and unwarranted interlocutory appeal. In the event that the Appeal Board chooses to consider the supplement on its merit, the NRC Staff believes strongly that it has none and that the relief sought should be denied.

The Intervenor was not entitled, as a matter of right, to have the subject written material of Drs. Luco and Trifunac in the record without the usual requisite showing of foundation and sponsorship. Nevertheless, absent objection of a party such material can be received into evidence. The Applicant, joined by Staff, agreed to waive proper objection to such material coming into the record without foundation and

sponsorship. The Intervenor, while now contending that it did not agree to the supposed stipulation, acquiesced sufficiently for the Applicant, Staff and most importantly, the Licensing Board to believe that inclusion of the subject material would satisfy the Intervenor's stated objective of having this material in the record and thereby obviate the need for the subpoena of Drs. Luco and Trifunac.

Based upon this understanding, the Board incorporated the subject material into the record as Board Exhibit Number 2.

When the Interv ior filed the instant petition which seeks, in essence, the actual issuance of two subpoenas, it became clear that the objective sought by the above agreement had not been achieved. Hence it was perfectly appropriate to consider the agreement voided, for the procedural objections to reinstate, and for the material to be removed as improperly included. If the subpoenas issue, the material would be considered for inclusion at the time of the appearance of the authors.

In any event, Intervenor cannot now be heard to complain about the removal of the material from the record. On the one hand, if it was not a party to the stipulation and did not agree to the original inclusion of the material as it now alleges, then surely it has no status to complain of its removal since it had no original right to its inclusion. On the other hand, if it was a party to that agreement, then by the instant petition it abrogated the very essence of that agreement and all parties are free to return to the positions they might have urged but for the agreement.

It is simply unconscionable for Intervenor to believe that it can agree to or even acquiesce in a quid pro quo by which it gets certain benefits and gives up certain others, but be left free to retain the benefits while continuing to seek removal of the burden.

VII. Conclusion

For the reasons discussed above, the NRC Staff concludes that the Intervenor's petition for directed certification and the supplement should be denied.[1/]

Respectfully submitted,

William J. Olmstead

for Marc R. Staenberg
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 18th day of January, 1979.

1/ Due to the short response times involved and the absence of Staff counsel from his Washington office to attend the ongoing hearings in this docket in California, the logistics involved in preparation of this response have been complicated. Consequently, the NRC Staff moves this Board to waive the requirements of 10 CFR §2.762(c) regarding table of contents, table of cases, statutes, regulations and other authorities for briefs in excess of ten pages.

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.
	)	50-323 O.L.
(Diablo Canyon Nuclear Power Plant Unit Nos. 1 and 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF MOTION TO WAIVE 10 CFR §2.762(c) AND RESPONSE TO INTERVENOR'S SAN LUIS OBISPO MOTHERS FOR PEACE PETITION FOR DIRECTED CERTIFICATION DATED DECEMBER 31, 1978 AND SUPPLEMENT DATED JANUARY 11, 1979", dated January 18, 1979, in the above-captioned proceeding, have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, this 18th day of January, 1979.

* Richard S. Salzman, Esq., Chairman
Atomic Safety and Licensing Appeal Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

* Alan S. Rosenthal, Esq.
Atomic Safety and Licensing Appeal Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

* Dr. W. Reed Johnson
Atomic Safety and Licensing Appeal Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

* Elizabeth S. Bowers, Esq.
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

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

* Mr. Glenn O. Bright
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Dr. William E. Martin
Senior Ecologist
Battelle Memorial Institute
Columbus, Ohio 43201

Philip A. Crane, Jr., Esq.
Pacific Gas and Electric Company
Room 3127
77 Beale Street
San Francisco, California 94106

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

Mrs Raye Fleming
1920 Mattie Road
Shell Beach, California 93449

Mrs. Sandra A. Silver
5055 Radford Avenue
North Hollywood, California 91607

Mr. Gordon Silver
5055 Radford Avenue
North Hollywood, California 91607

John R. Phillips, Esq.
Simon Klevansky, Esq.
Margaret Blodgett, Esq.
Center for Law in the
Public Interest
10203 Santa Monica Drive
Los Angeles, California 90067

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

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

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

Janice E. Kerr, Esq.
Lawrence Q. Garcia, Esq.
350 McAllister Street
San Francisco, California 94102

Mr. James O. Schuyler
Nuclear Projects Engineer
Pacific Gas and Electric Company
77 Beale Street
San Francisco, California 94106

Bruce Norton, Esq.
3216 North 3rd Street
Suite 202
Phoenix, Arizona 85012

David F. Fleischaker, Esq.
1025 15th Street, N.W.
5th Floor
Washington, D. C. 20005

* Atomic Safety and Licensing
Appeal Panel
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

* Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

* Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Richard B. Hubbard
MHB Technical Associates
366 California Avenue
Palo Alto, California 94306

John Marrs
Managing Editor
San Luis Obispo County
Telegram-Tribune
1321 Johnson Avenue
P. O. Box 112
San Luis Obispo, California 93406

for William J. Olmsted
Marc R. Staenberg
Counsel for NRC Staff