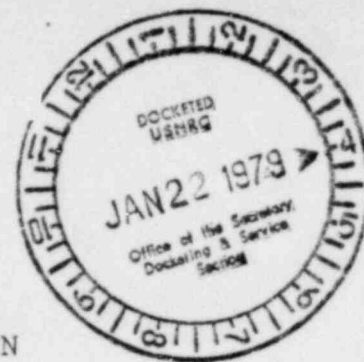


NRC PUBLIC DOCUMENT ROOM



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)

APPLICANT'S RESPONSES TO ORDER
TO SHOW CAUSE AND REQUEST FOR
DIRECTED CERTIFICATION

Prior to the issuance by the Appeal Board of its directive to the Applicant and NRC Staff, 1/ the sole interlocutory issue before the Appeal Board was whether or not the Appeal Board should direct certification to it of that portion of the record now before the Atomic Safety and Licensing Board (ASLB) relating to the ruling by the ASLB that subpoenas for the appearance of two of nine to eleven consultants to the Advisory Committee on Reactor Safeguards (ACRS) in this particular case, Drs. Trifunac and Luco, cannot be issued, because -

(1) The Commission has determined that "the exceptional circumstances test of section 2.720(h) [of 10 CFR Part 2] is properly applicable to consultants to the ACRS in cases in which they have served as consultants," 2/ and

THIS DOCUMENT CONTAINS
POOR QUALITY PAGES

- 1/ Order of Appeal Board entered herein on January 4, 1979.
- 2/ "Interpretative Commission Statement on Amiability to Subpoena of Consultants to the Advisory Committee on Reactor Safeguards under 10 CFR 2.720," released November 29, 1978, by James L. Kelley, Acting General Counsel (hereinafter referred to as Interpretative Statement).

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(2) The ASLB, in the exercise of its sound discretion pursuant to the Interpretative Statement, determined after careful review of the transcript and the documents that exceptional circumstances have not been established. (Tr. 4683-5 12/2/78) 3/

The Appeal Board's order of January 4, 1979, has introduced a puzzling, new element or issue into this matter by directing the Applicant and the Staff to show cause "why the Licensing Board's order in question should not be reversed summarily and the subpoenas issued." The direction to show cause is puzzling, because it is not clear whether the Appeal Board (i) has already decided the original issue and granted the motion for directed certification or (ii) is merely attempting to expedite the resolution of the subpoena issue.

If the Appeal Board has, in fact, granted the request for certification, then it must be said that it has acted in contravention of 10 CFR 2.730(c) and basic principles of fairness which require that interested parties be given the right to respond. Nevertheless we do not raise this as an objection to the procedure followed.

3/ Relevant portions of the transcript are attached hereto as follows:

| <u>Attachment</u> | <u>Pages</u> | <u>Date</u> | <u>Subject Matter</u> |
|-------------------|------------------------|-------------|-----------------------------------------------------------|
| 1 | 4273-4333 | 12/6/78 | Arguments of counsel re exceptional circumstances |
| 2 | 4683-4688 | 12/8/78 | ASLB initial ruling |
| 3 | 7420-7437 7486-7517 | 1/5/79 | Arguments of counsel re motion to reconsider |
| 4 | 7518-7523 | 1/5/79 | ASLB ruling on motion to reconsider |
| 5 | 7701-7702 | 1/8/79 | Restatement of ruling |
| 6 | 8398-8403 | 1/11/79 | Joint Intervenors Exhibits G and H admitted into evidence |

If the Appeal Board has not decided the question of certification, but was merely acting in a manner which it deemed would expedite the resolution, Applicant applauds the effort, and as hereinafter set forth has suggested that such subpoenas be issued promptly subject to certain conditions.

Under date of January 10, 1979, following the Appeal Board's order herein, Intervenors filed a Supplement to Joint Intervenors' Request for Directed Certification enlarging the scope of the requested review to include the question of the admissibility of certain documents marked for identification as Board Exhibit 2, Attachments A through J.

Before responding to the Board's show cause order and the Supplement to the Joint Intervenors' Request for Directed Certification, we should mention that the Joint Intervenors have the burden of establishing the existence of exceptional circumstances. It is not the burden of Applicant and the Staff to disprove their existence, as the tone of the show cause order would imply to those unfamiliar with the applicable rules of procedure.

As Applicant has serious reservations about Joint Intervenors' statement of facts leading to the immediate request for certification, a brief recitation of the cogent facts is as follows:

1. Dr. M. Trifunac and Dr. E. Luco have served as two of nine to eleven consultants to the ACRS as respects Diablo Canyon during the past two plus years.
2. They have expressed views contrary to those of the Applicant and its consultants; the NRC and its consultants; and the ACRS and the remainder of its consultants concerning the methodology of the so-called Hosgri evaluation of Diablo Canyon.
3. Presumably because of their differences of opinion, Joint Intervenors have, in a series of motions, requested that they be subpoenaed to attend and testify at the operating license proceedings.
4. The Commission issued, through the office of General Counsel, an Interpretative Commission Statement on Amenability to Subpoena of Consultants to the Advisory Committee on Reactor Safeguards under 10 CFR 2.720.

5. That Statement held, in essence, that "exceptional circumstances" must be shown in order for subpoenas to issue. No meaningful discussion or statement as to what might constitute "exceptional circumstances" in this or any other case was contained in that opinion.
6. At the start of the seismic portion of the safety hearings, Joint Intervenors made a motion requesting the Board to issue subpoenas requiring the attendance of Drs. Trifunac and Luco. As a part of that motion, Joint Intervenors filed with the Board their Exhibits A through J which consisted of all of the written comments, reports, evaluations and the like which had been submitted by Drs. Trifunac and Luco to the ACRS subcommittee and full committee. (Tr. 4273-4332)
7. Because it believed that "exceptional circumstances" did not exist in this case and because Counsel for Joint Intervenors avowed to the Board and parties that Drs. Trifunac and Luco would not have anything to say that was not contained in Joint Intervenors Exhibits A through J, Applicant proposed that those Exhibits be placed in evidence as a means of getting into the record the views contained therein. Nevertheless, Counsel for Joint Intervenors indicated he wanted Drs. Trifunac and Luco to appear in person. (Tr. 4273-4332)
8. The Board, operating under the assumption that all parties had stipulated to the admission of the Exhibits, redesignated them as Board Exhibit 2, Attachments A through J and placed them in evidence. (Tr. 4683-4688)
9. In fact, Counsel for Joint Intervenors did not stipulate to the documents going into evidence but simply remained silent, voicing no objection. (Tr. 4273-4332) It was when Intervenors' Counsel so adamantly pointed this out (Tr. 7512-13) that Applicant realized that without such a stipulation among the parties no foundation existed for Board Exhibit 2 and moved to have them removed from evidence.
10. Applicant has not opposed the presentation of Drs. Trifunac's and Luco's views in these proceedings. It has and continues to oppose a finding that exceptional circumstances exist in this case. Intervenors simply argue that because

two of nine to eleven technical consultants to a collegial body have dissident views in regard to seismic criteria, that this is an area of safety, voila, we have exceptional circumstances.

11. Intervenors did arrange to have two of the attachments to Board Exhibit 2 (Attachments G and H) admitted into evidence, after Board Exhibit 2 was withdrawn, by having them marked as Intervenors' G and H and presenting them to NRC Staff Project Manager Allison to ask if the recommended analyses therein were performed by the Staff or Applicant. (Tr. 8398-8402) Why Intervenors chose not to get the remainder of the Trifunac-Luco documents in evidence by the same method remains an easily solved mystery.

The argument presented by Joint Intervenors to the Appeal Board to support the request for directed certification nowhere addresses what constitutes "exceptional circumstances," nor what criteria should be used to determine whether any circumstances are exceptional within the meaning of 10 CFR 2.720(h). In fact, when confronted with the omission in arguments before the ASLB, Counsel for Intervenors simply admitted that he had not argued the question of exceptional circumstances because he did not think it was appropriate to do so.

"The argument of exceptional circumstances was not made in the request for directed certification for one simple reason: the issue wasn't before the Appeal Board. The issue before the Appeal Board was whether they should accept direct certification. [sic]. Once they make the decision of whether to certify the legal issue then we brief exceptional circumstances."
(Tr. 7500-01)

Thus, despite Intervenors' protestations of concern for expeditious disposition of this proceeding, it becomes apparent that Intervenors would rather pursue the dilatory course of repeatedly creating excuses for interrupting the

proceedings before the ASLB by making interlocutory appeals to this Appeal Board for prolonged, duplicative arguments. 4/

The Appeal Board may have also assumed that all of the matter presented in its request for directed certification had been presented and argued before the ASLB. If such an assumption was made, it is absolutely contrary to the facts. In section II of its request (pages 5-11 and Attachments 1, 2 and 3) Intervenors make the allegation at length, almost defamatory in nature, that the NRC Staff was governed by a prior bias. Such an argument and supporting materials, even if true, were never presented to the ASLB, and therefore the ASLB has never been given an opportunity to rule on this "new matter." For this reason alone there is no basis for summarily reversing the ASLB's denial of subpoenas for two of the several ACRS consultants. If any summary action is warranted, it is the dismissal of Intervenors' request, so that the ASLB may consider the "new matter" if in its discretion it decides that Intervenors are entitled to another bite of the apple.

The realities are that Intervenors argued to the ASLB that there are four reasons for finding the existence of "exceptional circumstances" as a predicate for the issuance of subpoenas under 10 CFR 2.720(h), to wit:

1. The issues under consideration are critical to plant safety;
2. The two ACRS consultants have criticized specific aspects of analyses made by the Applicant and NRC Staff;
3. The ACRS has recognized that some assumptions in such analyses are unique and that Diablo is not designed to as high a level as the plant that would be designed today; and

4/ There can be little doubt respecting Intervenors intent to stall these proceedings. In the course of the arguments on the Applicant's motion to the ASLB to reconsider its denial of subpoenas, counsel for Intervenors refused to stipulate that the finding of exceptional circumstances should be waived. Among other things, he stated:

"Subpoenas can issue, but only on a finding of exceptional circumstances. * * * Otherwise we sit and wait for the Appeal Board to make its decision."
(Tr. 7499)

4. The pool of experts available for such analysis is extremely limited.

The ASLB correctly rejected these reasons as establishing "exceptional circumstances." The first reason relates solely to relevancy and clearly everything that is relevant cannot be categorized as an "exceptional circumstance."

The second reason merely cites that two of several consultants to the ACRS have differing opinions on certain aspects of the Applicant's and NRC Staff's analyses, but not necessarily in the end result as reached by the ACRS, nor that such differences have led or could lead to an unsafe plant. Clearly, differences in opinions of experts over details or analyses cannot be considered exceptional; rather, it would be exceptional to find total agreement among any group of experts on every detail of any analysis. In any event, differences of opinion that two out of nine to eleven consultants engaged by the ACRS in this case cannot be used to establish exceptional circumstances, because that would justify issuance of subpoenas for all ACRS consultants which of itself would be a "probe of the reasoning process underlying the collegial ACRS report" proscribed by the Interpretative Statement. Further, if a difference of opinion by itself constitutes an "exceptional circumstance," the intent and purpose of the "exceptional circumstance" test of 10 CFR 2.720(k) will be defeated and no NRC personnel will be able to avoid a subpoena.

The third reason presents nothing exceptional as to the two consultants sought to be subpoenaed. The ultimate question is whether operation of the plant as built will create an undue risk to health and safety of the public. It is not whether a plant designed today would be designed to a higher level.

The fourth reason, i.e., that the pool of experts is small, is fabricated from whole cloth. There is nothing in the record to find whether the pool is large or small nor whether Intervenor's have exhausted all reasonable efforts to find other competent witnesses.

In sum, the ASLB, after careful review of the extensive arguments respecting the four reasons on which Intervenor's relied, correctly rules that exceptional

circumstances had not been established. 5/ On the basis of the arguments and material presented to the ASLB, any other conclusion would have totally denuded the protection which section 2.720(h) is intended to afford. For, if exceptional circumstances exist here, they would exist in all situations where consultants present reports, whether they contain favorable or unfavorable comments on the Applicant's or the Staff's presentation. The consultants are not the only persons qualified to give their expert opinion on the subjects under review. This being so, the only difference between the consultants and other equally or better qualified persons who are not consultants to the ACRS is the fact that they have addressed their expertise to the very project in question. If this constitutes exceptional circumstances, it would be equally true of every ACRS consultant and ACRS member, and the same would be true of all NRC Staff members, their consultants, and to the NRC itself.

If each and every ACRS consultant or NRC Staff member who reviewed a project and has an opinion on the project comes within the exemption of exceptional circumstances, Section 2.720(h)(i) would have little or no meaning and serve no purpose whatsoever.

Motion To Reconsider

On January 5, 1979, the day after Intervenors' Request for Directed Certification was received, the Applicant requested that the ASLB treat and consider such request as a motion for reconsideration. (Tr. 7420-22) Subsequently, when it was determined that the two ACRS consultants would not appear voluntarily, the Applicant proposed that the parties stipulate to the issuance of subpoenas for Drs. Trifunac and Luco to testify in these proceedings without a finding of exceptional circumstances. The NRC Staff joined in this proposal. (Tr. 7424-26)

5/ Request for Directed Certification, p. 19. It is unconscionable that Counsel for Intervenors nowhere in its Request quote or otherwise set forth in full or paraphrase, or provide even a transcript reference to, the ASLB's subpoena ruling. Instead, Counsel has flagrantly misled the Appeal Board with his statement at p. 4 of the Request that the ASLB made its decision "without providing any explanation for its decision." Intervenors' omission has been corrected by the transcript portions attached to this Response. See Tr. 4683-86, 7518-21.

Counsel for Intervenors, however, refused to stipulate to the issuance of subpoenas without a finding of exceptional circumstances. Instead, counsel for Intervenors insisted that "we sit and wait for the Appeal Board to make its decision." (Tr. 7499)

During the course of the argument on reconsideration it became abundantly clear that counsel for Intervenors did not stipulate to admission into evidence of the documents designated as Board Exhibit 2. Applicant then moved that they be withdrawn as, lacking either foundation, sponsorship or a stipulation of all parties, they had no basis for being in the record. The ASLB granted the motion and removed Board Exhibit 2 from the record.

Counsel for Joint Intervenors has no basis for complaint. He is the one who made it clear that he did not stipulate to the admission of Board Exhibit 2 into evidence, thereby emphasizing his objection to its inclusion. He has now changed his mind. He now argues that he would have conducted his cross examination of the seismic criteria differently if Board Exhibit 2 had not been in evidence. However, the seismic criteria were selected by the Staff consultants, members of the U.S.G.S. and Dr. Nathan Newmark, and Counsel for Joint Intervenors cross examined them after Board Exhibit 2 was withdrawn. He could have used all of the subject documents comprising that Exhibit in his cross examination of those witnesses and failed to do so. He used only two of them, G and H, in the cross examination of Staff witness Allison, and they were thus introduced into evidence. (Tr. 8398-8402)

Counsel for Joint Intervenors' own actions deny his words. He was in no way disadvantaged by the withdrawal of Board Exhibit 2 from the record. He simply failed to use its contents in this cross examination for reasons of his own.

Applicant's Suggested Resolution Of This Matter

In conclusion and in order to expedite the termination of this protracted proceeding, Applicant suggests the following actions be taken by the Appeal Board.

First, the finding by the ASLB that Intervenors have failed to establish that the requisite exceptional circumstances exist should be summarily affirmed.

Second, the Appeal Board should rule that if all parties stipulate that subpoenas may issue without a finding of exceptional circumstances, the ASLB may properly issue subpoenas for ACRS consultants.

Third, absent a stipulation by all parties, the Appeal Board should rule that Board Exhibit 2 should not be accepted into evidence without proper foundation.

Fourth, the Appeal Board should remand the matter to the ASLB for further consideration in accordance with the suggested ruling.

These suggested actions offer several advantages to the Applicant, the NRC Staff and the Intervenors. Applicants are advantaged, because the potential interruption and delay of the proceedings before the ASLB will be obviated and Intervenors' delaying tactics will be thwarted at least in part. The NRC Staff will have avoided being saddled forever-after with a ruling that any difference of opinion of any NRC personnel, including ACRS consultants, with either the NRC Staff, the ACRS, an applicant or an intervenor will satisfy the exceptional circumstances test of Section 2.720(h).

Finally, the Intervenors will have been fully accommodated without any prejudice and Drs. Trifunac and Luco will be required to attend the hearings and give testimony. Applicant will have an opportunity to cross examine them and to present rebuttal testimony, if it so desires after cross examination.

Moreover, if the actions suggested by the Applicant are taken and Drs. Trifunac and Luco do testify, review of the ASLB's ruling to withdraw Board Exhibit 2 from the record will be obviated, because Intervenors will be enabled to lay a proper foundation for their introduction.

Respectfully submitted,

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by [Signature]

Dated: January 17, 1979



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MRS. BOWERS: I should ask the other parties:

Does anyone want rebuttal time?

MR. HORTON: No, Mrs. Bowers.

MRS. BOWERS: Mr. Fleischaker?

MR. FLEISCHAKER: No, ma'am. I've learned when Jim starts up you don't tangle with him.

MRS. BOWERS: Well, one other matter that we put you on notice that we wanted to discuss this morning is the recent Commission position on the subpoena of ACRS consultants.

Mr. Fleischaker, earlier you asked this Board -- well, you didn't submit proposed subpoenas, but you put us on notice that you considered it important to your case to consider the subpoena of two ACRS consultants. So now do you want to proceed?

Now yesterday we ascertained that you do all have copies of the Commission document which actually was issued at the close of business last Wednesday. So do you want to proceed?

MR. FLEISCHAKER: Thank you, Mrs. Bowers.

I have a statement which outlines the background and presents our arguments. Essentially we will request the issuance of a subpoena for Dr. Trifunac and Dr. Lucco.

The issue before the Licensing Board is whether to grant Joint Intervenor's request to subpoena two experts

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who consulted to the Advisory Committee on Reactor Safeguards in that Committee's review of the reanalysis of the Diablo Canyon seismic design. These two experts are Dr. Trifunac, an associate professor of civil engineering at the University of Southern California, and Dr. Enrique Luce, associate professor of applied mechanics, University of California, San Diego.

The Joint Interveners requested that the subpoenas be issued for Dr. Trifunac and Dr. Luce on September 1st, 1978. Both the Nuclear Regulatory Commission Staff and Pacific Gas and Electric opposed the Joint Interveners' request.

Both the Staff and the Applicant argued that the general immunities from subpoenas granted to members of the Advisory Committee on Reactor Safeguards covered consultants to the Committee as well. The Applicant argued as follows:

"The Commission in other proceedings has expressly considered and rejected requests by parties to proceedings that ACRS members be required to testify in licensing proceedings. Consultants to the ACRS are quite obviously agents of the Committee itself. They are retained by the Committee to assist in their deliberations. To allow Interveners to

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1 subpoena consultants would for all practical
2 purposes be no different than calling the
3 Committee members themselves.

4 "There is express authority that such
5 a procedure is impermissible in these proceed-
6 ings."

7 The Staff argued in much the same vein. The
8 Staff argued as follows:

9 "Clearly there is a prohibition against
10 subpoenaing ACRS members. This position has
11 been supported in the Federal court, notably in
12 the Reschman decision. And there the Board
13 held that the unique role of the ACRS as an
14 independent part of the administrative proce-
15 dures was sufficiently analogous to that of an
16 administrative decisionmaker to bring into play
17 the rule that the mental process of such a
18 collaborative instrumentality of justice are
19 not ordinarily subject to probing, citing U.S.
20 v. Morgan, 313 U.S. 409 422, 1941.

21 "Certainly if it is improper to examine
22 the mental processes of ACRS members, it is even
23 more inappropriate to examine ACRS consultants
24 since they are presumably less involved with
25 the total synthesis of the ultimate ACRS decision."

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1 In addition, the Staff argued that in any case
2 the Joint Interveners had failed to satisfy the tests set
3 out in 10 CFR Section 2.720H, the regulation that controls
4 the issuance of subpoenas to "NRC personnel".

5 This regulation requires a showing of exception-
6 al circumstances before issuance of subpoenas. That is, in
7 this case, a showing that Drs. Whifunc and Lucc had direct
8 personal knowledge of a material fact not known to witnesses
9 made available by the Executive Director for Operations.

10 On October 10, the Board issued an order deferring
11 ruling on this question, noting that the Commission was in
12 the process of establishing a general policy on the availability
13 of ACRS consultants to licensing board subpoenas.

14 On October 26, the Commission asked the parties
15 to this proceeding and one other, as well as the OELD, the
16 Office of Executive Legal Director, to submit comments on the
17 general policy question that it was considering. The ACRS
18 advised the Commission of its position on the matter in a
19 joint session with the Commission on November 3. The ACRS
20 took the position that its consultants should be extended the
21 same immunity from subpoena as the members.

22 PG&E agreed with the ACRS. The Office of
23 Executive Legal Director, representing the Staff, took the
24 position that ACRS consultants should be subpoenaed only
25 where they have unique possession of material facts.

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1 The Joint Intervenor argued that ACRS consult-
2 ants should be subpoenaed when their view would materially
3 assist in the full development of a record, and in the alter-
4 native if the exceptional circumstances were to apply it
5 should not be limited to unique possession of material facts
6 as urged by the Office of Executive Legal Director.

7 On November 29 the Commission issued a document
8 entitled "Interpretive Commission Statement on Am¹²enability
9 to Subpoena of Consultants to the Advisory Committee on
10 Reactor Safeguards" under 10 CFR 2.720. In that statement
11 the NRC first rejected the ACRS and PG&E position that ACRS
12 consultants be granted the same immunity from subpoena grant-
13 ed to members of the ACRS. And second, rejected the OMB
14 position that exceptional circumstances be limited to unique
15 possession of material facts. Third, accepted the Intervenor
16 argument for a broader reading of the exceptional circum-
17 stances test.

