

ORIGINAL

NUCLEAR REGULATORY COMMISSION

APPEAL BOARD

In the Matter of:

SOUTHERN CALIFORNIA EDISON COMPANY, et al

(San Onofre Nuclear Generating Station,

Units 2 and 3

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)
)
) DOCKET NOS.
) 50-361
) 50-362

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1 UNITED STATES OF AMERICA
2 NUCLEAR REGULATORY COMMISSION
3 APPEAL BOARD

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6 SOUTHERN CALIFORNIA EDISON COMPANY, et al. : Docket Nos.
7 (San Onofre Nuclear Generating Station, : 50-361
8 Units 2 and 3) : 50-362
9 -----X

10 Room 358
11 San Diego County
12 Administration Building
13 1600 Pacific Highway
14 San Diego, California

15 Wednesday, October 6, 1982

16 Oral argument in the above-entitled matter was
17 convened, pursuant to notice, at 9:15 a.m.

18 BEFORE:

19 STEPHEN S. EILPERIN, Chairman

20 DR. W. REED JOHNSON

21 DR. REGINALD GOTCHY

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P R O C E E D I N G S

(9:15 a.m.)

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4 CHAIRMAN EILPERIN: Good morning, ladies and
5 gentlemen.

6 I'm sorry for the slight inconvenience in
7 switching rooms this morning, but I think that this room
8 can accommodate more people more easily and I think we will
9 have a better hearing in here.

10 My name is Stephen Eilperin. I am the Chairman
11 of the NRC Appeal Board in this case.

12 With me today are the two other members of the
13 Appeal Board.

14 On my right, Dr. Reed Johnson and, on my left,
15 Dr. Reginald Gotchy.

16 The argument today is on Intervenor's appeals
17 from two Licensing Board decisions, one issued January 11,
18 1982, the other May 14, 1982. Together they authorize
19 full power operating license for San Onofre Units 2 and 3.

20 The argument today is a consolidated argument
21 of an hour and a half for each side.

22 We'll proceed first with the argument on seismic
23 issues. After that, the argument on emergency planning
24 issues.

25 So the Intervenors will have 45 minutes per side

1 on each issue and the Applicants and the NRC Staff will
2 each share 45 minutes per side on each issue.

3 The Intervenors may, of course, reserve a portion
4 of their time for rebuttal.

5 At this point I'd ask counsel to identify
6 themselves formally for the record.

7 We'll begin with Mr. Wharton.

8 MR. WHARTON: My name is Richard Wharton,
9 attorney for Intervenors, Carstens, Friends of the Earth,
10 et al., arguing on the seismic issues.

11 At this time, Mr. Chairman, if it would be
12 appropriate, I think you mentioned that we would have 45
13 minutes for the seismic and 45 minutes for emergency
14 planning. Is there any objection to our splitting it up
15 an hour for seismic and a half an hour for emergency
16 planning?

17 CHAIRMAN EILPERIN: That would be quite all
18 right.

19 Do you want to reserve a portion of your time
20 for rebuttal?

21 MR. WHARTON: Yes, Mr. Chairman. We'd like
22 about 15 or 20 minutes for rebuttal and the other portion
23 for direct.

24 CHAIRMAN EILPERIN: All right. So you'll have
25 45 minutes for direct and about 15 minutes on rebuttal.

1 Thank you, Mr. Wharton.

2 Mr. Mc Clung.

3 MR. MC CLUNG: Yes. I'm Charles E. Mc Clung,
4 Jr. I'm counsel for the Intervenors with respect to the
5 emergency planning issues and I will take the balance of
6 the time, which is 30 minutes, I believe, and I will
7 reserve five minutes for rebuttal.

8 CHAIRMAN EILPERIN: Thank you, Mr. Mc Clung.
9 Mr. Pigott.

10 MR. PIGOTT: Yes. My name is David R. Pigott
11 of the law firm of Orrick, Herrington & Sutcliffe,
12 San Francisco, representing Applicants.

13 Also with me and appearing today is Mr. Sam Casey
14 of the same law firm, Mr. Mendez of the same law firm,
15 Mr. Charles R. Kocher, associate general counsel, Southern
16 California Edison, and Mr. James A. Beoletto, counsel for
17 Southern California Edison Company. Also present with us
18 today Mr. Robert Dietch, Vice President, Southern California
19 Edison Company.

20 I will be presenting the argument for Applicants
21 on all issues. I believe Staff and Applicants have worked
22 out 25 minutes for Applicants and 20 minutes for NRC
23 Staff with respect to each of the segments. Rather than
24 defining how much we might want to use for seismic versus
25 emergency planning, perhaps we can just play that by ear

1 as it develops.

2 CHAIRMAN EILPERIN: Thank you, Mr. Pigott.
3 Mr. Chandler.

4 MR. CHANDLER: My name is Lawrence J. Chandler
5 with the Office of the Executive Legal Director, U.S.
6 Nuclear Regulatory Commission, Washington, D. C. I will
7 present argument on behalf of the Commission Staff with
8 respect to both of the issues before the Appeal Board this
9 morning.

10 With me also on my left is Mr. Spence Perry.
11 He is the associate general counsel of the Federal Emergency
12 Management Agency and he would, as I indicated in my letter
13 to the Board's secretary, be available to respond if
14 particular matters were directed to him.

15 CHAIRMAN EILPERIN: Thank you, Mr. Chandler.
16 Mr. Wharton, would you like to proceed?

17 MR. WHARTON: Yes, Mr. Chairman.

18 ORAL ARGUMENT BY MR. WHARTON ON BEHALF OF INTERVENORS

19 A. S. CARSTENS, FRIENDS OF THE EARTH, ET AL.

20 MR. WHARTON: Mr. Chairman, members of the Board,
21 my name is Richard Wharton, attorney for the Intervenors
22 Carstens, et al., and we will be doing the oral argument
23 on the seismic portion of the hearings.

24 For purposes of the argument today, I would like
25 to put our arguments in context of three rulings regarding

1 the administrative proceedings.

2 The first ruling is on the Office of
3 Communication of the United Church of Christ vs. Federal
4 Communication Commission at 425 Fed. 2d 543, 1969 case,
5 U.S. Court of Appeals, District of Columbia. The opinion
6 was written by now Chief Justice Warren Burger.

7 This was a matter before the Federal
8 Communications Commission on remand of the Court, and, at
9 that hearing, the Licensee was to demonstrate to the
10 examiner and to the FCC that it was in the public interest
11 for his broadcast license to be renewed.

12 The ruling in the case by the Appeals Board
13 I think is very appropos to this particular case. The
14 Court points out in its opinion that the examiner seems to
15 have regarded the Appellants or the Intervenors in this
16 particular case as Plaintiffs and the Licensee as
17 Defendants, with the burden of proof allocated accordingly.

18 The Court states, and we quote:

19 "We did not intend Intervenors
20 representing a public interest to be
21 treated as interlopers. Rather, if
22 analogs can be useful, a public
23 intervenor who is seeking no license or
24 private right is in this context more
25 nearly like a complaining witness who

1 presents evidence to police or
2 prosecutor whose duty it is to conduct
3 an affirmative and objective
4 investigation of all of the facts."

5 The Court continues:

6 "It was not the correct role of
7 the examiner or the Commission to sit
8 back and simply provide a forum for
9 the Intervenors. The Commission's duties
10 did not end by allowing Appellants to
11 intervene. Its duties began at that
12 particular stage."

13 The Court continues, and I think most apropos
14 to the present case:

15 "A curious neutrality in favor of
16 the Licensee seems to have guided the
17 examiner in his conducting of the
18 evidentiary hearing. An example of this
19 is found"

20 The Court goes on. This is quoting the Court:

21 "In his reaction to evidence of
22 a monitoring study conducted by Appellants
23 for about one week in 1964 and which
24 was subject of two days of testimony at
25 the hearing, the examiner's conclusion

1 was that the playback had virtually
2 no meaning for the simple reason that
3 it was not fair and equitable. It is
4 worthless and therefore completely
5 discounted for any consideration by
6 the hearing examiner."

7 The Court continues:

8 "In context or out, this reaction
9 is difficult to comprehend. The
10 Commission has often complained, no
11 doubt justifiably so, that it cannot
12 monitor licensees in any meaningful
13 way. Here a seven-day monitoring study
14 was made at no public expense, was
15 presented by a public interest intervenor
16 and was dismissed as worthless by the
17 Commission."

18 The point we're making here -- and the case goes
19 on in other areas that I want to get into -- is that is
20 precisely what happened with the issue of the Cristianitos
21 Fault. We have a situation here where there is evidence
22 by the Applicants and by the NRC Staff that the earthquakes
23 that occurred in '75 and '76 in fact occurred on the
24 Cristianitos Fault, as evidenced by the diagram of
25 Dr. Biehler on Page 13 of our appellate brief. That is the

1 diagram that shows the arrow bars around Dr. Biehler's
2 diagram. That shows the arrow bars going through -- the
3 Cristianitos Fault going through the arrow bars of
4 Dr. Biehler's diagram which at least should raise the
5 issue of the Cristianitos Fault because there you have the
6 fault that we're concerned about, and the Applicant's
7 witness saying that, "Yes, his arrow bar would encompass
8 the Cristianitos Fault," which, for purposes of conservatism,
9 you would think would raise the question of whether or not
10 the Cristianitos Fault is active.

11 DR. JOHNSON: Mr. Wharton, what you are
12 characterizing as the Cristianitos Fault, was that an
13 actual mapping of the fault or a projected concept of
14 where the fault might go under certain conditions?

15 MR. WHARTON: That was Dr. Biehler's -- the
16 diagram is on Page 10-A of the Intervenor's Brief in
17 Support of Exceptions. That was his mapping of the
18 projected -- shallowest possible projection of the
19 Cristianitos Fault. Now this particular --

20 DR. JOHNSON: Shallowest possible projection.

21 MR. WHARTON: Yes. That's what he said in this
22 particular point.

23 In response further, this particular chart does
24 not show and does not give significance to the testimony
25 of Dr. Ehlig and other testimony that the Cristianitos

1 Fault is a listric normal fault. That is that it drops
2 down and then bends to the west. It does not show that
3 kind of curve.

4 What we're saying here is that the evidence
5 presented by the Applicants and the NRC Staff here raised
6 the question -- serious question as to whether those
7 earthquakes occurred on the Cristianitos Fault. That is
8 the only fault that goes through the arrow bars as far as
9 we know.

10 So the question here is the Intervenors prepare
11 testimony and a study done by a seismologist at Scripps
12 whose job it is to do the kinds of studies he did here for
13 Scripps, do a complete survey and map the survey and this
14 particular evidence is dismissed as absolutely worthless.

15 Now not only was the evidence dismissed as
16 worthless, the entire issue was thrown out after we tried
17 to present this particular evidence.

18 The Court in the FCC case that I'm citing
19 proceeds to criticize the examiner there for placing an
20 unrealistic burden of proof on the Intervenors and not
21 properly considering their evidence.

22 The Court states there that the examiner's
23 erroneous concept of the burden of proof shows a failure
24 to grasp the distinction between allegations and testimonial
25 evidence and prevented the development of a satisfactory

1 record.

2 CHAIRMAN EILPERIN: I don't think that there'll
3 be any dispute in this case that the Applicant has the
4 burden of proof.

5 The question is has the Applicant met that
6 burden of proof by the evidence it has put on as to the
7 capability or noncapability of the Cristianitos Fault?

8 MR. WHARTON: My point, Mr. Chairman, is, while
9 the Applicant has the burden of proof, that's not the way
10 the hearing was conducted.

11 We have a situation here where essentially the
12 Intervenors had to prove that the Cristianitos Fault was
13 active. That was a burden placed on us. The Board
14 decided, "Well, you haven't proved that the Cristianitos
15 Fault is active," and, in fact, in the Appeals Board's
16 decision on the stay, you said we haven't shown that the
17 Cristianitos Fault is active. It is not our burden to
18 show that it is active. It is the Applicant's burden to
19 show that it is inactive and at least the Licensing Board
20 should address the issue and decide the issue, and, in fact,
21 they did not. They threw it out because supposedly we
22 didn't make a threshold showing of activity. That's the
23 point we're trying to make. The burden of proof was
24 wrongfully shifted on that particular issue and others.

25 CHAIRMAN EILPERIN: What do you do with

1 Dr. Biehler's evidence about the focal mechanism studies
2 that he conducted?

3 MR. WHARTON: The focal mechanism study is one
4 method of determining whether or not that particular
5 fault -- the earthquakes occurred on the Cristianitos
6 Fault. It is one method. It is evidence in favor of
7 saying the Cristianitos Fault is inactive. That's true.

8 The point is the issue was not decided. All
9 of these questions are raised. The Licensing Board never
10 addressed the issue because it threw the whole issue out.

11 There is no decision on this record regarding
12 the activity of the Cristianitos Fault because it was
13 foreclosed from litigation by the Licensing Board. That is
14 the point that I'm t ying to make here.

15 Now this Board can look at the record and
16 redecide the issue, but you're not the hearing board. The
17 hearing board has to make the decision and, in fact, they
18 did not make that decision and we're calling for that
19 decision to be made.

20 CHAIRMAN EILPERIN: Excuse me. Do you mean we
21 have to remand to the Licensing Board to decide the issue
22 in the first instance, or do you think we can look at the
23 testimony that's in the record and decide whether or not
24 the Cristianitos Fault is or is not a capable fault?

25 MR. WHARTON: This Appeals Board should remand

1 that issue to the Licensing Board for the hearings. The
2 record that you have -- first of all, the evidence
3 regarding the Cristianitos Fault by the Intervenors is not
4 in the record. It's stricken from the record.

5 CHAIRMAN EILPERIN: Well it's formally set out
6 in the record.

7 MR. WHARTON: It's set in as an offer of proof
8 only. Now to say that that is all of the evidence that
9 the Intervenors would have presented and to say that we've
10 looked at all the evidence you could have possibly presented
11 and say, "Well, you couldn't have proven that it was
12 active anyway," which is essentially what's happening here,
13 is incorrect. That decision has to be made by the hearing
14 board itself and they did not make it. And, in absence
15 of making it, it should be remanded to them.

16 CHAIRMAN EILPERIN: What sort of offer of proof
17 do you think you were obliged to put on?

18 MR. WHARTON: Mr. Chairman, we made our offer
19 of proof regarding the issue of the Cristianitos Fault.
20 The Applicants made their offer of proof regarding the
21 Cristianitos Fault. They presented evidence regarding it.

22 The evidence we presented by Mr. Simons is an
23 offer of proof. And, if you will look at the partial
24 initial decision -- I believe it's on Page 13 -- the
25 chairman there says that the evidence presented by

1 Mr. Simons was an offer of proof regarding the activity of
2 the Cristianitos Fault.

3 Now I believe you're talking about the issue of
4 Dr. Reiter and Mr. Cardone.

5 CHAIRMAN EILPERIN: What further witnesses
6 would you have put on dealing with the capability of the
7 Cristianitos Fault that you were not able to put on and
8 make an offer of proof as to?

