UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

NRC STAFF'S RESPONSE TO JOINT INTERVENORS' BRIEF IN SUPPORT OF EXCEPTIONS

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I. INTRODUCTION

On July 17, 1981 the Atomic Safety and Licensing Board issued a Partial Initial Decision (PID) favorably ruling on a motion by Pacific Gas and Electric Company (Applicant) for authorization pursuant to 10 C.F.R. § 50.57(c) to conduct fuel load and low power test activities at its Diablo Canyon Nuclear Plant Unit 1. The Licensing Board conditioned its decision on favorable resolution of security issues pending before an Atomic Safety and Licensing Appeal Board and subsequent favorable review by the Commission pursuant to 10 C.F.R. § 2.786. Exceptions to the PID were filed by the San Luis Obispo Mothers for Peace, Scenic Shoreline Preservation Conference, Inc., Ecology Action Club, Sandra Silver, Gordon Silver, Elizabeth Apfelberg, and John J. Forster (collectively known as "Joint Intervenors") on August 3, 1981. Joint Intervenors' Brief in Support of Exceptions was filed September 2, 1981. The NRC Staff opposes Joint Intervenors' position in its entirety.

II. STATEMENT OF ISSUES ON APPEAL

1. Whether the legal standards for reopening the record and for late-filed contentions applied to Joint Intervenors' contentions in

this proceeding are consistent with the Administrative Procedure Act, the Atomic Energy Act, and the Commission's Policy on TMI-related issues.

2. Whether the Licensing Board correctly applied the standards of 10 C.F.R. § 50.57(c) and § 50.47(c) in rendering its findings on Joint Intervenors' Emergency Planning Contentions.

3. Whether the Licensing Board correctly denied Joint Intervenors' motion to reopen the record to consider "Class 9" accidents and to require a separate environmental impact statement for low power testing.

4. Whether the Licensing Board correctly granted summary disposition on Joint Intervenors' Water Level Indicator Contention.

5. Whether the Licensing Board correctly ruled in making its findings on Joint Intervenors Relief and Safety Valve Contention.

III. STATEMENT OF THE CASE

Applications for operating licenses for Diablo Canyon Units 1 and 2 were docketed in 1973. Following a lengthy procedural and litigation history, the Licensing Board completed safety hearings and closed the evidentiary record on March 12, 1979. Before a decision was rendered, however, Joint Intervenors filed a motion to reopen the record in May 1979 seeking to litigate additional contentions related to emergency planning and "Class-9 accidents". The basis for Joint Intervenors' motion was stated to be the Three Mile Island Accident. Joint Intervenors also sought to reopen the record in 1980 on seismic issues then pending before the Appeal Board as a result of the Licensing Board's Partial Initial Decision issued on September 27, 1979. The basis for Joint Intervenors' motion was a recent earthquake in the Imperial Valley Region of California which provided significant new information concerning near field accelerations. The Appeal Board reopened on that issue and subsequently held extensive hearings culminating in a favorable

resolution of the seismic issue in ALAB-644 issued June 16, 1981. The Appeal Board also reopened the record on security matters and permitted Joint Intervenors to participate in subsequent hearings. A favorable decision on security issues was issued on September 9, 1981 in ALAB-653.

A ruling on Joint Intervenors' original motion to reopen on Class 9 accidents and emergency planning was held in abeyance while Commission policy on the appropriate regulatory response to the Three Mile Island Accident was being developed and the NRC Staff's Safety Evaluation Report (SER) addressing specific TMI issues applicable to Diablo Canyon was being prepared. On June 20, 1980, the Commission issued "Further Commission Guidance for Power Reactor Operating Licenses". (45 Fed. Reg. 41738 (1980)). In that policy statement, the Commission addressed the standards which it expected its licensing boards to apply when considering motions to reopen the record in pending operating license proceedings. Shortly thereafter, on July 14, 1980, the Applicant filed a motion requesting authorization pursuant to 10 C.F.R. § 50.57(c) to load fuel and conduct low power testing. The Licensing Board subsequently allowed Joint Intervenors to file additional contentions concerning their motion to reopen on or before December 3, 1980.

Joint Intervenors filed 27 contentions on December 3, 1980. Joint Intervenors did not address the standards to reopen or the standards for late filed contentions in their filings at that time. Rather the December 3, 1980 filing was merely a recitation of issues the Joint Intervenors sought to litigate as though the proceeding were in its initial phase of contention drafting.

Prior to the Prehearing Conference, the Commission issued additional guidance by Order dated December 18, 1980. (CLI-80-42, 12 NRC 654). D[redacted] Prehearing Conference on January 28 and 29, 1981, the Joint I[redacted]rs opposed the positions of the Applicant and NRC Staff and arg[redacted]at pursuant to the Commission's policy, they were entitled to litigate all their contentions whether or not they could meet the reopening standards or the late filed contention standards. (Tr. 53-55). The Licensing Board rejected the positions of all the parties and formulated its own interpretation of Commission policy and regulations which it documented in its Prehearing Conference Order of February 13, 1981. The parties sought Commission certification of the Order. However, the Commission, acting on its own motion, issued an Order on April 1, 1981 providing additional guidance to the Board in its consideration of TMI-related matters.

As a result of that Order, Joint Intervenors apparently realized the need to address the legal standards for reopening and late filed contentions as well as to state with precision the nexus of the contentions they sought to litigate to the TMI-related guidance in Commission policy documents. Consequently, in their April 22, 1981 response to Staff's and Applicant's Motions for Reconsideration, Joint Intervenors for the first time substantively addressed such standards. In the NRC Staff's view this was too little, too late. The Licensing Board viewed the additional Commission guidance as supporting its determinations in its Prehearing Conference Order and it directed the parties to proceed with preparations for hearing the issues it had identified. Four TMI-related contentions were admitted for hearing.

(The Class 9 contention which was one of two matters in Joint Intervenors' original motion to reopen was rejected by the Licensing Board in its June 19, 1981 Order.) The Licensing Board subsequently granted summary disposition on two contentions leaving two contentions at issue: emergency planning and relief, safety and block valve testing requirements.

Joint Intervenors take issue with the Licensing Board's decisions in this proceeding and in their September 2, 1981 Brief in Support of Exceptions they make five separate arguments.

First, without reference to the legal standards for reopening the record, Joint Intervenors argue that the Licensing Board's application of the Commission's policy statements amounted to impermissible rule-making in violation of the Administrative Procedure Act, Section 189 of the Atomic Energy Act and the Commission's own statements of policy. As to the issues on which the Licensing Board did allow hearings, Joint Intervenors next argue that the PID is flawed because it "in effect" failed to apply the Commission's emergency planning regulations to reactor operations at low power. Third, Joint Intervenors argue that a separate Environmental Impact Statement is required for low power test authorizations. Finally, Joint Intervenors' fourth and fifth arguments dispute the Licensing Board's summary disposition of their contentions on reactor vessel level indications and the Licensing Board's conclusion regarding relief and safety valve testing. For the reasons which we will now discuss, Joint Intervenors' exceptions should be denied.

IV. ARGUMENT

A. Proper Application Of The Legal Standards For Reopening The Record And Admitting Late Filed Contentions Results In The Conclusion That Joint Intervenors Have Been Afforded An Opportunity To Be Heard Which Fully Complies With The Administrative Procedure Act, The Atomic Energy Act, And Commission Policy

Joint Intervenors' argue that their right to be heard was violated by the Licensing Board's rejection of contentions and interpretation of the Commission's policy statements on NUREG-0737. However, Joint Intervenors' contentions failed to meet the requirements for late filing of contentions and for reopening a closed record. Consequently, the Licensing Board, in fact, properly excluded the contentions based on the Commission's policy statements. In addition, an examination of both the Commission's policy statements and the way in which the Licensing Board used NUREG-0737 reveals that those actions are consistent with the Administrative Procedure Act (APA) and with the precedent defining notice and comment requirements. Having properly excluded the contentions and having met the APA requirements, the Licensing Board's actions also were consistent with the hearing requirements of Section 189(a) of the Atomic Energy Act of 1954 as amended.