18 Essentially the Commission recognized that the
19 test must balance two legitimate and possible conflicting
20 considerations. On the one hand the Committee recognized
21 that ACRS consultants represented an important source of
22 scientific opinion useful to licensing boards in resolving
23 technical issues. On the other hand, the Commission recogniz-
24 ed that making consultants amenable to subpoena might impair
25 the ACRS's ability to obtain qualified consultants who do not

mpb6 1 want to expose themselves to the hassle of appearances
2 before licensing boards.

3 The Commission found that the balance is struck
4 by providing the ACRS "the limited protection of the excep-
5 tional circumstances test". The Commission then provided the
6 following guidelines in its interpretative statement --- excuse
7 me, this interpretative statement actually was written by
8 the Office of General Counsel.

9 By the terms of the rule:

10 "Exceptional circumstances are not limited
11 to situations in which the particular individual
12 has unique knowledge of facts. Furthermore, the
13 mere fact that a particular person may have been
14 an ACRS consultant in a particular case does not
15 mean that exceptional circumstances must be shown
16 as a predicate for a subpoena to that person in
17 another case. That limitation applies only in
18 cases where we has served as a consultant."

19 Finally:

20 "Parties may not seek to probe the reason-
21 ing process underlying the collegio-ACRS report
22 through the device of a subpoena to a consultant."

23 The thing I want to focus on here in part is
24 that in rejecting the OEDB argu ment that the test should be
25 restricted to unique possession of material facts, the

mpb7 1 Commission appears to have accepted the point brought out by
2 the Joint Interveners. I think the transcript from the NRC's
3 last meeting demonstrates that point.

4 Let me read from page 28 of the transcript of
5 the meeting of November 17, 1978.

6 (Pause.)

7 Again, this is the transcript of the Commission's
8 meeting dated November 17, 1978; I'm at page 30 of the
9 transcript, at the end of line six. This is Chairman Hendrie
10 speaking:

11 "Mr. Fleischaker points out that should
12 the Commission adopt the exceptional circumstances
13 standard for consultants, NCRS consultants that is,
14 put them in the same category as the other approach,
15 it should make clear that it is not applying that
16 personal knowledge of material facts not known to
17 other witnesses provision is the sole basis because
18 I think he makes the perfectly sound point that
19 experts -- and I'll just quote him. I'll just
20 quote from him, in fact:

21 "Since experts are often working with
22 the new data base, this narrow reading
23 would preclude the issuance of a judgment
24 in many instances where an NCRS consultant
25 has an opinion on an important issue

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1 substantially different from reports of
2 the Staff and the Applicant. "I feel that's
3 a worthwhile point."

4 The request for the subpoenas for Drs. Trifunac
5 and Luco satisfies the exceptional circumstances test, first
6 as the ACRS itself recognized in the letter of July 14, the
7 assumptions critical to the Staff analysis, the use of
8 ineffective accelerations and tau effect which have the effect
9 of reducing the earthquake input on a plant, are based pri-
10 marily on the judgment and experience of its consultant,
11 Dr. Nathan Newmark, rather than on extensive observations and
12 analysis.

13 The use of these assumptions is exceptional.
14 They have not previously been applied in the design of nuclear
15 power plants. That is almost a direct quote from page two of
16 the July 14 letter from the ACRS, down at the bottom of the
17 page.

18 Both Drs. Trifunac and Luco had submitted
19 comments disagreeing with the use of these reduction factors,
20 arguing in essence that they distort the design analysis. And
21 let me quote from some of the papers that they've written.

22 First with respect to the tau effect:

23 In his comments entitled "Comments on Seismic
24 Design Levels for Diablo Canyon Site in California", dated
25 April, 1978, Dr. Trifunac states as follows -- volume 1, X

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have copies of these which I was going to submit for the
record. I can provide them to the Board now before I continue.

MRS. LOWERS: Fine.

MR. FLEISCHER: Okay. Just one moment.

(Pause.)

and lc
and
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1 MR. NORTON: No, I'm just trying to find out what
2 you're submitting, Mr. Fleischaker.

3 MR. FLEISCHAKER: You'll see them when I hand them
4 to you.

5 (Pause.)

6 I'm sorry to take the time. I thought we had it
7 organized but I don't have it as well organized as I should
8 like.

9 (Distributing documents.)

10 MR. NORTON: Excuse me. Are these different
11 papers that accompanied the original motion for subpoena
12 which I thought included everything that they had submitted?
13 I think we're doing something redundant, is really why I'm
14 asking. Are these something different?

15 MR. FLEISCHAKER: No. My recollection is what was
16 submitted with the original motion were curriculum vitae
17 and the April, 1978, comments. This packet includes the
18 April, 1978, comments and other comments that have been sub-
19 mitted.

20 MRS. BOWERS: I think it would be appropriate to
21 take a 15-minute recess so we have an opportunity to read
22 these. Have you distributed them to everybody?

23 MR. FLEISCHAKER: There's more to come.

24 MR. NORTON: Mrs. Bowers, we've seen them all, and
25 I'm sure the staff has, and we don't need the opportunity to

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1 read them unless if the Board wants to read them before a
2 decision is made, I have a feeling it is going to take a lot
3 more than 15 minutes.

4 MRS. BOWERS: We do not intend at the close of
5 argument this morning to give you our decision. We may be
6 able to give you our decision after the luncheon break or
7 maybe tomorrow. We need an opportunity to carefully review
8 these papers.

9 MR. NORTON: I didn't realize this was going to be
10 an exhibit to the evidence. I thought it was going to be an
11 attachment to his legal argument which has a distinct dif-
12 ference on an appeal. I thought it was not an exhibit. I
13 thought it was just an attachment to the legal argument.

14 MR. FLEISCHAKER: I think all we have is a dif-
15 ference in the name you want to hang on it. I was going to
16 mark it as an exhibit. I don't intend to introduce it into
17 evidence to go to the substantive issues. But however we
18 want to agree upon how these should be designated for pur-
19 poses of the record is fine with me.

20 MRS. BOWERS: I think calling them attachments A
21 through whatever it amounts to would be better.

22 MR. FLEISCHAKER: Okay. Let me then designate
23 these. Attachment A would be the curriculum vitae for
24 Dr. Mihail Trifunac.

25 Attachment B would be the curriculum vitae for

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1 Dr. Lucc.

2 Attachment C would be ---

3 MRS. BOWERS: Now some of these already have
4 attachment letters or numbers on them, so we want to make sure
5 that's not confusing.

6 MR. FIBISCHAKER: The curriculum vitae for Dr. Lucc
7 has Attachment M on the top. That's because this curriculum
8 vitae was attached to the original motion that was filed.
9 That should have been whited out for purposes of xeroxing.

10 MR. MONTON: Excuse me. I really don't understand
11 why we're putting these in the transcript which is going to
12 be voluminous enough. If the Board has copies of them as part
13 of this oral argument, I don't understand why they're going
14 in the transcript as attachments or exhibits or anything else,
15 if they're just part of a legal argument and the Board has
16 copies of them.

17 MR. FIBISCHAKER: For purposes of appeal it would
18 be useful to have them in the transcript so that if this
19 issue needs to be briefed on appeal, reference can be made
20 to the specific documents themselves.

21 MRS. BOWERS: He's just identifying them.

22 You don't intend to furnish 30 copies to have them
23 physically inserted in the transcript, do you?

24 MR. MONTON: I think that's exactly what he intends
25 Mrs. Powers, and that's what I'm trying to prevent. We're

eb5

1 putting in, I don't know how many, 100, 150 pages of extra
2 transcript, and Mr. Fleischaker only has two copies of some
3 of the documents, let alone the 25 or 40 that he needs.

4 MR. FLEISCHAKER: My only concern is that however
5 we want to facilitate this, that we have the opportunity, if
6 we need to brief this on appeal, to refer to these documents
7 and their contents for purposes of appealing this specific
8 issue, the question of issuance of a subpoena.

9 MRS. BOWERS: Well, if you fully identify them
10 in the transcript, doesn't that preserve their identity?

11 MR. FLEISCHAKER: Okay. That's all that's neces-
12 sary.

13 Attachment C then would be--- It includes a cover
14 letter dated September 22, 1978, from Dr. Luce to John
15 McKinley, comments that he submitted, and a cover letter from
16 Dr. Luce to Mr. McKinley dated June 5, 1978, and comments
17 that he submitted to the ACBS dated May 30, 1978.

18 Attachment D ---

19 MR. TOURTELLOTTIE: Excuse me. Was that all one
20 attachment?

21 MR. FLEISCHAKER: Yes.

22 Attachment D includes or is comments on seismic
23 design levels for Diablo Canyon site in California by
24 Dr. Trifunac dated April 1978.

25 Attachment E includes the letter from Dr. Trifunac

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1 to Mr. McKinley dated February 28, 1978, his report entitled
2 "Comments on the SAM V Procedure for Measuring Peak
3 Earthquake Accelerations," and all attachments to that report.

4 Attachment F includes a cover letter from
5 Dr. McKinley to Dr. Sloss dated June 12, 1978; a letter from
6 Dr. Trifunac to Mr. McKinley dated June 8, 1978 enclosing
7 Dr. Trifunac's calculations for peak ground accelerations at
8 the Diablo Canyon site in California. These attachments are
9 entitled Table 1, Table 2, Table 3, and also two graphs.

10 MRS. BOWERS: Mr. Fleischaker, what did you identify
11 as B?

12 MR. FLEISCHAKER: These were Dr. Trifunac's
13 comments dated April, 1978.

14 MRS. BOWERS: You see my problem. You have just
15 the two copies of these.

16 MR. FLEISCHAKER: That's correct.

17 MRS. BOWERS: Okay.

18 (Pause.)

19 MR. FLEISCHAKER: Thank you. I apologize to the
20 Board for this delay.

21 MR. TOURTELLOTTE: What is this thing here? It's
22 attachment what?

23 MR. FLEISCHAKER: That's Attachment E.

24 MRS. BOWERS: I mentioned that we might be able
25 to state our position after the luncheon break, or perhaps

eb7 : tomorrow morning. It may be next Monday by the time we get
2 through all the documentation.

3 MR. FLEISCHER: Let me run through this again
4 as we have it here.

5 Attachment A is the resume of Dr. Trifunac.

6 Attachment B is the resume of Dr. Luco.

7 Attachment C is the September 22nd letter to
8 Mr. McKinley, including Dr. Luco's -- including certain
9 comments by Dr. Luco, and then a June 5th letter from Dr. Luco
10 to Mr. McKinley, including Dr. Luco's May 30th comments.

11 Attachment D is Dr. Trifunac's comments dated
12 April, 1970.

13 Attachment E includes a letter from Dr. Trifunac
14 to Mr. McKinley dated February, '76, including his comments
15 on the SAN V procedures and also attachments thereto.

16 And Attachment F includes a letter from
17 Mr. McKinley to Dr. Siess and Dr. Trifunac's letter to
18 Mr. McKinley, and several tables and graphs attached to the
19 transmittal letter from Dr. Trifunac to Mr. McKinley.

20 MRS. BOWERS: Mr. Fleischer, before you begin
21 again, were you making a point when you stated that the
22 Commission position document was prepared by the Office of
23 the General Counsel, and then you read from a transcript of
24 a Commission meeting on this question of AGCS consultants
25 as to what Chairman Hendrie had said? Were you trying to

eb8

1 make a point that the document issued did not reflect his
2 thinking? I'm not sure.

3 MR. FLEISCHNER: No, Ma'am. I think that the
4 document issued reflected his thinking. I have referred to
5 it as the Commission's document and I was just being more
6 precise in identifying that it had been drafted by the Office
7 of General Counsel to the Commission. That's all.

8 MRS. BOWERS: And quoting him from the meeting,
9 was the purpose to bring in additional criteria?

10 MR. FLEISCHNER: The purpose in quoting the
11 transcript was to support our argument that the Commission
12 essentially has recognized the validity of our argument that
13 the test, "exceptional circumstances," should not be limited
14 to the unique possession of a material fact.

15 MRS. BOWERS: Well, do you think the Commission
16 document says something else?

17 MR. FLEISCHNER: No. I was simply offering
18 additional support for that argument.

19 MRS. BOWERS: Fine.

20 MR. FLEISCHNER: Frosting on the cake.

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1 Okay. Let me start again with the argument that
2 these circumstances are exceptional circumstances which merit
3 the subpoenaing of Drs. Trifunac and Luco.

4 First, as the ACRS recognized in its letter of
5 July 14, the assumptions are critical to the Staff's analysis.
6 What is, the use of effective accelerations and tau effect
7 and which have the effect of reducing the earthquake input
8 to the plant are based primarily on the judgment and experience
9 of its consultant, Dr. Nathan Newman, rather than on exten-
10 sive observations and analysis.

11 The use of these assumptions is exceptional,
12 they have not previously been applied in the design of
13 nuclear power plants. Dr. Luco and Dr. Trifunac have sub-
14 mitted comments disagreeing with the use of these reduction
15 factors, arguing in essence that they distort the design
16 analysis.

17 With respect to the tau effect, Dr. Trifunac,
18 in his April, 1978, comment states as follows on Page Two:

19 "Scattering and defraction of high-
20 frequency waves from the foundations of differ-
21 ent plant structures has been proposed as a
22 vehicle to justify reduction of high-frequency
23 spectro amplitudes (tau effect).

24 "The manner in which this reduction
25 has been effected requires unrealistic assumptions,

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1 For example, that the foundation is rigid. The
 2 manner in which this assumption is involved
 3 into analysis is often one-sided and considers
 4 mainly only those consequences of the physical
 5 phenomena which lead to reduction of spectral
 6 amplitudes.

7 "Other consequences of this phenom-
 8 ens, for example, torsional and rocking
 9 excitation of the foundation which may amplify
 10 the structural response have been so far
 11 either overlooked or treated inadequately.

12 "This has been achieved by utiliza-
 13 tion of dynamic models for analysis which are so
 14 defined that only an incomplete physics of the
 15 problem; i.e., seismic excitation and the
 16 structural response, can be considered."

17 Later on, on Page Three of his comments, under
 18 the designation small-letter "c," Dr. Trifunac comments
 19 further on the tau effect:

20 "Hypocentral rather than distance
 21 closest to the fault have been used to evalu-
 22 ate peak and effective peak acceleration.
 23 This assumption implies certain angle of
 24 approach of seismic wave energy. These angles
 25 of approach should thus be consistent with

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agb3

1 the extent to which tau effect is allowed to
2 influence the spectral amplitudes.

3 "Little or no attention seems to
4 have been given to mutual consistency of
5 these assumptions, and in some cases, in-
6 consistent assumptions have been utilized.

7 "For example --

8 MR. NORICH: Excuse me, are we reading from the
9 documents that were just handed to the Board for the Board
10 to read? Is that what's happening and, if so, I object.
11 I mean, the Board is perfectly capable of reading the documents
12 You know, this argument can take three weeks if we proceed
13 to read all the papers and we would like to get on with the
14 argument and then on to the hearing.

15 MRS. BOWERS: I believe Mr. Fleischaker was
16 highlighting certain areas that he considers particularly
17 relevant.

18 Are you going to continue with many areas?

19 MR. FLEISCHAKER: I'm going to discuss basically
20 three areas: tau effect, effective acceleration and damping.

21 The Board has an enormous amount of material
22 before it. I don't intend to go through it piece-by-piece,
23 but rather, as you indicated, the purpose here is simply to
24 highlight those areas, specific areas of disagreement between
25 the Staff and Applicant's analysis and the opinions of

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1 Dr. Trifund and Eves. And that's the purpose.

2 What I am doing now is highlighting the areas
3 in their papers where I think their comments indicate a
4 clear-cut disagreement on the methods used.

5 Continuing on Page Three, Dr. Trifund indicates:

6 "Little or no attention seems to
7 have been given to mutual consistencies of
8 these assumptions and, in some cases, inconsis-
9 tant assumptions have been utilized.

10 "For example, the hypocenter will
11 increase the distance at which peak acceleration
12 is evaluated, thus, reducing the estimated peak
13 acceleration amplitudes.

14 "This would, however, also imply that
15 waves arrive toward the foundation almost verti-
16 cally. In consideration of San effect, however,
17 horizontal dimensions of foundations appear to
18 have been used implying horizontal incident
19 waves."

20 With respect to effective acceleration in his
21 April, 1978, comments, Dr. Trifund states as follows:

22 "The term 'effective peak acceleration'
23 has been introduced suggesting that the structure
24 will see something smaller than actual peak
25 accelerations.

agb5

1 "Though such approach may be useful
2 for earthquake-resistant design of ordinary
3 structures by means of the response spectrum
4 technique, the term 'effective peak acceleration'
5 has not been defined in a way that would enable
6 the derivation of consistent results by several
7 different experts in the field.

8 "Since the procedures for scaling
9 Reg. Guide 160 spectra are based on maximum
10 laboratory acceleration, as defined in Appendix
11 A, this departure from routine design practices
12 makes it difficult to evaluate the number and
13 the nature of the consequences which would
14 result from such an approach."

15 With respect to the tau effect, Dr. Luce states
16 as follows. I'm going to quote from parts of Dr. Luce's
17 comments dated May 30, 1970, beginning on Page Three,
18 Number Three, on the effective scattering of waves from
19 rigid foundations.

20 "The high-frequency components of the
21 free field motions have been reduced by the so-
22 called 'tau filtering procedure' to account by
23 the scattering of waves by the supposedly rigid
24 foundation.

25 "This correction amounts to a reduction

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of the Newark Area field design spectrum by 20 to 30 percent for frequencies higher than two cps, cycles per second. Slightly lower reductions have been used in the Blume spectrum.

"The correction for foundation scattering effects is based on assumption of a rigid foundation and horizontally propagating SH waves.

"Although the assumption of a rigid foundation may be reasonable, it must be recognized that deviations from the assumption lead to localized higher stresses in the lower portions of the different structures."

"The assumption of horizontally incident SH waves is highly questionable, considering that the epicentral distance is comparable with the focal depth. Under these conditions, the possibility of nearly vertically incident waves may not be ruled out. For vertically incident waves, the scattering by the foundation is practically nonexistent, given the shallow embedment.

"Assuming for the sake of the argument that the seismic excitations at the sites corresponds to horizontally incident SH waves, I

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find that the reductions proposed by Housner and Blum are too high when compared with analytical solutions. For horizontally incident SH waves, the reduction of the translational components of motion is coupled with the existence of a marked torsion input to the structure. For details, refer to the attached papers.

"The Applicant has included accidental eccentricities of five to seven percent to represent these torsional effects."

Then, continuing over to Page Five:

"From the point of view of the analysis of the structural response, it does not seem adequate to introduce the torsional input through the use of accidental eccentricities. Such procedure, which leads to the coupling of the torsional and translational response, is essentially symmetric structure, distorts the response of the natural frequencies of the system.

"The effects of the torsional input may be significant for the turbine building in which the possibility of portions of the structure undergoing inelastic deformation may increase with eccentricity."

Finally:

1 "If it is shown that the seismic
2 excitation of the site corresponds mainly to
3 horizontally incident waves, the reduction of
4 the translational and torsional response should
5 be evaluated on the basis of the more exact
6 methods presently available to include an
7 unaccounted reduction of the translational
8 motion without incorporating the full torsional
9 effects is improper."

10 With respect to effective acceleration, Dr. Luce
11 states as follows:

12 "A judgmental factor has been used
13 to reduce the 1.15 peak acceleration recommended
14 in USGS Circular 672 to a value of 0.75g. This
15 ill-defined factor has been used in the past to
16 account for discrepancies in the level of damage
17 observed as compared with the predictions of
18 ordinary seismic analysis which do not account
19 for the effects of soil-structure interaction --
20 are based on nominal values for damping and
21 strength, assumed linear behavior and do not in-
22 clude energy dissipation in partitions and other
23 non-structural elements. This 'catch-all' re-
24 duction factor has no place in the design of
25 carefully analyzed structures, such as those in
nuclear power plants."

1 Finally, let me move to damping.

2 The Staff has permitted the use of damping
3 values equal to seven percent. While this is permitted in
4 the regulations, Reg. Guide 1.61, it is exceptional in
5 nuclear power plant design. Most facilities utilize damping
6 values in the range of four to five percent. Increasing the
7 damping values reduces predicted plant response. And accord-
8 ing to Dr. Trifunac in the case of Diablo Canyon, may under-
9 estimate the plant's response to a given level of strong
10 ground motion.

11 Let me read again shortly from the Trifunac
12 comments of April, 1978. On page 3 of the April, 1978,
13 comments:

14 "Too large damping equal to seven percent
15 has been adopted for dynamic response calculations.
16 Though the apparent damping for the complete soil-
17 structure system subjected to earthquake excita-
18 tions may be larger than seven percent, inadequate
19 basis has been presented to justify seven percent
20 damping in structural systems only. Selection of
21 too large structural damping coupled with only two
22 dimensional or simple three dimensional analysis
23 of soil-structure interaction can lead to unreliable
24 response estimates."

25 These are a brief outline of some of the important

mpb3 1 safety.

2 Third, as the ACRS acknowledged in its letter of
3 July 14 -- let me get that letter, please.

4 (Pause.)

5 At page 3 of the July 14 letter, 1978, the ACRS
6 in its top paragraph stated as follows:

7 "It is evident from the foregoing that the
8 design basis and criteria utilized in the seismic
9 reevaluation of Diablo Canyon station for the
10 postulated Hosgr event are in certain cases less
11 conservative than those that would be used for an
12 original design."

13 Even though the ACRS determined that the plant
14 has "an adequate margin of safety" it finds also that the
15 plant has a design which is less conservative than for a plant
16 that would be built today.

17 Finally, the pool of experts who have the exper-
18 ience necessary to adequately address the engineering issues
19 raised in this reanalysis is small. This experience relates
20 to two specialized fields: earthquake engineering and the
21 design of nuclear power plants, and within that field there
22 are very few who have the experience and the knowledge and
23 the expertise to address the questions of expected building
24 response in the near field to a conceivible fault assuming the
25 occurrence of a 7.5 magnitude event.