9 MR. WHARTON: I'm not sure that we would have
10 put anymore witnesses on regarding that particular issue.

11 But the fact is we were going this particular
12 case day by day. When Mr. Simons' testimony was thrown
13 out, when the issue was thrown out, there was nothing more
14 to do about that issue. And for you to speculate and for
15 me to speculate what evidence would have been presented to
16 the Board if the Board hadn't thrown the issue out I
17 believe is improper. The fact is the issue was thrown out.

18 Now, if I'm to be here and present the case to
19 you now, I'll bring in some witnesses now. But we're not
20 doing that. We're looking at the case of the Licensing
21 Board. The Licensing Board threw out the evidence and
22 the issue. It was not decided.

23 CHAIRMAN EILPERIN: But isn't it fairly standard
24 law in the federal courts that, if you are complaining
25 about evidentiary ruling below, you're obliged to make

1 essentially an offer of proof as to what is your case on
2 that issue?

3 MR. WHARTON: Mr. Chairman --

4 CHAIRMAN EILPERIN: The courts aren't supposed to
5 be engaged in kind of a ping-pong match, remanding cases,
6 coming back up, remanding cases and coming back up, if one
7 can avoid it. The recognized way of avoiding that is, if
8 the parties are going to complain about an evidentiary
9 ruling, to advise whoever is the trial court or the licensing
10 board what, as a matter of fact, they would have shown.

11 MR. WHARTON: Mr. Chairman, I believe that
12 you're taking that federal rule out of context. It does
13 not apply here.

14 The federal rule, I believe, refers to where
15 there is an evidentiary ruling ruling out evidence. That
16 is a question is asked and the Court rules that the
17 question cannot be answered or it rules it out. And, at
18 that particular time, you have to make an offer of proof
19 as to what the witness would say.

20 What we're talking about here is, at the time
21 Mr. Cardone and Mr. Reiter were on the stand, the issue was
22 already gone. We could not raise that particular point.
23 It's useless to raise an offer of proof regarding an issue
24 that has already been decided if not to be litigated. And
25 that's where we were at that particular time.

1 The offer of proof in this case was the offer
2 of proof made by Simons. It was entered as an offer of
3 proof. Once that issue was excluded by the hearing board,
4 it couldn't be raised anywhere else. It would be improper
5 for us to make an offer of proof regarding a nonissue
6 that the Board had already ruled out.

7 Again the rule applies to excluding evidence
8 on evidentiary grounds at the time an objection is made.
9 That's the time to make an offer of proof.

10 With Dr. Reiter and Mr. Cardone, the cross-
11 examination did not occur. We did not cross-examine them
12 about the Cristianitos Fault because it was no longer an
13 issue. It was not appropriate to make an offer of proof
14 because there was no evidentiary ruling being made at that
15 particular time.

16 CHAIRMAN EILPERIN: Well before the issue is
17 ruled out, don't you think you should at that point advise
18 the Licensing Board of what you're going to show on the
19 issue?

20 MR. WHARTON: Mr. Chairman, that's precisely
21 what the testimony of Mr. Simons was.

22 CHAIRMAN EILPERIN: And we can look at that.

23 MR. WHARTON: Yes.

24 If I may, the partial initial decision at
25 Page 17, it says here:

1 "Perhaps the most significant
2 exception was the Board's granting of
3 the motion to strike the testimony and
4 exhibits of an Intervenor witness who
5 was called to prove the seismicity of
6 the Cristianitos Fault."

7 Again look at the burden of proof here, that
8 is that we are called to prove the seismicity of the
9 Cristianitos Fault.

10 The Applicants, supported by the Staff, moved
11 to strike this evidence, following its presentation as an
12 offer of proof.

13 We made our offer of proof regarding the
14 Cristianitos Fault capability issue. The offer of proof
15 was made to the Board. It was Simons' testimony.

16 The issue was certainly relevant. There's no
17 question as to the substance of the testimony. There's no
18 question as to what we wanted to talk about. It was all
19 placed on the record as an offer of proof and then rejected,
20 not just as evidence but as an issue.

21 Any later cross-examining of any witnesses would
22 be futile, the same as any later presentations of findings
23 of facts and conclusions of law on this issue are futile
24 once the issue was thrown out.

25 We did make the offer of proof at the time it

1 was to do it. No. No offer of proof was made at the time
2 Mr. Cardone and Dr. Reiter testified because we were not
3 presenting evidence at that time. We couldn't present
4 evidence at that time.

5 DR. JOHNSON: Was Intervenor able to cross-
6 examine Dr. Biehler on this subject?

7 MR. WHARTON: We were able to cross-examine
8 Dr. Biehler regarding his particular charts and regarding
9 post-1973 events.

10 DR. JOHNSON: Well is it not the major aspect of
11 your evidence, certainly as you have presented it here
12 this morning, the earthquakes that occurred in 1975
13 are part and parcel of your evidence that the fault is
14 active and it was Dr. Biehler who actually studied those
15 two earthquakes and concluded that they were not on the
16 Cristianitos Fault -- was not your opportunity then to
17 cross-examine Dr. Biehler on his testimony about the best
18 thing you could have had in terms of cross-examining on the
19 activity of Cristianitos?

20 MR. WHARTON: The Board allowed us to cross-
21 examine Dr. Biehler regarding events after 1973, and we
22 did do that.

23 DR. JOHNSON: I just said that.

24 MR. WHARTON: He would not allow us to cross-
25 examine Dr. Biehler on events prior to 1973. And I would

1 submit that testifying -- presenting a case on the
2 activity of the fault through a nine-year history in the
3 science of geology is ludicrous.

4 DR. JOHNSON: But the primary evidence that
5 you would present regarding the activity of Cristianitos
6 was the earthquake in 1975. There's nothing prior to that
7 that would indicate that that fault was active. I mean
8 even Mr. Simons' circles -- the majority of his circles
9 which encompassed the lines representing Cristianitos were
10 circles drawn around the 1975 events; were they not?

11 MR. WHARTON: I would have to look at Mr. Simons'
12 circles again. I believe his data goes back from 1932 and
13 I believe there were some 20 circles that encompassed the
14 Cristianitos Fault and I believe of the 20 five were since
15 1973.

16 DR. JOHNSON: In terms of burdens, did Intervenor
17 in fact have not a burden of proving the seismicity but
18 a burden of making reasonable minds inquire further?
19 Isn't that what it takes to raise an issue?

20 MR. WHARTON: I believe -- that's correct, yes.

21 DR. JOHNSON: Are you saying that -- I gather
22 what you are saying is that the Board erred in not inquiring
23 or feeling that they should inquire further as a result of
24 the Simons' testimony.

25 MR. WHARTON: That's precisely the point. In

1 fact the Court in the FCC case states what I believe the
2 state of the law is on that.

3 The Court there rules -- and if I may read it
4 because it does respond to your question:

5 "We do not determine how factors
6 should have been weighed by the Commission
7 but only that they should have been
8 considered."

9 In this particular case, you never got to a
10 consideration of the issue. It was thrown out.

11 DR. JOHNSON: Well except that the Board had
12 Mr. Simons' testimony in front of them.

13 MR. WHARTON: That's correct.

14 DR. JOHNSON: They considered it. He was
15 questioned on it. And, as a result of that, they -- if we
16 assume that they were reasonable minds, they were not made
17 to inquire further. Now it's a judgment call presumably
18 on their part. But we're not writing here on an entirely
19 clean slate. We have spoken with regard to Mr. Simons'
20 presentation as well. I don't want to rehearse that
21 particular statement.

22 There were aspects of his -- I mean his
23 demonstration of seismicity was a rather weak one in terms
24 of a statistical analysis of what he was trying to present.
25 I mean we pointed out in our stay decision that, if he were

1 indeed attempting to show the seismicity of Cristianitos,
2 there were certain things that he might have done that would
3 have made a reasonable mind inquire further. He didn't do
4 those things.

5 Obviously you have read the stay decision. Do
6 you want to spend some time telling us why our view of
7 the Simons' testimony was wrong at that time?

8 MR. WHARTON: I don't believe that is the point
9 that we should be addressing. I will discuss that.

10 I believe the point to be made here on oral
11 argument on this legal issue of whether or not the issue
12 of the activity of the Cristianitos Fault should be litigated
13 -- should have been litigated -- the fact is that it was
14 not.

15 What the Court is saying here is that, when
16 you have hearings such as these, you must consider the
17 evidence and rule on it. And, in this case, the ruling
18 was "get rid of the issue." Not decide it but get rid of it.
19 They got rid of it during the hearings so there was never
20 a chance to argue that particular point and to put the
21 evidence --

22 CHAIRMAN EILPERIN: Excuse me. Why don't you
23 finish.

24 MR. WHARTON: I'm finished.

25 CHAIRMAN EILPERIN: Let me ask you a slightly

1 different question.

2 What contention that you had in the case do you
3 think raised the issue of the activity of the Cristianitos
4 Fault?

5 MR. WHARTON: Let me find my notes on that
6 particular part.

7 CHAIRMAN EILPERIN: I'm thinking of a footnote
8 in the stay decision that we wrote which said that the --
9 I'll read it to you.

10 "The four seismic contentions
11 dealt with the offshore zone of
12 deformation, the Cristianitos zone
13 of deformation, a feature not
14 synonymous with the Cristianitos Fault,
15 and the propriety of San Onofre's
16 seismic design in light of post-
17 construction permit date and techniques.
18 Prior to the hearing, the Licensing Board
19 rejected Intervenor's proposed
20 contention regarding the Cristianitos
21 Fault for lack of specificity."

22 Now my question to you is which of the
23 contentions at the hearing you interpret as raising the
24 question of the capability of the Cristianitos Fault?

25 MR. WHARTON: Contention Number 3 as revised and

1 admitted for the hearing states:

2 "Whether the seismic design
3 basis for SONGS 2 and 3 is inadequate
4 to protect the public health and
5 safety as a result of discoveries
6 subsequent to issuance of the
7 construction permit of the following
8 geologic features...."

9 Then there's a listing of certain features.
10 Three:

11 "Such other features as parties
12 may agree are relevant to the seismology
13 of the SONGS site or with respect to which
14 Intervenors, Friends of the Earth, make
15 a threshold showing of relevance."

16 The issue was presented under this contention.
17 I don't think there's any objection by any of the sides
18 that a threshold showing of relevance was not made nor
19 did the Board ever rule that the issue of the Cristianitos
20 Fault was not relevant.

21 CHAIRMAN EILPERIN: Excuse me. But is all of
22 that prefaced by it has to be based upon post-construction
23 permit data?

24 MR. WHARTON: The post-construction permit data,
25 that is events or information gained since the construction

1 licensing here -- if there is information such as that, it
2 raises the relevancy of the issue.

3 CHAIRMAN EILPERIN: What post-construction
4 permit data raised the relevance of the Cristianitos
5 Fault? Was it the 1975 earthquakes?

6 MR. WHARTON: The earthquakes occurring since
7 1973.

8 The question there is: Then do we only look at
9 the earthquakes that occurred in 1975? I would say "no".
10 I mean that raises the question of the relevancy of the
11 issue. And we don't just look at two earthquakes. We
12 have to look at that fault because the relevancy issue
13 was raised.

14 So I would submit then that the issue was
15 raised under Contention No. 3. There was never any question
16 that it was relevant because of the events that occurred.
17 So it was properly before the Board as that contention --

18 CHAIRMAN EILPERIN: I understand.

19 MR. WHARTON: And the Board didn't rule on that
20 basis.

21 If I may go back to the Office of Communication
22 of the United Church of Christ case, I believe again a
23 quote from that particular case is relevant here.

24 "In our view, the entire hearing was
25 permeated by a similar treatment of the

1 efforts of the Intervenors, and the
2 pervasive impatience, if not hostility,
3 of the examiner is a constant factor
4 which made fair and impartial considera-
5 tion impossible. The Commission and the
6 examiners have an affirmative duty to
7 assist in the development of a meaningful
8 record which can serve as the basis for
9 the evaluation of the licensee's
10 performance of his duty to serve the
11 public interest.

12 "The public Intervenors here, who
13 were performing a public service under
14 the mandate of this Court, were entitled
15 to a more hospitable reception in the
16 performance of that function.

17 "As we view the record, the
18 examiner tended to impede the exploration
19 of the very issues which we would
20 reasonably expect the Commission itself
21 would have initiated."

22 An ally in that case, as in this case, was
23 treated as an opponent.

24 The Court goes on to discuss how the examiner
25 improperly shifted the burden of proof as to the issues.

1 It goes on --

2 DR. JOHNSON: I'm having a little trouble,
3 Mr. Wharton, telling when you are quoting from an Appeals
4 Court decision and when you are making comments relevant
5 to the case at hand. I wish you would make that
6 distinction a little more clear.

7 MR. WHARTON: Very well. I agree. That last
8 statement that I made I interjected a personal opinion of
9 mine in there and I will so state when I'm doing that.

10 Thank you.

11 CHAIRMAN EILPERIN: Let me ask this.

12 Are you saying that the evidence of record
13 that was before the Licensing Board, including the
14 evidence of Mr. Simons and Mr. Legg and the evidence of
15 Dr. Biehler -- all of the evidence that was before the
16 Licensing Board on the capability of the Cristianitos Fault,
17 are you saying that that evidence was insufficient for the
18 Applicants to have discharged its burden that the
19 Cristianitos Fault was not capable, or are you saying that
20 you were denied a fair chance to put your case on? Or are
21 you saying both?

22 MR. WHARTON: We are saying both. Essentially
23 we were denied a fair hearing and a fair opportunity to
24 present our case.

25 As we mentioned before, it's not simply the

1 matter that we were not able to cross-examine the witnesses.

2 We have here as part of these proceedings, a
3 proceeding whereby you review the record and present your
4 proposed findings of fact -- it's essentially the oral
5 argument of the licensee here. Because that issue was
6 thrown out, it's improper for us to present findings of
7 fact from the record regarding the Cristianitos Fault
8 because the evidence in the record has been stricken and the
9 issue has been stricken.

10 So, yes, the ruling by the Licensing Board
11 made it impossible for us to have a fair hearing on the
12 issue of the activity of the Cristianitos Fault.

13 CHAIRMAN EILPERIN: You don't think you can
14 argue what your evidence that you put on showed to us?

15 MR. WHARTON: I believe that I can, yes.

16 CHAIRMAN EILPERIN: So why do you say that
17 somehow not being able to put your argument in terms of
18 proposed findings of facts prejudiced you? I really just
19 don't understand that argument.

20 MR. WHARTON: The difference is that you are not
21 the Appeals Board. It's not your function to decide issues
22 or decide questions of fact that were not decided by the
23 Licensing Board.

24 DR. JOHNSON: But are we not supposed to
25 decide whether or not the Licensing Board exercised its

1 judgment properly in determining that there was not a
2 sufficient question regarding the seismicity of Cristianitos
3 to make reasonable minds inquire further? And that
4 question was supposedly posed by the Simons' testimony.