1. The Commission's Policy Statements and NUREG-0737

Joint Intervenors contend that the Licensing Board's application of the Commission December 18, 1980 policy statement on the admission of contentions related to NUREG-0737 violated their right to be heard. ("Clarification of TMI Action Plan Requirements," November, 1980; Joint Intervenors' Brief at 13). The Joint Intervenors' position is not supported by an examination of the entire prehearing conference order of

February 13, 1981 in which the Licensing Board rejected the majority of Joint Intervenors' contentions. Joint Intervenors focus on a statement of the Licensing Board that, to be admitted in the present proceeding, the contentions must be related to NUREG-0737. (Prehearing Conference Order at 13.) Joint Intervenors believe that statement by the Licensing Board violates the Commission's directive in the April 1, 1981 clarification of the Revised Policy Statement that a contention would be admissible if it is addressing the same safety concern as NUREG-0737. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Plant, Units 1 & 2), CLI-81-5, 13 NRC 361, 363 (1981).[1/]

The Commission's guidance in the April 1, 1981 order in this proceeding is divided into four parts. The first part directed the Licensing Board to promptly rule on the motions for fuel loading and low power testing. (13 NRC at 362). The second part of the order states that the record should not be reopened absent a showing of significant new information which would affect the result reached in the initial decision. (13 NRC at 362.) The third section of the Commission order noted that significant new information showing that NRC regulations would be violated would justify reopening and admission of the contention, notwithstanding that it is not related to NUREG-0737. (Id. at 363.) However, that section also notes that the contentions will be subject to the requirements of 10 C.F.R. § 2.714 for admitting late filed

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1/ In the Commission's April 1, 1981 Order the Commission was giving further guidance as to the proper application of its earlier Statement of Policy entitled "Revised Statement of Policy: Further Commission Guidance for Power Reactor Operating Licenses," CLI-80-42, 12 NRC 654 (1980) (hereinafter Revised Policy Statement).

contentions. Joint Intervenors emphasize the fourth section concerning contentions which allege that TMI-related requirements provide insufficient protection in spite of compliance with the regulations. This section concludes however, with a reiteration that even these contentions must meet the requirements for late filing and reopening a record. (Id. at 364.)

An examination of the Licensing Board's Prehearing Conference order of February 13, 1981 reveals that the Licensing Board's rejection of contentions was based on a failure of Joint Intervenors to meet the requirements for reopening. It was not based on a determination that, if filed in a timely manner and in a proceeding where the record was open, the contentions would be inadmissable because they were not related to NUREG-0737. The Commission, in part four of the April 1, 1981 Order, was making a policy determination that, if related to the same safety concern as in NUREG-0737, a contention would not be considered as a challenge to the regulation requiring the proponent to meet 10 C.F.R. § 2.758. (Id.) Nowhere in Joint Intervenors' brief on appeal do they discuss the standard for reopening and admitting a contention into a proceeding. This is the fundamental flaw in their entire argument on the contentions, because it was the late filing and reopening standards which Joint Intervenors contentions failed to meet.

The Licensing Board's application of the Commission's revised policy statement gave the Joint Intervenors more generous treatment than required under the Commission's April 1, 1981 guidance. The Licensing Board stated in the February 13, 1981 Prehearing Conference Order that the Joint Intervenors had not at that time attempted to demonstrate good

cause for late filing of contentions and reopening a closed record. (Prehearing Conference Order at 8.) However, rather than rejecting all of the Joint Intervenors' contentions, the Licensing Board found that NUREG-0737 would constitute good cause for both late filing of contentions and reopening the record. (Id. at 12.) The Commission specifically noted in its April 1, 1981 guidance that, while NUREG-0737 may satisfy the requirement of significant new information, it must still be shown that the information would have caused a different result. (13 NRC at 365). Thus, as the contentions were presented to the Licensing Board, it would have been a correct decision to deny all contentions for failure to address, let alone meet, the requirements for reopening a closed record. Rather than applying NUREG-0737 as a rigid rule, as alleged by Joint Intervenors, preventing the admission of Joint Intervenors' contentions, the Licensing Board was giving more benefit to Joint Intervenors on the basis of NUREG-0737 than was necessary under the guidance in the April 1, 1981 Order.

In fact, the contentions which were admitted by the Licensing Board do not meet the strict requirements for late filing and reopening a record on TMI issues. Following is an example of how even the admitted contentions failed to meet these requirements.

Contention 13, which was admitted by the Licensing Board, reads as follows:

> Contention 13. NRC regulations require instrumentation to monitor variables as appropriate to ensure adequate safety (GDC 13) and that the instrumentation shall directly measure the desired variable. IEEE 279, § 4.8, as incorporated in 10 C.F.R. § 50.55a(h), states that:

> "To the extent feasible and practical protection system inputs shall be derived from signals which are direct measures of the desired variables."
>
> Diablo Canyon has no capability to directly measure the water level in the fuel assemblies. The absence of such instrumentation delayed recognition of a low-water level condition in the reactor for a long period of time. [sic] Nothing proposed by the Staff would require a direct measure of water level or provide an equivalent level of protection. The absence of such instrumentation poses a threat to public health and safety.

Joint Intervenors had not previously filed a contention on this subject. To reopen the record and admit this contention under the Commission's policy statements and April 1, 1981 guidance, therefore, the Joint Intervenors would have to first meet the requirements for late filing of contentions. Thus, a balancing of the factors in 10 C.F.R. § 2.714 must favor admitting the contention even though it is late. At the time of the prehearing conference, the Joint Intervenors had not presented the Licensing Board with any arguments addressing these requirements. The contention, therefore, could have properly been dismissed as being untimely. Even assuming such a showing had been made, Joint Intervenors would still have had to meet the requirements for reopening a closed record in order to have their contention admitted.

Under the Commission's April 1, 1981 guidance, if Joint Intervenors' contention was not related to the same safety concern as that addressed in NUREG-0737, it was necessary to have demonstrated both that there existed significant new information and that such information would have changed the initial result. (13 NRC at 362,363.) In the example presented in footnote 2 of the April 1, 1981 guidance the Commission clearly indicates that broad definitions of what the safety concern is will not be permitted. Thus, the fact that NUREG-0737 deals with the need

for inadequate core cooling indicators does not mean any contention that mentions inadequate core cooling indicators is related to the same "safety concern" as the NUREG-0737 guidance. The guidance in NUREG-0737 which addresses the need for an indication of inadequate core cooling is Section II.F.2. While that provision does address instrumentation for measurement of inadequate core cooling, it does not specifically state that the measurement to be used is water level. Rather the provision states only that water level should be included in the evaluation. Thus, rather than focusing on the general need for an unambiguous indication of inadequate core cooling, the Joint Intervenors have focused on the measurement of one variable which would be considered in an evaluation of core cooling. Joint Intervenors have not, therefore, focused on the same safety concern as the NUREG guidance, but rather seek to go beyond the concern of the NUREG provision to focus on a specific concern they have.[2/] To be admitted under the Revised Policy Statement as clarified by the April 1, 1981 guidance, Joint Intervenors must demonstrate both significant new information on the need for water level indicators as opposed to any other method of measuring inadequate core cooling, and demonstrate that the information is such as would change the result. No

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2/ The Staff, as noted infra., believes the Licensing Board admitted this contention on the limited basis of determining when the inadequate core cooling measuring system must be installed. Even under this more limited interpretation of the contention, Joint Intervenors must still demonstrate that the information would change the result. This they have not done.

such showing was before the Licensing Board at the Prehearing Conference. The Licensing Board could have justifiably excluded this contention.