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Throughout the intervenors' access or opportunity, ability to draw upon experts is extremely limited.

So basically for those reasons we believe that the Wisconsin -- that this case constitutes one of exceptional circumstances.

First of all, the issues under consideration are critical to plant safety. Secondly, Drs. Fridman and Luce have specifically criticized the Staff and Applicant's analysis, parts of those analyses that are critical to their conclusions regarding the safety of this facility.

Thirdly, the ACRS has recognized that these assumptions that are used, that many of these assumptions are unique in power plant design, and that this facility does not have a design, is not designed to the level -- as high a level as a plant that would be designed today.

And finally, the pool of experts available for such analysis and for such comment is extremely limited.

MRS. BOWERS: We'll have a ten minute recess.

(Recess.)

MRS. BOWERS: Mr. Fleischaker, do you want to continue, or have you concluded?

MR. FLEISCHAKER: Thank you, Mrs. Bowers, I had concluded.

MRS. BOWERS: The Staff?

The Joint Intervenor's were the proponents of this

mpb5 1 thing.

2 Mr. Horton?

3 MR. HORTON: We have a couple of questions of
4 Mr. Fleischaker before we respond to the argument.

5 Normally one would get a written brief on this
6 sort of thing, and I listened very carefully to his argument
7 and a couple of the questions I had were answered, a couple
8 I had were not.

9 The first one is:

10 Is Mr. Fleischaker proposing that if called
11 Drs. Luce and Trifonac would simply sponsor all of their
12 submittals to ACRS, all of their reports, some of which
13 Mr. Fleischaker has already given to the Board and the rest
14 of which he tells me he intends to give to the Board this
15 afternoon after he's had an opportunity to make copies?

16 Is it for the purpose of new testimony, things
17 that we don't know anything about, analyses that we are
18 unaware of? Or is it simply to sponsor their comments to the
19 ACRS? Because if it is for something new, something different,
20 certainly that would affect our position.

21 MRS. BOWERS: Do you want to respond to that,
22 please?

23 MR. FLEISCHAKER: We would be asking them
24 primarily to sponsor the comments, reports that have been
25 previously submitted to the ACRS.

mpb6 1

MR. NORTON: Okay.

2

It's my understanding they have done thorough analyses and a thorough review of Blum and McManis's work, and that they have fully set forth their opinions in those reports.

6

But I wondered if -- I know that Mr. Fleischaker has been in close contact, he and Mr. Hubbard have been in close contact with Drs. Luce and Trifunac, and I wondered if perhaps they prepared additional testimony or something like that.

11

My second question is --

12

MRS. POWERS: Mr. Fleischaker was shaking his head, which doesn't show up in the transcript.

14

MR. NORTON: Perhaps he could say yes or no.

15

MR. FLEISCHAKER: Should I go under oath?

16

I have not prepared with Drs. Trifunac or Luce any additional testimony.

18

MR. NORTON: Okay.

19

In addition to that, the next question we have is:

21

We have never, as far as I know, other than in incidental conversation between, for example, Dr. Blum or Dr. Smith or Dr. Cornell or something like that in an IGSR subcommittee meeting when they stand out in the hallway or something, we've never engaged in conversations with witnesses

25

mpb7 1 and Luce as have Intervenor. Intervenor have in some small
2 sense, I think, used Drs. Luce and Trifunac as consultants.
3 And I don't say that's bad; I don't say that's wrong. But
4 for Intervenor to then -- quote -- subpoena them -- end quote
5 -- and treat them as subpoenaed witnesses and feel that they
6 have the right to ask leading questions to cross-examine the
7 people who are in effect their own witnesses I think is a
8 great miscarriage of justice because it is not the way the
9 American judicial system is set up.

10 So I would like to know if they are going to
11 be treated by Intervenor as Intervenor would treat their
12 own witnesses, such as Dr. Silver and Dr. Graham and Mr.
13 Hubbard and Dr. Bruce. I think that is important again for
14 us to posture our response.

15 MR. FLEISCHAKER: Well, I think there's a clear
16 distinction between the position that Drs. Trifunac and Luce
17 have and the position that any witness we might sponsor has.
18 Dr. Trifunac and Dr. Luce are consultants to the AGC and we
19 must pass this exceptional circumstance test before we --
20 before the Licensing Board will issue a subpoena.

21 So I believe that they are in a different posture
22 from a witness that the Intervenor might sponsor. And so I
23 don't believe that the rules applicable to the form of ques-
24 tioning that might apply in the case when an Intervenor is
25 directing its own witness should apply in this case. Drs. Luce

mpbC

1 and Trifunac are not our consultants. They are consultants
2 to the Advisory Committee on Reactor Safeguards. They are
3 not -- well, okay.

4 MR. HORTON: I'm not sure that answers my ques-
5 tion, Mr. DeWans, because the content we have is that the
6 purpose or the technique of cross-examination -- you are
7 allowed to cross-examine when a witness is hostile, even if
8 you call him as your own witness if it suddenly becomes
9 apparent to the judicial body trying the case that the
10 witness is hostile, then cross-examination is allowed.

11 Very clearly Mr. Fleischaker has taken great
12 pains to read at length the positions as presented to the
13 ACRS of Drs. Lucco and Trifunac. Very clearly they are not
14 hostile to Mr. Fleischaker's position. And, as I have seen
15 walking down the hall Mr. Fleischaker and Dr. Lucco, sitting
16 in Dr. Lucco's office and taking notes and drinking coffee,
17 I don't think they're going to be hostile witnesses.

18 And, again, in private conversations I've had
19 with Mr. Fleischaker, he gives me the impression he's going
20 to put these people on the stand and lead them as if they
21 were hostile witnesses. And I don't think it is proper, and
22 we very strongly object to that. And that's why we're trying
23 to get an answer, and I'm not sure Mr. Fleischaker did answer
24 that question.

25 MR. FLEISCHAKER: I think I answered the question.

1 The issue goes to the form of the questioning process, as I
 2 understand it, what form will the questions have to take.
 3 And if I understand it, the Applicant's position is that the
 4 ICRC consultants are like consultants to the Interviewer.
 5 That's not the case.

6 We do not have the special relationship with
 7 those individuals that we might have with our own witnesses,
 8 that is,

9 Second, it's often the case in administrative
 10 proceedings that you aren't limited to the strict rules
 11 regarding the form of questioning that you might be in a
 12 criminal trial or in a civil proceeding in the federal
 13 district courts.

14 It is true that Drs. Trifunac and Looz are not
 15 hostile witnesses to the Interviewers. But on the other hand,
 16 they are not our consultants. So I think that fact and the
 17 fact that the administrative procedure recognizes that some
 18 looseness, some flexibility has to be applied when you're
 19 considering things like the form of the questioning leads to
 20 the conclusion that the Interviewers should not be locked into
 21 a form of questioning which is limited in the narrowest sense
 22 to direct presentation as you would find in a federal district
 23 court.

24 I think it would be perfectly appropriate for us
 25 to ask leading questions and for us to engage in that.

mp10 1 cross-examinations with respect to Mrs. Luffman and Lucy
2 if they've brought to the proceeding.

3 MR. BOWERS: Well you've just stated that you
4 would not consider them hostile witnesses. So are you saying
5 that you would be bound by what they would have to say?

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MR. FLEISCHER: I think we ought to have the
 opportunity to question them.

MR. NORRIS: Mrs. Levine, I have one last question.
 I take it then, from what Mr. Fleischaker has
 said this morning, that it's the purpose of Interviewers to
 have these witnesses appear here to express the same views
 that they expressed before the Advisory Committee on Reactor
 Safeguards, both in their written submissions before the ACRS—
 I think there were three or four substantial pieces, if I'm
 not mistaken, over the past several years.

I take it that I am correct that that is the
 purpose.

MR. FLEISCHER: Would you repeat your question?

MR. NORRIS: I gather from what you said,
 Mr. Fleischaker, that it is your purpose or your intent by
 calling these witnesses to have them express to this Board
 those opinions that they expressed in their many
 written submissions to the ACRS Subcommittee and Full Committee
 over the past several years concerning the Rosgor analysis
 of Diablo Canyon; and indeed that's the justification for
 calling them; that there is nothing additional to that.

MR. FLEISCHER: I guess I don't have any
 problem with your formulation. I'm just trying to figure out
 where you're going.

MR. NORRIS: Well, you're going to find out right

eb2

1 now.

2 MR. FLEISCHAKER: Okay. Good.

3 MR. NOTION: In that case we would suggest to the
4 Board, and we would stipulate to entering into the record
5 as evidence, every single document submitted by Drs. Trifunac
6 and Luce before the ACRS, every word, every analysis, every
7 attachment, their qualifications. We would stipulate that
8 indeed they are qualified by their qualifications which
9 Mr. Fleischaker has put in the record today.

10 We see absolutely no need to take up two days of
11 hearing time for them to come and simply read that which has
12 already been presented in full, and would be considered as
13 evidence in this hearing.

14 Absent that, we don't see any showing of excep-
15 tional circumstances whatsoever. What Mr. Fleischaker has
16 postulated is three things:

17 One, they have a different opinion. I don't read
18 the opinion of the Commission, the letter memorandum of the
19 Commission, as saying that is the test for exceptional
20 circumstances. If they had said that what they would have
21 said is ACRS consultants who have a different opinion from
22 that of the Applicant and/or staff may be subpoenaed, period.
23 That's the first showing.

24 The second showing is that it's related to safety.
25 Well, of course it's related to safety. The Advisory

cb? 1 Committee on Reactor Safeguards in a safety function. All
2 AEC consultants are related to safety. They're not environ-
3 mental consultants; they're safety consultants. So that
4 certainly isn't what the term "exceptional circumstances"
5 means, that is it is a difference of opinion and it's related
6 to safety, they may be called.

7 The third thing Mr. Fleischaker states is the pool
8 of our staff is small. Well, that's very interesting and
9 Mr. Fleischaker makes that statement.

10 One of the Vice Presidents of Engineering of
11 Pacific Gas and Electric came up to me at the break, and this
12 is something I didn't know. I was going to comment that that
13 was a statement of Counsel; there is no record in the evi-
14 dence to indicate that the pool is small.

15 In any event, the engineer came up to me and told
16 me that's totally untrue. The pool is very, very large of
17 people who do this kind of work and who are available as
18 consultants.

19 I don't know personally, but there is nothing in
20 the record and nothing before this Board to indicate whether
21 it is small, other than Mr. Fleischaker's statement, and you
22 now have my statement, based on hearsay, as I said.
23 Mr. Fleischaker's is, that the pool is not small.

24 So there's been no showing whatsoever of excep-
25 tional circumstances. I can't imagine how that could be.

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1 text of -- quota -- "exceptional circumstances."

2 But I think the whole problem can be avoided by
3 simply including -- and we're willing to so stipulate, that
4 everything that they have ever submitted be put into the
5 record as evidence and considered by this board. They're
6 not going to say anything new if they come here. They may
7 say it in different ways but they're not going to say any-
8 thing new. They've worked with this problem for several years.

9 Nor is Dr. Blume going to say anything new than
10 what he said over the last several years, and I assume
11 Dr. Newmark isn't going to say anything new than what he said
12 over the last several years.

13 And we have no objection to having that informa-
14 tion submitted to the Board for its due consideration.

15 MRS. BOWERS: Perhaps there hasn't been full
16 communication here, but would it be, in your opinion,
17 Mr. Norton, based on perhaps consultation-- Is the pool
18 small if you consider seismologists who have personal know-
19 ledge of Diablo Canyon?

20 MR. NORTON: No. And that wasn't what
21 Mr. Fleischaker was referring to. Mr. Fleischaker and I have
22 had private conversations about this, and he's talking about
23 seismologists who would be willing to get involved and look
24 at the evidence and arrive at decisions.

25 Obviously the pool is small of people who have

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1 worked on Diablo Canyon on any specific facility. I think
2 that's correct. But basically what we're talking about here
3 is a matter of analysis.

4 If you read carefully Drs. Lucco's and Trifunac's
5 reports, they're not talking about Diablo Canyon PER SE.
6 What they're mostly talking about is the method of analysis.
7 Dr. Lucco's primary concern is that we're using values for
8 damping, et cetera, et cetera, et cetera, that we shouldn't.
9 And Dr. Trifunac is slightly different than Dr. Lucco. But
10 again, it's an analysis; it's an approach difference of
11 opinion. There is not any difference of opinion otherwise.

12 As a matter of fact, Dr. Trifunac-- I guess he
13 does have some specific knowledge about the Houshi-Diablo
14 situation because he believes the magnitude 7.5 is way too
15 high for the Houshi. He believes it should be no more than
16 a 6.5, as do we.

17 But I really think it's a procedural analysis
18 difference of opinion, not a site specific. And in fact, I
19 think Dr. Trifunac's primary concern was that this method of
20 analysis would be used elsewhere if used here, and he felt
21 that, you know, it ought to be fine-tuned a little more
22 before it was used elsewhere.

23 And I think the ACPD staff said that well, this
24 is not to be used elsewhere; this is to be used only at
25 Diablo.

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MRS. BOMERS: We haven't had a chance to read the documents.

MR. NORTON: It's all in Dr. Trifunac's documents. It's paraphrasing of course what I think Dr. Trifunac has said. He said a heck of a lot more than that. As you have in front of you, there are a number of pages but it's all there. Everything he said is there. And there are also transcripts from the ACRS where Dr. Trifunac spoke, and we have absolutely no objection to those being in the record. We have copies and would happily furnish the Board with copies of those, the exchanges between the scientists at the ACRS Subcommittee meeting, both ours, the Staff's, and the consultants for ACRS.

And we have no objection and in fact would invite the Board's attention to those discussions.

MRS. BOMERS: Mr. Fleischaker, before we leave you to go on to the Staff, Mr. Norton has suggested a stipulation. Are you prepared to respond?

MR. FLEISCHAKER: I think that that's a totally unsatisfactory way to proceed. The reason it's a totally unsatisfactory way to proceed is because it doesn't permit anyone to -- because the whole purpose of these proceedings is to clarify, to examine carefully what these witnesses meant when they wrote these papers.

Mr. Norton has one interpretation of that

eb7

1 Dr. Trifunac intended when he wrote those comments in April,
 2 1978. I have a very different, and the Board may have a
 3 different one. The staff may have a different view alto-
 4 gether.

5 It is only by questioning Dr. Trifunac about the
 6 statements in the papers themselves that we can know what it
 7 is that he meant. To put the papers into the-- Just to
 8 submit them into the record I think leaves us with a skeleton
 9 without any real flesh on its bones. We have to have those
 10 experts here in order to permit questioning by the various
 11 parties on the different points of view in order to clarify
 12 and to build a complete record as to what it is that Dr.
 13 Trifunac and Haco meant in their various comments.

14 I'm not going to get into the specific points of
 15 disagreement that I have with Mr. Newton, but as to the
 16 representations that he made about Dr. Trifunac's testimony
 17 and the meaning of that testimony, I have a very different
 18 interpretation with respect to each of the specific points
 19 he made.

20 As far as-- Is that all you wanted me to limit
 21 my comments to, without responding to other arguments that
 22 he made?

23 MRS. BOWERS: Yes. We'll come back and give you a
 24 chance.

25 MR. VERMONT: All right.

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1 MRS. HOWARD: Mr. Tourtelotte?

2 MR. TOURTELLOTT: I'm not certain exactly where
3 we are, but it seems to me that the case is this, that
4 Mr. Fleischaker has made a motion to subpoena Drs. Trifunac
5 and Luce on the basis that there is some outstanding extra-
6 ordinary circumstance consistent with the memorandum put out
7 by the Office of General Counsel on November 29, 1978, and
8 that there is some kind of a counteroffer by the Applicant
9 to simply stipulate all of those materials that are written
10 into the record without having to reach the question of
11 whether there are or are not exceptional circumstances.

12 And I understand that the only reason for having
13 Drs. Trifunac and Luce here is that Mr. Fleischaker believes
14 that it would be beneficial to inquire of them as to exactly
15 what their basis for their thoughts were, and how they
16 worked this into their over-all participation in the SCRS.

17 It seems to me there are a couple of things. One
18 is that basically I don't really have much trouble with
19 stipulating those materials into the record, assuming that it
20 is made clear on the record that the Staff is not conceding
21 that any extraordinary circumstances are shown at all, that
22 we are simply doing this as a method of aiding the record.

23 It also seems to me that in light of the questions
24 asked by Mr. Norton and answered by Mr. Fleischaker, the
25 only question that remains is as to whether or not those

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1 materials might be inserted into the record in lieu of their
2 being present, is the question of whether or not Mr. Fleischman
3 or the Board should question Drs. Grifone and Laco.

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4 There are two points to make with respect to this
5 memorandum by the Office of General Counsel. One is that I
6 don't believe the points made by Mr. Fleischman, the four
7 points, in any way show exceptional circumstances. I per-
8 sonally do not know what "exceptional circumstances" are, and
9 perhaps as one Justice said in the Supreme Court, "I don't
10 know exactly what it is but I will know one if I see one.
11 I do know that I haven't seen one yet."

12 The fact that the issues are critical to safety,
13 I don't want to sound redundant but I guess I agree that
14 the issues are critical to safety is no different than it's
15 going to be in every case where we have a safety hearing,
16 and if the issues are not critical to safety in the safety
17 hearing, then obviously it's going to be irrelevant and we
18 don't need their testimony at all.

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1 That Trifunac and Luce are critical of the 20 14
 2 position is of no particular consequence to us, we've known
 3 that all along. They were critical of the ACRS consideration
 4 of the matter, and the ACRS chose to, at least, apparently,
 5 reject the views of Trifunac and Luce and in their overall
 6 consideration, arrived at a determination that the plant
 7 could be operated in a safe manner.

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8 The ACRS recognition of the unique nature of the
 9 methodology that's used in this plant is also not an extra-
 10 ordinary circumstance. I think I indicated in my opening
 11 statement that we're proceeding in this case under Appendix
 12 A to Part 100, where it states very clearly that if the
 13 Applicant has another approach rather than the approach that
 14 is suggested by our regulations, then they may suggest that
 15 and we will review it. And obviously, if they come up with
 16 something that is new or different, there may be unique
 17 methodologies. But the fact that a methodology is unique
 18 does not make it any less valid.

19 The fact that the pool of experts is small is --
 20 I don't really know what pool of experts Mr. Plischke is
 21 talking about. I don't really know whether it is small or
 22 not. And, frankly, in order to answer that kind of a question,
 23 I think I would have to do considerable digging myself or,
 24 to put the shoe on the right foot, I think Mr. Plischke
 25 does us an explanation of what the pool is and how many people

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are in that pool and how he tried to attract or tried to hire
the people from the pool and why he can't hire anybody from
that pool.

Finally, the second part that I have to address
relative to the statement of the General Counsel, is that
if the purpose, the only purpose of asking Trifunac and Luce
here is to inquire into their minds as to what their own
reasoning processes were, it seems to me that that is in-
consistent with the final statement that's made in the General
Counsel's memorandum which we've supposed to treat as governing
in this proceeding. And that is, and I'm quoting here from
Page Three:

"Finally, parties may not seek to
probe the reasoning process underlying the
collegial RCRS report through the device of a
supposed to a consultant."

It seems to me that, if indeed that is the
reason why Mr. Fleischaker is asking Mrs. Trifunac and Luce
be presented, then that runs squarely in opposition to the
memorandum that is supposed to be governing our proceeding.
And if it is something else, then I don't understand his
position.

Consequently, I think I would love to argue
that the action, at least, for a subpoena in the present set
of circumstances that are shown by the intervenor's counsel

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1 that that request for a subpoena be denied because there
 2 aren't exceptional circumstances and because the only reason
 3 for bringing these witnesses appears to be that of probing
 4 the reasoning process underlying the ACRS report.

5 And as far as the suggested alternative of
 6 stipulating those papers in, I think that's a matter which,
 7 if we're going to stipulate, everybody is going to have to
 8 agree to it or we won't have them in at all.

9 MRS. BOWERS: Mr. Courtelleste, in looking at
 10 the Commission's memorandum on Page Two, the beginning of
 11 the first full paragraph, starts out by saying:

12 "Upon consideration, the Commission
 13 believes that the exceptional circumstances test
 14 of Section 2.736(h) is properly applicable to
 15 consultants to the ACRS in cases in which they
 16 have served as consultants."

17 Then you get down, in the last full sentence on
 18 that page, by the terms of the rule,

19 "...exceptional circumstances are
 20 not limited to situations in which the particular
 21 individual has unique knowledge of facts."

22 Now, going back up for a minute to 736(h)
 23 the example given in (h) to small (i):

24 "The presiding officer may, upon a
 25 showing of exceptional circumstances, such as a

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1 case in which a particular named BAC employee
 2 has direct personal knowledge of a material
 3 fact not known to the witness made available
 4 by..." -- otherwise made available.

5 I guess my question, and I will go to the other
 6 parties too, if I followed your position, Mr. Fleischaker,
 7 I don't believe I heard you say that those two people are
 8 the only ones that have knowledge of material facts that
 9 others do not have. Is that correct?

10 MR. FLEISCHAKER: That's correct. -

11 I do not base the argument on the fact that --
 12 I do not argue that Drs. Trifunac and Duce have unique
 13 possession of material facts.

14 MRS. BOWERS: So you would be falling under the
 15 sentence near the bottom of Page Two that:

16 "...exceptional circumstances are
 17 not limited to situation in which the particular
 18 individual has unique knowledge of facts."

19 MR. FLEISCHAKER: That's correct.

20 MRS. BOWERS: Well, back for a moment to Mr.
 21 Tourtellotte:

22 In considering the situation, does the staff
 23 have a position as to whether the -- as to how the last
 24 full sentence on Page Two affects the regulation?

25 We realize that an example was given here that

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1 would clearly establish in the regulation exceptional cir-
2 cumstances. But if you get any idea that, then what, in the
3 Staff's opinion, would be necessary to establish exceptional
4 circumstances?