5 In other words, we've had an opportunity to
6 look at the Simons' testimony. We commented on the Simons'
7 testimony. That's where the Board made their error in
8 foreclosing the issue subsequent to that presentation.

9 It would seem to me your task is to persuade
10 us why the Simons' testimony was sufficient to cause the
11 Board to inquire further. In other words, they made a
12 judgment. You say that judgment was erroneous. Now you've
13 got to tell us why that judgment was erroneous. And it
14 seems to me that the basis for that demonstration to us is
15 the Simons' testimony.

16 The 1975 earthquakes were fully explored on
17 cross-examination with the man who did the exploration of
18 the events themselves. So the only thing, it seems to me,
19 that you've got to show us is why the Board erred in having
20 seen the Simons' testimony, saying, "We don't believe that
21 this is sufficient to bring the question of seismicity of
22 Cristianitos."

23 MR. WHARTON: Essentially what you are saying to
24 the Intervenors here is that, even if you were able to
25 present your case, you wouldn't have been able to prove

1 that the Cristianitos Fault was active. That's essentially
2 what the Appeals Board was saying.

3 I'm submitting to you the Appeals Board cannot
4 say that. The Appeals Board is to review and determine
5 whether or not the hearing was held properly.

6 And, one, you decided already that the foreclosure
7 was an error.

8 The second issue then is the only way that that
9 error can be termed not prejudicial is if you ruled that
10 it's a harmless error. And, in this particular case,
11 your only basis for saying that it's a harmless error is
12 "you couldn't prove it anyway" and that's not a standard
13 for harmless error. We have a situation here where it's
14 a crucial safety issue that should be litigated. It was
15 not litigated.

16 As a result of foreclosure of that issue, the
17 Intervenors were denied right to cross-examination, which
18 in all administrative cases has been termed a matter of
19 right. We were not allowed to cross-examine.

20 We were not allowed to present findings of
21 fact and conclusions of law regarding that issue and the
22 issue itself was not decided on the fact by the Licensing
23 Board. I submit to you that's the Licensing Board's
24 function.

25 If you want to look at evidence that is stricken

1 from that evidence, glean that evidence, not hear the
2 witnesses personally and decide from reading the evidence
3 that we couldn't prove that issue anyway and it's no big
4 deal, I suppose you could put that in your decision. But
5 I don't believe that's the state of the law at the present
6 time.

7 CHAIRMAN EILPERIN: What weight do you think we
8 should give to the fact that the DC Circuit dismissed the
9 petition for a stay of the San Onofre license?

10 MR. WHARTON: Mr. Chairman, as you are well
11 aware, the standards for convincing the District Court to
12 grant a stay are extremely strict. You not only have to
13 show that your likelihood of prevailing on the merits --
14 if you look at the District Court of Appeals, the
15 likelihood of prevailing on the merits, you have to show
16 them at that point that, when you get there, you're going
17 to be able to show abuse of discretion by all of the
18 Licensing Board. You also have to show irreparable injury
19 and you also have to show -- I forget the fourth factor.

20 The factors before the District Court are very,
21 very stringent.

22 CHAIRMAN EILPERIN: Which do you think you
23 failed to show?

24 MR. WHARTON: I cannot say. The opinion did
25 not say which one we failed to show. In my opinion, I

1 think we showed all of them, but they didn't say. It just
2 cited a case -- it listed the four factors. It didn't say
3 anymore than that. So I can't say why.

4 CHAIRMAN EILPERIN: Why do you think the
5 Applicant failed to carry its burden of proof on the
6 capability or lack of capability of the Cristianitos Fault?
7 What evidence in the record below do you think should
8 persuade us that that fault was not proved to be noncapable?

9 MR. WHARTON: I would again refer to our appeals
10 brief, Page 10, the diagram on Page 10-A.

11 CHAIRMAN EILPERIN: So it's basically that the
12 1975 faults could be placed on the Cristianitos Fault as
13 a possibility?

14 MR. WHARTON: Yes. Mr. Chairman, as testified to
15 by Shawn Biehler, two earthquakes occurred January 1st,
16 1975. The hypocenters of the earthquakes were shown
17 at Figure 19 which is at 10-A in our appeals brief.
18 Dr. Biehler himself determined the margins of error and
19 that was in his report, "Seismological Investigations of
20 the San Juan Capistrano Arrow." Arrow bars were drawn for
21 the two earthquakes by the Intervenors pursuant to the
22 Board's ruling on Page 3962-64. That is where Dr. Biehler
23 testified as to what his arrow bars were. I asked
24 Dr. Biehler to draw the arrow bars and the Board says,
25 "He doesn't have to draw the arrow bars. It's strictly a

1 mechanical operation." So we drew the arrow bars.

2 CHAIRMAN EILPERIN: Aren't you taking one part
3 of Dr. Biehler's testimony and then ignoring the second part
4 of his testimony?

5 MR. WHARTON: What I'm submitting here is that,
6 if you have the Applicant's witness and you have his
7 projection of the Cristianitos Fault and that projection
8 does not even include that it's listric normal and that
9 projection goes through his arrow bars at the
10 hypocenter of the earthquake, it at least raised an issue
11 for litigation.

12 CHAIRMAN EILPERIN: Okay. Accepting that,
13 didn't Dr. Biehler then go on and present additional
14 evidence as to why he thought the focal mechanisms
15 associated with the 1975 fault could not be the focal
16 mechanisms that would be associated with a fault -- with
17 movement on the Cristianitos Fault?

18 MR. WHARTON: Yes. And I believe the testimony
19 of Mark Legg contradicts that particular testimony also.

20 What I'm saying is you have an issue to be
21 decided here, not thrown out. And it was not decided. It
22 was thrown out.

23 DR. JOHNSON: I keep having a little trouble.

24 Was the issue of the seismicity subsequent to
25 1973 -- it sounds like it was litigated. I mean we're

1 talking about Biehler's testimony, we're talking about the
2 1975 earthquakes, we're talking about Mark Legg's testimony,
3 all regarding seismicity of the Cristianitos Fault resulting
4 from events subsequent to 1973. So that the characterization
5 you make of the issue not being raised at all, no testimony,
6 no opportunity for cross-examination, really is not
7 entirely factual, is it, because the large -- I mean the
8 major portion of your contention as to the seismicity was
9 in fact included in the hearing, in the evidentiary record,
10 and you filed proposed findings on it. And the Board made --

11 MR. WHARTON: No.

12 DR. JOHNSON: You didn't --

13 MR. WHARTON: No. No proposed findings were
14 filed by the Intervenors regarding the Cristianitos Fault
15 activity.

16 DR. JOHNSON: On the Biehler testimony and the
17 1975 events --

18 MR. WHARTON: Correct.

19 DR. JOHNSON: -- you didn't file --

20 MR. WHARTON: It was not an issue at that point.

21 CHAIRMAN EILPERIN: You have about seven minutes
22 left.

23 MR. WHARTON: Fine. If I may conclude by some
24 guidance from these particular cases on reviewing of our
25 case.

1 The Court in that particular case cited -- it
2 concludes by saying:

3 "The record now before us leaves us
4 with a profound concern over the entire
5 handling of the case following the remand
6 to the Commission. The impatience with
7 the public Intervenors, the hostility
8 towards their efforts to satisfy a
9 surprisingly strict standard of proof,
10 plain errors in rulings and findings
11 lead us, albeit reluctantly, to the
12 conclusion that it will serve no useful
13 purpose to ask the Commission to
14 reconsider the examiner's actions and
15 its decision and order under a correct
16 allocation of the burden of proof. The
17 administrative conduct reflected in this
18 record is beyond repair."

19 In that case, the Court went on to hold that
20 they are compelled to hold the record, that the Commission's
21 conclusion is not supported by substantial evidence.

22 The Intervenors submit that the record in the
23 present case shows that, one, the Intervenors were treated
24 as interlopers and opponents rather than as friends of the
25 Board.

1 Two, the NRC merely provided a forum for the
2 Intervenors and made it as difficult as possible for them
3 to present their case.

4 Three, the Licensing Board exhibited bias and
5 at best exhibited a neutrality in favor of the Applicants
6 in its conduct of the evidentiary hearing.

7 Four, the Licensing Board have totally
8 discounted valuable evidence and, in so doing, failed in
9 its duty to develop a satisfactory record.

10 Five, it improperly shifted the burden of
11 proof.

12 Six, treated Intervenors with such hostility
13 and impatience as to make a fair and impartial hearing
14 impossible.

t2 15 Seven, the Board failed to consider crucial
16 evidence and to decide crucial safety issues.

17 And, eight, the Board committed plain errors in
18 rulings and findings.

19 We submit that these errors of the Board make
20 it essential that the decision be overturned.

21 I think the need for a fair and impartial
22 hearing expressed well by Justice Douglas in his dissent
23 in the Morningside Renewal Council -- he stated there, in
24 referring to issues adjudicated at the operating license
25 stage:

1 "When that point is reached when
2 millions have been invested, the momentum
3 is on the side of the Applicant, not on
4 the side of the public. The momentum is
5 not only generated by the desire to salvage
6 an investment, but no agency wants to be
7 an architect of a white elephant."

8 He goes on to state in regard to nuclear power
9 generating plants:

10 "In fact conversion from construction
11 permit to operating licenses have been
12 automatic."

13 I believe this particular --

14 CHAIRMAN EILPERIN: Excuse me. Do you know if
15 Justice Douglas was writing for the Supreme Court on that
16 issue or was he the lone justice?

17 MR. WHARTON: He was writing a dissent and he
18 was not writing it on the Supreme Court. I'm using the --

19 CHAIRMAN EILPERIN: He was not writing on the
20 Supreme Court? Wasn't that the reversal by the Supreme
21 Court in --

22 MR. WHARTON: Yes, he was. Yes. He was
23 writing the dissent to the Supreme Court.

24 DR. JOHNSON: Presumably the majority then did
25 not agree with his comments.

1 MR. WHARTON: I'm not saying they didn't agree
2 with his comments. He had a different ruling.

3 What I'm saying here is these particular comments
4 I believe are apropos.

5 We do have a situation here where there's a
6 \$4 billion investment in a plant. Then the license had
7 been issued by the Nuclear Regulatory Commission.

8 It does create some problems for a Commission
9 to grant a license and someone go along at the rate of
10 \$4 billion and reliance on the license and then have a
11 hearing to decide whether or not that \$4 billion investment
12 is going to sit as a white elephant.

13 DR. JOHNSON: And you're saying the Commission
14 has never done that?

15 MR. WHARTON: The Commission has never denied
16 an operating license?

17 DR. JOHNSON: That's right.

18 MR. WHARTON: I'm not saying that.

19 DR. JOHNSON: Oh, I thought that's what you said.

20 MR. WHARTON: No. That was in the particular
21 quote at that particular time. I'm not aware of the
22 Commission denying an operating license myself. If there
23 is one, you can let me know. I know Diablo was not denied
24 by the Licensing Board but rather after some other
25 indications.

1 DR. JOHNSON: It is being held in abeyance
2 while allegations regarding the integrity of the structure
3 of the plant are being considered; is that correct?

4 MR. WHARTON: That's correct.

5 DR. JOHNSON: Yes.

6 MR. WHARTON: But I believe that originally a
7 license was issued by the Atomic Safety and Licensing
8 Board and it was affirmed by an Appeals Board.

9 DR. JOHNSON: Subsequent or prior to the
10 allegations which I referred to.

11 MR. WHARTON: That's correct; that's correct.

12 DR. JOHNSON: Okay.

13 MR. WHARTON: But that was not done by a
14 licensing board.

15 DR. JOHNSON: Because it wasn't before a
16 licensing board at the time the allegations were made.

17 MR. WHARTON: That's correct.

18 DR. JOHNSON: All right.

19 MR. WHARTON: Mr. Chairman, you said I have
20 seven minutes. Is that on my --

21 CHAIRMAN EILPERIN: If you're reserving 15
22 minutes for rebuttal, then you would have just a couple of
23 minutes.

24 MR. WHARTON: Okay. Just finishing up with the
25 basis for a fair trial. Stated as NLRB vs. Phelps, 136

1 Fed 2d 562:

2 "A fair trial but unbiased and
3 nonpartisan tryor of the facts is of
4 the essence of the adjudicatory
5 process, as well when the judging is
6 done in an administrative proceeding
7 by an administrative functionary as
8 when it is done by a court by a judge.
9 Indeed if there is any difference, the
10 rigidity of the requirement that the
11 tryor be impartial and unconcerned and
12 the result applies more szrictly to
13 the administrative adjudication. Where
14 many of the safeguards which have been
15 thrown around court proceedings have in
16 the interest of expedition and a supposed
17 administrative efficiency have been
18 relaxed. Nor will the fact that an
19 examination of the record shows that there
20 was evidence which would support the
21 judgment at all save a trial from a
22 charge of unfairness. For when the
23 fault of bias and prejudice in a judge
24 first rears its ugly head, its effect
25 remains throughout the whole proceeding."

1 In this particular case, I'm afraid we have a
2 situation where, I believe, bias and prejudice first raised
3 its head when there was a directive from the NRC ordering
4 the expedition of a licensing hearing.

5 CHAIRMAN EILPERIN: Excuse me, Mr. Wharton.

6 You have very little time left. I don't want
7 to cut you off, but do you want to touch on any of the
8 other substantive issues that you raised in your brief?

9 MR. WHARTON: Mr. Chairman, for purposes of the
10 record, I would like to raise just simply one issue
11 regarding the directive by the NRC.

12 CHAIRMAN EILPERIN: And this is in your brief?

13 MR. WHARTON: This is not in my brief. It's
14 referred to -- it comes under the caption of basic
15 fairness in treating Intervenors as opponents and
16 interlopers. And it's a point I want to make for the
17 record.

18 CHAIRMAN EILPERIN: Well there's also some
19 basic fairness about your putting your arguments in the
20 brief so that the other parties have an opportunity to
21 respond to them.

22 Why don't you take a few seconds on the point
23 you want to make.

24 MR. WHARTON: Yes. It will be very quick.

25 The NRC directive of May 20th said because

1 TMI hearings on a number of plants may not be completed
2 before construction is complete and, if such proceedings
3 are not concluded prior to completion of construction,
4 millions of dollars will be lost. "Encourage licensing
5 boards to expedite the hearing process."

6 As confirmed in the PID as a result of this
7 directive, Intervenors were ordered to file all their
8 written testimony only three weeks after discovery was
9 completed. Discovery was completed on May 20th. Testimony
10 was due on June 12th, 1981.

11 The Board here ordered the hearings to commence
12 on June 22nd, 1981, just ten days after submitting written
13 testimony. Intervenors had a little over a week and a half
14 to prepare for cross-examination of some 21 witnesses.

15 CHAIRMAN EILPERIN: If you felt so strongly
16 about this issue, may I ask you why you have not mentioned
17 it previously until just now?