Similarly, although the contentions on emergency planning were timely filed since this issue was raised in Joint Intervenors' May 1979 Motion to reopen the record on emergency planning and "Class 9" accidents, Joint Intervenors failed to meet or address the standards for reopening on this issue. Although arguably related to NUREG-0737 as it addresses upgrading of emergency planning, that relationship would only satisfy the "significant new information" requirement of the reopening standard. It was still incumbent upon Joint Intervenors to demonstrate that that information was such as would change the initial result. As reinforced by the eventual findings of the Licensing Board, for low power operation no such showing was made.

The Licensing Board also admitted Contention 11 on the attachment of pressurizer heaters to the emergency power supply (this contention was eventually withdrawn by Joint Intervenors) and Contention 24 on the testing of Relief and Safety Valves. Neither of these contentions related to a previously admitted contention. They were therefore late and should have been dismissed since Joint Intervenors not only failed to address the requirements for late filing before the Licensing Board's Prehearing Conference Order, but their belated allegation, in their April 22, 1981 Response to the Staff's Motion for Reconsideration, that TMI in general satisfies the late filing requirements is in direct conflict with the Commission's guidance in its April 1, 1981 Order. (13 NRC at 364). These two contentions also failed to meet the requirements for reopening. The first time Joint Inter nors even mentioned this standard was in the

April 22, 1981 filing. They again relied on a general statement that a relationship to TMI automatically satisfies the reopening standard. The Commission made clear that the mere mention of TMI does not have such a sweeping effect. (13 NRC at 362). These contentions, therefore, should also have been dismissed.

Thus, even the admitted contentions, when the late filing and reopening standards are strictly applied, fail to satisfy the requirements for admission into this proceeding. 3/

That Joint Intervenors have failed in general to meet the requirement of demonstrating significant new information which would change the initial result is reinforced by the Commission's ruling under 10 C.F.R. § 2.764 for low power testing. The Commission stated: "As a part of its effectiveness review the Commission has examined the disputed contentions and subjects and is convinced they hold little significance, from the standpoint of health and safety, for low-power operation." Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-22, 13 NRC ___ , Slip opinion at 2 (September 21, 1981). Unable to show significance from a health and safety endpoint, Joint Intervenors could not show the initial result would be changed by the information they reply upon.

By providing that a connection to NUREG-0737 would satisfy both the late filing and reopening requirements, the Licensing Board gave Joint

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3/ For further discussion of the admissability of all the admitted contentions in view of the Commission's April 1, 1981 Order, see the Staff "Motion for Reconsideration of Licensing Board's Order" filed with the Licensing Board on April 7, 1981. (Attachment 1.)

Intervenors favorable treatment beyond that required by the Commission's regulations and policy statements. Contrary to the impression Joint Intervenors attempt to create in their brief that this is a case involving questions of due process and Atomic Energy Act hearing rights, this is a case in which they have been afforded extensive hearings pursuant to a notice of hearing. In essence, Joint Intervenors are attempting to have a second hearing on the same application. Joint Intervenors have received favorable treatment in the consideration of their motions to reopen and it cannot reasonably be concluded that they were denied their right to a hearing. However, Joint Intervenors argue that the Licensing Board's treatment of their contentions violated their right to a hearing under both the Administrative Procedure Act and Section 189(a) of the Atomic Energy Act of 1954 as amended (AEA).

2. The Atomic Energy Act and the Administrative Procedure Act

a. The Atomic Energy Act

Section 189(a) of the AEA provides for a hearing upon request of any person whose interest may be affected prior to the issuance of an operating license. However, a party does not have the "right" to litigate in a hearing all of the contentions they propose regardless of when they propose them. Any such interpretation of the rule would create a never ending and uncontrollable licensing process. Clearly, the right to a hearing only exists to the extent that acceptable and timely contentions for the hearing are presented. Thus, the Commission has

regulations governing the requirements for admitting contentions and late filing of contentions.[4/]

In the present proceeding the Joint Intervenors have had many hearing opportunities on operation of the Diablo Canyon Facility.[5/] The fact that these hearings have taken place points out the failure in logic of the Joint Intervenors' citation to Brooks v. Atomic Energy Commission, 476 F.2d 924 (D.C. Cir. 1973) (per curiam) and Sholly and Hossler v. U.S. Nuclear Regulatory Commission, 651 F.2d 780 (1980). Both the Brooks and the Sholly cases dealt with the situation where the party requesting a hearing had been denied the opportunity to have any hearing whatsoever prior to the proposed action. The present case is completely distinguishable in that the issue is the extent of the hearing opportunity, not whether a right to any hearing at all exists. While the court in Sholly may have said that an amendment cannot be made immediately effective prior to a hearing if requested, that has no bearing on this proceeding since no one has argued that the hearings

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4/ See 10 C.F.R. § 2.714. Section 2.714 was specifically upheld by the D.C. Court of Appeals, the Court noting in the process that Section 189a of the AEA does not automatically confer the right to a hearing. BPI et al. v. AEC, 502 F.2d 424, 428-429 (D.C.C.A., 1974).

5/ The following evidentiary hearings concerning Diablo Canyon's operating license have been held: during December 7-10 and 13-17, 1976 on environmental issues; during October 18-19, 1977 on non-seismic health and safety issues; during December 4-23, 1978, January 3-16, 1979, and February 7-15, 1979 on seismic issues; during October 20-25, 1980 on seismic issues; during November 10-15, 1980 on the security plan; and during May 19-22, 1981 on low power issues.

need not be completed prior to the issuance of the applicable operating license. Thus, Joint Intervenors reliance on these cases as somehow affecting the present dispute over admissable contentions is misplaced.

As discussed in the preceeding section, Joint Intervenors' contentions were correctly excluded from the low power proceeding. Therefore, the hearing requirements of Section 189(a) of the Act have been met.

b. The Administrative Procedure Act

Joint Intervenors' cite the sections of the APA and associated precedent which provide that generic regulations proposed for adoption must be subject to prior public notice and comment. (Joint Intervenors' Brief at 25-27.) However, neither the Commission's Policy Statements nor NUREG-0737 are binding regulations requiring notice and comment. It was not necessary that they be noticed and circulated since they were not interpreted or applied as "binding norms" against either the Joint Intervenors or Governor Brown.

Section 553(b) of the APA, which specifically deals with the requirement of notice and comment in rulemaking, gives certain exceptions to those requirements. In Subpart A of that section, the APA provides that the notice and comment provisions will not apply "to interpretive rules, general statements of policy, or rules of agency organization, procedure or practice." NUREG-0737, as applied through the Commission's policy statement and as applied by the Licensing Board in this proceeding, is a policy statement falling within that exception.

In American Bus Ass'n v. United States, 627 F.2d 525 (D.C. Cir. 1980) the Court noted the basic characteristics of a policy statement saying:

> A general statment of policy...does not establish a "binding norm." It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy. A policy statement announces the agency's tentative intentions for the future. Id. at 529.

NUREG-0737 satisfies this description. It is not in dispute that NUREG-0737 acts prospectively. Even Joint Intervenors have not alleged otherwise. Rather, they center their argument on an allegation that NUREG-0737 and the Commission's Policy Statements are not policy statements, but were used as "binding norms" in the Diablo Canyon proceeding. (Joint Intervenors' Brief at 32.) An examination of the Policy Statements and the Licensing Board's application of the Statements reveals that allegation to be in error.