5 MR. TOWNSEND: Well, to begin with, I guess
6 before I could say whether or not Drs. Trifunac and Jugo
7 have possession of a material fact that is not known to the
8 witnesses that we're going to present, I think Mr. Fleischaker
9 owes us an explanation of what that material fact is or
10 those material facts are that he expects Dr. Trifunac and
11 Jugo to present which the Staff is not in possession -- does
12 not possess the knowledge of.

13 MRS. BOWERS: He just said that's not his
14 position. He's not claiming that they have material facts
15 that others do not have.

16 MR. TOWNSEND: Well, with all due respect
17 to General Counsel's Office, I don't know what that last
18 sentence means at all.

19 I think it means, what it says is it's leaving
20 the door open to the fact that there may be other situations
21 where exceptional circumstances may exist, and it's not
22 necessarily associated with unique knowledge of facts.

23 But I don't know what those exceptional circum-
24 stances are. And I think, again, as I pointed out, I can
25 only say that maybe if someone came up with an exceptional

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1 circumstances, I could agree that it was one. But I don't
 2 see that any of the arguments that are made by Mr. Thibodeau
 3 present that kind of a forceful presentation.

4 MR. NORRICH: Excuse me, Mrs. Bowers, could we
 5 comment on the same question?

6 MRS. BOWERS: Yes.

7 MR. NORRICH: I don't see the last subparagraph
 8 that opinion differing or changing in any way the regulation.

9 MRS. BOWERS: The last sentence on Page Two?

10 MR. NORRICH: Yes. It says:

11 "The presiding officer may, upon a
 12 showing of exceptional circumstances, such as a
 13 case in which a particular named HRC employee
 14 has direct personal knowledge of a material
 15 fact not known to the witnesses made available..."

16 That's just an example of an exceptional cir-
 17 cumstance. Evidently the lawyer who wrote that memorandum,
 18 all he was trying to do was to say that's not the only thing.
 19 Of course, that's not any help, because the regulation says
 20 that's not the only thing, so I don't think it adds anything
 21 and the regulation isn't in any way changed by it.

22 But perhaps to look at -- Mr. Thibodeau hit
 23 upon as good a definition as any that you know there is
 24 when you see one.

25 I think in this case the clearest way to state

pg 7

1 that you don't have an exceptional circumstance it to simply
2 counter Mr. Weisshaker's motion to subpoena Drs. Trifunovic
3 and Luce because they differ with the opinions of one of the
4 parties, we'll ask that the Grand subpoena Dr. Page, Dr.
5 Thompson, Dr. Pickel, Dr. White, Dr. Wilson, Dr. Scavuzzo,
6 who are all consultants to the ACRS who all differ with the
7 Intervenor's position in a safety related matter. . . .

8 If that's exceptional circumstances, then I
9 guess they should all nine members be called. The only
10 difference is one has a different opinion than another, and
11 that cannot be the basis for exceptional circumstances.

12 MRS. POWERS: Mr. Bright has a question.

13 MR. BRIGHT: I'm just curious, how many consultants
14 does ACRS have on this particular case?

15 MR. HORTON: On this particular case, I believe
16 they had nine. One of them, I believe, passed away, we have
17 several people on this project for the past 13 years,
18 through longevity, have passed away. And I forget who it was.
19 I guess it was Dr. Wilson. So a lot of the people I suggested
20 subpoenaing we obviously can't subpoena.

21 And I don't have all the names, there is one
22 name I do not have. But there were, I believe, a total of
23 nine consultants, one of them has passed away so there are
24 now only eight.

25 Dr. Pickel, I remember, did a special study on

1 caubank of Diablo Canyon. Mr. Bright was involved in the geology
2 and seismology aspect of it.

3 And Mr. Fleischman hasn't shown anything different
4 for Drs. Luce and Williams except they disagree with us.
5 Let all the others disagree with Mr. Fleischman, so they are
6 just an exceptional circumstances.

7 MR. BRIGHT: Well I really was just interested in
8 knowing whether ACRS was dependent upon these two gentlemen,
9 or --

10 MR. HENSON: Oh no, they had nine consultants.

11 MR. BRIGHT: Thank you.

12 MR. HENSON: The ACRS itself, of course, had
13 people in that field or in related fields and in those fields
14 that they were considering, of course.

15 MRS. BOWERS: Mr. Fleischman.

16 MR. FLEISCHMAN: A couple of comments.

17 First of all, Dr. Bright, to answer your question,
18 they may have had nine, ten or eleven consultants, I don't
19 know, but the number of consultants that they had on the
20 question of engineering design, the derivation of the response
21 spectra, was substantially more limited.

22 They had a number of experts on the question of
23 geology, a number on seismology and then they had a smaller
24 group on engineering design. And I believe that the number
25 of consultants that they had on that issue was probably four:

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Dr. Pichai, Dr. Wilby --

Mr. Pichai: I don't disagree, they weren't all
the same as the other issues, I don't disagree with that.

MR. WILBY: Okay.

Let's look at all the things that are some of the
arguments that have been made here.

First of all, I think the applicant's argument
was our argument when they say that we think exceptional
circumstances exist when there's a difference of opinion only.
That sort of characterizes the argument and dictates it.

The argument here is that there's different
opinions on engineering assumptions that are unique to
nuclear power plant design.

As indicated in the NRC's letter, there are
differences of opinions on engineering assumptions, each of
which has the effect of reducing the earthquake limit. There
are differences of opinions on assumptions for which there is
-- excuse me; which are without extensive observations and
analysis. All of that appears in the NRC's letter of July 14.
This isn't simply a matter of a difference of opinion.

Secondly, I think it's significant that we're
talking about a difference of opinion on matters critical
to safety, not tangentially related to safety.

This is a safety hearing, but that doesn't mean
that everything we discuss in this hearing is in any way safety

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1 hearing is not centrally related to the question of plant
2 safety or the seismic design of that facility. We're talking
3 about the very core -- and I mean that word literally --
4 we're talking about the core of the plant, we're not talking
5 about perimeter fences, we're not talking about transmission
6 lines specifically. We're talking about the design of the
7 facility to withstand the shaking.

8 Let me move on to some of the Staff arguments.

9 Mr. Tourtellotte points out that even if Mrs.
10 Trifunac and Luce had their figures different from the Staff
11 and Applicant, the ACRS went on and found that there was an
12 adequate margin of safety. What's not legally sufficient.

13 If the ACRS sign-off is all we need, let's
14 close up shop and go home, we can brief this thing. But the
15 ACRS doesn't have the duty to make the definitive finding of
16 safety. What the ACRS found is that there was an adequate
17 margin of safety, but nowhere in that letter will you find that
18 the ACRS found that the Commission's regulations had been met.

19 The Commission, not the ACRS, decides what is
20 safe, and the Commission's definition of safety is contained
21 in Appendix A, so it's important that this Board measure the
22 evidence that is submitted at this proceeding against the
23 Commission's definition of safety, because it is the Commission
24 that has the mandate from the Congress to define how safe is
25 safe enough, not the ACRS.

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1 as whether the final thing off on this or not is
 2 usually irrelevant. It's the Commission's... I think it
 3 was Vincent's idea when the Special Board pointed out the
 4 Staff can come in and say it's safe enough, the Board can come
 5 in and say it's safe enough, but the law is: what is safe
 6 enough is defined by the regulations. And the Board has to
 7 determine that the Applicant's analysis and the Staff's
 8 analysis meet regulations.

9 So the fact that the final position is the sign-off
 10 I think is legally irrelevant and should not stand before this
 11 Board -- but the issuance of the subpoenas. Because
 12 Drs. Trifunac and Luce have some very important information,
 13 I think, to present to the record.

14 There was a question as to the efforts we had
 15 made on how large the pool of people is. I think that's a
 16 subsidiary point; I don't think it's fundamental to the
 17 issue here. But I'll tell you about it.

18 We've been to a lot of people to try to get some
 19 experts on this issue. I talked to Dr. Trifunac on a number
 20 of occasions and asked him if he could provide us with the
 21 names of people who could assist us in this presentation.
 22 Nobody.

23 I talked to Dr. Luce and asked him whether he
 24 could provide us with names of people. And Dr. Luce has, I
 25 think, three graduate students; one works for General Atomics,

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1 one week for Mr. Krasner, Dr. Frazier, who is the applicant's
2 expert, and the other one I don't think had the time.

3 So the fact is we were trying to get to people
4 who had both the training and would be close enough to the
5 problem so they could understand the particular problems
6 involved with Diablo Canyon and get experts. We weren't able
7 to do that.

8 Those are the efforts we made.

9 We also went up to Stanford and looked for people
10 up there to see if we could get some people up there to help
11 us. And we can't find people who are available to assist us
12 in this problem.

13 That's in response to Mr. Fourtelle's inquiry.

14 Finally, it should be clear from every filing
15 that we've made that we are not calling Drs. Trifunac and
16 Luce to this proceeding to probe the collegial decision-making
17 of the ACRS; rather, we call them for a different reason,
18 and that reason is to probe their expert opinion on the
19 adequacy of the Staff and Applicant analysis.

20 MRS. BOWERS: Since we haven't had an opportunity
21 to read what you've handed us this morning, would their testi-
22 mony in any way duplicate the testimony of your other witnesses?

23 MR. FLEYSCHER: Not at all. Not at all. Our
24 other witnesses are-- There may be some small overlap in the
25 testimony of Dr. Brand and Dr. Trifunac insofar as they are

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1 both looking about the kinds of peak accelerations we can
2 expect to see in the core field of a large event; that is,
3 instrumental peak accelerations.

4 But when you get to all the other engineering
5 questions, the questions of effective accelerations, the
6 question of soil-structure interaction, the question of how
7 affect, the question of damping, the question of the non-
8 linear or the linear response of the facility, only Trifunac
9 and Ince can talk about these issues. These are engineering
10 design issues. And neither Dr. Silver, Dr. Graham nor
11 Dr. Bruene or Clarence Hall -- should be out back in that --
12 none of these people can talk about these issues.

13 MR. TOURTELLOTT: Mrs. Bowers, I think it is
14 my turn.

15 MRS. BOWERS: Yes. But I think we're going to have
16 to stop taking turns at some point.

17 MR. TOURTELLOTT: This is one of the difficulties
18 of course, of trying to deal with an oral action. It seems
19 to me in ordinary circumstances Mr. Fleischaker would have
20 filed a piece of paper with us and we'd have several days to
21 consider it. And we're trying to consider and give the Board
22 our views as they come up and so we get an exchange here.

23 Of course Mr. Fleischaker pointed the difference
24 between the AEC's and their use of the term "adequate margin
25 of safety" and the one that I used, "reasonable assurance of

1 public health and safety, and that's really not the...
2 The fact is that the AGCS found some...
3 be safe.

4 And it seems to me there are a couple of things
5 we should be considering here. One is... AGCS's...
6 with what Mr. Norton says, but it's also exactly the same
7 thing. He's saying, Well if the...
8 Dr. Trifunac and Dr. Luce then we've...
9 rest of the AGCS and let them state why they...
10 findings, and the beliefs of Dr. Trifunac and Dr. Luce.

11 There is something that is more important than
12 that, it seems to me. --or as important as that. That is,
13 that is -- the whole business of extraordinary circumstances
14 and subpoenaing AGCS consultants is affected by the fact that
15 you can reasonably foresee that if Dr. Trifunac and Dr. Luce
16 are subpoenaed in this case to present additional material --
17 and it isn't clear what additional material they will be
18 present that they haven't presented to the AGCS. You can
19 only ask yourself a couple of questions:

20 One is: If there is additional material for them
21 to present here, why didn't they present it to the AGCS? And
22 if they didn't present it to the AGCS, why is it so
23 important to us here?

24 The second thing that you can foresee is that
25 you're going to wind up, whether you like it or not -- and

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1 regardless of what this order says, you're going to stand up
 2 in order to maintain your responsibilities for monitoring and
 3 process of law is not, you're going to stand up probing the
 4 mental processes of the AGCS. Remember there's a simple fact
 5 about Writuras and Luce the consultants of the AGCS, and by
 6 reason of being consultants to the AGCS their titles carry
 7 a certain amount of prestige. The ordinary for any trial
 8 lawyer to seek that kind of a challenge is to simply subpoena
 9 the other people who are concerned the same equal type of
 10 status, and that's the AGCS.

11 And when you ask the AGCS to come in here and
 12 tell why they overruled Writuras and Luce, then you're going
 13 to be in the business of probing the mental processes of the
 14 AGCS. And that's precisely what this order says that they
 15 can't do.

16 It's a reasonably foreseeable thing. And it's
 17 a dilemma, it's a real dilemma to know what to do.

18 But in the final analysis it seems to be time
 19 when you consider that back when we started discussing this
 20 matter Mr. Fleischaker answered Mr. Norton's question that he
 21 knows of no other information that these AGCS members are
 22 going to present, other than that information that they gave
 23 to us in all of these many pleadings and filings, is they
 24 indeed are not going to present any other information, the
 25 is it even necessary that they be here?

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I mean, two days, or one day, or whatever time it is, to have them to sit here and present this information in, when the applicant, and I guess the staff, are willing to stipulate that material in. What other information is it?

Now if indeed there is other information which they are going to present to us, then I would say to you that Mr. Fleischaker has the responsibility to tell us have and how what that other information is. Because maybe that's the kind of information that we need to decide whether there are exceptional circumstances.

But it seems to me you can't have it both ways: you can't say that they're not going to present any new information but it is still necessary for them to be here, or you can say that they may present new information: let's have a fishing expedition to see what the ACRS consultants think, and they may come up with something new, and it may be important, and it may present exceptional circumstances, when, in fact, nobody knows.

It seems to me that we have the right to know what Trifunac and Loco are going to say before they come in here. And if this is all they're going to say, and everybody is willing to stipulate it in, they don't have to be here.

MRS. BOWERS: Well we'll call for a response from Mr. Fleischaker and then we'd like to go on to other matters.

One thought that crossed my mind, and you say or

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any and how information on a...
it is... they will be...
country? are they available?

MR. FLORENCE: Yes, it is...
they were...

MRS. BOWEN: Do you wish me...
report to Mr. Marshall's...?

MR. FLORENCE: I think Mr. T...
argument raises the point, it's...

The issue isn't whether we...
have any information to subject, the...
they should submit their opinions...
required to make the decision, to...
of safety. That's the legal question...
question of how information is...

That's all.

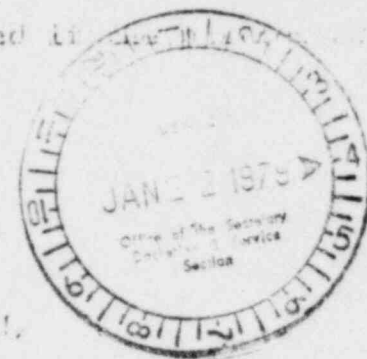
MRS. BOWEN: Well we will take...
for the arguments of all parties, and we will...
have today's transcript available to us, also, in considering
this matter.

So we now should go on to other things.

One thing that occurred to me in...
we got out an order some time ago...
to consider whether the record in this case...
exists in River... and...

EVIDENCE

MRS. BOBBS: We can proceed if you are ready.



WASHINGTON,

RICHARD H. TAMM,

DONALD H. DOLITTLE,

and

C. RICHARD WILLIAMS.

resumed the stand on behalf of the Applicants and, I would
been previously duly sworn, were examined and testified as
follows:

MRS. BOBBS: We have a preliminary matter that
we would like to discuss first, before we get back to the
taking of evidence.

Wednesday morning we had a long discussion about
the Intervenor's request for the Board to subpoena the BNL
consultants, and we told you that we would review the
transcript from that day, and also review the documents that
were identified as Attachments A through F.

Well, we have been able to do that and what we
have determined is that the Intervenor, on transcript page
4301, summarized the four points that they felt would
establish exceptional circumstances that would warrant the
issuance of subpoenas.

Also, I would like to bring to your attention

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1 transcript page 4288 and 1355. Those are the two pages
2 where the documents, Attachments A through I, are fully
3 identified.

4 We carefully reviewed the transcripts and the docu-
5 ments, and we have determined that exceptional circumstances
6 have not been established. We do think, since we have read
7 the documents A through I, that it is appropriate for those
8 documents to come into this record. So we will make those
9 documents Board Exhibit Number 2.

10 (Whereupon, the documents
11 referred to were marked
12 as Board Exhibit 2 for
13 identification.)
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ebl

1 Now one reason is that we feel this will give us a
2 good record and a thorough understanding of what those two
3 ACSRS consultants have said, what their positions are. In
4 the discussion of Counsel it was stated that there would not
5 be any direct testimony submitted and that the two of them
6 would be essentially sponsoring these documents. Both
7 Applicant and Staff said they had no objection to the docu-
8 ments coming into the record, and suggested the possibility
9 of the parties stipulating.

10 Mr. Fleischman said that was not acceptable to
11 the Intervenor, that they wanted the witnesses here in
12 person.

13 Our review shows us that we will have the infor-
14 mation before us from the discussion of Counsel, that we
15 would have if the witnesses appeared. And in our opinion
16 there are no exceptional circumstances here that would
17 warrant the subpoena of witnesses.

18 Now Mr. Norton, I think in a moment of little
19 the Applicant offered to make copies of those so they would
20 go in as exhibits. Is that correct?

21 MR. NORTON: It must have been a very heated
22 moment because I don't remember.

23 (Laughter.)

24 MRS. BOHANN: Well, you first suggested they go
25 in.

eb2

1 MR. NORTON: I may have done that, and we have no
2 problem. We can make-- I don't remember that, though. It
3 seemed he was going to supply some more documents,
4 Mr. Fleischaker was.

5 MRS. BOWERS: Well, after lunch we got three other
6 additional attachments.

7 Are there additional documents, Mr. Fleischaker?

8 MR. FLEISCHAKER: No, Ma'am.

9 MRS. BOWERS: It was after lunch, and that's the
10 second page I referenced.

11 MR. NORTON: So we need --

12 MRS. BOWERS: Three copies.

13 MR. NORTON: Yes, but then we all need a copy of
14 what went in.

15 We'll have the copies made.

16 MRS. BOWERS: Well, we have ours.

17 MR. NORTON: You all have a copy?

18 MRS. BOWERS: We have full sets.

19 MR. NORTON: So then we will make a master number.
20 That's fine. We'll take care of it.

21 MRS. BOWERS: Fine.

22 We will give each of the parties an opportunity
23 to respond to what the Board has determined this morning.

24 Do you have anything, Mr. Norton?

25 MR. NORTON: No.

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MRS. BOWERS: Mr. Fleischaker?

MR. FLEISCHAKER: I am honestly disappointed and I was trying to look at the rule for directed instructions, but I suspect that I would make such a motion. I haven't got the rule, and I will probably come back over the weekend with some appropriate motion.

MRS. BOWERS: Mr. Tournelotte?

MR. TOURNELLOTT: No objection.

MRS. BOWERS: We see no reason to try to identify the attachments. I think we have identified the two pages in the transcript which they are fully described.

MR. HORTON: Excuse me, Mrs. Bowers, if we could have what you have put together as an exhibit with them then start making copies.

MRS. BOWERS: Very well.

Well, we're ready to resume.

CROSS-EXAMINATION (Continued)

BY MR. FLEISCHAKER:

Q Dr. Jahns, I would like to direct your attention to page 4419 of the transcript from December 21st.

MR. HORTON: May I have the page with me, please?

MR. FLEISCHAKER: 4419.

MR. HORTON: Thank you.

BY MR. FLEISCHAKER:

Q Do you have that, Dr. Jahns?

A (Witness Jahns) Yes, I have it in front of me.

Q On lines 3 through 11, you indicate that there has been relatively minor movements in the late Pleistocene and Post Pleistocene or Holocene times.

What is the basis for that conclusion?

A The principal basis is the presence of discontinuities and offset features along parts of the sea floor trace of the Mesgri.

Q Is this primarily the evidence that is presented as the result of the seismic reflection surveys?

A Primarily so, yes.

Q Have you, yourself, reviewed that evidence?

A I have reviewed it briefly.

Q Did you find evidence of sea floor offsets?

A Before answering that, I had better ask what you mean by "sea floor offset."

Q Let me rephrase the question.

What evidence did you find that permitted you to date the recency of movements?

A I found no evidence personally. I only reviewed the evidence that has been compiled.

Q What evidence did you review?

A This is the evidence of seismic profiles principally.

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florida.

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(Laughter.)

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MRS. BOWERS: Any objection to the panel being

4

excused?

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MR. KRISTOVICH: No objection.

6

MRS. BOWERS: Mr. Notchen?

7

MR. KRISTOVICH: No objection.

8

MRS. BOWERS: The panel is excused.

9

(The panel excuses.)

10

MRS. BOWERS: Now can we talk about scheduling?

11

MR. NORRICH: Yes, I think we can.

12

This is talking about scheduling, but --

13

MRS. BOWERS: Well, we're going back tomorrow?

14

MR. NORRICH: Well, this is going the backdoor to

15

talk about that, however.

16

We have the Joint Intervenor's Request for

17

Directed Certification, and I think maybe if we could discuss

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that for a moment that will bear somewhat on scheduling.

19

At this time the Applicant would request that the

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Board consider Joint Intervenor's Request for Directed

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Certification as a motion for reconsideration to this Board

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also. That's perfectly proper, I believe. In Black Fox what

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was done. A Request for Directed Certification was made to

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the licensing board in that proceeding and they considered it

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or considered it as a motion for reconsideration.

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2 At this time I think we don't feel that any
 3 extraordinary circumstances are before us here. However, in the
 4 interest of moving these proceedings along, instead of having
 5 them drag on and on and on and come back again at a later time,
 6 or the possibility of coming back at a later time, we would
 7 ask that the Board indeed reconsider, and we would support the
 8 Intervenor's request to have Haddess, Whitford and Joyce appear
 9 at these hearings.

10 We have been assured -- you know, they have
 11 nothing to say other than what they've already submitted.
 12 We've been aware of that information obviously for many months.
 13 And as long as they're not coming in with new materials, as
 14 Council for Intervenor has stated on the record, we will not
 15 be surprised.