18 MR. WHARTON: Mr. Chairman, we have a certain
19 limitation on briefs. We have a certain limitation on time.

20 At the time of this particular proceeding, we
21 had ten days to file our petition for stay and a list of
22 all of our exceptions. From that point, we had 30 days
23 after that to file our brief and the brief was limited to
24 70 pages.

25 It was not possible in that period of time to

1 present all of your arguments.

2 CHAIRMAN EILPERIN: There are also motions that
3 can be made for time -- enlargement for the number of
4 pages in briefs and things of that kind if it's necessary.

5 MR. WHARTON: Thank you, Mr. Chairman.

6 CHAIRMAN EILPERIN: Thank you, Mr. Wharton.
7 Mr. Pigott.

8 Mr. Pigott, I'd appreciate it if you could
9 advise me how much time you think you'll be using at this
10 juncture.

11 MR. PIGOTT: I don't think it will take more
12 than 25 minutes.

13 CHAIRMAN EILPERIN: Okay. Thank you.

14 Why don't you, if you would, at some early
15 point in your argument, address the question of whether
16 or not Dr. Biehler's plotting of the 1975 earthquakes
17 would have possibly placed those earthquakes on the
18 Cristianitos Fault. And, if so, what you are relying upon
19 to show that the Cristianitos Fault in fact is not a
20 capable fault.

21 MR. PIGOTT: Certainly.

22 ORAL ARGUMENT BY MR. PIGOTT ON BEHALF OF THE APPLICANT
23 SOUTHERN CALIFORNIA EDISON COMPANY, ET AL.

24 MR. PIGOTT: In view of Intervenors having
25 expended their total period of time on matters revolving

1 around the Cristianitos Fault, I will probably let the many
2 other exceptions they have briefed stand on the basis of
3 our briefs and address Mr. Wharton's arguments.

4 The first thing I would like -- well with one
5 exception and that is with respect to the handling of the
6 hearing and the fair play aspects. We have a short
7 discussion of that in our brief, I believe Pages 15 and 16
8 perhaps, and I really wouldn't want to comment on it beyond
9 what we have in the brief. Needless to say, we think it
10 was an extremely fair hearing from start to finish and the
11 Intervenors were in no way prejudiced by the behavior of the
12 Board.

13 But backing up, I think maybe an important
14 place to start in the discussion of the Cristianitos is
15 to start with the contentions that were actually before the
16 Board.

17 There were four contentions. You have discussed
18 them somewhat in your earlier opinion. Two and four don't
19 come into play at all with respect to the arguments
20 Mr. Wharton has just been making.

21 In fact the arguments in Mr. Simons' testimony
22 and Dr. Biehler's testimony all came in under Issue No. 1
23 -- or all arose, at least, under Issue No. 1. And the
24 issue there was whether as a result of ground motion
25 analysis or data gathered from earthquakes which occurred

1 subsequent to issuance of the construction permit -- whether
2 that rendered the seismic design basis inadequate.

3 I refer back to my brief. The first pre-
4 hearing conference in this operating license stage took
5 place in December of 1977. There at Pages 23, I believe,
6 it begins -- there's a discussion between Mr. Wharton and
7 then Licensing Board member Kornblith. And Mr. Wharton
8 makes the statement at that time -- he uses the language
9 that they have no reason to believe that the Cristianitos
10 is an active fault. He is using it as an example of the
11 kinds of issues they would expect to raise during the
12 operating license stage.

13 As we move towards the hearing itself, we have
14 final pre-hearing conferences approximately a month or
15 so before the hearings actually began. Again there's just
16 the bald statement that the Cristianitos Fault -- the
17 capability of the Cristianitos Fault should be raised as
18 an issue.

19 CHAIRMAN EILPERIN: Let me interrupt here, if I
20 may.

21 MR. PIGOTT: Sure.

22 CHAIRMAN EILPERIN: Do you have any quarrel with,
23 as I understand Mr. Wharton's position, that, in fact, the
24 1975 earthquakes that did occur in that area constituted
25 post-construction permit data which raised the issue of

1 the Cristianitos Fault so that people could in fact
2 litigate that?

3 MR. PIGOTT: Yes. The post-construction permit
4 events certainly included the two Trabuco Canyon events
5 in January of 1975. They were to be examined in the
6 context stated in Issue No. 1. Did that data or did those
7 subsequent earthquakes in any way cause the seismic
8 design basis that had been earlier determined to become
9 questionable?

10 CHAIRMAN EILPERIN: Well isn't it plain that,
11 if, in fact, those earthquakes could be put on the
12 Cristianitos Fault, that would raise a question of the
13 propriety of the seismic design for San Onofre?

14 MR. PIGOTT: Absolutely, and that's why we're
15 discussing them. And that's why they were located, why
16 there was a special crustal model built, why there was an
17 examination of the focal solutions of those earthquakes
18 along with what was able to be done with the swarm that
19 occurred in 1977. And the evidence showed and the Board
20 found that those events were not associated with the
21 Cristianitos.

22 Now had they been associated with the Cristianitos,
23 I would certainly have to say, "Yes, you'd have to go back
24 and look at the whole issue of whether or not that is --
25 whether or not it is capable and thus whether or not it

1 affects the seismic design as it was determined in 1973."

2 But in the absence of that kind of that kind
3 of a finding -- if you get a finding such as we did, that
4 those events in effect are a part of the random seismicity
5 that occurs throughout Southern California and not
6 associated with the Cristianitos Fault, there's no reason to
7 go any further.

8 CHAIRMAN EILPERIN: The fact that those 1975
9 earthquakes did occur and it was argued that those
10 earthquakes could be associated with the Cristianitos
11 Fault, it seems to me that that raises the question of
12 the seismicity of the Cristianitos Fault and that's fair
13 game for anyone to put evidence on.

14 MR. PIGOTT: Not really, not until --

15 CHAIRMAN EILPERIN: Why not?

16 MR. PIGOTT: You don't reach the question --
17 well you don't go beyond the subsequent earthquakes until
18 it's been shown that they cast some cloud over the
19 Cristianitos.

20 CHAIRMAN EILPERIN: Well what about Dr. Biehler's
21 testimony that, in fact, there is a possibility that those
22 1975 earthquakes could be placed on the shallowest point
23 of the Cristianitos?

24 MR. PIGOTT: Well, first of all, he said that
25 the arrows associated with -- well let's take a look at

1 that particular diagram. It's Page 10-A of the Intervenor's
2 brief. Let's see how we got these arrow bars on this line.

3 First of all, the two dots on there, of course,
4 do represent the locations of the 1975 events and the
5 dotted lines -- arrow bars have been inserted by someone
6 on behalf of Intervenors. And we believe they --

7 CHAIRMAN EILPERIN: Do those accurately reflect
8 the arrow bars?

9 MR. PIGOTT: We believe they reflect Dr. Biehler's
10 testimony concerning the arrow bars, yes. I don't quarrel
11 with that.

12 Now, if you notice, we get the line passing
13 through those arrow bars or tangent to one and through
14 the edge of one not by any geologic evidence -- not by
15 any hard evidence. That is a line drawn from the eastern
16 most surface trace of the Cristianitos Fault to a point
17 directly below the deepest bore hole that was used to
18 examine the geology in the area.

19 Had the bore hole, by Exxon, I believe it was,
20 gone another 1000 feet deeper, they would have had to draw
21 that line at a sharper angle. But that does not relate
22 to real geology. That relates only to what is seen and
23 taking the most conservative or the most extreme hypothesis
24 of what the Cristianitos could be.

25 DR. POTCHY: And there was no evidence from that

1 Exxon drill hole that the fault was there at the end of
2 that hole.

3 MR. PIGOTT: Absolutely none. But, on the
4 other hand, to be candid, one can't say that they know what
5 is one foot beyond the end of the bore hole. So that is the
6 way that was drawn.

7 Now there is also testimony on the --

8 CHAIRMAN EILPERIN: I'm a little unclear.

9 What do you make of that? Do you make of that
(sic) 10 that that line should be totally disregarded or do you make
11 of that that that line is a possible, albeit conservative,
12 rendition of where the Cristianitos Fault may possibly
13 extend to?

14 MR. PIGOTT: That's the extreme bounding line
15 of what could possibly, at the lowest probability, be the
16 strike of the Cristianitos Fault.

17 In fact, both Dr. Ehlig, who had studied the
18 area of the Cristianitos, and Dr. Biehler testified that,
19 with their knowledge of the geology and their knowledge of
20 the Cristianitos Fault, that they would place the base of
21 the Cristianitos several thousand kilometers below these
22 hypocenters.

23 DR. GOTCHY: Kilometers or meters?

24 MR. PIGOTT: Meters. I'm sorry. Meters below
25 the hypocenters. So they would not agree with this as

1 being a realistic interpretation of the geology of the
2 Cristianitos.

3 DR. JOHNSON: Were they taken into account, the
4 fact that it was a listric normal fault? I mean their
5 speculation as to the location made in light of that fact?

6 MR. PIGOTT: It's only by calling it a listric
7 normal fault that they were able to put it under the
8 hypocenters at all. If it were a normal fault, it would
9 go probably straight down and never pass under those
10 particular hypocenters. It's only because it does flatten
11 at some depth that you get it under the hypocenters.

12 DR. JOHNSON: How near the prospective location
13 of the 1975 events was the Exxon bore hole? Was it
14 generally in the same region or was that hole some kilo-
15 meters away?

16 MR. PIGOTT: The surface distance from the
17 Exxon -- I don't offhand know the distance from the
18 surface of the Exxon bore holes to the -- I guess it would
19 be the epicenter of those events, their expression at the
20 surface.

21 DR. JOHNSON: The figure shows them all aligned
22 in the same plane and they could be displaced laterally.
23 Okay.

24 MR. PIGOTT: As I stand here now, I'm not --
25 just a second. If you allow me one second to consult, I

1 may be able to get that number very quickly.

2 CHAIRMAN EILPERIN: Certainly.

3 MR. PIGOTT: I am told that distance would be
4 in the area of two to three kilometers at the surface
5 between that bore hole and the location above ground of
6 those two events.

7 DR. JOHNSON: Thank you.

8 CHAIRMAN EILPERIN: Correct me if I'm wrong,
9 but doesn't the testimony then come down to the fact that
10 you have two extreme conditions, one, an extreme condition
11 about the extent of error in placing the 1975 earthquakes
12 another -- in extreme or bounding condition dealing with
13 the strike of the Cristianitos Fault, and, if you accept
14 those two extreme bounding principles, you can in fact
15 still place the 1975 earthquakes on the Cristianitos Fault?

16 MR. PIGOTT: You can draw lines and you can
17 hypothesize and you can place it in a way that those
18 hypocenters fall on a line that could represent the
19 Cristianitos Fault. However, that is only the first step
20 and really the most superficial step in arriving at the
21 location of an earthquake with respect to a fault.

22 CHAIRMAN EILPERIN: Okay. But we're still not
23 talking about something that is wholly and completely
24 hypothetical like drawing a line somewhere. This is based
25 upon testimony as to what some extreme but possible

1 condition might look like.

2 MR. PIGOTT: Mr. Chairman, that's why we did the
3 investigation. I mean those events occurred close to the
4 Cristianitos and that's what made us go look at them, yes.

5 CHAIRMAN EILPERIN: What other parts of the
6 testimony do you think show that the Cristianitos Fault
7 is not capable?

8 MR. PIGOTT: Well primarily the focal solutions.
9 The study done by Dr. Biehler -- all of Dr. Biehler's
10 testimony -- an intensive study where he in effect
11 calibrated the crust in the area of Trabuco Canyon and the
12 Cristianitos Fault through a series of explosions, then
13 went back and took the recordings from the two events and
14 then putting them into his model, he was able to come up
15 with some great amount of confidence with the focal
16 solutions for those two events. And when those focal
17 solutions are then balanced against the actual geology of
18 the area and of the Cristianitos Fault, it shows that they
19 are just simply incompatible.

20 CHAIRMAN EILPERIN: Would you like to comment on
21 Mr. Legg's focal solution?

22 MR. PIGOTT: Mr. Legg's focal solutions were
23 never able to be justified on cross-examination. Mr. Legg
24 had talked in terms of the stress patterns being favorably
25 oriented, but, when questioned, and in particular I recall

1 him being questioned by the Licensing Board, he was never
2 able to put favorably oriented into anything other than --
3 almost any direction would be favorably oriented the way
4 he conceived it. Now that's to the contrary of what
5 Dr. Biehler did. He did have stress patterns that he
6 thought were pretty firmly embedded in the area and he also
7 had the background of the geology of the Cristianitos which
8 is a down-dropping to the west type of structure. And,
9 in order for this event to have been on the Cristianitos,
10 we would have had a complete reversal of the previous
11 motion of the Cristianitos. It would in effect be moving
12 uphill.

13 I think if you review Mr. Biehler's testimony,
14 you will find that it was just crystal clear to him that
15 this earthquake with these motions just could not happen
16 on the Cristianitos.

17 Now there is a way that it can happen and it's
18 discussed in the testimony. And I guess if Mr. Simons'
19 testimony was to be taken to reflect anything, it would --
20 it could be taken to reflect the fact that in Southern
21 California you have what is called random seismicity. You
22 have the small events -- small swarms of events that happen
23 throughout the area on a random basis. They are not
24 associated with any particular structure. They stay in
25 the microseismic category. They're 1's, 2's, maybe up to

1 3-1/2. This, I believe -- as I believe, 3.5 was the
2 largest event that we're dealing with. But that's still
3 considered microseismic in this area.

4 So what you had was an occurrence that is
5 neither unusual or unexpected in this area, a small,
6 microseismic earthquake. Now it happened to occur
7 relatively close to the Cristianitos, so you get out into
8 the field, do your investigations and find out whether or
9 not this is one of these random items that doesn't occur
10 on a major structure or whether it's something that maybe
11 will breathe some life back into the Cristianitos. And
12 the conclusion was that it was one of the random type
13 events. It was certainly not associated with the
14 Cristianitos.

15 DR. JOHNSON: Early in your argument,
16 Mr. Pigott, you mentioned the fact that -- or you called
17 these two events Trabuco Canyon events, I believe. Is
18 there anymore evidence locating the 1975 events on that
19 canyon or the structure associated with that canyon than
20 there is associating them with Cristianitos?

21 MR. PIGOTT: Well there is no surface expression
22 of a structure going through Trabuco Canyon. It is possible
23 that there is something at depth, but that was never
24 confirmed. If it is, it would have to be a very minor kind
25 of a structure. I think the conclusion was more likely

1 that it was some kind of a -- just a fracture of the crust
2 that appears to occur, as I say randomly.

3 DR. JOHNSON: Well there is no real basis for
4 calling them Traduco(sic) --

5 MR. PIGOTT: Trabuco Canyon --

6 DR. JOHNSON: -- Trabuco Canyon events.

7 MR. PIGOTT: No. That's the physical location.

8 As we go to the surface from these hypocenters, you come
9 up in Trabuco Canyon. That's how the name arose.

10 CHAIRMAN EILPERIN: Were you saying that
11 Mr. Legg's focal mechanisms would have caused the
12 Cristianitos Fault to have moved uphill? Is that what you
13 had said before?