In December of 1980, the Commission issued the Revised Policy Statement which addressed the appropriate application of the NUREG-0737 guidance to individual nuclear plants and the proceedings associated with the licensing of the plants.[6/] In that statement, the Commission specifically noted that to the extent the guidance in NUREG-0737 went beyond interpreting, refining or quantifying the general language of existing regulations it would be subject to challenges as to both the sufficiency and necessity of the recommendations. Thus, the Revised Policy Statement clearly left the determination of whether contentions should be admitted which challenge the guidance in NUREG-0737 to the

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6/ The Commission had issued a policy statement in June of 1980 on the application of NUREG-0737 in licensing proceedings, but the Revised Policy Statement (see note 1 above) had replaced the June 1980 statement prior to the Licensing Board's ruling on the admissability of contentions.

Licensing Board's discretion. The NUREG-0737 guidance as applied by the Revised Policy Statement did not, therefore, create a "binding norm" which would jeopardize its status as a policy statement. The additional guidance the Commission provided in CLI-81-5 did not alter the discretion available to the Licensing Boards. That guidance simply reaffirmed what the Commission had stated in the December 1980 Revised Policy Statement in that the normal rules for late filing, reopening the record, and challenges to the regulations still applied to litigation of the TMI issues. Thus, a connection to either NUREG-0737 or TMI in general would not lead to automatic admission of a contention.

The Commission's application of NUREG-0737 through the policy statements is entirely consistent with past agency practice and determinations under the Administrative Procedure Act. Decisions by Licensing Boards, Appeal Boards and the Commission itself have confirmed that Staff issuances such as NUREG-0737 only present methods which the Staff finds will meet the regulations, rather than changes in the regulations themselves.7/ The position that guidelines can appropriately be exempt from the notice and comment provisions of the APA on the basis that they are policy statements was confirmed by the court in American Bankers Ass'n v. Board of Governors, Federal Reserve System, 48 Ad. L.2d 592 (D.D.C. 1980). The Court explained that guidelines which only warn

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7/ See Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 406 (1978); Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 772 (1977); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-179, 7 AEC 159, 174 n.27 (1974); and Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), LBP-76-13, 3 NRC 425, 432 (1976).

the affected party of what the agency might do are nothing more than general statements of agency policy as to how their powers under the regulations might be enforced. Similarly, NUREG-0737 provides guidance as to how the Commission will interpret its regulations in response to its findings following the TMI accident. To the extent any of the NUREG-0737 guidance goes beyond interpreting the regulations, as noted above, the Revised Policy Statement specifically provides that the guidance is subject to challenge and is thus not binding.

Since the Commission did not adopt NUREG-0737 as a "binding norm", the only remaining question is whether, in its application of the Revised Policy Statement to the Joint Intervenors' contentions, the Licensing Board complied with the APA.

As discussed above, the Joint Intervenors focus on a statement in the PID to support their argument that the Licensing Board applied NUREG-0737 as a rigid requirement. This statement was taken out of context. A close examination of the Licensing Board's statement cited by Joint Intervenors reveals that the Licensing Board did not violate the APA. The Licensing Board stated in the Prehearing Conference Order of February 13, 1981 that NUREG-0737 would constitute good cause for both late filing and reopening a record for contentions related to the NUREG. (Prehearing Conference Order at 12.) The Licensing Board, thus, correctly required that Joint Intervenors meet the late filing requirements of 10 C.F.R. § 2.714 and the reopening requirements as stated in the Commission's Revised Policy Statement. In the statements immediately following the language cited by Joint Intervenors, the Licensing Board states that they will admit contentions on the NUREG-0737

guidance, and that those contentions may challenge both the necessity and sufficiency of the guidance.[8/] Thus, taken in context, the only interpretation of the Licensing Board's statement which would be internally consistent, is that the Board was requiring a relationship to NUREG-0737 to be demonstrated if Joint Intervenors wished to meet the late filing and reopening standards without additional pleading justification. The Licensing Board was not using NUREG-0737 and the Revised Policy Statement as a "binding norm" limiting Joint Intervenors participation. In fact, the Licensing Board arguably allowed the Joint Intervenors to meet the reopening standards more easily than the Commission's Revised Policy Statement required. (Supra. pp. 18-19). As the Commission noted in its guidance of April 1, 1981, while the information in NUREG-0737 may constitute significant new information for the purposes of meeting the reopening standard, the Joint Intervenors would still have to show that the information would have changed the initial result. (13 NRC at 364-365.) Joint Intervenors' contentions were rejected because they never satisfied the reopening requirement in order to reach the point where they could challenge the adequacy or sufficiency of the NUREG-0737 requirements.

3. Conclusion As to Joint Intervenors Right to be Heard

The above discussion has demonstrated three points relevant to Joint Intervenors' argument that they were denied their right to be heard. First, Joint Intervenors' contentions as presented to the Licensing

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8/ The portion of the Prehearing Conference Order in which the statements quoted by Joint Intervenors appear is attached. (Attachment 2.)

Board, did not meet the requirements for reopening a closed record or for late filing of contentions. This analysis was based on an application of the Revised Policy Statement and the Commission's additional guidance in the April 1, 1981 Order on NUREG-0737.

Second, the application of the Revised Policy Statement and the Commission's guidance in the April 1, 1981 Order on NUREG-0737 does not present a "binding norm" which would render its designation as a Policy Statement improper under the APA.

Finally, the Licensing Board's interpretation and application of the Revised Policy Statement on NUREG-0737 did not violate the APA and did not result in the improper exclusion of any contentions. The Licensing Board did not, therefore, err in setting the issues for hearing which would necessitate a reversal of their Partial Initial Decision authorizing low power operation of the Diablo Canyon Nuclear Facility.

B. Emergency Planning for Low Power

The second basis for the Joint Intervenors' position that the Licensing Board was in error in authorizing issuance of the low power testing license for Diablo Canyon, is that the Board incorrectly applied the Commission's emergency planning regulations. (Joint Intervenor's Brief at 37.) Joint Intervenors argue that the Board misinterpreted 10 C.F.R. § 50.47, that it improperly relied on testimony relative to low risk, and that it improperly failed to consider the effects of earthquakes on emergency plans.

1. Application of the Emergency Planning Regulations

Joint Intervenors first allege that the Licensing Board's conclusion is in error because the Board misinterpreted the Commission's emergency

planning regulations. In fact, the Licensing Board's conclusions are supported on any of three separate bases.

a. 10 C.F.R. § 50.47

10 C.F.R. § 50.47(b) sets out the standards which emergency plans are to meet in order to provide adequate emergency planning for the licensing of reactors. 10 C.F.R. § 50.47(c), however, specifically provides that the standards in § 50.47(b) need not be met if the applicant has demonstrated the "deficiencies in the plans are not significant for the plant in question."[9/] It is the exemption provisions of 10 C.F.R. § 50.47(c) which form the first basis for the result reached by the Licensing Board.

In the low power hearing the testimony presented by both the applicant and the Staff established conclusively that due to the significantly lower risk from accidents present during low power and the level of emergency planning which is presently available, any deficiencies in the emergency plan as compared to the standards in

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9/ 10 C.F.R. § 50.47(c) states:

> (c)(1) Failure to meet the standards set forth in paragraph (b) of this section may result in the Commission declining to issue an Operating License; however, the applicant will have an opportunity to demonstrate to the satisfaction of the Commission that deficiencies in the plans are not significant for the plant in question, that adequate interim compensating actions have been or will be taken promptly, or that there are other compelling reasons to permit plant operation.

Section 50.47(b) would be insignificant for low power.[10/] During the course of the hearing neither Joint Intervenors nor Governor Brown presented any witnesses to dispute the fact that the risks at low power are significantly less than those at full power.