16 We feel that we can indeed proceed most expeditiously
 17 by having them here.

18 The reason we didn't want them in the first place
 19 was we didn't want to drag these hearings out another week.
 20 But no matter what we do, the hearings are being dragged out.
 21 So rather than have that carry out for months, we would just
 22 as soon have them here, and so we'll be here an extra two or
 23 three days because they're here -- or a week perhaps. But in
 24 the long run that's going to be a shorter period of time.

25 So we would ask the Board to reconsider the
 Intervenor's request for the issuance of subpoenas.

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I'm also a little puzzled as to why -- and I don't think the Interveners have ever told us -- why these people can't be here voluntarily, why subpoenas have to be issued in the first place. I know, for example, that Interveners have consulted with these two people on numerous occasions in this case, and I don't understand why they have to be subpoenaed, why they can't voluntarily appear. That has never been adequately explained. And frankly, that's the way we would prefer to go, because I don't think there are any exceptional circumstances.

I don't think -- of course exceptional circumstances were never defined, but I agree with Mr. Scutellitto, if you see or you know what it is. And this isn't one.

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I don't understand, you know, why they can't voluntarily appear, why they can't just appear as intervenor witnesses. You don't have to call those intervenors' witnesses you can call them anybody's witness you want, but I don't see why they can't voluntarily appear.

But short of that, we would ask that the subpoenaed issue, simply so we can get these proceedings over, instead of dragging them out for months.

MRS. BOWERS: Mr. Norton, do you think this Board, if it does follow your suggestion to consider the notice to the Appeal Board as a notice for consideration, do you think this Board could justify issuing subpoenas unless it determined there were exceptional circumstances?

MR. NORTON: I think that's for the Staff to answer.

(Laughter.)

MR. NORTON: It seems to me that if the parties do not object -- I'll withdraw from the Staff and let them collect their thought for a moment.

It seems to me that if the parties withdraw their objection, then you don't need exceptional circumstances. It would seem to me only if the parties objected and somebody was against their coming, that there would have to be a showing of exceptional circumstances.

It seems to me it's just like the intervenor case

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were stipulated into the record. There was no real basis for that other than the fact that the parties stipulated to it. And I think that in this case if the parties stipulate to it, I don't think there would have to be a showing of exceptional circumstances because, frankly, exceptional circumstances don't exist.

(The Board conferring.)

MRS. BOWERS: Mr. Kristovich?

MR. KRISTOVICH: Mrs. Bowers, I just wanted to clear up one thing. It's my understanding that it's AASA policy not to have the consultants appear at licensing proceedings. And this is, as I understand it, the understanding of Drs. Luce and Trifunac.

MRS. BOWERS: Does the Staff have a position on the Applicant's comments?

MR. FOURMELLOTT: Well I think we ought to straighten the record out. As I recall, Mr. Horton said the Staff should collect their thoughts, and it was in the singular.

(Laughter.)

I just wanted you to know that we have more than one.

(Laughter.)

Well, Staff is of the same opinion that we were originally that (a), there is no real reason -- there was no good reason shown for their appearance, primarily because

1 Mr. Fleischaker stated the only reason for their appearance
2 was to sponsor this document or these series of documents and
3 testimony and that they were not going to be presented for
4 the purpose of producing any further testimony.

5 In the second place, I don't believe that Mr.
6 Fleischaker ever really did show an exceptional circumstance
7 existed. And so to that extent, I don't think our position
8 has changed much.

9 I do, of course, agree that perhaps there is some
10 valid reason for subpoenaing them if it would help to expedite
11 the case and in some way could be considered as serving the
12 public interest in that regard.

13 Of course, the right of the Licensing Board to
14 treat an interlocutory appeal as a motion to reconsider was
15 established in ALAB 376 in Black Fox. So I do think the Board
16 has the right to reconsider it, and if it will help expedite
17 the case, the Staff would be willing to have the subpoenas
18 issued and I suppose the subpoenas in this case are issuing
19 for the convenience of Drs. Luce and Trifunac because of the
20 outstanding policy and I think that probably a justification
21 can be made on the grounds not that exceptional circumstances
22 have been shown, because I don't believe they have been shown
23 in this case but, rather, that it is an action to which all
24 parties agree and which in some way probably help to expedite
25 the case and serve the public interest.

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So we would not expose their appearance here whether it's voluntarily or their part or by subpoena.

MRS. BOWERS: I don't know whether it was just Appeal Board or Appeal Board and Commission in another proceeding where the parties entered into a stipulation and the Licensing Board didn't accept it--do you recall that case -- And the Licensing Board was scolded for not accepting a stipulation of all parties.

Now are you saying that that sort of thinking prevails here?

MR. TOURTELLOTT: Yes.

MR. KRISOVICH: Mrs. Bowers, since both Applicant and Staff have had an opportunity to speak their mind and say they don't believe exceptional circumstances are present, I would merely like to reiterate the Joint Intervenor's position.

We feel there are exceptional circumstances here and that would be a proper basis for issuing a subpoena.

MRS. BOWERS: What are the exceptional circumstances?

MR. KRISOVICH: I believe the Board has a copy of Mr. Fleischaker's Request for Directed Certification and they're all outlined in there and in the previous oral argument.

MR. HORNON: Excuse me. There is not one word about how exceptional circumstances exist in this Request for Directed Certification. It is totally ignored. And as you're

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...making the point in one, I would love to read it.

MRS. BOWEN: Well the only thing I saw was that the general discussion and there are individuals' names in their opinions from the first AGNS position. In that context

MR. KENNEDY: Mrs. Bowen, I believe we had oral arguments the first week in December at the hearings, and Mr. Fleischaker at that time published what he believed were the exceptional circumstances, and I believe it's all in the transcript already and this notice speaks for itself.

MR. HORN: Mrs. Bowen, I would like to address one thing Mr. Fleischaker said before the Staff again, and that is that the AGNS has no position against their consultants appearing voluntarily.

In fact, I was there when Chairman Kowalski was asked that question by Chairman Bantro. And the response was well, of course, there's nothing we can do about their appearing voluntarily, but we don't want them subpoenaed.

That was the position of the AGNS, they said they have absolutely no control over someone's appearing voluntarily. They don't like it, but they have absolutely no control over it whatsoever. If someone wants to appear voluntarily they have that right, absolute right. That the AGNS was against was the subpoenaing of their consultants, consultants who didn't want to come to the hearing.

MR. KENNEDY: Mrs. Bowen, that's Mr. Kowalski's

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1 understanding. I believe there were additional comments
2 that the ACRE did not want their consultants in the future
3 voluntarily appearing.

4 MR. NORTON: No, no, no.

5 MR. KRISOVICH: That's your understanding and I
6 have an understanding.

7 MR. NORTON: Were you there?

8 MR. KRISOVICH: Mr. Fleischaker was there.

9 MRS. BOWERS: Please address the Board.

10 Does the Staff have any position on this partic-
11 ular point?

12 MR. FOURBELLOWEE: You mean on whether exceptional
13 circumstances --

14 MRS. BOWERS: No, whether the ACRE consultants
15 can voluntarily appear.

16 MR. FOURBELLOWEE: Yes, I was there and I recall
17 their saying that they didn't really feel they had the control
18 over their own members or consultants and that if they wished
19 to appear voluntarily they could.

20 So really there is no reason why they can't appear
21 voluntarily, except for the fact that they might be individually
22 reluctant to do so. If they are individually reluctant to do
23 so, then that's what a subpoena is for, for whatever reason
24 they are reluctant.

25 I don't know that they are or they're not.

MRS. BOWERS: Mr. Kriestovitch, do you have any information?

MR. KRISTOVICH: Mrs. Bowers, they have expressed their reluctance to just voluntarily appear because of their relationship to the NLR and the ILEW.

MR. HOBSON: Mrs. Bowers, I guess Interveners would have no objection if we called Messrs. Kuro and Sulzberg and asked them if they would like to come up to these hearings and then perhaps we can report back what their answers are.

MRS. BOWERS: In this proceeding -- I guess it was a year or so ago in the environmental issue, there was a letter from someone, a witness for the Interveners, who said in the letter that because of his employment, his situation, he could not voluntarily appear and requested a subpoena.

Now have you attempted to get that kind of information, or information is waiting from the two witnesses?

MR. HOBSON: Well Mrs. Bowers, my suggestion of calling them -- we are perfectly willing to call them and ask them to come and ask them if they would come and see if they will and then report back to this Board. I'm sure we can accomplish that before the lunch hour break -- as witnesses.

MR. KRISTOVICH: Mrs. Bowers, Mr. Flatschaker has spoken to them and the answer was they do not want to voluntarily appear.

MRS. BOWERS: Well do you have any objection to

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Mr. Horton making a phone call?

MR. KRISTOVICH: I just don't understand the purpose of this. I'm at a loss as to what has transpired in the last five minutes.

MRS. BOWERS: Well, you know, Mr. Horton could make the phone call without getting a clearance from the Board on it.

MR. KRISTOVICH: That's very clear.

But I thought I had just said that Mr. Fleischman had spoken with them and they had expressed to Mr. Fleischman a reluctance to appear voluntarily. But that's not the issue before the Board anyway.

MRS. BOWERS: Well, in a way it is because we have a Commission document that goes into about exceptional circumstances being established before a subpoena is issued, and both Applicant and Staff have suggested that circumstances dealing with the efficiency of the proceeding would be justification for the issuing of the subpoena.

But if these witnesses will appear voluntarily, then we're not faced with the hard question of exceptional circumstances.

MR. KRISTOVICH: I guess it just seems -- maybe I'm confused, but I thought I just said that my understanding is that they want appear voluntarily. And I don't know, is you just want Mr. Horton to say that to you based on his phone

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1 conversation and you can't want us to tell you based on Mr.
2 Flinschaker's conversation...

3 MRS. BOWERS: Well, I think at the time those
4 conversations occurred with Mr. Flinschaker -- and don't
5 misunderstand. We're not in any way challenging the construc-
6 tion -- the situation, though, perhaps was different at those
7 times. Both Applicant and Staff were very opposed to them
8 appearing, and that's no longer true.

9 MR. KRISTOVICH: I don't see how that makes a
10 difference. I don't know what we're arguing about.

11 MR. BOWEN: I'm not.

12 Mrs. Bowers, we request that the decision of the
13 Board be postponed until after lunch, and in the meantime we
14 will contact Messrs. Kristovitch and Bowe -- we will attempt to
15 contact them and see if they will appear at these proceedings
16 voluntarily. And if they can't, then we would urge the Board
17 issue subpoenas in the public interest of expediting these
18 proceedings.

19 MRS. BOWERS: We'll defer our ruling until after
20 lunch.

21 MR. KRISTOVICH: Mrs. Bowers, can we have a recess
22 for a few minutes?

23 MRS. BOWERS: Two minutes.

24 (Pause.)

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MRS. BOWERS: We'd like to continue.

MR. HORTON: Mrs. Bowers, in this thing, we would like to start on the introduction of consolidation of the court system. This is where you get away from the structural side the mechanical side. The so-called structure or consolidation of

MR. HRESKOVICH: It's going to be interrupted, but have we decided whether we're going to go tomorrow or is that going to be decided after lunch?

MR. HORTON: I think we're going to go tomorrow. I presume that -- well I think we have to wait until after lunch to make that decision.

MRS. BOWERS: We can go tomorrow not to go tomorrow, and we were going to remind Mr. Horton he is surrounded by expert counsel, and when you have two things to do you want to be able to spread it out. I believe that was your position when we were talking about Saturdays earlier.

(Laughter.)

MR. HORTON: Absolutely. You're correct on the expert counsel part.

MR. HRESKOVICH: One other scheduling matter. I've been informed that Mr. Burt could not be here before next Wednesday, which I believe is the 21st.

MRS. BOWERS: Well, we're going to start on

MR. HORTON: Mrs. Bowers, in other words, the intervenors are going to put their case on Monday which

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1 Mr. Hubbard and then we're going to wait three or four days
2 for Evans and then we're going to wait some other period of
3 time for Trifunac and Luce. Is that what I'm had to believe?

4 MR. BENSCHOWSKI: Mr. Hubbard, as I understand,
5 will testify tomorrow. Mr. Evans is available beginning the
6 9th and I don't know about Luce and Trifunac.

7 MRS. BOWERS: Well we talked yesterday that the
8 staff will have their witnesses, a panel to put on Monday.

9 MR. FOURBELLOWSE: I'm not sure that's what we
10 said yesterday. I'm sure that's not what we said yesterday.

11 MRS. BOWERS: They're coming in Sunday.

12 Can you do what we were told?

13 MR. FOURBELLOWSE: I talked about this with Mr.
14 Ketchen last night, and as I recall, he put somewhere in his
15 discussion a caveat that he was going to discuss it with me.

16 We simply don't want to proceed in a way that --
17 where the Intervenor puts on their case to fill and we put
18 on our case to fill up the spots that they can't fill up because
19 they can't get their witnesses here.

20 We want the Intervenor's case to be on and complete
21 before we start our case. And we think we have the right
22 to do that and that's what we're going to do.

23 I would say, with regard to Monday and Tuesday,
24 maybe if we receive that, it appears as though Trifunac and
25 Luce are going to be here anyway on the 9th, whether they

appear voluntarily or whether they appear by subpoena. I mean, of course the Board will make the ultimate decision on the subpoenaing. But if so, I don't see why they couldn't be here Monday and Tuesday.

MRS. BOWERS: Do you think, Mr. Boardman, that exceptional circumstances exist if Staff and Applicant agree with the Intervenor that they should be here?

MR. BOWEN: That's an exceptional circumstance if there is such agreement.

(Laughter.)

MR. BOARDMAN: I think really stipulations are discouraged by the regulations. The regulations specifically say that stipulations are discouraged.

And it seems to me that any time you have a stipulation, you have a rule which is being, in effect, waived by the parties in a particular circumstance for whatever reason the parties have of their own. It doesn't make any difference what those reasons are.

And it seems to me that if the parties are willing to stipulate that in this case there are circumstances of the AGPS may be subpoenaed without a showing of exceptional circumstances, then we can do that, and then the subpoena can be issued.

Now the only process we could argue with is that the subpoena would be issued or not would be the process that's

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receiving the subpoena. And if Drs. Wilbur and Lane are willing to appear under the power of subpoena and they do not complain, then I don't really see that we have to raise the issue of exceptional circumstances in this case.

I made the statement that I made simply as a preliminary statement to make it clear for the record that we have not changed our mind at all about the fact that those circumstances had not been shown, that we're not in any way agreeing to the appearance of these two gentlemen because we changed our mind about those facts.

But the single fact is we are now stipulating that they can appear without a showing of exceptional circumstance and I don't see there's much left to discuss.

The business of whether they appear voluntarily or not I think is something else, although I don't know --

MR. HOWSON: Could I address that?

We've not been able to get hold of Dr. Wilbur, but we did get hold of Dr. Lane, I'm told, and he said he'd be willing to come if the AGS said it was a good idea. I don't know how we're going to get the AGS to say it was a good idea or a bad idea, but otherwise he would have to be subpoenaed.

So we would request the Board to advise the appropriate course. We think the only exceptional circumstance is that the three parties are stipulating that they should be

have an oral hearing.

WCB/sglc

Now I don't think the Board should be hindered by this case however that when there is a real conflict of interest with all the other NRC committee that normally comes in exceptional circumstances.

I mean, as we argued before, what's already not a test for exceptional circumstances. And by the way, I think that the Staff of the Nuclear Regulatory Commission would somehow be saddled with a precedent that this alone makes an exceptional circumstance and I think the record should be perfectly clear that the exceptional circumstance is that the same parties agree they should be heard.

MR. KRISTOVICH: Mrs. Board, I don't know what stipulation Mr. Horton is speaking of when he says "the same parties." I don't recall the intervenors saying anything like a stipulation.

MR. FLAUSCHNER is going to be here shortly and perhaps this could be held until Mr. Flaushner is here, because I know he would like to have some input in the discussion.

MRS. BOARD: Well the intervenors asked the Board to subpoena the two witnesses.

MR. KRISTOVICH: Yes, based on exceptional circumstances.

MR. BOARD: One thing, we will try to get

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consideration until after the lunch is over. The only
question, somebody would be suggesting things.

MR. HOLSON: Not me.

(Thoughtful.)

MR. BRIDGEMAN: Now, however, perhaps we should
just postpone this until after lunch and just proceed with
cross-examination. Mr. Fleischman will be here then.

MRS. BOWERS: Well, I want to make sure that we
understand exactly what's before us. Now we've heard from
Applicant and Staff express their position.

Are the Joint Interveners still asking this Board
to determine exceptional circumstances with respect to the
subpoena and fine?

MR. BRIDGEMAN: Correct. And regarding other things
that I think Mr. Fleischman should address.

MR. HOLSON: Well, if the Interveners are going
to take the position that the only way subpoena can issue
in this case is that they have shown that exceptional cir-
cumstances exist for the subpoenaing of the witnesses and
they refuse to stipulate that the witnesses are gone, then
we'll withdraw and we'll go ahead and be up on the appeal.
That just is business.

MR. BRIDGEMAN: Mrs. Bowers, I don't think I
wanted a position one way or the other on this. I thought
Mr. Fleischman will take care of this matter.

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MRS. BOWERS: Well let's proceed then with your next panel.

MR. NORRIS: All right. The next panels will really be co-chaired by three people Mr. County, Dr. Haskins and Mr. Gangloff. Mr. County of Pacific Gas and Electric, Haskins, Gangloff and Gangloff with Westinghouse, and if they would come up now and be sworn in.

MRS. BOWERS: They were not in the room when the large group was sworn in?

MR. NORRIS: That's right.

Whereupon,

H. JAMES GORMAN,

THOMAS C. HASKINS,

and

WALTER C. GANGLOFF

were called to the stand as witnesses on behalf of the applicants and, having been first duly sworn, were examined and testified as follows:

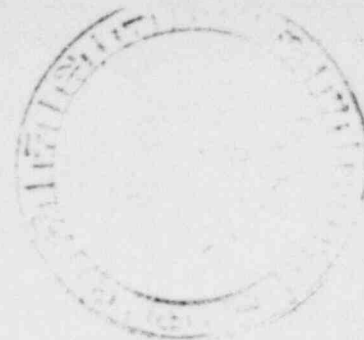
MR. NORRIS: Excuse me, Mrs. Bowers. We have a lot of other panel members and perhaps they could be sworn in now, too. I'll make sure they're all here.

Mr. Lovelady, Mr. Shilker, Mr. Antioch, Mr. Basha, Mr. Young, Mr. Allen -- I'm sorry, not Mr. Allen, he'll not be called.

I think that's it. Thank you.

CARD Z

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minutes.

(Laughter.)

MRS. BOWERS: Any objection to the panel being excused?

MR. KRISTOVICH: No objection.

MRS. BOWERS: Mr. Katchen?

MR. KATCHEN: No objection.

MRS. BOWERS: The panel is excused.

(The panel excused.)

MRS. BOWERS: Now can we talk about scheduling?

MR. HORTON: Yes, I think we can.

This is talking about scheduling, but --

MRS. BOWERS: Well, we're going back tomorrow

MR. HORTON: Well, this is going the back door to talk about that, however.

We have the Joint Interveners Request for Directed Certification, and I think maybe if we could discuss that for a moment that will bear somewhat on scheduling.

At this time the Applicant would request that the Board consider Joint Interveners' Request for Directed Certification as a motion for reconsideration to this Board also. That's perfectly proper, I believe. In Black Fox what was done. A Request for Directed Certification was made to the licensing board in that proceeding and they excused it or considered it as a motion for reconsideration.

At this time we would like to feel that any extraordinary circumstances have been shown. However, in the interest of moving these proceedings along, instead of having them drag on and on and on and on and on again at a later time or the possibility of coming back at a later time, we would ask that the Board indeed reconsider, and we would support the Intervenor's request to have Harbo, Trifunac and Lane appear at these hearings.

We have been assured -- you know, they have nothing to say other than what they've already admitted. We've been aware of that information obviously for many months. And as long as they're not coming in with new materials, as Council for Intervention has stated on the record, we will not be surprised.

We feel that we can indeed proceed most expeditiously by having them here.

The reason we didn't want them in the first place was we didn't want to drag these hearings out another week. But no matter what we do, the hearings are being dragged out. So rather than have that carry out for months, we would just as soon have them here, and so we'll be here an extra two or three days because they're here -- or a week perhaps. But in the long run that's going to be a shorter period of time.

So we would ask the Board to reconsider the Intervenor's request for the inclusion of witnesses.

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I'm also a little puzzled as to why -- and I don't think the intervenors have ever told us -- why these people can't be here voluntarily, why subpoenas have to be issued in the first place. I know, for example, that intervenors have consulted with these two people on numerous occasions in this case, and I don't understand why they have to be subpoenaed, why they can't voluntarily appear. That has never been adequately explained. And frankly, that's the way we would prefer to go, because I don't think there are any exceptional circumstances.

I don't think -- of course exceptional circumstances were never defined, but I agree with Mr. Gauthier, if you see one you know what it is. And this isn't one.

and MPB2
MPB3 files

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1 I don't understand, you know, why they can't
2 voluntarily appear, why they can't just appear as Intervenor
3 witnesses. You don't have to call them Intervenor's witnesses,
4 you can call them anybody's witness you want, but I don't
5 see why they can't voluntarily appear.

6 But short of that, we would ask that the subpoenaed
7 issue, simply so we can get those proceedings over, instead
8 of dragging them out for months.

9 MRS. DOMING: Mr. Norton, do you think this Board,
10 if it does follow your suggestion to consider the motion
11 to the Appeal Board as a motion for consideration, do you
12 think this Board could justify issuing subpoenas unless it
13 determined there were exceptional circumstances?

14 MR. NORTON: I think that's for the Staff to
15 answer.

16 (Laughter.)