14 MR. PIGOTT: No. I didn't ascribe that to
15 Mr. Legg. What I said was, when Dr. Biehler examined the
16 focal mechanisms, in order to have placed them on the
17 Cristianitos, it would have had to have this Cristianitos
18 Fault virtually moving back uphill, a complete reversal
19 to the type of movement that it experienced at the time
20 that it was active. And that was also concurred in by
21 Dr. Reiter who -- his words, I believe, were that it would
22 take an arbitrary construction of the motion on those
23 events in order to place them on the Cristianitos.

24 DR. GOTCHY: Do I recollect correctly that the
25 last movement along that fault was four to ten million

1 years ago?

2 MR. PIGOTT: I don't have that in mind. I
3 don't know. I could not give you a last date of movement
4 on the Cristianitos from my memory right now.

5 CHAIRMAN EILPERIN: What did you say again was
6 wrong with Mr. Legg's focal mechanism?

7 MR. PIGOTT: Well he had a definition of the
8 stress-strain system in the area that would have been
9 favorable to virtually any kind of action. Any kind of a
10 movement on any fault he would have said was favorably
11 oriented with the then existing stress patterns. And, on
12 cross-examination, I think it was pretty clearly pointed
13 out that he didn't have a real definite feeling as to
14 which way the stress patterns were moving in that area.

15 CHAIRMAN EILPERIN: What other testimony is
16 there in the record that goes to the question of what the
17 stress-strain patterns in the area look like?

18 MR. PIGOTT: Well you're asking now a very
19 general question because that becomes a discussion, for
20 instance, with the whole region. It's generally north-
21 south, I believe. And that's the pattern that controls,
22 for instance, the off-shore zone of deformation, the
23 San Jacinto Fault, the San Andreas Fault. That's the
24 general pattern throughout Southern California for these
25 strikes of the faults. That is a completely different

1 kind of stress pattern and activity from what was seen on
2 the Cristianitos at the time it was formed. It was a
3 normal, not strike, slip and it was down-dropping to the
4 west as opposed to the north-south movement that we now
5 see on the currently active faults. So, in that sense, I
6 believe that is what they mean by the regional stress
7 pattern being north-south and these particular events not
8 being -- being north-south which is not compatible with
9 current movement on the Cristianitos.

10 CHAIRMAN EILPERIN: Was there other testimony
11 in the record as to the stress-strain pattern in the more
12 limited area right around the Cristianitos Fault?

13 MR. PIGOTT: I think Dr. Biehler probably
14 addressed it. And that may also be in the testimony of
15 Dr. Reiter.

16 CHAIRMAN EILPERIN: Is there generally much
17 variation from place to place in the region in terms
18 of the stress-strain patterns?

19 MR. PIGOTT: Not on a large scale is my
20 understanding.

21 CHAIRMAN EILPERIN: So you think that the small
22 scale reflects pretty much throughout what the large scale
23 stress pattern is? Is that what the testimony shows?

24 MR. PIGOTT: Well, no. The large scale stress
25 pattern, in my understanding, is probably what is going to

1 drive the larger events on the known features. The smaller
2 features, the random features can become so localized that
3 they have a very local stress associated with them and the
4 crust just breaks, depending on those very local
5 conditions. So they need not follow the major patterns.

6 But my understanding is you would not get
7 earthquakes of significance on the significant structures,
8 on the known structures, varying from this pattern.

9 Again you're getting me into a very technical
10 area that I'm trying to give my best understanding of it
11 and I'm sure there are --

12 CHAIRMAN EILPERIN: We've used up most of
13 your time with questions. Do you want to take a few
14 minutes --

15 MR. PIGOTT: Just one other thing.

16 We started with the issues in the fact that we
17 were developing an issue related to the Cristianitos based
18 on post-construction permit events.

19 There never was an issue with respect to the
20 overall capability of the Cristianitos, so there was
21 nothing to throw out as Mr. Wharton says. The determination
22 was made as to whether or not there were any events that
23 rendered it capable.

24 CHAIRMAN EILPERIN: Well, if I understand his
25 position, his position is that, once he showed that there

1 were post-construction permit events which raised the
2 question of the activity of the capability of the
3 Cristianitos Fault, then the capability of that fault was
4 fair game and open to testimony, not that he was restricted
5 to putting on testimony from the time of the post-
6 construction events forward. Do you disagree with that?

7 MR. PIGOTT: I absolutely disagree. The very
8 wording of the language says that we are confining ourselves
9 to an examination of the post-CP events.

10 CHAIRMAN EILPERIN: But don't you have to
11 interpret that in light of pre-existing data and pre-
12 existing testimony?

13 MR. PIGOTT: Absolutely not. It's a very
14 discreet issue, looking at very particular information.
15 And depending on the results of it -- now, as I said
16 earlier, if there was a finding that these events were on
17 the Cristianitos, then the Cristianitos becomes wide open.
18 But if you can't get there, why would one want to go back
19 for the pure gratuity of looking at the whole history of
20 the Cristianitos?

21 CHAIRMAN EILPERIN: But the question is what
22 must be shown to activate that contention about the
23 capability of the Cristianitos Fault? Must it just be
24 shown that there's reason to inquire further or must it
25 be shown that, in fact, those events can be placed on the

1 Cristianitos Fault beyond whatever -- a preponderance of
2 the evidence or what have you?

3 It seems to be your position that there
4 actually has to be a finding that it can be placed on the
5 Cristianitos which seems to me a bit more stringent than
6 I would have looked at it. And it also seems to me that
7 that would introduce some sort of procedural complications
8 if you in fact want to go through an initial decision,
9 come up with formal findings and then say, after their
10 formal findings, lo and behold, one can now look at the
11 Cristianitos because we have now had a formal finding that
12 in fact those earthquakes may be placed on it. That
13 doesn't sound like a practical approach.

14 MR. PIGOTT: Applicant's position is that, in
15 order to have looked at the capability of the Cristianitos
16 generally, they should have followed and never followed the
17 requirements of the rules which says they state a basis for
18 an issue. They should have stated a basis for an issue
19 to examine whether or not the Cristianitos is capable.
20 They tried it a couple of three times. At one time they
21 said they weren't interested. They tried a couple of other
22 times and had no basis.

23 Now suddenly, in the context -- the proper
24 context of Issue 1, they all of a sudden -- they say that
25 issue is there. It never was there.

1 CHAIRMAN EILPERIN: Well they're saying that the
2 1975 earthquakes put it there and Dr. Biehler's testimony,
3 combined with what Mr. Simons and Mr. Legg had to say,
4 raised the issue of the capability of the Cristianitos
5 Fault.

6 MR. PIGOTT: That interpretation leaves
7 absolutely no meaning to Issue No. 1 --

8 CHAIRMAN EILPERIN: Why?

9 MR. PIGOTT: -- which is did the subsequent
10 earthquakes have any impact on seismic design basis?

11 What it almost says is that you can look at any
12 earthquake in any context for any purpose without any kind
13 of a showing.

14 We were here looking at specific events,
15 defined events, to find out whether, as a result of those
16 events, the mistake had been made back at the construction
17 permit stage, and that was the sole purpose of the issue.

18 Now, in the absence of that, there is no basis
19 and there is no reason, simply because you're talking
20 about a known structure, to go back to the very beginning
21 and look at that structure from its inception.

22 My position would be that, if they had been
23 able to succeed to show that there was some connection
24 with these events to the Cristianitos, then the whole
25 seismic design basis question would have been reopened.

1 But they weren't able to do that. And the fact that the
2 Board made findings that sustained our position on Issue
3 No. 1 shouldn't be allowed to be bootstrapped into a basis
4 for a brand new issue, that being the overall capability
5 of the Cristianitos.

6 CHAIRMAN EILPERIN: So is it your position, if
7 I understand it, then, that the Intervenors were properly
8 foreclosed from litigating pre-1973 matters dealing with the
9 Cristianitos Fault, one, because the Licensing Board's
10 foreclosure ruling was correct, despite the fact that in
11 our stay decision we expressed serious doubts about it,
12 and, two, because it doesn't fit within the contentions
13 as drawn for the hearing?

14 MR. PIGOTT: I would state them in reverse order.
15 That primarily it was beyond the contentions and it never
16 came to the level of a showing that would indicate that a
17 second issue, i.e. the capability of the Cristianitos
18 Fault generally should be followed.

19 With respect to the foreclosure, we get into --
20 I won't call it semantics but I think we got into a
21 situation where the Board felt that, in the absence of
22 some kind of a showing -- they actually made no showing
23 with respect to the Cristianitos, that they shouldn't be
24 able to just open it up and discuss whatever they wanted
25 just because the word Cristianitos had been used.

1 Foreclosure was a new discussion in this context, so I
2 wouldn't really want to rest all of my argument on foreclosure.
3 But there were good and sufficient traditional basis for
4 disregarding the Cristianitos evidence that Mr. Simons
5 wanted to bring in and for not allowing it to be opened
6 as a separate and new issue within the proceeding.

7 CHAIRMAN EILPERIN: I think I understand your
8 position.

9 Thank you, Mr. Pigott.

10 DR. JOHNSON: I have a question.

11 Regarding the proposed findings on the Biehler
12 testimony in the 1975 event, were you precluded from
13 submitting proposed findings on that evidentiary testimony?

14 MR. PIGOTT: As far as I am aware, the parties
15 were wide open to propose findings of any kind. I know of
16 no restriction on the proposed findings.

17 DR. JOHNSON: It was open to Intervenors to
18 propose a finding that the Biehler testimony and the arrow
19 bar interpretation of it was demonstration that the
20 Cristianitos Fault was active; is that within the rules of
21 the hearing?

22 MR. PIGOTT: They certainly could have proposed
23 that. Yes, they could have proposed that.

24 DR. JOHNSON: You mean that was not in some way
25 forbidden to any party under the rules of this hearing?

1 MR. PIGOTT: There was no restriction on the
2 proposal of findings. They could have proposed that the
3 world is flat and that would have been a legitimate
4 proposed finding. It probably wouldn't have been sustained
5 but they could have put anything in there.

6 DR. JOHNSON: Well I guess the point I'm getting
7 at is there was no contention per se that Cristianitos
8 was an active fault. Therefore, would such a finding, had
9 it been proposed, have been some sort of an odd duck that
10 would not have been comparable to any of the issues in
11 the case?

12 MR. PIGOTT: Oh, no, because I think you will --
13 I don't have them in front of me, but I'm sure you could
14 go back into our proposed findings and find findings that
15 would say that, as a result of the determinations of
16 Dr. Biehler and the testimony of Dr. Reiter, the
17 Cristianitos is not capable, or at least indicating that
18 there is no reason to look at the Cristianitos.

19 DR. JOHNSON: And you had such findings actually
20 made? I mean --

21 MR. PIGOTT: I would be surprised if we did not
22 have something going in that direction.

23 DR. JOHNSON: And Intervenor had the opportunity
24 to review your findings prior to submitting their findings,
25 if I recall the -- or is that correct?

1 MR. PIGOTT: Yes, they did, I believe. They had
2 a rebuttal opportunity in any event.

3 DR. JOHNSON: Normally I thought Applicant-
4 proposed findings came first, with the other findings
5 subsequent.

6 MR. PIGOTT: Yes.

7 If I might just check my notes and make sure
8 there isn't perhaps one small letter that I wanted to --
9 No, I have nothing further.

10 CHAIRMAN EILPERIN: Thank you, Mr. Pigott.
11 Mr. Chandler.

12 It's my understanding you have about 20 minutes,
13 Mr. Chandler.

14 MR. CHANDLER: Thank you. That's correct.
15 ORAL ARGUMENT BY MR. CHANDLER ON BEHALF OF THE REGULATORY
16 STAFF

17 MR. CHANDLER: Members of the Board, the Staff
18 too would like to focus its argument this morning in
19 response to the points raised by the Intervenors in this
20 argument.

21 We are satisfied that our brief fully addresses
22 the other matters that have been raised.

23 Basically we consider what the Intervenors have
24 said this morning to really be comprised of unsupported,
25 generalized kinds of references to their treatment by this

1 Licensing Board and I think a review of the full record
2 in this proceeding of these issues will not bear them out.

3 I think we would be fundamentally in agreement
4 with the views that Mr. Pigott just expressed with respect
5 to the scope of this proceeding, with respect to considera-
6 tion of the Cristianitos Fault.

7 I think the contentions themselves are very,
8 very clear in that, regardless of whether one looks at
9 Contention 1 or Contention 3, a predicate for consideration
10 of a matter is that it relate to something which occurred
11 post-CP, subsequent to the issuance of construction permits
12 in 1973. And, in that sense, the parties did -- that is
13 to say the Applicants and the Staff properly did focus
14 on the 1975 events which we've been discussing this morning.

15 DR. JOHNSON: Mr. Chandler, the capability of
16 Cristianitos obviously is called to question by post-'75
17 events. You've got two earthquakes that could have or
18 could not have -- I mean there's a question as to where
19 they were located. Obviously they were close to the
20 strike in the Cristianitos Fault.

21 MR. CHANDLER: That's correct.

22 DR. JOHNSON: Along comes an Intervenor witness
23 with a technique for determining whether a particular fault
24 was capable. I'm referring specifically to Mr. Simons,
25 and he is given an opportunity to present that evidence,

1 evidence which is pertinent now because we have questions
2 regarding this Cristianitos Fault. There's been earthquakes
3 near it.

4 Would you address why the Board didn't make an
5 error when they wiped out Simons' and his testimony and why
6 that testimony, in addition to the information that had
7 resulted from the 1975 event, didn't raise Cristianitos
8 to the point where, by golly, it should be a full-blown
9 issue in this case?

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SB 1

1 MR. CHANDLER: I think the fundamental premise that
2 we must recognize is that under the Commission's regulations
3 this Licensing Board was charged with resolving the matters in
4 controversy between the parties. And as I mentioned a moment
5 ago, the issues in this proceeding focused on post-construction
6 permit events.

7 Let's look at Mr. Simons' testimony in that regard.
8 As we have pointed out in connection with both our response to
9 the stay and with respect to our responsive brief on the appeal,
10 the testimony that Mr. Simons was intending to offer goes far
11 beyond the scope of that contention. It goes back as far as
12 1932, I believe. And this data is intertwined. The Intervenors
13 have made no effort to try, when this issues was raised before
14 the Licensing Board, to cull out data which was relevant from
15 that which was irrelevant to that basic issue.

16 MR. EILPERIN: Excuse me, but Dr. Beihler had testi-
17 mony that dealt with pre-1975 matters as well as post-1975 mat-
18 ters. He didn't make any attempt to cull out pre-1975 from
19 post -1975 data, and I think very properly so. Because I think
20 that when you are investigating the capability of that fault,
21 you do want to draw on the full geological history that you
22 can get, and not limit it to a couple of years.