There are several flaws in the Joint Intervenors' argument that Diablo Canyon does not satisfy the requirements of Section 50.47(c) as it applies to any deficiencies in the emergency plans. Joint Intervenors assume that any deviation from the reviewing criteria in NUREG-0654 is the equivalent of a failure to meet the 10 C.F.R. § 50.47(b) standard which it addresses. This ignores the stated intent and effect of the criteria in that NUREG. In fact, the criteria in NUREG-0654 are meant to serve as an aid to reviewers in determining the adequacy of the emergency plan. The NUREG specifically notes that inadequacies by an organization in one area do not automatically result in a reviewer being unable to find an adequate state of emergency preparedness. (NUREG-0654 at I.F., p. 24.) Thus, Joint Intervenors' apparent belief that failure to meet every one of the NUREG-0654 criteria is equivalent to failing to meet the 16 standards in section 50.47(b) is in error. Thus, even if it were required that each deficiency in meeting the 16 standards of section 50.47(b) must be individually addressed (a requirement that the Staff maintains is not required), this would not result in having to

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10/ See Testimony of Sears following Tr. 11035 at p. 8; Testimony of Lauben following Tr. 11014 at p. 9; Testimony of Brunot following Tr. 10595 at p. 21; and Testimony of PG&E Panel following Tr. 10604 at p. 41.

specifically address every item in Joint Intervenors' Exhibit 111 as they urge.

There is no basis for interpreting 10 C.F.R. § 50.47(c) as preventing a general finding that the remaining deficiencies in an emergency plan are insignificant for low power operation. That provision simply does not say that a deficiency-by-deficiency examination must be conducted by the Board. If a Licensing Board has examined an emergency plan and the particular risks of a proposed undertaking, and has found that the level of protection provided meets the level of protection that compliance with the individual criteria in the emergency planning regulations would provide, then any deficiencies as compared to those regulations must be insignificant. Requiring the Board to take each deficiency and state that it is insignificant, because of the low risk during the proposed operation and the level of emergency planning which is available during low power, does not strengthen or change the aralysis. Any requirement that a deficiency-by-deficiency examination be conducted would put form over substance.

The Licensing Board in this proceeding was applying 10 C.F.R. § 50.47(c) as described above. In stating that the question was whether emergency planning for fuel loading and low power testing was sufficient to confer the same level of protection to the public as afforded by full compliance with the regulations at full power operation, the Licensing Board was, in effect, creating a test which would result in a finding that the deficiencies were insignificant for the activity in question. (PID at 24.) Thus, the analysis the Board embarked upon necessarily results in their making a determination of whether the requirements of

Section 50.47(c)(1) for an exemption are met. Indeed, the Board, after having set out the present state of emergency planning as presented at the hearing and having examined the low risk during low power operation, stated "[t]he deficiencies in the PG&E, local and state plans are not significant for operation of Diablo Canyon at power levels not to exceed 5 percent of full power." (PID at 51.)

Joint Intervenors' position that the Licensing Board's decision reached an improper result also centers around SECY-81-188, in which the Commission approved changes in the tables in NUREG-0737. (Joint Intervenors Brief at 42.) The Staff has never alleged that SECY-81-188 could change or amend 10 C.F.R. § 50.47. As the Staff pointed out to the Licensing Board, what that paper does, by indicating that all emergency planning requirements of NUREG-0737 need not be met until full power, is provide conclusive evidence to refute Joint Intervenors' assertion that any deficiency is significant. (Staff Findings of Fact at 33.) It confirms as a matter of policy that the Commission recognizes, for the purposes of emergency planning, that when a plant will be operated at low power instead of full power there is an effect on the level of emergency planning necessary to meet Commission regulations. It confirms that, as a matter of policy, the Staff's presentations on the reduced risk at low power instead of full power are valid considerations in determining whether remaining emergency planning deficiencies are significant.

In sum, the process by which the Licensing Board reached its determination that the emergency plans at Diablo Canyon were adequate for low power operation did nothing more than result in the findings required under 10 C.F.R. § 50.47(c). The SECY paper cited by Joint Intervenors is

nothing more than a policy statement by the Commission which confirmed both the Section 50.47(c) process and that low power operation as opposed to full power operation is a valid distinction for consideration under § 50.47(c).

b. 10 C.F.R. § 50.57(c)

SECY-81-188 not only confirmed that the low power/full power distinction was a valid consideration for the purposes of Section 50.47(c), it confirmed that, as a matter of policy, it is a valid consideration for 10 C.F.R. § 50.57. Section 50.57(c) is the section of the Commission's regulations which addresses the hearings to be held on low power applications. That regulation provides that a party has a right to be heard to the extent his contentions are "relevant to the activity to be authorized." The presiding officer is required to make findings only on matters which are both contained in 10 C.F.R. § 50.57(a) and which are properly in controversy. Therefore, under 10 C.F.R. § 50.57(c) the Board need only rule as to those matters which are relevant to the activity to be authorized - in this case low power testing.

SECY-81-188 states:

> "...10 C.F.R. § 50.57(c), governing adjudicatory hearings for the issuance of operating licenses, is specifically framed in terms of requiring Board findings only on those matters significant for the activity to be authorized. Thus, § 50.57(c) provides a basis for making a distinction between the Licensing Board findings necessary for issuance of full power operating licenses and those necessary for issuance of operating licenses authorizing low power testing for fuel loading.

This provision, in conjunction with the unanswered testimony on the low risk during low power testing, provides a basis by which it can be

found that certain standards in the emergency planning regulations are not relevant for low power operation. In addition, this provision provides a basis for finding that the individual deficiencies are not relevant. This being so, it is evident that a deficiency-by-deficiency examination by the Board is not necessary for low power. This is not to say that under this provision emergency planning as a whole is irrelevant to the activity to be authorized. The conclusion which can be reached is that, in determining the adequacy of emergency planning for low power testing (the activity to be licensed), the standards in the emergency planning regulations which apply to full power may not be relevant. The Licensing Board's findings would as easily support such a determination under Section 50.57(c) as they would under Section 50.47(c). Clearly, if failure to meet certain requirements of the regulations is found to be insignificant, as concluded by the Licensing Board, those particular portions of the regulations are not relevant to the activity to be authorized. In fact, the Staff specifically found in SER Supplement 12 that the "emergency planning requirements of the new regulation are not relevant to the low power testing activities for which PG&E seeks authorization." (Staff Exhibit 23 at p. III-2.)[11/] While the Licensing Board would still have to find that adequate emergency planning exists for low power operation, the regulations may not be the relevant

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11/ In his "Additional Views of Commissioner Ahearnee" attached to Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-22, 13 NRC ___ (September 21, 1981), Commissioner Ahearne expressed his belief that the Commission intended the interim emergency planning criteria to apply to Diablo Canyon, rather than the emergency planning criteria which became effective in November, 1980.

standard to determine adequacy for low power operation. Thus, a deficiency-by-deficiency comparison to the regulations is not required for low power. The Staff emphasizes that such an interpretation is not a challenge to the emergency planning regulations, but is a recognition of the flexibility that both § 50.47(c) and § 50.57(c) provide to the licensing process.

c. 10 C.F.R. § 50.12

Section 50.12 of the regulations provides that the Commission may grant an exemption from the requirements of the regulations in Part 50 if it is determined such an exemption is authorized by law and it will not endanger life or property or the common defense and security. Such an exemption can be granted upon request of any person or on the Commission's own initiative.

PG&E has requested relief from compliance with the current requirements of Appendix E to Part 50 and the provisions of NUREG-0654 ("Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants," November, 1980) on state and local emergency plans. (Staff Exhibit 23 at p. III-2.) The Staff has indicated its conclusion that the requested relief is appropriate. (Id.) In the event it were to be concluded that § 50.47(c) or § 50.57(c) did not provide the flexibility found by the Board, the evidence supports the granting of a § 50.12 exemption to PG&E to the extent that they do not comply with the emergency planning regulations for low power operation at the Diablo Canyon Nuclear Plant.