17 MR. NORTON: It seems to me that if the parties
18 do not object -- I'll withdraw from the Staff and let them
19 collect their thought for a moment.

20 It seems to me that if the parties withdraw
21 their objections, then you don't need exceptional circumstances.
22 It would seem to me only if the parties objected and somebody
23 was against their coming, that there would have to be a showing
24 of exceptional circumstances.

25 It seems to me it's just like the materials that

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were stipulated into the record. There was no real basis for that other than the fact that the parties stipulated to it. And I think that in this case if the parties stipulate to it, I don't think there would have to be a showing of exceptional circumstances because, frankly, exceptional circumstances don't exist.

(The Board conferring.)

MRS. BOWERS: Mr. Kristovich?

MR. KRISTOVICH: Mrs. Bowers, I just wanted to clear up one thing. It's my understanding that it's AGPS policy not to have the consultants appear at licensing proceedings. And this is, as I understand it, the understanding of Drs. Luce and Trifunac.

MRS. BOWERS: Does the Staff have a position on the Applicant's comments?

MR. FOURBEELOPTE: Well I think we ought to straighten the record out. As I recall, Mr. Horton said the Staff should collect their thoughts, and it was in the singular.

(Laughter.)

I just wanted you to know that we have more than one.

(Laughter.)

Well, Staff is of the same opinion that we were originally that (a), there is no real reason -- there was no good reason shown for their appearance, primarily because

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Mr. Fleischaker stated the only reason for their appearing was to present this document or these series of documents in a bookish way and that they were not going to be presented for the purpose of presenting any further testimony.

In the record phase, I don't believe that Mr. Fleischaker ever really did show an exceptional circumstance existed. And so to that extent, I don't think our position has changed much.

I do, of course, agree that perhaps there is some valid reason for subpoenaing them if it would help to expedite the case and in some way could be construed as serving the public interest in that regard.

Of course, the right of the Licensing Board to treat an interlocutory appeal as a motion to reconsider was established in MAB 370 in Black Fox. So I do think the Board has the right to reconsider it, and if it will help expedite the case, the Staff would be willing to have the subpoenas issued and I suppose the subpoenas in this case are issued for the convenience of Drs. Love and Trifunac because of the outstanding policy and I think that probably a justification can be made on the grounds not that exceptional circumstances have been shown, because I don't believe they have been shown in this case but, rather, that it is an action to which all parties agree and which in some way may help to expedite the case and serve the public interest.

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So we would not oppose their appearance here, whether it's voluntarily on their part or by subpoena.

MRS. BOWERS: I don't know whether it was just Appeal Board or Appeal Board and Commission in another proceeding where the parties entered into a stipulation and the Licensing Board didn't accept it--do you recall that case -- And the Licensing Board was scolded for not accepting a stipulation of all parties.

Now are you saying that that sort of thinking prevails here?

MR. TOURTELLOTT: Yes.

MR. KRISTOVICH: Mrs. Bowers, since both Applicant and Staff have had an opportunity to speak their mind and say they don't believe exceptional circumstances are present, I would merely like to reiterate the Joint Intervenor's position.

We feel there are exceptional circumstances here and that would be a proper basis for issuing a subpoena.

MRS. BOWERS: What are the exceptional circumstances?

MR. KRISTOVICH: I believe the Board has a copy of Mr. Fleischaker's Request for Directed Certification and they're all outlined in there and in the previous oral argument.

MR. HORTON: Excuse me. There is not one word about how exceptional circumstances exist in this Request for Directed Certification. It is totally ignored. And if you're

1 willing to point it out, I would love to read it.

2
3 MRS. BYERS: Well the only thing I saw was just
4 the general discussion that these two individuals differ in
5 their opinion from the fiscal AGCS position. Is that correct?

6 MR. KRISOVICH: Mrs. Byers, I believe we had
7 oral argument the first week in December at the hearing,
8 and Mr. Flatschauer at that time outlined what he believed
9 were the exceptional circumstances, and I believe it's all
10 in the transcript already and this motion speaks for itself.

11 MR. HORTON: Mrs. Byers, I would like to address
12 one thing Mr. Krisevich said before the Staff spoke, and
13 that is that the AGCS has no position against their consultants
14 appearing voluntarily.

15 In fact, I was there when Chairman Harkin was
16 asked that question by Chairman Harkin. And the response
17 was well, of course, there's nothing we can do about their
18 appearing voluntarily, but we don't want them subpoenaed.

19 That was the position of the AGCS, they said
20 they have absolutely no control over someone's appearing
21 voluntarily. They don't like it, but they have absolutely no
22 control over it whatsoever. If someone wants to appear
23 voluntarily they have that right, absolute right. What the
24 AGCS was against was the subpoenaing of their consultants,
25 consultants who didn't want to come to the hearing.

26 MR. KRISOVICH: Mrs. Byers, that's Mr. Horton's

1 understanding. I believe there were addi- tional concerns
Madison/agh 10 2 that the ACRS did not want their consultants in the future
3 voluntarily appearing.

4 MR. NORTON: No, no, no.

5 MR. KRISOVICH: That's your understanding and I
6 have an understanding.

7 MR. NORTON: Were you there?

8 MR. KRISOVICH: Mr. Fleischaker was there.

9 MRS. BOWERS: Please address the Board.

10 Does the Staff have any position on this parti-
11 cular point?

12 MR. TOWNSEND: You mean on whether exceptional
13 circumstances --

14 MRS. BOWERS: No, whether the ACRS consultants
15 can voluntarily appear.

16 MR. TOWNSEND: Yes, I was there and I recall
17 their saying that they didn't really feel they had the control
18 over their own members or consultants and that if they wished
19 to appear voluntarily they could.

20 So really there is no reason why they can't appear
21 voluntarily, except for the fact that they might be individually
22 reluctant to do so. If they are individually reluctant to do
23 so, then that's what a subpoena is for, for whatever reason
24 they are reluctant.

25 I don't know that they are or they're not.

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MRS. BOWERS: Mr. Kristovich, do you have any information?

MR. KRISTOVICH: Mrs. Bowers, they have expressed their reluctance to just voluntarily appear because of their relationship to the NRC and the IGSS.

MR. HORTON: Mrs. Bowers, I guess Intervenor would have no objection if we called them. Here and there and asked them if they would like to come up to these hearings and then perhaps we can report back what their answers are.

MRS. BOWERS: In this proceeding -- I guess it was a year or so ago in the environmental issue, there was a letter from someone, a witness for the Intervenor, who said in the letter that because of his employment, his situation, he could not voluntarily appear and requested a subpoena.

Now have you attempted to get that kind of information, or information in writing from the two witnesses?

MR. HORTON: Well Mrs. Bowers, my suggestion of calling them -- we are perfectly willing to call them and ask them to come and ask them if they would come and see if they will and then report back to this Board. I'm sure we can accomplish that before the lunch hour break -- as witnesses.

MR. KRISTOVICH: Mrs. Bowers, Mr. Flinchak has spoken to them and the answer was they do not want to voluntarily appear.

MRS. BOWERS: Well do you have any objection to

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1 Mr. Norton making a phone call?

2 MR. KRISTOVICH: I just don't understand the
3 purpose of this. I'm at a loss as to what has transpired in
4 the last five minutes.

5 MRS. BOWENS: Well, you know, Mr. Norton could
6 make the phone call without getting a clearance from the Board
7 on it.

8 MR. KRISTOVICH: That's very clear.

9 But I thought I had just said that Mr. Fleischaker
10 had spoken with them and they had expressed to Mr. Fleischaker
11 a reluctance to appear voluntarily. But that's not the issue
12 before the Board anyway.

13 MRS. BOWENS: Well, in a way it is because we
14 have a Commission document that does talk about exceptional
15 circumstances being established before a subpoena is issued,
16 and both Applicant and Staff have suggested that circumstances
17 dealing with the efficiency of the proceeding would be justifi-
18 cation for the issuing of the subpoena.

19 But if these witnesses will appear voluntarily,
20 then we're not faced with the hard question of exceptional
21 circumstances.

22 MR. KRISTOVICH: I guess it just seems -- maybe
23 I'm confused, but I thought I just said that my understanding
24 is that they won't appear voluntarily. And I don't know, if
25 you just want Mr. Norton to say that to you based on his phone

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conversation and you don't want to tell me about Mr. Fischel's conversation...

MRS. BOWERS: Well, I think at the time those conversations occurred with Mr. Fischel -- and don't misunderstand. We're not in any way challenging the determination -- the situation, though, perhaps was different at that time. Both Applicant and Staff were very opposed to them appearing, and that's no longer true.

MR. KRISTOVICH: I don't see how that makes a difference. I don't know what we're arguing about.

MR. HORTON: I'm not.

Mrs. Bowers, we request that the decision of the Board be postponed until after lunch, and in the meantime we will contact Messrs. Friedman and Luce -- we will attempt to contact them and see if they will appear at these proceedings voluntarily. And if they don't, then we would urge the Board issue subpoenas in the public interest of expediting these proceedings.

MRS. BOWERS: We'll defer our ruling until after lunch.

MR. KRISTOVICH: Mrs. Bowers, can we have a recess for a few minutes?

MRS. BOWERS: Ten minutes.

(Recess.)

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MRS. BOWERS: We'd like to discuss.

MR. HORTON: Mrs. Bowers, on this side, we'd like to start on the introduction of a change of the system. This is one you get away from the standard and the mechanical end. The scheduled changes or adjustments on

MR. KRISTOVICH: It's sorry to interrupt, but have we decided whether we're going to go tomorrow or is that going to be decided after lunch?

MR. HORTON: I think we're going to go tomorrow. I presume that -- well, I think we have to wait until after lunch to make that decision.

MRS. BOWERS: We can no longer not to go tomorrow, and we were going to remind Mr. Horton he is concerned by expert counsel, and when you have two things to do you should be able to spread it out. I believe that was your position when we were talking about Saturdays earlier.

(Laughter.)

MR. HORTON: Absolutely. You're correct on the expert counsel part.

MR. KRISTOVICH: One other scheduling matter. I've been informed that Mr. Brown could not be here before next Wednesday, which I believe is the 11th.

MRS. BOWERS: Well, we're going to start --

MR. HORTON: Mrs. Bowers, in other words, the Kresnovichs are going to put their case on Monday night.

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1 Mr. Hubbard and then we're going to wait three or four days
2 for Burns and then we're going to wait some other period of
3 time for Sullivan and Lane. Is that what I'm not to believe?

4 MR. KANELOWICH: Mr. Hubbard, as I understand, will
5 testify tomorrow. Dr. Lunde is available beginning the
6 9th and I don't know about Lane and Sullivan.

7 MRS. BOWERS: Well we talked yesterday that the
8 staff will have their witnesses, a panel to put on Monday.

9 MR. SCURIELLOTTI: I'm not sure that's what we
10 said yesterday. I'm sure that's not what we said yesterday.

11 MRS. BOWERS: They're coming in Sunday.

12 Can you do what we were told?

13 MR. SCURIELLOTTI: I talked about this with Mr.
14 Ketchum last night, and as I recall, he put somewhere in his
15 discussion a caveat that he was going to discuss it with me.

16 We simply don't want to proceed in a way that --
17 where the interviewers put on their case as well and we get
18 on our case to fill up the spots that they can't fill up because
19 they can't get their witnesses here.

20 We want the interviewers' case to be on and complete
21 before we start our case. And we think we have the right
22 to do that and that's what we're going to do.

23 I would say, with regard to Monday and Tuesday,
24 maybe if we receive this, it appears as though Sullivan and
25 Lane are going to be here one way or the other, whether they

agrees voluntarily or not. Any order of subpoena. I mean, of course the Board will make the ultimate decision on the subpoenaing. But if so, I don't see why they couldn't be here Monday and Tuesday.

MRS. BOWERS: Do you think, Mr. Boardman, that exceptional circumstances exist in this case and Applicant has agreed with the Intervenor that they should be heard?

MR. HORTON: That's an exceptional circumstance if there is such agreement.

(Laughter.)

MR. SCHLESINGER: I think really stipulations are encouraged by the regulations. The regulations specifically say that stipulations are encouraged.

And it seems to me that any time you have a stipulation, you have a rule which is being, in effect, waived by the parties in a particular circumstance for whatever reasons the parties have of their own. It doesn't make any difference what those reasons are.

And it seems to me that if the parties are willing to stipulate that in this case there are conditions of the case may be stipulated without a showing of exceptional circumstances, then we can do that, and then the subpoena can be issued.

Now the only person who could object that the subpoena would be issued but would be the parties who

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1 receiving the subpoena. And if Dr. Whitford and Lane are
 2 willing to appear under the power of subpoena and they do not
 3 complain, then I don't really see that we have to face the
 4 issue of exceptional circumstances in this case.

5 I made the statement that I made simply as a pre-
 6 liminary statement to make it clear for the record that we have
 7 not changed our mind at all about the fact that those circum-
 8 stances had not been shown, that we're not in any way agreeing
 9 to the appearance of those two gentlemen because we changed
 10 our mind about those facts.

11 But the single fact is we are now stipulating
 12 that they can appear without a showing of exceptional cir-
 13 cumstance and I don't see there's much left to discuss.

14 The question of whether they appear voluntarily
 15 or not I think is something else, although I don't know --

16 MR. FORBES: Could I address that?

17 We've not known what to do about Dr. Whitford,
 18 but we did get about Dr. Lane, I'm told, and he said he'd
 19 be willing to come if the NRS said it was a good idea. I
 20 don't know how we're going to get the NRS to say it was a
 21 good idea or a bad idea, but otherwise he would have to be
 22 subpoenaed.

23 So we would request the Board to issue the sub-
 24 poenas. We think the only exceptional circumstances are
 25 that the three parties are stipulating that they should be

...an above hearing.

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...I don't think the Staff should be excluded by the case however that what there is an ADNS consultation with the Board with all the other ADNS committees that operate because in exceptional circumstances.

I mean, as we argued before, what's clearly not a fact for exceptional circumstances. And my concern would be that the Staff of the Nuclear Regulatory Commission would somehow be saddled with a precedent that that alone makes an exceptional circumstance and I think the record should be perfectly clear that the exceptional circumstance is that the same parties agree they should be here.

MR. KRISOVICH: Mrs. Bowen, I don't know what stipulation Mr. Norton is speaking of when he says "the same parties." I don't recall the Intervenor saying anything about a stipulation.

Mr. Flinchbaugh is going to be here shortly and perhaps this could be held kept until Mr. Flinchbaugh is here, because I know he would like to have some input in the discussion.

MRS. BOWEN: Will the Intervenor advise the Board to subpoena the two witnesses.

MR. KRISOVICH: Yes, based on exceptional circumstances.

MRS. BOWEN: One thing, we still may have our

consideration until after the afternoon break. But in the
meantime, somebody would be preparing arguments.

MR. HORTON: Not us.

(Laughter.)

MR. KRISNOVICH: Mrs. Rowan, perhaps we should
just postpone this until after lunch and just proceed with
communications. Mr. Fleischaker will be here then.

MRS. ROWAN: Well, I want to make sure that we
understand exactly what's before us. Now we've heard both
Applicant and Staff express their position.

Are the Joint Interveners still asking this Board
to determine exceptional circumstances exist before the
subpoena are issued?

MR. KRISNOVICH: Correct. And anything other than
that I think Mr. Fleischaker should address.

MR. HORTON: WELL, if the Interveners are going
to take the position that the only way subpoena can issue
in this case is that they have shown that exceptional cir-
cumstances exist for the subpoenaing of the witnesses and
they refuse to stipulate that the witnesses can come, then
we'll withdraw and we'll go ahead and we go up on the Appeal.
That just is business.

MR. KRISNOVICH: Mrs. Rowan, I don't think I
covered a position one way or the other on that. I think that
Mr. Fleischaker will want to be heard shortly.

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MRS. BOWERS: Well let's proceed then with your next panel.

MR. MORSON: All right. The next panels will really be co-chaired by three peoples: Mr. Cowley, Dr. Eschmann and Mr. Gangloff. Mr. Cowley of Pacific Gas and Electric, Messrs. Eschmann and Gangloff with Washington, and if they would come up now and be sworn in.

MRS. BOWERS: They were not in the room when the large group was sworn in?

MR. MORSON: That's right.
Whaseygon,

H. JAMES CORWELL,

THOMAS C. ESCHMANN,

and

WIMMER C. GANGLOFF

were called to the stand as witnesses on behalf of the Applicant, and, having been sworn duly sworn, were examined and testified as follows:

MR. MORSON: Excuse me, Mrs. Bowers. We have a lot of other panel members and perhaps they could be sworn in now, too. I'll make sure they're all here.

Mr. Savory, Dr. Shiffar, Mr. Antickos, Mr. Bachar, Mr. Young, Mr. Allen -- I'm sorry, not Mr. Allen, he'll not be called.

I think that's it. Thank gentlemen.



AFTERNOON SESSION

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12:00 P.M.

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MRS. BOWERS: We'd like to conduct,

Two matters we'd like to talk about, and I'll mention them briefly and then we'd like to go on to the first one.

The first matter concerns Dr. Weidmann and Dr. Luce. That's the first matter.

The second matter was a position stated by the Staff this morning that they did not want to proceed with any of their case until the Interveners had concluded, and we'd like to talk a little bit more about that.

First, in considering the matters of Dr. Weidmann and Dr. Luce, contact I think was going to be made or attempted to be made with each of them to see if, because of the changed attitude on the part of -- well I won't say changed. It's going to get in trouble no matter what I say. I won't say attitude or position, but on the different approach now being suggested by Applicant and the Staff, that perhaps they might feel comfortable appearing voluntarily.

Mr. Newton, I know you said you got in touch with Dr. Luce.

MR. NEWTON: Well Mr. Weidmann's time was busy, and we found out why. I guess Mr. St. Johnston was talking to him, so we weren't able to talk to Mr. Weidmann.

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MRS. BOSSER: Well Mr. Fischhaber, I don't know how much Mr. Kristovich has been able to brief you on what was said this morning.

Mr. Kristovich, did you have an opportunity to brief him on what occurred this morning?

MR. FENISCHMANN: Mr. Kristovich briefed me on most of what transpired this morning, and then called me, and when he called me I called both Dr. Trifunac and Luce. When I called Dr. Trifunac his line was busy, too.

(laughter.)

I assumed he was talking to someone from the Applicant, so I thereafter called Dr. Luce to find he had already spoken to someone from the Applicant so we had a short discussion anyway, then later on in the morning I was able to reach Dr. Trifunac. So that I have determined -- I think I understand what their position is.

But what I don't understand from my discussions with Mr. Kristovich is the nature of the stipulation that's being proposed by the Staff, I believe.

MR. BOSSER: I believe it was our proposal, and I believe the Staff joined in it, and that is that we feel that the Board -- we have no objection to the Board's issuing subpoenas for Messrs. Luce and Trifunac to come to this hearing.

We do not feel, however, that exceptional

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circumstances have been shown at all, and as it is a Commission policy that exceptional circumstances be shown, this could have ramifications for other cases now pending or in the future, not to which we are a party but that other Applicants and the Nuclear Regulatory Commission are parties to.

So we don't think the subpoena should be issued under the theory that exceptional circumstances have been shown when they indeed have not but, rather, the subpoena should be issued simply because the parties agree that there are witnesses should appear at this proceeding.

That, I think, fairly sums up our position and, if the Staff doesn't disagree, the position of the Staff.

MRS. BOWEN: Mr. Scarborough.

MR. SCARBOROUGH: Well, I think what we're talking about is really an agreement among the parties that these witnesses can be subpoenaed without really fixing the question of whether or not exceptional circumstances have been shown, would be a better way to put it.

I understand that the Intervenor said that they've shown exceptional circumstances, and I think it is clear on the record that both the Applicant and the Staff believe those exceptional circumstances have not been shown.

However, it really is of no particular consequence if the parties agree that the witnesses can be subpoenaed and can be required to appear and agree to waive out fees and things

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1 any rights that they have relative to whatever requirements are
2 outstanding.

3 I guess that's kind of the proposal that we have
4 before the Board.

5 I don't know how much more we're going to talk
6 about this, so I don't know whether to give you everything
7 I've got right now or wait and see. But there were a couple
8 of things, I think.

9 To begin with although, perhaps, it is or would be
10 a stipulation or would not be a stipulation, depending upon
11 whether the intervenors agree that the subpoena can issue
12 simply by reason of agreement of the parties, I don't really
13 see how the intervenors can request that subpoena issue
14 and then be heard to complain about the fact that no finding
15 is made relative to exceptional circumstances. Because, in
16 effect, the only thing that they should really be interested
17 in is whether, in fact, the desired witnesses do appear and
18 are available for questioning.

19 I would point out, however, that in Section 2.755
20 of 10 CFR on stipulations it states that:

21 "Apart from any stipulations made
22 during or as a result of a prehearing conference,
23 the parties may stipulate in writing at any stage
24 of the proceeding or orally during the hearing
25 any relevant fact or the contents or authenticity

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of any document.

Such stipulations may be admitted in evidence. The parties may also stipulate as to the procedure to be followed in the proceeding. Such stipulations may, on motion of all parties, be recognized by the presiding officer to govern the conduct of the proceedings.

Now, that is a verbatim wording of that statute. I think the part that pertains here is that the parties may stipulate as to the procedure to be followed in the proceeding.

What that indicates there is that, as a procedural matter, it seems to me it can be argued that, as a procedural matter, if we choose among ourselves to accept the fact that substance was issued in this case without regard to whether exceptional circumstances have or have not been shown -- that is, reserving in our stipulations the fact that that question was not really faced in this case -- then I think the Board has the power to do that under Section 2.752.

I would also point out that if there's any question about whether it's regular or irregular, Section 2.752, Illinois Nuclear Power Station Union Worker O., 2000 231, stated that absent extraordinary circumstances, a Board appeal will not consider alleged procedural irregularities unless an appeal has been taken by a party whose rights may have been

1/2/56

1 substantially affected by such irregularities.