23 MR. CHANDLER: I think that is right.

24 MR. EILPERIN: Then why are not Intervenors, then,
25 perfectly within their rights in going back to pre-1975 or

sb 2

1 pre-1973 geological history?

2 MR. CHANDLER: Because I don't think you can compare
3 fairly the testimony that Dr. Biehler presented in this pro-
4 ceeding with that which Mr. Simons intended to offer specific-
5 ally. Dr. Biehler's testimony was comprised essentially of
6 the report submitted to the Commission staff in the period
7 following these 1975 events. The testimony discusses, for
8 purposes of historical perspective, as I understand it, pre-
9 1975 events. It does not rely with respect to the conclusions
10 relating to the 1975 events to any great degree -- I am not
11 even sure if it relies at all -- on the historic activity in
12 that general area. It is presented for perspective.

13 MR. EILPERIN: What is the matter with historical
14 perspective? You use that as some sort of denegrating term.

15 MR. CHANDLER: No, not at all.

16 MR. EILPERIN: Okay, so isn't another name for
17 historical perspective relevant evidence that someone should
18 consider in making a judgment whether the Cristianitos Fault
19 is or is not capable.

20 MR. CHANDLER: If that is the issue before the
21 Board, if the full issue of the Cristianitos Fault had been
22 before the Board, had Intervenors made any threshold showing
23 of relevance that this was properly before the Board under
24 contention 3, or perhaps shown somehow that it properly came
25 under contention 1, then perhaps one goes back and looks at

sb 3 1 pre-1973 data, but not initially.

2 MR. EILPERIN: Why isn't that threshold showing
3 made simply on the basis of the 1975 events combined with the
4 bounding cases that those events may possibly have occurred
5 on the Cristianitos? Why isn't that sufficient?

6 MR. CHANDLER: I think the thrust of that point was
7 very clear. There was no showing in any of the -- certainly
8 not in the staff's testimony, and not in the testimony by
9 Applicants, that there was any association between these events
10 and the Cristianitos fault, or that they were not typical of
11 -- I think Mr. Piggot just mentioned a moment ago -- micro-
12 seismic-type of activity in the general area, which is a
13 random sort of occurrence, not necessarily associated with
14 any structure.

15 MR. EILPERIN: But I thought the testimony was that
16 if you took into account the error bands about where those
17 events may have occurred, and took into consideration the
18 possible strike of the Cristianitos, then in fact you have
19 got a possible intersection.

20 MR. CHANDLER: I think what we have -- and you have
21 stated it correctly -- if we take the possible this and the
22 possible that and the if on that and we pyramid speculation
23 upon speculation upon speculation, perhaps we get to that
24 point. But there was nothing --

25 MR. EILPERIN: What troubles me with your position

sb 4

1 and with the Applicant's position is that those two facts were
2 enough to get the Applicant, presumably at the NRC's request,
3 to make further detailed studies about the activity of the
4 Cristianitos fault. So on the one hand those events are good
5 enough to require that sort of investigation, and on the other
6 hand you are saying that they are not good enough to allow
7 the Intervenors to get into the Cristianitos fault pre-1973.

8 MR. CHANDLER: I can't speak with certainty. It goes
9 back to 1975, but I don't recall whether the staff said take
10 a look at the 1975 events, or tell us what the 1975 events
11 mean with respect to the Cristianitos fault. The Applicants
12 came back with the latter.

13 MR. EILPERIN: Forgetting who was the prime mover in
14 getting further study done as to the Cristianitos fault as a
15 result of those events, there is no doubt that in fact that
16 study was undertaken. And it seems to me that speaks for
17 itself about the possible meaning that should attach to it.
18 It was then a field of inquiry that deserved looking into,
19 and in fact the Applicant looked into it.

20 MR. CHANDLER: I understand what you are saying, Mr.
21 Chairman. I think as we have indicated earlier, I don't think
22 that we have crossed that point under the contentions that
23 raised this to a matter that brought into question the entire
24 Cristianitos fault issue.

25 DR. JOHNSON: Can I raise a hypothetical here?

SB 5
1 MR. CHANDLER: Sure.

2 DR. JOHNSON: If, instead of what he did, Mr. Simons
3 had come in with evidence that he trenched the Cristianitos
4 fault and found that there was evidence of breakage on that
5 fault within the last 10,000 years but earlier than 1975 or
6 '73, would that evidence have been allowed in the discussion
7 of whether or not Cristianitos was an active fault under the
8 rules of the game?

9 MR. CHANDLER: I think, given the context of the
10 issues before the Board, the answer is no. But two things,
11 I think, have to be examined when we look at Mr. Simon's
12 testimony.

13 DR. JOHNSON: No, not in regard to the quality of
14 Mr. Simons' evidence. If it were pre-'73 it was inadmissible,
15 is that your point? I mean, it was not to be treated in this
16 hearing?

17 MR. CHANDLER: I think essentially it would be beyond
18 the scope of the issues before the Board. Now, that is not to
19 say that this Board was forever barred from raising something
20 that went beyond the scope of these issues. Quite clearly
21 it has long been recognized that boards can go beyond the
22 issues if they feel a serious safety issue is presented. And
23 had the Intervenors attempted to make some showing of the kind
24 you suggest, I would fully expect that the Board would certainly
25 undertake an examination of that matter. I know for certain

sb 6
1 that the staff would. And that is one of the points that I
2 think has to be made in this proceeding.

3 MR. EILPERIN: You are saying, then, that if there
4 had been the kind of post-construction data that Dr. Johnson
5 was just talking about, it would have made a lot of sense to
6 the Board to look into it. It would have made a lot of sense
7 for the NRC staff to look into it. And the Interventors were
8 foreclosed from looking into it?

9 MR. CHANDLER: No. That is not at all what I am
10 saying. I think you were talking about pre-'73.

11 DR. JOHNSON: Well, the data is generated post-
12 construction permit, post-1973, or whatever, but relates to
13 events that occurred prior to the issuance of the construction
14 permit. That was the hypothetical.

15 MR. CHANDLER: Let me take it out of the context,
16 for a moment, entirely of the wording of the contentions. Had
17 the Intervenor been able to make any showing with respect to
18 a serious safety matter, this Board would have properly under-
19 taken some consideration of it. And I don't think the Intervenor
20 came close to making that kind of a showing.

21 I think when one looks at the quality of the testimony
22 that they intended to offer, Mr. Simons' testimony in particular,
23 one sees that the Board had rather great difficulty in accepting
24 that. I think this Appeal Board has noted some at least tentative
25 views with respect to the probative value of that testimony.

sb 7
1 The Appeal Board recently spoke to this kind of
2 a question in its decision in Duke Power Company, McGuire
3 proceeding, which is A-LAB 669 in 15 NRC 453 at page 475, a
4 March, 1982, decision. The question that we were dealing with
5 is whether this kind of testimony would have aided the trier
6 of fact in resolving an issue before them. And I think this
7 Board was justified in reaching a negative conclusion on that.

8 MR. EILPERIN: Forget the testimony that Intervenors
9 put on and just consider the testimony that Dr. Biehler put
10 on.

11 MR. CHANDLER: I think the testimony of Dr. Biehler
12 is clear in showing that the Cristianitos fault is not a
13 capable fault within the meaning of the Commission's regulations.
14 I think that view has been supported based on a review by
15 the Commission staff. It has been accepted by the U.S.
16 Geological Survey. It is reflected in our safety evaluation
17 report.

18 MR. EILPERIN: I am not talking about the totality
19 of the testimony and where it came out in the conclusion, I
20 am talking about was there enough in that testimony to raise
21 a question about the capability of the Cristianitos fault
22 so that it was then fair game for it to be litigated in its
23 entirety?

24 MR. CHANDLER: No, I don't think so. I think when
25 one looks -- and we have discussed this in our brief around

sb 8

1 page 18 or 19 -- at these types of questions, I think when one
2 correlates it to what Mr. Wharton was discussing earlier
3 this morning, the question of whether one can draw error
4 bars was discussed by Dr. Reiter of the staff, by Dr. Biehler,
5 and it made rather clear that this is a very difficult under-
6 taking given the information that is available. It is not
7 clear to me that the error bars were appropriately drawn in
8 this case. There were some questions in some staff people's
9 mind when they reviewed them.

10 MR. EILPERIN What testimony in the record are you
11 referring to?

12 MR. CHANDLER: We have cited transcript pages 3964
13 to 65, which was a discussion with -- I think Mr. Wharton
14 referred to it a moment ago -- with Dr. Biehler, Dr. Reiter
15 at pages 5745 and 5746 where they indicated that basically
16 a lot of assumptions are involved, and that it would require
17 at least some arbitrary shaping to fit the error bars, as has
18 been done.

19 I think the other thing that has to be recognized
20 is at least what the staff considers to be convincing evidence
21 presented by Dr. Biehler's focal plain solutions. They just
22 don't correlate those events with activity one would associate
23 with the Cristianitos fault.

24 MR. ELPERIN: What if I or the Board were to disagree
25 with you about whether or not the 1975 events were sufficient

sb 9
1 to allow Intervenorors to litigate the capability of the
2 Cristianitos fault in its entirety, how should that affect our
3 decision in this case.

4 MR. CHANDLER: I don't think it need affect your
5 decision at all because I think the second question we have
6 to focus on, then, is what testimony was offered with respect
7 to that whole issue, if you will, of the Cristianitos fault.

8 And as we have argued, the testimony offered by
9 Intervenorors simply was far wide of the mark of being considered
10 as reliable, relevant information -- or certainly I underscore
11 the reliable information -- so that it should have been admitted.

12 DR. JOHNSON: How much did Dr. Cardone and Dr. Reiter
13 get into the question of the meaning of the 1975 events?

14 MR. CHANDLER: I don't understand what you mean by
15 meaning.

16 MR. EILPERIN: Well, the interpretation of the 1975
17 events.

18 MR. CHANDLER: There is a discussion in the SER on
19 page 2--and it is brief, Section 2.5.2.2sat --

20 MR. EILPERIN: Excuse me, could you give me those
21 page again?

22 MR. CHANDLER: I am trying to locate the pages. If
23 one looks at page 2-52, which is Section 2.5.2.2, as well as
24 Section 2.5.1.7 at 238-239.

25 MR. EILPERIN: Did that evidence, or any other

sb 10

1 evidence that the staff had as to the meaning of the 1975
2 events add anything to what Dr. Biehler had said? And if so,
3 what did it add?

4 MR. CHANDLER: I don't believe it adds to it. It
5 reflects the staff's -- at least the conclusions of the staff's
6 evaluation of the information submitted by the Applicants
7 and Dr. Biehler on behalf of the applicants.

8 DR. JOHNSON: Let me follow that. Did Dr. Reiter or
9 Mr. Cardone conduct any investigation of their own comparable to
10 those of Dr. Biehler, or did they simply evaluate the report
11 submitted by Dr. Biehler?

12 MR. CHANDLER: I believe they may have observed the
13 area on a field trip. But certainly I could not say that
14 they conducted anything like the independent investigation
15 undertaken by Dr. Biehler. Traditionally the staff would
16 evaluate the Applicant's information on that.

17 MR. EILPERIN: So your position is that the staff's
18 testimony on the 1975 events was essentially cumulative of
19 what the applicant had presented.

20 MR. CHANDLER: No, not at all. I think that what
21 it does, which the Applicant's does not do, is reflects the
22 staff's evaluation of the information. It doesn't add addi-
23 tional information that has already been presented by Dr.
24 Biehler. It says that the staff has evaluated that, and here
25 are the staff's conclusions. Typically that is what the

sb 11

1 safety evaluation does.

2 MR. EILPERIN: That is what I meant by cumulative.
3 I wasn't trying to denigrate it, but there wasn't any
4 additional factual data that was presented through the staff's
5 evaluation. Is that accurate?

6 MR. CHANDLER: Yes, I think that is accurate.
7 I think one of the other things that we also have to look at
8 here is a comment that was made earlier with respect to testi-
9 mony that may have or may not have been offered. I find it
10 rather curious, given the nature of the Commission's regulations.
11 I think we know what testimony the Intervenors would have
12 offered on this issue. I think it was the testimony of Mr.
13 Simons and very briefly the testimony of Mr. Legg, the Commis-
14 sion's regulations require pre-filed testimony being submitted.
15 That, we understood, was their case. They had identified a
16 number of witnesses they would have subpoenaed before the
17 hearing. They had prefiled some testimony before the hearing.
18 And that testimony was the testimony of Mr. Simons and Mr. Legg.

19 MR. EILPERIN: Were there any last-minute witnesses
20 at all in the case?

21 MR. CHANDLER: There was discussion about at least
22 one last-minute witness who did not, in the end, show. But
23 I think everybody else had been, at least at one point in
24 time, previously identified.

25 MR. EILPERIN: Were there any other geological

sb 12 1 witnesses that Intervenors had identified beyond Mr. Simons
2 and Mr. Legg? Were there any other possible witnesses as to
3 the Cristianitos fault who had been identified by the Inter-
4 venors, other than Mr. Simons and Mr. Legg?

5 MR. CHANDLER: I don't believe -- I don't recall any-
6 I think certainly we would have had some indication had they
7 had any, given, as I say, the Commission's regulations on
8 those.

9 MR. EILPERIN: You just have a very few minutes left.

10 MR. CHANDLER: One other point, I think, ought to
11 be made, and we have to recognize, and the Appeal Board has
12 recognized in a different context in this proceeding already,
13 merely the fact that an issue does not get litigated in a pro-
14 ceeding such as this, an operating license proceeding, does
15 not mean that the matter is unresolved or that, as the
16 Intervenor suggests, an important safety issue goes unconsidered.

17 I think the Appeal Board has repeatedly noted in,
18 for example, Salem in the proceeding in ALAB-680, the fact
19 is that the staff itself as part of its review of the applica-
20 tion, undertakes a review of all of these matters. I think
21 it is clear in this case that is an issue, the Cristianitos
22 fault is an issue that has been considered in the context of
23 the San Onofre Unit 1 facility. It was considered by the staff
24 in a context of the construction permit facility for units
25 2 and 3, and was reconsidered by the staff in the context of

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1 this proceeding, the operating license proceeding. It is
2 simply not a matter that goes unanswered, unresolved, and no,
3 I don't think it is fair at all to suggest that an important
4 safety issue has not been sufficiently considered at all.

5 DR. JOHNSON: At the construction permit stage the
6 Cristianitos fault was addressed in the safety evaluation
7 report; was it not?

8 MR. CHANDLER: That is correct.

9 DR. JOHNSON: And if my memory is correct, whereas
10 there were Intervenors at that proceeding, the Intervenors
11 chose not to question the finding by the staff or the Applicant
12 that Cristianitos was not capable, and that it was not in
13 any way obscure that there was such a fault and that it had
14 been evaluated as a -- at that time -- a non capable fault.
15 Is that right?

16 MR. CHANDLER: I don't think there was any mystery
17 about the Cristianitos fault in 1973. And it was not an
18 issue that was litigated. The parties had agreed to and stip-
19 ulated to all the issues in that proceeding.