There would be no adverse impact on the environment by granting such an exemption. As has been discussed above, the Licensing Board has

already determined that the deficiencies in the emergency plans for Diablo Canyon are insignificant. Exemption from the emergency planning regulations would not, therefore, result in any adverse environmental impact beyond that analyzed for normal plant operation. Both the low risk during low power and the emergency plans presently in place at the facility insure that the exemption would have no adverse impact on the environment.

Since the emergency plan's deficiencies in meeting the regulatory standards are insignificant, the present plans, as concluded by the Staff and supported by the NRC/FEMA steering committee's conclusion, are adequate to redress any reasonably conceivable releases which could occur during low power. (SER Supp. No. 12 at p. III-3; and Memorandum to Harold Denton (NRC) and John McConnell (FEMA), with enclosure "FEMA/NRC Interim Agreement on Criteria for Low Power Testing at New Commercial Nuclear Facilities", (March 6, 1980).) Further, the implementation of low power testing with the present state of emergency plans rather than with plans which meet every regulatory item, does not foreclose in any way the addition or modification of the plans in the future. In fact, the Staff has pointed out that PG&E has committed to full compliance with the regulations for full power operation of the Diablo Canyon Facility (Testimony of Sears following Tr. 11035 at p. 4.)

Finally, the public interest, including costs to applicant or consumers, the need for power and the availability of alternative sources weighs in favor of such an exemption if required. Although alternative sources such as oil may be available, clearly such replacement would

result in increased costs to both PG&E and its consumers. The public interest, therefore, does not favor delaying the operation of the Diablo Canyon Nuclear Plant because of failure to literally comply with all the Section 50.47 standards, when the present plans are adequate to satisfy the applicable requirements of Section 50.47.

On balance, therefore, if literal compliance with § 50.47 were to be the required interpretation, PG&E should be granted an exemption from literal compliance with the emergency planning standards.

d. Conclusion on the Application of the Emergency Planning Regulations

The failure of the Diablo Canyon Emergency plans to meet specific criteria in Section 50.47 should not prevent the issuance of a low power testing license for the plant. That a nuclear power plant should receive a license for low power testing while certain emergency planning deficiencies exist is neither a unique or new occurrence. In fact, the majority of the facilities which have received low power authorization since TMI have had identified emergency planning deficiencies.[12/] Those deficiencies included a lack of a fast alerting system and lack of an

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12/ Virginia Electric & Power Co. (North Anna, Unit 2), Low Power Authorization issued April 11, 1980; Public Service Electric and Gas Company (Salem, Unit 2), Low Power Authorization issued April 16, 1980; TVA, (Sequoyah, Unit 1), Low Power Authorization issued February 29, 1980 and Alabama Power Company (Joseph M. Farley Nuclear Power Plant, Unit 2), Low Power Authorization issued October 23, 1980).

adequate public information program.[13/] Thus, plants which had the same deficiencies emphasized as existing at Diablo Canyon were granted low power testing authorization. (Testimony of Sears following Tr. 11035.) In fact, two of the 5 plants which received low power authorization cited the NRC/FEMA Interim Agreement on Criteria for Low Power Testing at New Commercial Facilities (Governor Brown Exhibit 1) in the SER Supplement on which the low power testing was based, as supporting the Staff's position.[14/]

The NRC regulations, in Sections 50.47(c); 50.57(c); and 50.12 clearly provided flexibility in the licensing process by which the Commission and its Boards may reach conclusions on licensing which are reasonable under the circumstances of individual cases. That flexibility along with a consideration of the low risk and existing emergency plans for low power operation of Diablo Canyon, confirm the correctness of the Licensing Board's authorization of a fuel load and low power testing license for Diablo Canyon.

2. The Licensing Board's Use of Low Risk

Joint Intervenors argue that the Licensing Board improperly relied on the low risk during low power operation in reaching its decision on

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13/ Those deficiencies were identified in the Safety Evaluation Report Supplements as follows: Sequoyah - SER Supp. No. 1, Part II, Section III.B; Salem - SER Supp. No. 4, Part II, Section III.B; North Anna - SER Supp. No. 10, Part II, Section III.B; Farley - SER Supp. No. 4, p. 110.

14/ See Salem SER Supp. No. 4, Part II, page III-B-4 and North Anna SER Supp. No. 10, Part II, page III-B-4.

emergency planning. (Joint Intervenors' Brief at 46.) Neither 10 C.F.R. § 50.47(c) nor § 50.57(c) place any restrictions on the bases which the Licensing Board may rely upon in concluding that a deficiency is insignificant or a regulation is irrelevant for the activity to be authorized. As has been discussed above, SECY-81-188 confirms that the nature of the activity to be authorized may affect the findings to be made under either Section 50.47 or 50.57. In the present case, if the Board determined, by considering the present state of emergency planning and low risk during low power operation, that adequate protection exists so that any further deficiencies are insignificant, then the provisions of 10 C.F.R. § 50.47(c) have been met. Similarly, if the Board after examining the present emergency plans and the low risk during low power concludes that meeting the specific standards of the regulations are not relevant to low power, then they need not make specific findings on those standards under Section 50.57. Thus, there is no prohibition on low risk being one of the bases for meeting the requirements of Sections 50.47 and 50.57. The Staff notes that the Licensing Board's conclusions were not based solely on the low risk during low power testing. The Board's PID also contained extensive discussion on the present state of emergency planning.15/

The Joint Intervenors also attack the factual determination by the Board that there is low risk at low power. This assertion is made in spite of the fact that neither Joint Intervenors nor Governor Brown

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15/ The Licensing Board's discussion of the risk factor appears in the PID at 24-36. The discussion of the state of emergency planning appears in the PID at 36-51.

presented any witnesses to refute the analyses of Mr. Lauben and Dr. Brunot.

The Joint Intervenors' first two bases for attacking the finding of low risk are that the release of only a small amount of the fission product inventories would pose a risk requiring protective actions and that the risk analyses failed to consider greater than design basis accidents. (Joint Intervenors' Brief at 48-49.) Both of these arguments suffer from the same infirmity. The arguments on these points can be restated as "assuming there is a release which you are not prepared for, are you prepared for it?" The Staff would not dispute that if you assume that a portion of the fission product inventory is immediately released to the environment without any effective containment, it would take only a small percentage of the investory to result in exposures exceeding Part 100 limits and requiring protective actions. However, the release of the inventory as suggested by the Joint Intervenors is not the assumption which the regulations indicate should be used in making a Part 100 analysis. 10 C.F.R. § 100.11, footnote 1, specifically states that in using Part 100, the Applicant should assume a fission product release no greater than that which would be expected from any accident considered credible. The Joint Intervenors have not presented any reasonable explanation as to how such an extraordinary event as they have postulated could occur. As the Licensing Board specifically noted:

> Reactor safety and emergency planning must be rational. To be so risk analysis must take account of safety features design, siting, containment, reasonable operator actions and credible accident sequences. To do otherwise would permit unbounded speculation as to the magnitude and consequences of accidents. (PID at 35.)

Thus, contrary to Joint Intervenors assertion, the Board did address their argument. (Joint Intervenors' Brief at 51.) The Board's conclusion that there is significantly lower risk at low power was completely justifiable based on the evidence at the hearing.

An additional basis on which the Joint Intervenors attack the low risk finding is that the analysis did not assume other than single failure criteria. (Joint Intervenors' brief at 50.) Joint Intervenors argue that the analysis should have used a multiple failure criteria. (Joint Intervenor's Brief at 50.) This argument totally misinterprets the analysis being conducted by Mr. Lauben. It was specifically pointed out that Mr. Lauben's analysis was a comparative risk analysis not a fault tree analysis. As such, the question of whether a single failure criteria was used as opposed to a multiple failure criteria is relevant to the comparative analysis only if there is a difference in the accident sequences at low power as compared to full power. Mr. Lauben testified that the Staff had analyzed the accident sequences to be sure that additional transients did not become dominant at low power. (Lauben Testimony following Tr. 11014, p. 8.) Thus, the Joint Intervenors argument that multiple failure criteria should have been used has no basis since they have not alleged any difference in the failures leading to accidents which would be expected at low power as compared to full power.