2 Will the only parties in this case be the Applica-
3 ant and the Staff and the Intervenor. And the agreement
4 to bring these people in or to have these people subpoenaed
5 is something which only we could disagree with and only we
6 could appeal from.

7 And since the Intervenor has requested that
8 appearance and he is going to be getting what he wants and
9 the Applicant agrees and the Staff agrees, none of us are
10 in a position to appeal. Consequently, it doesn't come like
11 it would be any kind of appealable issue if we all agree
12 as to what the procedure should be, and we do.

13 So I guess what I would urge is that the Board
14 make it clear in its ruling not that this -- there is no
15 exceptional circumstances -- I want to make this is a fact that
16 there is no real exception I circumstance to the fact that we
17 agree. I think that would be a perversion of using the term,
18 "exceptional circumstances;" although it certainly is an
19 exceptional circumstance, it's not one that applies to the
20 rule.

21 I do think it is important, however, for the Board
22 to note that if we strike this agreement, if everybody agrees
23 that the subpoena are being issued because the parties agree
24 and not because of the resolution of any issue about exceptional
25 circumstances.

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MR. BOWERS: ... the same ... different ...

MR. BOWERS: ... certainly ... stipulate as to a given set of facts ... without passing upon the merits of those statements ... in order cases that they say have. It's a very common thing. And I would certainly say that's the case.

MRS. BOWERS: Mr. Boardman, this morning you mentioned Black Fox, the Appeal Board decision that dealt with -- well, I guess the Licensing Board's decision with respect to the Appeal Board of a motion for reconsideration, is that correct?

MR. BOARDMAN: Yes.

MRS. BOWERS: In that case, had the Appeal Board already acted and issued an order which's been in force here?

MR. BOARDMAN: The Appeal Board has not yet issued an order.

MRS. BOWERS: Well according to my office this morning, they got out an order giving 10 days and the Board 15 days -- until January 15 to respond.

MR. BOARDMAN: A Board that is much older, and I don't believe it's an order. It's a motion for reconsideration.

rb/egh

Board and its just says:

"We have intervenors' notice dated December 31st, 1978 for directed certification of the question what the Licensing Board erroneously denied the request to subpoena Minnie Trifunac and Adeline Buro to testify in this operating license case.

"The Applicants and the Staff are directed to respond by January 15, 1979 showing causality the Licensing Board's order in question should not be reversed summarily and the subpoenas issued. Because time is of the essence, requests for additional time will be looked upon with disfavor."

MRS. BOWERS: Will you're directed to do something

MR. HORNOR: Yes, but it's not a ruling on the issue. And if the parties make that moot, then the response of the Applicant and Staff will simply be that the subpoenas have issued, the witnesses are scheduled to appear, the question is moot, period. The Appeal Board will deny a request for certification, I'm sure. . . . n, there's nothing that --

MR. FOURMELLOTT: My view on that telegram, in terms of an order issuing, I haven't seen an order. I know my office received a copy, or received a telephone call from a number -- from, I think, Mrs. Baffle. But the ordinary view

SL/ago

for responding would have been January 23rd.

And what I got from this message is that instead of the 22nd, they want us to answer it a week earlier, on the 15th, and that was the only purpose for that. I don't think they intended to say that at this time they're taking any kind of special jurisdiction over it.

In any event, it seems to me that the Black Fox rule would say that whatever the Appeal Board is doing with it, that the Licensing Board may consider the requests concurrently or at the same time, and if the Licensing Board comes out with a decision before the Appeal Board does, then the Appeal Board will simply agree it as a moot issue.

MRS. BOWERS: Well I don't know that there was another piece of paper, because this is the information my secretary gave me and it would well have been in this file only.

MR. BOWEN: But it really doesn't make any difference, Mrs. Bowers, because we intend to respond, we intend to file something by January 15. We intend to comply even if you construe it, as an order, we fully intend to comply with it.

But it just doesn't make any logical sense at all to not allow the parties to go ahead and do what the Enforcement is complaining of. I don't think there's no way in which the Appeal Board would say well, yes, you can't do that is

zb/abblu

everybody agrees to it, it just doesn't make any logical sense that we would then have to go through with the appeal instead of making the appeal.

MS. DOWNING: Well let's hear from Mr. [unclear]

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1 MR. WATKINS: I gather that there are hundreds
 2 and hundreds that are being considered. The first is whether
 3 the parties will enter into a stipulation which would permit
 4 this board to issue subpoenas to the witnesses and take
 5 without making the finding required by 5.270(1) that exceptional
 6 circumstances exist. The second matter is whether the
 7 board can on its own recommend the decision and make a
 8 finding of exceptional circumstances and issue subpoenas.

9 But to address the first question.

10 We cannot agree to enter into a stipulation that
 11 subpoena issue to the Drs. Williams and Lane without making
 12 the finding of exceptional circumstances. The one reason
 13 that reason is that we can't agree that we should ignore
 14 the express language of the regulations. The regulations
 15 are binding on the interview, on the applicant, on the
 16 staff, or the licensing board. And the regulations state
 17 as follows:

18 "The attendance and testimony of the
 19 Commission and named NRC personnel at a hearing
 20 or deposition may not be required by the Presiding
 21 Officer by subpoena or otherwise, provided that the
 22 Presiding Officer may, upon a showing of exceptional
 23 circumstances such as a case in which a particular
 24 named NRC employee has direct personal knowledge of
 25 a material fact not known to the interviewee and

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1 available by the Executive Director of Operations,
 2 require the attendance and testimony of named
 3 HMC personnel."

4 I read that provision to verify that this
 5 Licensing Board under a finding of exceptional circumstances
 6 before it issues the subpoena requested to Drs. Williams
 7 and Lingo. And I don't think that the parties can, by
 8 stipulation to ignore that regulation and to permit this
 9 Board to issue a subpoena which, in essence violates that
 10 regulation. So we cannot be a party to that stipulation.

11 I'd like to say that there is no one who is more
 12 interested in getting Williams and Lingo to this proceeding
 13 than we are. We started in August the process of trying to
 14 get those two men into this proceeding. We submitted success-
 15 16 sive requests for subpoenas to the Board. We believed that
 17 by pursuing before the Board the question of the policy to
 18 be established on requiring AIDS consultants, or making AIDS
 19 consultants amenable to Licensing Board subpoenas. And when
 20 that process was over or before the process ended we also
 21 indicated this Board our desire, through letters, to make
 22 the issue.

23 So we're interested. We're the most interested
 24 party in getting those two witnesses to this proceeding.

25 I am sure that the clear intent of the Board
 26 will not participate in the stipulation because of any possibility

10/15

1 make changes on the part of the intervenors, and I've
 2 been by experience that the intervenors' behavior is not
 3 carried by strict adherence to the rules of procedure. I've
 4 been by experience in licensing proceedings, and that the
 5 cases are out and then I've had intervenors who give
 6 it is usually at the intervenors' expense and to the benefit
 7 of Applicants and the Staff.

8 And as my supervisor wishes me to require, and
 9 to insist upon strict adherence to the regulations. And in
 10 this case I believe a fair and strict adherence to the regula-
 11 tions requires an express finding of exceptional circumstances
 12 before the substance issue.

13 As to the second question, I think the Board can
 14 reconsider its decision, I think I've already said that I think
 15 the intervenors' power to have anything to say about it. I mean
 16 it's totally beyond my discussion.

17 At the time, however, that I indicated to the
 18 Board that I was going to file a request for reconsideration
 19 certification I requested the Board, or indicated to the
 20 Board that I would be willing to file that request to the
 21 Board, and at that time I did not receive an indication from
 22 the Board that that would be useful or necessary. In fact, for
 23 that reason, I went ahead and filed the reconsideration
 24 application with the Appeal Board.

25 So it seems to me that the better line is that

WRS/vbt

1 Subpoenas can issue, but only on a finding of exceptional
2 circumstances, for Trifunac and Lucco. On the Executive
3 Director of Operations can decide when they will produce
4 Trifunac and Lucco, in which case there's no need to issue
5 subpoenas. Otherwise we sit and wait for the Appeal Board
6 to make its decision. Or, finally, this Licensing Board
7 can reconsider its decision and make a finding of exceptional
8 circumstances and issue subpoenas.

9 MR. NORRON: Mrs. Bowers, that's absolutely
10 fascinating. If I understood the scenario correctly,
11 Mr. Fleischaker has been complaining bitterly since August
12 that this Board won't issue subpoenas. And now he doesn't
13 want subpoenas issued unless there's a finding of exceptional
14 circumstances.

15 He never, of course, argued exceptional circumstances
16 in August, he never argued exceptional circumstances at any
17 time until the Commission said that that's what was required.
18 He then made an argument that because they have a difference
19 of opinion, therefore -- or that fact, therefore, created
20 "exceptional circumstances."

21 Even in his position for certification, or his
22 request for certification he doesn't argue that exceptional
23 circumstances exist. He never addressed that question at all.
24 Now he's saying, through, that this Board won't issue subpoenas
25 before they subpoena these witnesses.

1 The question that I would like to ask is
2 way is it any way prejudicial to the
3 a finding of exceptional circumstances?

4 If the witnesses are here, which they are, and
5 so critical to their case -- which is what they say they
6 got to have, is to have those witnesses here -- this is a
7 method to allow them to have the witnesses here to testify
8 to be cross-examined.

9 Now on each of them have the basis for appeal
10 when there is absolutely no prejudice to them present?

11 And I think the record should be put before them
12 that they are rejecting that opportunity, the opportunity to
13 have those two witnesses here, because there's no way this
14 Board can find exceptional circumstances. They don't wish.
15 And you can't make whole either one of them now.

16 MR. FLEISCHMAN: May I reply to that last one?

17 MRS. BOWERS: Very well.

18 MR. FLEISCHMAN: First of all, Mr. Board's
19 memory is short. In the supplemental notice, we responded
20 that we filed back in September following the Applicant and
21 the Staff's reply to our initial request for a subpoena I
22 argued exceptional circumstances at length. The argument
23 was made, therefore, in September in an extensive pleading
24 that I filed with this Board.

25 The argument of exceptional circumstances was

HR/ADG

1 made in the request for direct certification for one simple
 2 reasons. The issue was before the Appeal Board. The
 3 issue before the Appeal Board was whether they should accept
 4 direct certification. Once they made the decision of whether
 5 to certify the legal issue then we had a completed process
 6 process.

7 As far as the question of our position, I'll
 8 rely on the record to reflect my statements instead of
 9 Mr. Norton's interpretation.

10 MRS. ROWERS: Mr. Tolson?

11 MR. TOLSON: Well, it's important
 12 to consider the regulation that Mr. Tolson has referred
 13 to in its proper context. The regulation that he's referring
 14 to Section 2.720(h)(2)(i), and it reads as follows:

15 "In a proceeding in which the NRC
 16 is a party the NRC shall call such available one
 17 or more witnesses designated by the Executive
 18 Director for Operations as appropriate or by other
 19 designee for oral examination at the hearing or on
 20 deposition regarding any matter not privileged
 21 which is relevant to the issues in the proceeding.
 22 The attendance and testimony of the Commission
 23 and named NRC personnel at a hearing or on depo-
 24 sition may not be required by the Executive Director
 25 by subpoena or otherwise, provided that the testimony

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...a showing of exceptional circumstances, such as a case in which a particular award was made to a particular individual of a material that not known to the thousands made available by the Executive Director for Operations, require the attention and scrutiny of the entire NRC personnel."

Now if you recall the way we got started we have with the ACRS consultants, it's not because of any direct language in the regulation. And if we're going to insist upon nothing but the direct strict language of the regulations, then you're not ever going to be able to subpoena the ACRS consultants, because they're not mentioned as being those who are among those whom we can subpoena.

What we have is an interpretation by the General Counsel of the NRC that, in reading this regulation that you can subpoena within that framework you can subpoena NRC members and ACRS consultants on occasion. And that he also says is that the question is a showing of exceptional circumstances.

So, to begin with, the idea of subpoenaing ACRS consultants is not something that we insisted at through a strict interpretation of the regulation. And the Executive Council have it both ways. With us we're going to subpoena it directly and ACRS consultants are not going to be subpoenaed.

my/whb

1 at all, or we're going to maintain it in a reasonable way,
 2 which is what the General Counsel has done, which the General
 3 Counsel's office has done, and then you're going to include
 4 the DHS comments. But if you're going to do that then
 5 you have to continue to be reasonable about it. You can't
 6 suddenly get strict again.

7 And what is the reason behind this procedural
 8 section of the regulation?

9 And ID
 10 LONDON file
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Well, the idea is that the regulation is saying that the NRC has hundreds and hundreds of people working for it, and they work on each case in different ways, and the NRC is the one that's going to have to make the final analysis, the final judgment, about the their operation is going to be. We can't possibly have a situation that would be judicially efficient or administratively efficient if you allow someone to subpoena every NRC staff member that ever worked on any given case.

C13

So we let the NRC decide who it is that they're going to present. That's what the beginning of that paragraph says.

So the NRC is making its selection.

We have selected the people who are going to represent us in the areas that Dr. Wickman and Dr. Luce would have their testimony about.

It's only because the intervenors asked Dr. Wickman and Dr. Luce here, for some reason have only to themselves, that we're even considering bringing them here at all. Now, if there is any right in this particular regulation, the only people who can insist upon that right are the people in the NRC staff, because that particular section is designed to protect the NRC staff from a multitude of subpoenas that would come down virtually every member of our group.

1 IF we agree there is a line we can go to and
 2 require that exceptional circumstances be shown, that I think
 3 see that someone who is requesting the subpoena is in the right
 4 place is in any position to complain about that, because
 5 it's there for our protection. This is for their benefit
 6 protection of the intervenors.

7 The Intervenor also has to consider the point as
 8 me, aside from the fact that their interpretation is
 9 inconsistent with their own request and is very unreasonable,
 10 they have to consider the fact that if indeed we are going
 11 to come down to this business of arguing exceptional
 12 circumstances -- whether they exist or they don't exist --
 13 that the Staff would then be required to take the position
 14 which we've previously taken, and I'm relatively certain that
 15 we'll win that on appeal, and I'm not concerned about that.

16 But what I am concerned about at this point is
 17 judicial efficiency, administrative efficiency, and I am
 18 willing to forego the rights that the Staff has under this
 19 section to those ends. And if we're going to get into a
 20 straight legal argument about this other issue, and if that's
 21 what the Intervenor wants to do, then we'll argue it
 22 straight.

23 But we don't believe that that's necessary, and
 24 we also believe that the Intervenor has to be satisfied
 25 whether he wants these people here or not.

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Mr. Chairman, Mr. Commissioner, and members of the Commission, my name is [Name], and I am a consultant to the ACRS.

I'd like to discuss the interpretation of Section 2.730(b) of the Regulations.

I agree with Mr. [Name] that only the portion of the Regulations which is relevant to the issue at hand should be considered. I believe that the Regulations are intended to apply to the ACRS, and that they should be interpreted in a manner that is consistent with the intent of the Commission.

I believe I brought this up in the way that I did in my letter. The Commission's decision in [Case Name] is a good example of the Commission's interpretation of the Regulations. I believe that the Commission's decision is correct, and that it should be followed.

In that interpretive memorandum, the Commission stated that Section 2.730(b) was intended to apply to the ACRS, and that it should be interpreted in a manner that is consistent with the intent of the Commission. I believe that the Commission's decision is correct, and that it should be followed.

So that I don't think that there's any doubt as to whether Section 2.730(b) applies in the case of a request to suspend contributions to the ACRS.

The Commission's decision in [Case Name] is a good example of the Commission's interpretation of the Regulations. I believe that the Commission's decision is correct, and that it should be followed.

partially in the past.

The Interpretative Memoranda from the General Council's office again make very clear that the interests sought to be protected by providing for the AGCS consultants, the limited protection of the original Memoranda, but that is the interest of the AGCS, and that interest is that they will have access to consultants.

The concern was that by making AGCS consultants amenable to subpoena, that the AGCS would lose the access to consultants who didn't want to be bothered with the hassle of appearing before Licensing Boards.

So it is the AGCS interest that is sought to be protected here, not, strictly speaking, the NRC staff interest that is sought to be protected.

In fact, as I recall the interpretative Memoranda, the General Council's opinion balanced on the one hand the interest of the Licensing Board to obtain the useful information from AGCS consultants against the hassle for it.

Furthermore -- or finally, in that decision, in the interpretative Memoranda, the Commission directed the Licensing Boards to resolve, on a case-by-case basis the question of whether exceptional circumstances existed, and when they provided a brief interpretation as to the exceptional circumstances.

So I believe the Commission's interpretation of the

MR. FORTSON: No, we are not challenging it.

MR. FORTSON: It was going to be that it has the form and effect of a Commission position until the Commission takes more drastic action.

MRS. BOWERS: Well, apparently what was said that Wednesday morning in discussion reached the ears of the Acting General Counsel, and he had concern that if it actually was being challenged as not representing the Commission position, that then some further action needed to be taken.

I assured him that I had faced this question head on, and the answer was no.

Mr. Horton?

MR. FORTSON: Mrs. Bowers, the fact that it is puzzled by how Intervenor is in any way prejudiced by the issuance of subpoenas to Madam. But the Tribunal without the showing of extraordinary circumstances.

There is absolutely no prejudice to Intervenor, and if this Board chooses to issue the subpoenas, there is no basis for Intervenor to appeal that decision -- just absolutely none -- because there is no prejudice.

To the contrary, the prejudice is to the Staff and Applicant, who could argue that exceptional circumstances had not been shown, but they are willing to stipulate in this case -- in this limited situation -- that

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1 that showing is not necessary?

2 Now, however, there are the other parties that
3 can raise that argument. And that is Marcus, Isaac and
4 Trifunac. If they receive those subpoenas and they really
5 don't want to come, then they can go out and hire a lawyer
6 and go to a judge and get those subpoenas pushed, because
7 there has been no showing of extraordinary circumstances.

8 They can argue that, but Interveners are in
9 absolutely no position to argue that. He's the one that
10 wants them here. And so he's not in any way prejudicial.

11 This is folly.

12 MR. ELISCHENKA: Mrs. Bowers, can I address that?

13 MRS. BOWERS: One last shot.

14 MR. ELISCHENKA: Okay.

15 MR. TOURTELLOTT: Well, before -- maybe it would
16 be better if I say something before he has his one last
17 shot, then it would be one last shot.

18 (Laughter.)

19 MRS. BOWERS: All right.

20 MR. TOURTELLOTT: I couldn't help but think,
21 while Mr. Norton was talking, that if the Board would issue
22 the subpoena then the Interveners would be in the unique
23 position of wanting to quash their own subpoena, because
24 extraordinary circumstances were not proven -- which
25 would be a unique legal experience for me.

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1 However, there's one thing that came up as I
2 was talking and Mr. Ketchen was reading, and I did want to
3 bring it to the Board's attention, this one additional
4 factor.

5 In the statement of considerations for the change
6 in the rules, part 2 -- and that appears in 40 Federal
7 Register 2973, starting the third paragraph, it says:

8 "To conform the regulations in Part 2 to this
9 Commission decision, Sections 2.720(b), 2.744(d) and
10 (g), and paragraph IV(d) to Appendix A are amended,
11 and Section 2.744(a) is deleted, to permit the
12 presiding officer, in his discretion, to compel the
13 attendance and testimony of AEC personnel, and to
14 require the Staff to answer any written interrogatories.

15 Now, the reason I mention this is, this is
16 the underlying basis for the regulation. As we know, in
17 the past the statement of consideration has been used in
18 interpreting the regulations.

19 While Mr. Fleischaker says that the regulation
20 on its face tells us what to do, the statement of considera-
21 tion gives us an indication of what the Commission was
22 thinking at the time they put these regulations into effect.
23 And what it clearly says is that this is a discretionary
24 matter with the Board.

25 Consequently, it seems to me that no one could

1 Would the Board for disciplinary discretion to recommend
2 a given and, which all the parties agreed upon. And it
3 would be extremely unusual for the board to not issue an
4 subpoena in a case where the parties agreed, except one
5 party felt that a certain finding should be made as a
6 condition precedent to the issuance of the subpoena, even
7 when the parties who are affected are not complaining.

8 That's what I wanted to present for the Board.

9 In the final analysis, issuing the subpoena or
10 not issuing the subpoena is a matter of discretion for the
11 Board, and I believe in this case if the Board was left
12 discretion to issue the subpoena, that that would not in
13 any event ever be held to be an abuse of discretion.

14 MR. HORTON: Excuse me, Mr. Board. I just
15 want to say one thing.

16 It just occurred to me -- actually Mr. Berkman
17 brought it to my attention -- that Mr. Finkelman is insisting
18 here insisting on this strict interpretation of the rules,
19 but I'm afraid he's a little bit pregnant. He stipulated in
20 all of the submissions of the 1970s by Mr. Finkelman and Mrs.
21 and I'd like to know when that is in the rules.

22 MR. FINKELMAN: I didn't stipulate anything.
23 You're wrong.

24 MR. HORTON: You did, yes.

25 MR. BOARD: I believe --

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1 that those exhibits that were marked for discovery, admitted
 2 and could be removed from the record as evidence immediately,
 3 based on Mr. Fleischaker's position that they are not
 4 properly in the record, and there was no stipulation that
 5 they be entered in the record by the parties.

6 MR. FLEISCHAKER: Let's set the record straight:
 7 Mr. Fleischaker has never taken the position that
 8 they were improperly in the record.

9 Mr. Fleischaker has only taken the position that
 10 he would not stipulate, agree with the parties, that those
 11 should be placed into evidence in lieu of calling them.

12 That's all I did, was reject the offer to
 13 stipulate that they be placed into the record instead of
 14 calling the witnesses to testify.

15 MR. WORTON: Well, Mrs. Bowers, if that's the
 16 case, when they're not properly in the record, there's no
 17 stipulation between the parties, as Mr. Fleischaker has
 18 repeated again, and there is no vehicle to get them into
 19 the record then without a stipulation between the parties.
 20 You have to have a stipulation by all the parties.