20 In conclusion, Members of the Board, I think it is
21 clear that when one looks at the record in this proceeding,
22 when one examines the latitude that was given Intervenors in
23 the scope of examination and the type of examination of the
24 witnesses of the other parties, in recognizing the needs of
25 the Intervenors with respect to calling witnesses, the record

sb 14

1 is just crystal clear that these Intervenors were afforded
2 every opportunity to have full and complete participation
3 in this proceeding. They were not denied an opportunity to
4 cross-examine Dr. Reiter and Mr. Cardone. They simply didn't
5 try. The question certainly of post-construction permit --

6 MR. EILPERIN: They were certainly denied an oppor-
7 tunity to cross-examine them as to pre-1973.

8 MR. CHANDLER: That is what I was just saying, yes.
9 They were not denied, they didn't make any effort. The prior
10 ruling, they argue, would have barred them from raising those
11 things, but they didn't try.

12 MR. EILPERIN: Well, wouldn't it have?

13 MR. CHANDLER: I certainly think I would have
14 objected, Mr. Chairman, absolutely.

15 MR. EILPERIN: Would have objected to their question-
16 ing, obviously.

17 MR. CHANDLER: Yes, that is correct.

18 MR. EILPERIN: You would have.

19 MR. CHANDLER: Yes. But they made no effort to
20 cross-examine, and they pointed out in the record, that I
21 am aware of, that --

22 MR. EILPERIN: But what you are saying is that the
23 Licensing Board had already ruled them out on the issue.

24 MR. CHANDLER: They had not ruled out the post-1973
25 issue at all. The whole issue is not out.

sb 15

1 MR. EILPERIN: As to pre-1973.

2 MR. CHANDLER: Yes, but I think we can't just accept
3 at least not out of hand, the suggestion that this whole issue
4 has been ruled out of this case. Only one part of it has been
5 and we believe with justification. The rest of the issue is
6 in this case. The fact that the Intervenors didn't avail
7 themselves of an opportunity to examine the Staff with respect
8 to that issue is something I can't speak to.

9 MR. EILPERIN: So that I am clear, you agree that
10 the Licensing Board had ruled out of the case questioning by
11 Intervenors as to pre-1973 matters?

12 MR. CHANDLER: I wouldn't say they ruled it out.
13 But they certainly indicated that they were not going to
14 entertain consideration of that.

15 MR. EILPERIN: What is the difference?

16 MR. CHANDLER: Other than semantics, none.

17 MR. EILPERIN: Thank you, Mr. Chandler.

18 MR. CHANDLER: Thank you.

19 MR. EILPERIN: We will conclude with Mr. Wharton.
20 After Mr. Wharton's rebuttal we will take a break between
21 this argument and that on emergency planning issues.

22 REBUTTAL ORAL ARGUMENT OF RICHARD WAHRTON ON BEHALF OF INTERVENORS,
23 FRIENDS OF THE EARTH, et al.

24 MR. WHARTON: I will be brief, and I will be
25 within my 15 minutes. Let's get clear as to what the ruling

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1 was on the foreclosure. The partial initial decision, page
2 20 states: "As previously described, the Cristianitos fault
3 is the closest significant geologic feature to San Onofre.
4 If the Cristianitos were shown to be a capable fault, it
5 certainly would be significant and perhaps crucial to the
6 safety of the San Onofre facility." That was the purpose of
7 the evidence we have just described. However, in the circum-
8 stances of this case the Board determined that the prior oppor-
9 tunity to litigate the capability of the Cristianitos at the
10 construction permit stage foreclosed the litigation of that
11 question in this operating licensing procedure absent a
12 sufficient showing of changed circumstances, a showing that
13 was not made.

14 There is really no question that the Board in this
15 case ruled out the entire issue.

16 MR. EILPERIN: Oh, but if you had made what the Board
17 considered a sufficient showing of changed circumstances,
18 namely new data as a result of the 1975 events, then don't
19 you agree the issue would have been in? You may quarrel
20 with the Board's decision that what evidence there was before
21 the Board was not sufficient, but isn't it clear that what the
22 Board is saying is if there is sufficient evidence, no matter
23 how that is defined, you get to fight about the issue?

24 MR. WHARTON: I think what the Board is looking at
25 is a sufficient showing of changed circumstances. We have the

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1 showing of earthquakes occurring in 1975. We have testimony
2 of Dr. Biehler. The testimony of Dr. Biehler can go either
3 way, I agree. The testimony of Mr. Simons indicates that
4 since 1975 these earthquakes occurred, and since 1930 earth-
5 quakes occurred. The purpose of his testimony is to show
6 within 68 percent of accuracy that earthquakes occurred on
7 the Cristianitos fault, using the data from Cal Tech.

8 Now all of that data, all of that testimony, the
9 testimony of Dr. Ehlig, if you look in the SER, all of that
10 testimony goes to the Cristianitos fault. Most of the testi-
11 mony goes to after 1973. Now, if that is not a showing of
12 changed circumstances, I can't find what is, because we are
13 talking about events that occurred on the fault.

14 MR. EILPERIN: I understand that you disagree with
15 the Board on whether or not that is sufficient. All I am saying
16 is that as I heard your discussion of the Board's ruling, the
17 Board is saying that if there is sufficient evidence of changed
18 circumstances, then the issue is up for grabs.

19 MR. WHARTON: Right. The Board also says, "Waiver
20 of an objection along res judicata lines was discussed."
21 Judge Kelly, addressing the Applicants, states at transcript
22 955-956, "Going back to the Cristianitos fault, it would be
23 possible for you to waive an objection along res judicata lines
24 by getting into the matter in your own testimony." That is at
25 page 955. Later he says "If you open the topic, then it will

sb 18

1 stand as opened up. And the other parties will be entitled
2 to get into it." That is at transcript page 956.

3 Now, in circumstances of this case we have the
4 testimony of Dr. Biehler, testimony of Dr. Ehlig, the SER
5 which was admitted into evidence in its entirety in SER section
6 2.5-2 and 2.5-12. All of this goes into the activity of the
7 Cristianitos fault. And it goes into the activity of the
8 Cristianitos fault not just in 1973, but prior to 1973. The
9 area had been opened up. There is no question about the
10 relevancy of it. There is no question there are changed
11 circumstances. Therefore it is an issue to be litigated,
12 and in fact it was not.

13 MR. EILPERIN: Okay, let me ask this: If Dr. Reiter
14 and Mr. Cardone's testimony was cumulative of Dr. Biehler's
15 testimony, in other words, it was their evaluation, but it
16 didn't add any new or further studies, what more could you
17 have gotten out of cross-examining them than you had gotten
18 out of cross-examining Dr. Biehler?

19 MR. WHARTON: I really don't know what I could have
20 gotten out of Dr. Reiter and Mr. Cardone, nor do you know what
21 I could have gotten out of Dr. Reiter and Mr. Cardone. In fact,
22 no one knows, because we weren't able to do it. It was no
23 longer an issue.

24 DR. JOHNSON: But you could have cross-examined
25 the witnesses regarding their statements on the 1975 events;

sb 19

1 couldn't you?

2 MR. WHARTON: It was not my understanding. I read
3 the ruling of the Board. The ruling of the Board was they
4 ruled out the issue of the capability of the Cristianitos
5 fault. It was no longer an issue in the proceeding.

6 DR. JOHNSON: I understand what you have said, I am
7 not that dumb. But we have a witness in the proceeding that
8 you cross-examined, Dr. Biehler. And now you have staff
9 witnesses who have commented on and evaluated the Biehler
10 reports regarding these 1975 events. And you are saying that
11 you think the Board ruled out questioning those people regard-
12 ing their evaluation of the Biehler testimony? Certainly that
13 is not covered by a pre-1973 ruling. I don't understand what
14 made you think that you couldn't cross-examine those witnesses
15 on their evaluation of the Biehler testimony? Or, for that
16 matter, why you felt that you couldn't propose findings regard-
17 ing the Biehler testimony.

18 MR. WHARTON: The reason is quite simple, I am an
19 attorney.

20 DR. JOHNSON: That is good enough for me.

21 MR. WHARTON: I am bound to follow the rules of the
22 administrative bodies that I am before. This administrative
23 body said "this is not an issue" at that hearing. Once they
24 have ruled that way I don't continue to raise questions that
25 they are not going to entertain.

sb 20

1 DR. JOHNSON: All right. But with regard to the
2 findings, now, I have not read the findings recently, but
3 apparently the Applicant proposed findings relative to the
4 Biehler testimony. Now, did you object at that time, or make
5 any noise about the fact that here they were proposing findings
6 on an issue that wasn't in the case?

7 MR. WHARTON: No, I did not. I don't recall if they
8 did make findings regarding that. The findings themselves
9 don't go to objecting to legal issues. The findings are what
10 we want the Board to find on the factual issues. I don't think
11 it is the context to object to them raising these particular
12 issues. We didn't raise them.

13 DR. JOHNSON: Rather than objecting, though, obviously
14 if we accept what Mr. Pigott said with regard to the timing
15 or the scheduling of findings, you had an opportunity to re-
16 view the Applicant's findings prior to proposing yours. If
17 they spread stuff about the Biehler testimony in their findings,
18 would you still have, as an attorney, considered that that
19 issue was foreclosed and you couldn't talk about it, even
20 though the applicant, your opponent, was talking about it?

21 MR. WHARTON: Yes, I would. The Applicant doesn't
22 rule the hearing.

23 DR. JOHNSON: No, I realize. But here is the Appli-
24 cant taking what would seem to me to be unfair advantage of
25 you. You either ought to use the issue yourself, or wave a

sb 21

1 flag about what they are doing.

2 MR. WHARTON: Maybe I just got used to it.

3 MR. EILPERIN: Presumably you could have addressed
4 the Board by either moving to strike those proposed findings
5 or commenting on the proposed findings as irrelevant because
6 the Board had ruled the issue out. It doesn't defend your
7 client to say "I got used to erroneous rulings from the Board,
8 so I rolled up and played dead."

9 MR. WHARTON: Mr. Chairman, I apologize for what
10 was a facetious comment. The point is first of all I don't
11 recall whether the Applicants did submit extensive findings
12 of fact regarding the Cristianitos fault. I don't recall that
13 they did. If they have, I am sure they can have copies here
14 and they can present them. I don't recall that. With present-
15 ing the findings of fact in the time that we have to present
16 the findings of fact, we go directly to our best case.

17 MR. EILPERIN: Do you have anything further to say
18 on Applicant's critique of Mr. Legg's focal mechanism study
19 that, as I understand the Applicant's position, they are
20 essentially saying that the study was virtually useless because
21 it posited a focal mechanism which could have been consistent
22 with any sort or stress-strain relationship in the region?

23 MR. WHARTON: Mr. Chairman, I must confess to a
24 weakness on a full understanding of the concept of focal mechan-
25 ism. My understanding of Mr. Legg's testimony is that he is

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1 qualified to testify regarding focal mechanisms, and that
2 his testimony was that his understanding and his review
3 indicated that the Cristianitos fault was favorably oriented
4 for the earthquakes that occurred.

5 MR. EILPERIN: But isn't that a very, very critical
6 issue in this case?

7 MR. WHARTON: Yes, it is. And again, that critical
8 issue was not decided by anyone.

9 MR. EILPERIN: Well, but there is testimony in the
10 record dealing with whether the focal mechanisms of that
11 earthquake are consistent with placing those 1975 events on
12 the Cristianitos fault.

13 MR. WHARTON: That is correct.

14 MR. EILPERIN: And that seems to me to be very
15 very important testimony.

16 MR. WHARTON: That is correct, and it is unresolved;
17 isn't it?

18 MR. EILPERIN: Well, what I heard you say, you said
19 you could not give this Board any further guidance on the issue
20 because you really are not up on that testimony.

21 MR. WHARTON: Mr. Chairman, I can't come in here
22 and be expert on every piece of expert opinion that goes into
23 the testimony.

24 At the time of preparing findings of fact, when I
25 put those together, I can have my experts around, and we can

sb 23

1 sit down and write out what the findings of fact are and argue
2 that. We are talking now about a very, very technical term
3 that I dealt with a year and a half ago. I can't recall all
4 of the testimony regarding that.

5 MR. EILPERIN: Okay, well, we will definitely read
6 it all.

7 MR. WHARTON: Mr. Chairman, I have nothing further
8 regarding the Cristianitos fault, because of the time limitation,
9 the oral argument was based primarily on Cristianitos fault.
10 Of course there are other issues, many other issues involved
11 here. If you have any questions, or some particular area you
12 would like me to discuss, I would be glad to. Otherwise, I
13 will conclude my oral argument.

14 DR. JOHNSON: Just one minute, please.

15 I have an entirely different subject I would like
16 to explore with you very briefly regarding the Frazier theoret-
17 ical model of earthquake and the factor of two multiplier to
18 account for error in his model. Are you tracking me right now?

19 MR. WHARTON: Yes, that was ACRS?

20 DR. JOHNSON: Right. Actually, are you not repeating
21 a mischaracterization? The panel of four experts referred to
22 in the SER were in fact experts employed by the NRC staff,
23 rather than the ACRS, the panel of which Dr. Luco was a member.
24 I realize that Dr. Luco has served as an ACRS consultant.
25 However, in this particular proceeding, Dr. Luco and three other

sb 24

1 gentlemen were a panel convened by the NRC staff to review the
2 seismic-- or at least to review the Frazier model. I believe
3 even Dr. Luco says that.

4 MR. WHARTON: That could be.

5 DR. JOHNSON: It is irrelevant to my question.

6 Dr. Frazier's calculations for San Onofre result in
7 a peak ground acceleration of .31G and a spectrum of ground
8 motion, a typical response spectrum anchored at .31G at the
9 high frequency end. He also has a one standard deviation
10 peak ground acceleration of .37G. These are all numbers
11 directly out of your brief. I don't think I am springing
12 anything on you simply from my memory.

13 And you say in your brief that the factor of two
14 should multiply the .37G number to come with a .74G character-
15 istic of a conservative estimate of the motion at San Onofre
16 resulting from the off-shore zone information. Do you recall
17 all that?

18 MR. WHARTON: Yes. I believe that is citing Dr.
19 Reiter's testimony.

20 DR. JOHNSON: No, what you cite from Dr. Reiter is
21 you ask Dr. Reiter, if you multiply .37 by 2 does it come up
22 to .74. And Dr. Reiter properly came up with the right answer.

23 But that is where you and I disagree, or we fall
24 out. The .37G is in fact one standard deviation quoted by
25 Frazier as a result of his modeling.

sb 25

1 MR. WHARTON: That is right.

2 DR. JOHNSON: But his mean value is .31G.

3 MR. WHARTON: Right.

4 DR. JOHNSON: Now the panel of seismic experts said
5 that in order to account for uncertainties of standard deviation,
6 we really ought to multiply the Frazier model by a factor of
7 two. And I think Dr. Luco said this at the hearing, and the
8 panel apparently -- or at least three of the four panel members
9 said that, and that was referred to in the SER by the staff.