Nevertheless, Mr. Lauben's testimony indicated that accidents beyond design basis accidents were considered in his analysis. Mr. Lauben's testimony was that, in performing his risk assessment, he assumed, for small break LOCA's, that the ECCS failed to operate as

designed. (Lauben testimony following Tr. 11014 at p. 5). Such accidents would be beyond the design basis. As to multiple failures, Mr. Lauben testified that he considered total loss of feedwater which includes both main and redundant auxiliary feedwater failures. This would be a multiple failure. (Id. at 7).

Additionally, Dr. Brunot's testimony specifically addressed the risks from a TMI type accident during low power. (Brunot Testimony following Tr. 10595, p. 18.) Thus, Dr. Brunot's testimony, at least to the extent of the TMI accident scenario, did address multiple failure sequences. The Staff maintains, therefore, that the analyses of Mr. Lauben and Dr. Brunot were both adequate and appropriate for the purposes for which they were conducted.

Finally, the Joint Intervenors attack the use of low risk as being an impermissable attack on the regulations. Their attack is based on a citation to Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520 (1973). (Joint Intervenors' brief at 52.) Joint Intervenors' reliance on Vermont Yankee is misplaced. Unlike the situation in Vermont Yankee, the very provision involved in this proceeding allows the Licensing Board to exempt the applicant from compliance with the standards in the regulation. Joint Intervenors' have not presented any precedent that shows low risk is an improper consideration in determining insignificance. As discussed above, the Commission itself in SECY-81-188 has affirmed that the nature of low power testing can result in some of the emergency planning standards being insignificant or irrelevant for low power operation. The Commission further confirms the appropriateness of risk considerations in

analyzing accidents in the analogous situation involving environmental re ews. While the consideration of the effects of accidents assumes, as doe emergency planning, that an unlikely accident has occurred, the Commission specifically noted that it was appropriate to consider the probability of occurrence of the events in determining whether compensating actions should be required. ("Nuclear Power Plant Accident Consideration under the Environmental Policy Act of 1969," 45 Fed. Reg. 40101, 40103 (1980).) Thus, the low risk of low power operation is an appropriate consideration in determining whether deficiencies in meeting specific regulations are insignificant and irrelevant.

3. Consideration of Earthquake Effects on the Emergency Plans

Joint Intervenors also argue that the Licensing Board's consideration of the emergency plans' adequacy was deficient because the Board did not consider the effects of an earthquake on the emergency plan. The Licensing Board did consider this point. As testified to by Staff witnesses, and as noted by the Board, the effect of earthquakes on the emergency plans is the subject of a study which was being conducted by the TERA Corporation. PG&E will make any modifications indicated by that study as being necessary. (Testimony of Sears following Tr. 11035 at p. 7; Tr. at 11057 11060, PID at 47.) The results of the earthquake study have been published since completion of the low power hearing. ("Earthquake Emergency Planning at Diablo Canyon", dated September 2, 1981.) In view of PG&E's commitment to make any changes the report suggests, the Staff maintains that adequate consideration was given to this factor.

C. Necessity of an Environmental Impact Appraisal

Joint Intervenors argue that the low power license for Diablo Canyon cannot be issued because the Staff has never considered class nine accidents in its analysis, and that a separate environmental statement or appraisal should have been issued for low power. (Joint Intervenors' Brief at 56-57.)

The Commission has issued guidance on the consideration of Class nine accidents in the licensing process. ("Nuclear Power Plant Accident Consideration Under the National Environmental Policy Act of 1969." 45 Fed. Reg. 40101 (1980).) The Commission specifically noted that the new policy was not to serve as the basis for reopening a closed record absent a showing of special circumstances. (Id. at 40103.) The Policy Statement also notes that the Staff should take steps to identify plants which, because of such factors as population density or special site features, should be required to have the class nine analysis. As noted in the Director of Nuclear Reactor Regulation's decision under 10 C.F.R. § 2.206 issued June 19, 1980, the Staff is of the opinion that the Diablo Canyon site is not located in an area of high population density, that the reactors are not of novel design or involve unique siting or a combination thereof and that, therefore, no special circumstances exist to consider class nine accidents at the site. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), DD-80-22, 11 NRC 919, 925,926 (1980). The Joint Intervenors have not presented any argument in their present brief, showing that special circumstances exist in this case such that the Board should not follow the Commission's general guidance that proceedings where the Final Environmental Statement has

been issued should not be reopened to consider class nine accidents.[16/] There is no basis for reopening the proceeding to consider the environmental effect of class nine accidents.

Joint Intervenors also argue that a separate environmental impact statement should be issued for low power operations at Diablo Canyon. (Joint Intervenors' Brief at 57.) Joint Intervenors allege that the regulations and precedent require an EIS or an environmental impact appraisal prior to issuance of the low power license. The Staff agrees. What the Joint Intervenors do not acknowledge is that a final environmental statement has been issued for operation of the Diablo Canyon Nuclear Plant. The final environmental statement was issued in May of 1973, with an addendum being prepared and added in May 1976. Hearings were held on the environmental issues resulting in the Licensing Board's Partial Initial Decision on environmental matters in 1978. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-78-19, 7 NRC 989 (1978). Joint Intervenors apparently believe that because no separate consideration was given to the impacts of low power operation in the FES, an impact statement covering low power

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16/ The only special circumstance which has ever been advanced by Joint Intervenor's to justify reopening the environmental record is the adequacy of Diablo Canyon's seismic design. After hearings on that issue, the Appeal Board ruled that the plant was adequately designed from a seismic standpoint. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-644, 13 NRC ___(June 16, 1981). Thus, the seismic issue does not present special circumstances requiring reopening of the environmental record. The Staff also notes that the FES for Diablo Canyon was issued in May 1973 and an addendum was prepared in May 1976. The environmental hearing concluded with a Board Order on June 12, 1978. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-78-19, 7 NRC 989 (1978).

has not been issued. Such an interpretation is incorrect. It is clear from decisions of the Commission and the courts that an adequate environmental impact statement for full power includes the lesser impacts attendant to low power authorizations. In making the contrary argument, the Joint Intervenors have ignored a decision of the U.S. Court of Appeals for the District of Columbia Circuit which specifically stated that a FES for full rated power and full term licensing was not defective because it did not include a discussion of the issuance of an operating license for less than full rated power as an alternative. Citizens for Safe Power, Inc. v. NRC, 524 F.2d 1291, 1301 (D.C. Cir. 1975). Joint Intervenors provide no basis for their position that a full EIS should not be deemed to bound lesser impacts.

The essence of Joint Intervenors' position is that Part 51 of the Commission's regulations require either a separate environmental impact statement or an environmental impact appraisal before low power authorization can be approved. In a case involving seismic design reconsideration another Licensing Board noted:

> "There is nothing that would indicate that interim operation would involve environmental impacts other than those previously considered and evaluated in the prior initial decisions. Consequently, we find that authorization of interim operation does not require the preparation and issuance of either an environmental impact statement or an environmental impact appraisal and negative declaration pursuant to 10 C.F.R. 51.5(b) and (c)."

Portland General Electric Company (Trojan Nuclear Plant), LBP-78-40, 8 NRC 717, 744 (1978); affirmed, ALAB-534, 9 NRC 287 (1979).

