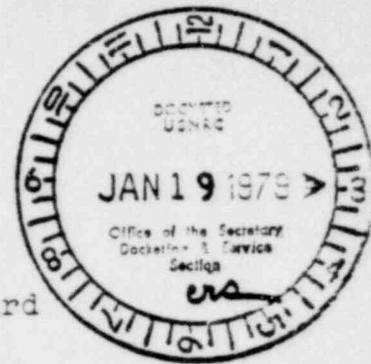


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



Before the Atomic Safety and Licensing Appeal Board

In the Matter of:

PACIFIC GAS AND ELECTRIC COMPANY

Docket Nos. 50-275 OL
50-323 OL

(Diablo Canyon Nuclear Power
Plant, Units 1 & 2)

BRIEF AMICUS CURIAE OF THE
ADVISORY COMMITTEE ON REACTOR SAFEGUARDS

The Advisory Committee on Reactor Safeguards (ACRS), by its counsel, files this brief in response to the January 4, 1979 Order of the Appeal Board in the above-captioned proceeding. This Order directed the NRC staff and the applicant to show cause why the subpoenas sought by the joint intervenors but denied by the Licensing Board should not be issued. Because the subpoenas would require ACRS consultants to testify in this proceeding, the ACRS wishes to make its views known to the Board, regarding the effect such an action would have on the activities of the ACRS.

In a statement issued November 29, 1978, the Commission ruled that the "exceptional circumstances" criterion of 10 CFR 2.720(h) applied to the subpoena of an ACRS consultant whose testimony is sought in a particular proceeding on a project where has has served as an ACRS consultant. The

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present case therefore turns on whether or not "exceptional circumstances" exist which justify the issuance of subpoenas to Drs. Trifunac and Luco, whose testimony on seismic questions is sought by the joint intervenors. The Licensing Board ruled that exceptional circumstances had not been shown and therefore denied the request for subpoenas. The Licensing Board did not provide the rationale for its finding.

The Joint Intervenors' Request for Directed Certification explains at some length how the views of Drs. Trifunac and Luco differ from the position of the NRC staff, the applicant, and the ACRS as a whole on seismic issues applicable to Diablo Canyon. Intervenors fail to state, however, in what way such disagreement constitutes "exceptional circumstances" within the meaning of 10 CFR 2.720(h). On the contrary, it is often the case that professional disagreements of this kind occur in the course of ACRS reviews of license applications, and are a deliberate result of the ACRS's policy of obtaining a wide spectrum of views on technical issues. In the course of reviewing an application, the ACRS may employ a number of consultants whose conclusions and recommendations may vary considerably from each other and from those reached by the NRC staff and the applicant. The Committee considers the views of its

consultants, and often discusses varying results with the consultants at its meetings before arriving at a collegial judgment. This judgment may not agree with that of any specific consultant, nor will it necessarily coincide with either the most or least conservative approaches to a particular problem. Hence, opinions by individual consultants which are at variance with the majority opinion are to be expected and do not constitute "exception circumstances."

To hold that ACRS consultants should be subject to subpoena solely because their conclusions differ from those of their colleagues would have an adverse affect on the ability of the ACRS to obtain the breadth of views it needs to reach an informed scientific judgment on controversial technical issues. Most consultants hired by the ACRS can devote only a limited period of time to the assigned project. Their involvement in hearings would limit the time they can devote to work for the ACRS, and they might decline to do such work if there is a substantial possibility they would at some later time be called to testify in adjudicatory proceedings. Moreover, a ruling that the maintaining of dissenting views satisfies the "exceptional circumstances" test of 10 CFR 2.720(h) might tend to influence ACRS consultants in presenting such views, depending on their interest and availability for participation in future

adjudicatory proceedings. In either case, the ACRS would be deprived of the free exchange of professional judgments which it needs to reach its own recommendations. The Commission's interpretation of 10 CFR 2.720(h) was intended to avoid this effect. If the term "exceptional" is to have any meaning, it must not be equated with circumstances that arise frequently in ACRS reviews where controversial scientific and engineering questions (e.g., seismic design) are presented and a wide range of consulting opinions is sought.

For these reasons the ACRS urges the Appeal Board to allow to stand the Licensing Board's ruling denying the requested subpoenas.

Respectfully submitted,

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Office of the General Counsel
Counsel for the ACRS

January 18, 1979

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INTERIM REPORT

Accession No. 7902140418
Contractor's Report No. _____

Contract Program or Project Title: Nuclear Power Plant Design Concepts
for Sabotage Protection

Subject of this Document: Progress reported for October-December 1978

Type of Document: Quarterly Progress Report

Author(s): Dave Erickson

Date of Document: December 1978

Responsible NRC Individual and NRC Office or Division: _____

William H. Immerman, Operational Support Branch, SAFER:RES

This document was prepared primarily for preliminary or internal use. It has not received full review and approval. Since there may be substantive changes, this document should not be considered final.

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INTERIM REPORT