21 Now, if Messrs. Laro and Trifunac are going to
 22 be here, then they can lay a proper foundation and get
 23 those documents in.

24 If they're not going to be here, and Mr.
 25 Fleischaker doesn't want to stipulate, so there's nothing here.

12

1 then fine, let's get the records out of evidence.

2

MRS. BOWERS: Mr. Tournillo?

3

MR. TOUNTELOTT: I was going to say also that
4 if -- I'm not sure that I understood all of what's going
5 on here --

6

(Laughter.)

7

-- but if Mr. Fleischaker believes that those matters are
8 properly in the record, then I think the question that
9 remains is where is it in our rules that specifically says
10 that you can get evidence into the record that way?

11

If it's not specifically in the rules, and he
12 insists on having the rules be complied with to the letter,
13 then maybe they should be taken out.

14

MRS. BOWERS: Well, as you know, we heard
15 argument from the parties on this matter -- I guess it was
16 December 8, Wednesday, I know, of that first week -- and
17 when we heard that the primary purpose of having Drs.
18 Griffin and Ghee appear was to sponsor the introduction
19 of those documents, we made that Board Exhibit Number 2,
20 with the thought that while we didn't believe that
21 exceptional circumstances existed to subpoena the two
22 witnesses, that we would, in effect, by going that route,
23 have the information in the record that would be considered.

24

And it wasn't really on the basis of objection.
It's just that we felt that was the accommodation that would

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1 anything it wants in terms of putting stuff in evidence,
2 but that doesn't make it right.

3 MRS. BOWERS: We discussed this at length over
4 the luncheon break, but I think we'll take ten minutes now,

5 (Laughter.)

6 and see if anything has happened.

7 (Recess.)

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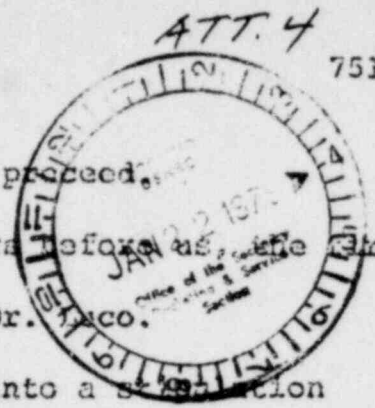
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MRS. DOWERS: We'd like to proceed.
We actually have two matters before us, the first
being the subpoena of Dr. Trifunac and Dr. [unclear]



The parties did not enter into a stipulation
that these witnesses be issued subpoenas. If the parties
had entered into a stipulation, the majority opinion of the
Board would have been that it was inadequate unless it
recognized that exceptional circumstances had to exist. I
would have had a dissenting opinion if there had been a stipu-
lation.

But here we are faced with no stipulation. And
so it is the opinion of this Board that exceptional circum-
stances must exist in order for these witnesses to be subpoena-
ed.

Now a second matter is the motion to purge
the record of Board's Exhibit number 2. And we have deter-
mined, since the matter of subpoena is before -- well, in
essence we've reconsidered and determined that our position
remains the same.

So we've also determined that since this matter
is before the Appeal Board, that we will withdraw Board
Exhibit number 2.

Now if the Appeal Board determines that the two
witnesses should be subpoenaed, of course that would also
automatically bring into the picture those documents.

mpb2

1 (Whereupon, the document
2 previously marked for
3 identification as Board
4 Exhibit number 2 was
5 Withdrawn.)

6 MR. FLEISCHAKER: What is the Board determines
7 not to subpoena them?

8 MRS. BOWERS: Well, we were trying to work out
9 an accomodation that didn't fly very far, and we now have the
10 matter -- our thought at the time by taking the documents in
11 was that the Intervenors would feel they were getting their
12 day in court on the documents. We now know that's not true.
13 And so we see no reason to leave them in the record.

14 And if the Appeal Board determines that the
15 witnesses should not be subpoenaed, we would make no change
16 as far as the record.

17 So the Board's Exhibit number 2 is simply with-
18 drawn.

19 MR. FLEISCHAKER: Well, let me see.

20 The basis for the Board's decision, then, is
21 that -- could you explain the basis for the Board's decision
22 in withdrawing those documents?

23 MRS. BOWERS: We admitted them in the first place
24 thinking that that would be a satisfactory solution to all
25 parties. We know now that that's not a satisfactory solution

mpb3

1 because we have a motion before the Appeal Board that
2 Drs. Trifunac and Lucc be subpoenaed. So our purpose is no
3 longer accomplishing anything.

4 So we simply will withdraw the documents. And
5 if the Appeal Board feels that the subpoenas should be issued,
6 then the documents of course would come back in.

7 MR. TOURTELLOTT: If offered.

8 MRS. BOWERS: Yes, if offered.

9 MR. NORTON: Mrs. Bowers, the basis for our
10 objection for having them removed is that if there was no
11 stipulation from the parties, as pointed out by Mr. Fleischaker
12 then there's no basis for the records to be in evidence, be-
13 cause there is no foundation for those exhibits, and that was
14 the basis for our objection, of course.

15 MR. FLEISCHAKER: Well, I just want to point
16 out for the record that everybody agreed to their authenticity
17 first.

18 Second, there was no stipulation. However, there
19 was no objection at the time.

20 Third, that while they are hearsay, it's perfect-
21 ly proper for the Board to bring that kind of hearsay evidence
22 into the record.

23 And as I understand the Board's ruling, it is
24 because the Interveners chose to pursue with the Appeal Board
25 the request for subpoena. They have now determined that their

mpb4

1 decision to accept this into the record is objectionable.

2 MRS. BOWERS: Well, we understand the entire
3 matter is now before the Appeal Board.

4 MR. FLEISCHAKER: Is the Licensing Board going
5 to make the Appeal Board aware of this decision and the argu-
6 ments and the basis for this decision?

7 MRS. BOWERS: Well, we would assume that the
8 parties, who have a responsibility to file by January the 15th,
9 will bring out this situation.

10 MR. NORTON: Mrs. Bowers, you can rest assured
11 that we will make the entire transcript of this afternoon's
12 session to this point in time, plus the appropriate portions
13 of the December 6th arguments, available to the Appeal Board.

14 MRS. BOWERS: Can we move on to other matters?

15 MR. NORTON: Mrs. Bowers, we do have some ques-
16 tions about scheduling. And that is, Mr. Fleischaker has
17 never informed us as to when Dr. Hall is going to appear.

18 Before we left he told me that he was coming
19 back into the country around the first of January or the first
20 part of January. And we would certainly like to know -- and
21 I think the Staff would too -- when he will be available for
22 deposition and when they intend to put him on as a witness, if
23 they intend to put him on as a witness.

24 MR. FLEISCHAKER: I thought we were going to talk
25 about Dr. Brune first.

mpb5

1 MR. NORTON: I'd like to talk about Dr. Bruene
2 too, both of them.

3 One of the problems with Dr. Bruene is this
4 morning I think Mr. -- Counsel for Intervenors said he would
5 be available Wednesday the 9th, and I'm not sure Wednesday is
6 the 9th. Is it? I don't think it is.

7 Okay. And that had me confused, because I didn't
8 know whether he'd be available Wednesday or Tuesday the 9th.

9 MRS. BOWERS: Before we get into this too deeply,
10 Dr. Martin feels the record may not show that the Board ruled
11 on your motion to delete the Trifunac and Lucco documents. I
12 thought I had expressed it in a way that did contain a ruling.

13 But the motion is granted.

14 MR. FLEISCHAKER: I guess one problem I have in
15 terms of keeping the record straight is that there may have
16 been reference to those documents in cross-examination at
17 several places along the way --

18 MR. NORTON: Mrs. Bowers, that is not the case.
19 None of our witnesses were cross-examined on those exhibits
20 at all. They were referred to, of course, by Counsel in his
21 arguments to the Board about why exceptional circumstances
22 existed. But there were no references whatsoever to those
23 documents in cross-examination, because we would have objected
24 had there been and I would have remembered so.

25 MR. FLEISCHAKER: Well, I don't recall

mpb6 1 specifically. I know that I referred to them on several
2 occasions. I would rather not rely on your recollection at
3 this point, Mr. Norton.

4 And so what I would suggest, just in terms of
5 housekeeping, is that we leave those documents marked as
6 Exhibits, as Joint Intervenors' exhibits, if necessary, or
7 as Board exhibits, recognizing that they haven't been admitted
8 into evidence, but to the extent that they've been referred
9 to either in argument or in cross-examination.

10 MRS. BOWERS: Well, they would remain a part of
11 the documentation because if something is offered and rejected
12 it's a part of the --

13 MR. FLEISCHAKER: Okay.

14 It is still the Board's Exhibit number 2, but
15 it is now deleted from evidence, but part of the record.

16 MRS. BOWERS: Right.

17 MR. FLEISCHAKER: Okay. Fine.

18 MRS. BOWERS: One other matter, and of course
19 this goes to scheduling.

20 As I mentioned, the Board was somewhat disturbed
21 by what seemed to be a very rigid position on the part of the
22 Staff that you would not consider beginning any of your
23 direct case until the Intervenors had completed their case.

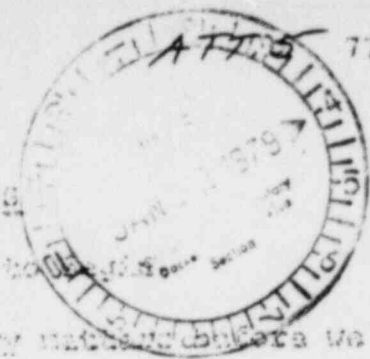
24 Now when we had two weeks of hearings on the
25 environmental issues there was very fine accomodation among

mpb7 1 the parties in order to have each party's witnesses avail-
2 able when it would best fit their schedules. And of course
3 we recognize that we're dealing here, maybe even more so than
4 in other proceedings that I've been in, with university
5 professors who have obligations. We're dealing with people
6 who have other outside obligations.

7 So perhaps you've been able to work out an
8 accommodation during the luncheon break. But we do need to
9 face that issue.

10 MR. NORTON: Well, Mrs. Bowers, frankly we find
11 it most irritating that -- you know, we have our witnesses
12 which you've heard, and they were university professors from
13 Washington and Berkeley and Stanford and MIT and all over.
14 In fact, the man who came from MIT had to bring a teaching
15 assistant with him and the exam papers to grade during the
16 hearing, during the nights. And yet Intervenor's seem to be
17 able to have a special circumstance for every single witness,
18 that he can only be here -- that he's going to go on a
19 cruise, one of them was going to go on a cruise and he had
20 to be here early. Somebody else has got to go someplace, so
21 they can't be here until then.

22 I don't understand why the Intervenor's get
23 special treatment in terms of their witnesses when neither
24 the Applicant nor the Staff -- and I don't mean to say that
25 exclusively never get special treatment, but we do whatever



PROCEEDINGS

MRS. BOWERS: We'd like to know
Are there any preliminary matters we
start with Mr. Huxford?

MR. WORTON: Yes, Mrs. Bowers, we have one and
that is there was some confusion in my mind, if no one else's,
about how you ruled on Friday regarding how the board would
have ruled should there have been a stipulation among all
the parties to have the subpoenas issued.

MRS. BOWERS: Well if there had been a stipulation
that recited exceptional circumstances that the parties agreed
to, then the board would have accepted it without reservation.
If there was a stipulation that did not recite exceptional
circumstances, the majority of the board would not have
accepted it. I mentioned that I would have been dissenting
in that case. It doesn't matter, though.

MR. WORTON: Okay.

MR. TOURTELLOTTIE: The majority of the board
would not have accepted the stipulation and the subpoenas
would not have issued?

MRS. BOWERS: That's right, unless the stipulation
were citing exceptional circumstances.

MR. TOURTELLOTTIE: And you would have dissented
from that?

MRS. BOWERS: Yes, if there had been a stipulation

100/agh?

1 that was silent. I probably shouldn't have volunteered that,
2 but for future guidance....

3 I believe that if the parties enter into a stipula-
4 tion, even though it doesn't recite exceptional circumstances,
5 that it's appropriate for the Board to accept it. The other
6 Board members do not agree with that.

7 MR. TOURTELLOTT: I take it inherent in that
8 ruling also is a rejection of the Staff's position that the
9 exceptional circumstances are there to protect the Staff,
10 and the Staff is in a position of waiving those, the right
11 to insist upon that.

12 MRS. BOWERS: Well, it would have that effect
13 because the other Board members felt that exceptional cir-
14 cumstances had to be established.

15 Now, Mr. Fleischaker called Saturday afternoon
16 and said with the approval of Mr. Tourtelotte and Mr. Morton
17 that he had been able to get in touch with Dr. Brune and that
18 if the Board wanted Dr. Brune here tomorrow to testify that,
19 if he could get plane reservations, that he would be here.

20 Do you have any more information on that?

21 MR. KRISTOVICH: Dr. Brune will be here.

22 MRS. BOWERS: Fine. Well, the meeting was at the
23 Shamrock Hilton but I understand he was staying with relative

24 Is there any other preliminary matter?

25 (No response.)

(The Board conferring.)

MRS. BOWERS: The objection is sustained in part and denied in part. We think there should be a clarification and that the witness should be asked about what Drs. Trifunac and Lucco have said and what is their relationship to this paragraph 3 and the items recited.

MR. FLEISCHAKER: Okay. Thank you.

BY MR. FLEISCHAKER:

Q Were Drs. Trifunac and Lucco's recommendations among the ten that were attached there?

A Yes, they were.

Q Is it your understanding that the reference here to some of the sensitivity studies suggested include those suggested by Drs. Trifunac and Lucco?

A Yes, it is.

Q What were those studies -- recommendations -- by Drs. Trifunac and Lucco?

A I would have to read those documents to answer.

Q Okay. Let me suggest that you might turn -- first with respect to Dr. Trifunac -- to page . . . the second to the last page --

MR. NORTON: Excuse me, Mrs. Bowers. If the document is going to be read it should be offered into evidence and then read. Actually it speaks for itself, and I have no objection to its being read as long as it's being

1 offered into evidence.

2 MRS. BOWERS: It's not in evidence now. It was
3 for awhile Board Exhibit 2 and was then withdrawn.

4 MR. FLEISCHER: I'm not offering the documents
5 into evidence. I'm asking Mr. Allison to state what the
6 Trifunac and Luce recommendations were, and I believe he has
7 a document before him which permits him to state those recom-
8 mendations. I'm not asking him about the merit of the
9 recommendations, I'm just asking him to state what they were.

10 MR. NORLON: Mrs. Bowers, at this time we would
11 move what appears to be Joint Intervenors' G and H -- that's
12 how they're labeled on my copies that I was furnished,
13 JI-G and H -- into evidence.

14 MRS. BOWERS: I think the identification may be
15 misleading. They are now called Joint Intervenors' G and H,
16 but they're in the docket file as Board Number 2, G and H.

17 But now, the renumbered -- well, I don't know
18 that JI-G and H would have any meaning, because there's
19 nothing prior in the alphabet for Joint Intervenors.

20 MR. TOURTELLOTT: I've got a whole can of worms
21 of problems.

22 One is, I thought Board Exhibit Number 2 was
23 excluded from the record.

24 MRS. BOWERS: It remains in the docket file.

25 MR. TOURTELLOTT: I understand that, but it is --

3
1 MRS. BOWERS: It's not in the record.

2 MR. TOURTELLOTTÉ: It's not in the record. That's
3 one problem I have.

4 Therefore, unless Mr. Horton is going to offer
5 up the necessary copies to make them exhibits, I don't really
6 see how that can be done, and --

7 MR. HORTON: Well, they've already been furnished.
8 The necessary copies have already been furnished.

9 MR. TOURTELLOTTÉ: Well, it's an unusual
10 procedure. I don't have too much difficulty with that. But
11 it's peculiar.

12 The other thing that bothers me is that I thought
13 that a question was asked of this witness as to whether he
14 knew what the views of Trifunac and Iucco were, and he said
15 he didn't know. Then he was asked to open a piece of paper,
16 to read that paper.

17 The purpose of having this witness on the stand
18 is to probe what he knows, not his ability to read somebody
19 else's opinion. And I think that's objectionable.

20 MRS. BOWERS: Is he just refreshing his recollec-
21 tion that these are the --

2 MR. TOURTELLOTTÉ: Well, he hasn't been asked to
3 refresh his recollection. When he said he didn't know, that
4 was as far as it went. Whether he ever knew or not, or
5 whether he ever paid any attention to that or not, was

4
1 something that wasn't established.

2 So there's no foundation for doing whatever in the
3 world he's doing. And I guess I object to his being required
4 to read something into the record which he says he didn't
5 know in the first place. It's of a real probative value in
6 terms of what this witness knows.

7 MRS. BOWERS: Well, if I followed everybody, Mr.
8 Norton has now offered these two documents into evidence.

9 MR. FOULDELOTTE: Even if he offers them into
10 evidence, what I'm saying is that whether they're in evidence
11 or not, the purpose of cross-examination is to probe what is
12 in Mr. Allison's mind, not to put something else in his mind
13 and then probe whatever it is.

14 MR. NORTON: Mrs. Bowers, I didn't offer them
15 into evidence. I'm moving them into evidence. They were
16 originally offered to be marked by Joint Interveners, of
17 course, and it's our position that if they're going to be
18 used in these proceedings for purposes of cross-examination,
19 that there has been a foundation laid, the letter has been
20 identified that they were attached to, and we're now moving
21 that they be placed into evidence.

22 Maybe Mr. Fleischaker wants to object to these
23 documents of Trifunac and Inco coming into evidence, I don't
24 know.

25 MR. FLEISCHAKER: Well, you know, this is becoming

1 kind of a circus, this trifling and lingo thing. Mr. Norton
 2 has changed his position three times now with respect to
 3 whether this document has adequate -- twice -- with respect
 4 to whether this document has adequate foundation.

5 I'd like to think for a minute. I believe that I
 6 can request this witness to refresh his recollection on the
 7 basis of the document before him, and then he can state for
 8 the record what the recommendations were.

9 I'd like to have a moment to think about what
 10 position I want to take with respect to Mr. Norton's moving
 11 this document into evidence. May I have a moment?

12 MRS. BOWERS: Fine.

13 (Pause.)

14 MR. NORTON: Mrs. Bowers, while he takes that
 15 moment to think, he might want to think about this too:

16 I haven't changed my position at all. At the
 17 very beginning these documents were offered by Intervenor
 18 and given to the Board in support of their motion.

19 I stipulated that those documents could go into
 20 evidence. The Staff stipulated that they could go into
 21 evidence. And at that time I was under the impression that
 22 Mr. Fleischaker so stipulated. He later pointed out that
 23 indeed he had not stipulated, that he had remained silent and
 24 not objected, and had done nothing.

25 And I said, well, if that's the case, there's no

1 legal basis for those documents to be in evidence, without a
2 full stipulation of all the parties there's no way they could
3 be in evidence, without a proper foundation.

4 Now Mr. Fleischaker has offered two of those
5 documents up, a foundation has been laid, and I'm moving them
6 into evidence.

7 That position is 100 percent consistent on all
8 three occasions. I suggest that it's Mr. Fleischaker's
9 position which is fluctuating.

10 MR. FLEISCHAKER: I have no comment on that. I
11 think the record speaks for itself and the issue is before
12 the Appeal Board.

13 May I have a moment, please?

14 (Pause.)

15 MR. FLEISCHAKER: Mrs. Bowers, we have a position.
16 We have no objection.

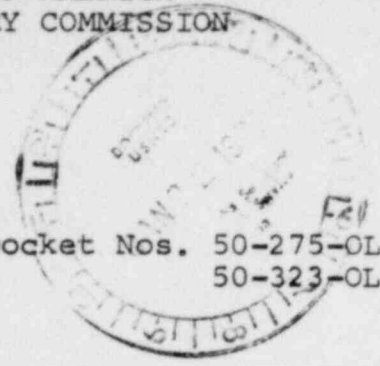
17 MRS. BOWERS: The documents that have been now
18 identified as Joint Intervenors' G and H, which are actually
19 the same documents that were originally Board's Exhibit Number
20 2, G and H, are admitted into evidence.

21 (The documents referred to were
22 received in evidence as Joint
23 Intervenors' Exhibits G and H.)

24 But I think to help move this thing along it
25 should be made clear as to what the witness' prior contact was

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

NEW PUBLIC INFORMATION ROOM



In the Matter of)
PACIFIC GAS AND ELECTRIC COMPANY)
Units 1 and 2)
Diablo Canyon Site)

Docket Nos. 50-275-OL
50-323-OL

CERTIFICATE OF SERVICE

The foregoing document of Pacific Gas and Electric Company has been served today on the following by deposit in the United States mail, properly stamped and addressed:

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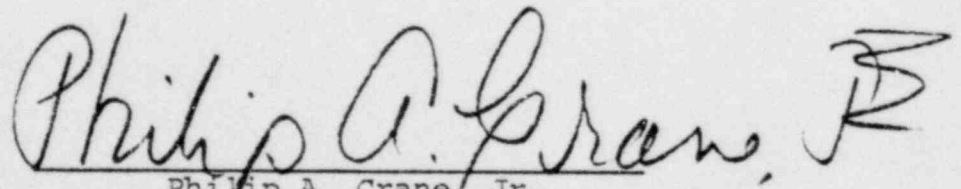
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*Delivered by courier

Dated: January 17, 1979


Philip A. Crane, Jr.
Attorney
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INTERIM REPORT

2-6-79

Accession No. 7702210089

Contract Program or Project Title: Loss-of-Coolant Accident Analysis

Subject of this Document: "P.LAP4 Stagnation Properties Option"

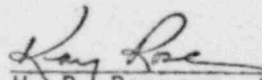
Type of Document: Preliminary Analysis Report

Author(s): T. L. DeYoung

Date of Document: January 1979

Responsible NRC Individual and NRC Office or Division: W. C. Lyon
Reactor Safety Research

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.

for

H. P. Pearson, Supervisor
Information Processing
EG&G Idaho

Prepared for
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

NRC File #A6047

INTERIM REPORT