Absent some showing that the activities PG&E seeks to have authorized involve impacts other than those previously considered and

evaluated in prior decisions the Licensing Board is not authorized to embark on a fresh assessment of environmental issues which have already been thoroughly considered and decided.[17/] The precedent cited by Joint Intervenors does not support a different result. In fact, an examination of those cases supports the Staff's position.

In Natural Resources Defense Council v. United States Nuclear Regulatory Commission, 539 F.2d 824 (2d Cir. 1976), vacated for reconsideration of mootness, 434 U.S. 1030 (1977), the Court enjoined the issuance of any licenses authorizing the interim use of mixed oxide fuel prior to the completion of the generic impact statement in the GESMO (General Environmental Statement on Mixed Oxide Fuel) proceeding. Unlike the situation at Diablo Canyon, there had been no impact statement completed and approved which addressed the broader activity (In GESMO case the general use of mixed oxide fuel). The Court noted that the issuance of an license for the interim use of mixed oxide fuel, when there had not been any opportunity to comment on and reach a final decision on the broader generic statement, was an inappropriate action. (Id. at 829). In the case of Diablo Canyon a final decision has already been issued on the environmental statement covering the overall activity (full power operation). The Court specifically noted that the problem in the case before them was that the opportunity to comment on and discuss an EIS was a prerequisite to licensing the use of mixed oxided

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17/ Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 & 2), ALAB-291, 2 NRC 404, 415 (1975); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 393, (1978); Northern States Power Co., (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-455, 7 NRC 41, 46 n. 4 (1978).

fuel for an interim period. (Id. at 845). In Diablo Canyon's case, an opportunity to comment and discuss such an EIS (including a hearing) has taken place.

The same distinction is true with respect to Joint Intervenors' citation to Izaak Walton League of America v. Schlesinger, 337 F. Supp. 287 (D.D.C. 1971). In that case the draft impact statement for full power operation had not yet been completed when interim operation was approved. The Court specifically noted, while disapproving the interim license, that there would not be much delay because the EIS was almost completed. (Id. at 295.) Thus, by implication, it was the full power EIS that was necessary for interim licensing, not a separate EIS addressing interim licensing.

The above interpretations also comport with the Commission's practice in licensing plants since TMI. A number of nuclear plants have been issued a low power license since the TMI accident and none of them have had a separate EIS or EIA on low power operation.[18/] They did, however, have a completed EIS as does Diablo Canyon.

In sum, the environmental impact statement prepared for the Diablo Canyon facility is not required to be amended to consider remote class nine accidents under the Commission's regulations or policy statements. The EIS for full power also envelopes the operation of the plant at levels below full power, thus no separate EIS or EIA is required for low power operation.

18/ See note 12, supra.

D. Summary Disposition of the Water Level Indicator Contention

Joint Intervenors argue that the Licensing Board was in error in granting a summary disposition request on their contention 13 related to water level indicators for the Diablo Canyon Units. (Joint Intervenors' Brief at 60.) The Joint Intervenors' position is that their contention was addressing the adequacy of the proposed instrumentation at Diablo Canyon, and the Licensing Board's summary disposition of that contention focused on the timing of the installation of the instrumentation. However, for the purposes of litigation the question is not what Joint Intervenors wished to litigate, but what the Licensing Board admitted for litigation. The Licensing Board quite clearly stated that the contention would be admitted only to the extent that Joint Intervenors wished to address their concern that the instrumentation be installed prior to fuel load rather than by January 1, 1982. (Prehearing Conference Order of February 13, 1981 at 23.) The fact that the Staff or any other party discussed anything broader than the admitted contention is not determinitive of the scope of the issue admitted for litigation. This is particularly true of discovery requests because the scope of discovery includes information which may lead to relevant information, even though the requested information may not be admissable in the proceeding. Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Station), LBP-77-13, 5 NRC 489,491 (1977). Thus, Joint Intervenors' citation to Staff discovery requests as somehow defining the admitted contention is in error.

In addition, Joint Intervenors' position in their present brief not withstanding, the Joint Intervenors' counsel stated at the prehearing

conference that the insufficiency in NUREG-0737 was related to the timing issue. Following is the pertinent discussion from the transcript of the prehearing conference.

> MR. OLMSTEAD: ...We did have concerns about the specificity that we noted in our response to these contentions, because the SER does address this fairly specifically. And to the extent that they're arguing that this requirement in NUREG-0737 is not sufficient, I think we have a right to know what it is they would require.
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> MR. REYNOLDS: I think that what we would require is that the time for implementation of 2.F.2 not be January 1, 1982, but be prior to fuel load.

(Prehearing Conference Tr. at 262.)

Joint Intervenors' quarrel is not with the summary disposition by the Licensing Board. Joint Intervenors still do not contend that the proposed system for measuring inadequate core cooling will not be installed prior to fuel load. Joint Intervenors argument is actually that the Licensing Board's denial of their contention as written, by limiting it to the timing issue, was improper. This is really a question of the admissability of the contention - a subject which has been addressed in Section A.1 above.

The Staff maintains that, based on the contention as admitted and the undisputed fact that the proposed system will be operational for low power, summary disposition was properly granted on Joint Intervenors' contention 13.

E. The Licensing Board's Ruling on Relief and Safety Valves

In the PID, the Licensing Board concluded that there was no necessity of completing the testing of block valves prior to the date of fuel loading. This conclusion was based on the reliability of the relief and safety valves resulting in low risk of the block valves being

challenged, and on the testing of the relief and safety valves in compliance with the NUREG-0737 due dates. (PID at 59-60.) On July 24, 1981, the Staff issued a Board notification which informed the Board that the testing of the relief and safety valves was taking longer than expected and would not meet the schedule in NUREG-0737. (Attachment 3 hereto.) The Licensing Board addressed this issue in a prehearing conference order issued with respect to the full power proceeding. After finding a lack of any evidence that relief and block valves were unreliable which would justify reopening the record, the Board stated:

> These notifications do not change our views on this contention since the Staff planned to bring the change in program completion dates to the Commission as a generic NUREG-0737 action item. Prior to any change in Commission policy, however, the Board continues to expect the Staff will implement current licensing requirements related to valve testing.

(Memorandum and Order dated August 4, 1981 at 4-5.)

On September 15, 1981, the Commission approved SECY 81-491. That document modified NUREG-0737 by changing the due date for completion of relief and safety valve testing to April of 1982. (SECY-81-491, enclosure 3.) As a result of this change, the EPRI program will be completed in compliance with the revised due date in NUREG-0737. Thus, the testing of the type of relief and safety valves at Diablo Canyon will be completed in accordance with the Licensing Board's directions in the August 4, 1981 Prehearing Conference Order. There is, therefore, no reason for reversing the Licensing Board's low power rulings on relief and safety valves on the basis of the delay in completion of the EPRI testing program.

V. CONCLUSION

Joint Intervenors have presented arguments falling into five broad categories alleging that the Licensing Board made various errors in its PID on low power operation of the Diablo Canyon Nuclear Facility and the rulings leading up to that decision. Those five categories can be summarized as being related to: 1) Joint Intervenors right to be heard, 2) application of the emergency planning regulations, 3) compliance with NEPA, 4) the correctness of the Board's Summary Disposition Order and 5) relief and safety valve testing. The Staff has addressed the various arguments presented in Joint Intervenors' brief under those categories and has demonstrated that they lack merit. Joint Intervenors have not presented any basis on which the Licensing Board's rulings should be overturned. The Staff, therefore, urges the Appeal Board to affirm the Licensing Board's rulings in the low power proceeding.

Respectfully submitted,

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Deputy Chief Hearing Counsel

Bradley W. Jones
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 19th day of October, 1981.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of NRC STAFF'S RESPONSE TO JOINT INTERVENORS' BRIEF IN SUPPORT OF EXCEPTIONS in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 19th day of October, 1981.

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