10 What basis would anyone have for multiplying the .37G
11 number by a factor of two? In other words, .37 is Dr.
12 Frazier's estimate of the mean plus one standard deviation on
13 his results. The factor of two is what the panel of NRC experts
14 estimates is the standard deviation of his result. So it sounds
15 like to me that your multiplication of two times .37 is doubling
16 the estimate of error. And I am not sure of any witness that
17 would have done that. And I think Dr. Reiter objected to your
18 having him perform the exercise, in fact.

19 Do you have any basis for saying "What you really
20 ought to do is multiply the mean plus one standard deviation
21 by two to get a conservative number"?

22 MR. WHARTON: The uncertainty you have here is --
23 it could be that there is a confusion as to what the ACRS panel
24 was referring to. My understanding was that he came up with
25 .31G of standard deviation .37G. And my understanding was that

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1 the three members of the ACRS panel said that those two
2 figures -- now the question is which one did they think is
3 insufficient by a matter of two? It is .31 or .37? Quite
4 frankly I don't know, and it is not clear from the evidence.

5 DR. JOHNSON: You continue to refer to an ACRS panel.

6 MR. WHARTON: I am sorry. I was referring to --

7 DR. JOHNSON: The same group that I am talking about?

8 MR. WHARTON: Yes, the same group.

9 DR. JOHNSON: Thank you very much, that is all I had.

10 MR. EILPERIN: Thank you, Mr. Wharton. Your argument
11 is submitted.

12 We will take a 15-minute break, and reconvene at 20
13 of 12:00 for the argument on emergency planning issues.

14 Off the record.

15 (Recess.)

16 MR. EILPERIN: On the record. We will turn to argu-
17 ment on emergency planning issues. If my recollection is correct,
18 Mr. McClung, you reserved half an hour for your side of the
19 Argument.

20 MR. MC CLUNG: That is correct.

21 ORAL ARGUMENT OF CHARLES MC CLUNG ON BEHALF OF INTERVENOR,
22 FRIENDS OF THE EARTH, et al.

23 MR. MC CLUNG: Good morning, Your Honors, it is nice
24 to see you again. I think I will be taking approximately 25
25 minutes to answer your questions and to present my case. And

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1 I would like to reserve approximately five minutes to tie up
2 any loose ends that may still be remaining after the other
3 side has presented their argument.

4 MR. EILPERIN: I should say, before you begin your
5 argument, that at least as to one of the issues covered in the
6 briefs about medical arrangements and the meaning of contamin-
7 ated individual, that that issue has been taken up by the
8 Commission. So you needn't address it today. I am sure you
9 will have an opportunity to address that to the Commission,
10 and they will be deciding it.

11 MR. MC CLUNG: Thank you. Your Honor. I was going
12 to briefly preface my remarks by telling you what I was going
13 to talk about. And I will not be talking about that issue at
14 all this morning. I will not also be referring to the other
15 issues that we discussed on the application for a stay.

16 Instead I will be turning to the other issues which
17 I brought up in my brief which have been discussed before you
18 relating to the FEMA due process arguments and the standard
19 of adequacy arguments. And I will be taking up the FEMA argu-
20 ment first.

21 The first point I would like to make is my issue with
22 the ex parte communications between the Applicant and the people
23 at FEMA is directly tied to the second part of my argument
24 relating to their admission of testimony at the end of the
25 hearing to rebut the earlier findings.

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1 Now the reason these things are tied together is
2 I think if you don't let me talk to FEMA, during those
3 periods of time when the Applicant is going in there and
4 presenting their fixes, so to speak, of the original FEMA
5 findings, I think it is then unfair to allow FEMA, after
6 all this prejudicial information, albeit relevant information,
7 and whatever else transpired at these ex parte meetings, to allow
8 that to influence that representative, and then to have that
9 representative come in and give evidence saying "Don't worry
10 about my findings. Don't worry about the previous stuff.
11 The Applicants are working on this. I know they are working
12 on it because I have talked to them a whole bunch of times."

13 MR. EILPERIN: Let me ask you this: Who didn't let
14 you talk to FEMA? FEMA is a government agency. It is my
15 understanding that citizens can talk to government agencies.

16 MR. MC CLUNG: That is correct, Your Honor. And we
17 have made Freedom of Information Act requests with them.
18 We have discussed the issues generally with them at the hearings.
19 And we have received certain correspondence. But let me focus
20 on the point of what I am trying to say. And I think a
21 factual incident will help.

22 We had discovery of FEMA, in this case. We had an
23 informal discovery session which the Board ordered and we agreed
24 to, which the Chairman of the Board was present during part
25 of, during the month of July, about a month after the interim

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1 findings of June 3rd were issued, to discuss those findings.
2 We attended. We asked questions. We said "What is going to
3 be done?" We were satisfied that we had complete discovery
4 at that time of everything that FEMA -- all the contacts that
5 they had had up until that time. We were satisfied. We were
6 ready to go to trial.

7 MR. EILPERIN: Who did you talk to who represented
8 FEMA?

9 MR. MC CLUNG: Mr. Ken Nauman, the same person that
10 was a witness. I believe Mr. Sanguina was also there. All
11 the attorneys for the Applicant and the NRC were there, and
12 the chairman, as I said, of the Hearing Board was also there.
13 It was an informal discovery session, it was not subject to
14 transcript or anything like that. But we did get to air our
15 questions at that time.

16 Now, the reason I bring it up is we left that meeting.
17 Right after that meeting the meeting was reconvened as a
18 strategy session on how to take care of the problems, how to
19 fix the old interim findings of June 3rd. Out of that meeting
20 arose the document which is Applicant's Exhibit 144, which is
21 a letter from the Applicants.

22 MR. EILPERIN: Let me interrupt for a second. When
23 did you find out there was a later meeting without your par-
24 ticipation?

25 MR. MC CLUNG: We found that out, and we knew about

sb 30 1 it on the first day of the hearing. We found it out in a
2 submittal which was made pursuant to, I believe -- let me
3 answer that two ways, because I am not sure exactly when I
4 first learned about it. I think I learned about it in a
5 motion, the motion for low power, to have a low-power license,
6 in which some of this information was addressed. I am not
7 positive. The second place that it was confirmed to me was
8 in the letter when it was preferred, Applicant's Exhibit 144,
9 where the meeting is set forth and discussed in that letter.

10 But be that as it may, I knew about it the first
11 day of the hearing.

12 MR. EILPERIN: Are you contending that there is
13 anything wrong or illegal with one of the parties talking to
14 FEMA without all of the parties being present?

15 MR. MC CLUNG: I have two points to make on that.
16 The first is the weaker argument, stronger point, which is
17 I think it is illegal. I think that it has never been decided.
18 But I think that the FEMA witness should be treated as --
19 and FEMA people in Washington, D.C. should be treated as
20 employees or agents of the Licensing Board, and therefore fall
21 within the strictures of the ex parte rule.

22 MR. EILPERIN: Let's back up a second. If Mr. Nauman
23 or anyone else from FEMA was just an ordinary witness, you are
24 not contending that before any party talks with a perspective
25 witness that all of the parties have to be present to interview

sb 31
1 that witness?

2 MR. MC CLUNG: No, of course not.

3 MR. EILPERIN: So what you are saying is that there
4 is something special about the FEMA witness which prevents
5 one side, if you will, from talking to him without the other
6 side being present; is that correct?

7 MR. MC CLUNG: That is correct. All right, and that
8 special character is provided in the Memorandum of Understanding
9 whereby FEMA is entrusted, it is a delagation of authority,
10 if you will, by the NRC to investigate and take care of and
11 research the adequacy of the off-site jurisdiction's plans.
12 The NRC doesn't do it. It is not part of what they do. And
13 after FEMA takes a look at the plans, pursuant to that Memor-
14 andum of Understanding, they are to provide findings to help
15 the Licensing Board make a determination whether the health
16 and safety of the public is going to be protected by the state
17 of those plans.

18 Now those findings that the FEMA body makes become
19 rebuttable presumptions. And whether we quibble over the
20 effect of them, they become very powerful and persuasive
21 evidence in the licensing hearing.

22 The evidence that was put on by Mr. Nauman when he
23 was just a witness, as you point out, was not objected to.
24 I did not object to him coming and testifying as to his
25 knowledge or state of the plans. What I objected to was his

sb 32
1 testimony that the FEMA findings were no longer to be given
2 effect based on his knowledge of the work that was being done.

3 MR. EILPERIN: This seem to me as if you are sliding
4 into a second point now.

5 MR. MC CLUNG: Yes, there are two points.

6 DR. JOHNSON: May I ask a couple of questions?

7 Oh, go ahead.

8 MR. EILPERIN: I am just still trying to understand
9 why it is that FEMA should be treated as some kind of very,
10 very special witness. I mean, they were subject to cross-
11 examination. The Licensing Board isn't subject to cross-exam-
12 ination. The exparte rule that you referred to earlier deals
13 with decision making. One side is not supposed to get the ear
14 of the decision maker without the other side being present.

15 FEMA is not up here at this table. FEMA was not up
16 at the dias at the Licensing Board hearing. It is just not
17 a decision maker. It presents an evaluation which does in
18 fact carry some weight. But that doesn't give it conclusive
19 weight and it doesn't call the shots.

20 DR. JOHNSON: May I amplify on that question/statement?

21 MR. EILPERIN: Go ahead.

22 DR. JOHNSON: And that is in what respect to FEMA
23 representatives differ from repretatives of, say, the U.S.
24 Geological Survey who are called upon in cases particularly
25 like this to offer evaluations and whose evaluations the staff

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1 rely on very, very heavily, and yet they are not accorded
2 any special treatment in terms of exparte communications and
3 things like that? As an example of what the Chairman was
4 referring to.

5 One other thing, too. Your earlier statement about
6 reconvening the meeting after you left, I think you said the
7 chairman of the licensing Board was present during your meeting?

8 MR. MC CLUNG: Right.

9 DR. JOHNSON: You do not imply that the Chairman of
10 the Licensing Board was a party to the reconvened meeting, do
11 you?

12 MR. MC CLUNG: No, I do not wish to state that.
13 And I also do not wish to state as a matter of my absolute
14 certainty that that meeting took place immediately following
15 that meeting. It was either that day in another location,
16 or sometime right around that time.

17 DR. GOTCHY: I have two questions too.

18 MR. EILPERIN: Let Mr. Mc Clung answer what he has
19 been asked.

20 DR. GOTCHY: Well, they are all related.

21 MR. MC CLUNG: Let me just start. And then feel
22 free to interrupt me, Your Honor, if necessary.

23 Addressing what makes them different, I am turning
24 to 2.780 and the part of that section of the regulations which
25 says that not the Board itself, but you should not have

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1 contact with the people who advised the Board in making its
2 decision. Now, how does this group distinguish itself from
3 some other expert body who is also advising the Board?

4 In this case the Board and the NRC staff do not
5 make an independent investigation of this issue. Actually the
6 FEMA body itself has been delegated the responsibility to look
7 into this issue. And they are the only people that look into
8 this issue.

9 Now, if you look at the Memorandum of Understandings
10 and the regulations, it says that, especially as currently
11 the redrafted regulation, it says FEMA, please look at the
12 plans and give me a finding.

13 MR. EILPERIN: Let me interrupt for a second. The
14 gist of the rule against ex parte communications is that the
15 case should be decided on the record that is made. There
16 should not be one party who has the special ear of the
17 decision maker and uses that special ear to take advantage
18 and to have the Board decide on a case, decide the case on
19 something which is not in the record, not a matter of evidence.

20 Now the problem I have with your position is that
21 FEMA does present testimony. FEMA is subject to cross-examin-
22 ation. There is no contention, there is no claim that somehow
23 the Licensing Board which is the decision maker here, and we,
24 the Appeal Board, are being influenced by something that FEMA
25 has to say which you don't get a crack at disputing through

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1 cross-examining the FEMA witness. That seems to be the gist
2 of the ex parte rule, that there is a basic difference between
3 a witness who is obliged to present evidence of an adjudicatory
4 hearing and someone coming outside the circle of that adjudica-
5 tory hearing and whispering in the ear of the decision maker.

6 MR. MC CLUNG: Okay. I think that is a good point.
7 I will give you another factual example to try to help what
8 my point is on this. There was a meeting that was held around
9 June 10th in Washington, D.C. at which Mr. Nauman, I don't know
10 if he was present or not, but the director of the Emergency
11 Management Agency was present, as were officials from the
12 Applicant. And at that meeting the findings of the June 3rd
13 exercise and evaluation were brought up, and how to satisfy
14 those findings.

15 MR. EILPERIN: What is the matter with that?

16 MR. MC CLUNG: Those people aren't subject to cross-
17 examination

18 MR. EILPERIN: But the findings as to what will,
19 in fact, satisfy the deficiencies that FEMA found, what they
20 happen to have said at a meeting doesn't carry any weight.
21 It is only whatever testimony that is given by FEMA at that
22 hearing. That is the only thing that is going to carry weight
23 on that point. And that is subject to cross-examination.

24 MR. MC CLUNG: I believe that the first findings
25 that they issue, the formal findings should carry a great deal

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1 of weight. I think that there can be testimony put in the
2 record, and much of it is in the record, put in by the Applicants
3 about what they are doing after those findings.

4 What I am objecting to is without my participation
5 in the process having a new set of findings put in without any
6 ability of me to cross-examine the people that are making those
7 findings.

8 MR. EILPERIN: Where are those new findings? You
9 have a FEMA witness, Mr. Nauman, who is testifying about what
10 he thinks will suffice to satisfy him. And the record is a
11 little unclear about whether it also deals with what will suf-
12 fice to satisfy FEMA nationally. But certainly as to what is
13 going to satisfy Mr. Nauman, it seems to me he is there and
14 he is testifying, and you have a right and an opportunity to
15 cross-examine him about why it is that the Applicant's plan
16 should or should not satisfy you.

17 MR. MC CLUNG: And I don't have any problem with
18 that evidence. And I don't have any problem with that. We
19 did cross-examine him extensively.

20 But there was another piece of evidence, Your Honor,
21 that was referred to my brief, and it is referred to at around
22 page 75 of my slip opinion in the Licensing Board opinion which
23 says isn't it true that the FEMA people in Washington will agree
24 that everything will be okay if and as long as the applicant
25 does everything that is contained in essentially their Exhibit

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1 144, which is the letter that I referred to. And it is that
2 piece of evidence which I was not able to cross-examine anybody
3 in FEMA which I take to be something that was unfairly put
4 into that hearing and extremely prejudicial as set forth
5 in the Licensing Board's decision, giving it tremendous weight.

6 At the time when the Licensing Board allowed it to
7 come in the chairman stated in the record at that point that
8 it wasn't going to have very much weight, that it would be
9 fairly meaningless because it was tautological. But when he
10 got into writing the opinion, when the Board wrote its actual
11 opinion, it rejected the fact that it was tautological, which
12 Mr. Nauman said it was essentially when I cross-examined him,
13 except as a statement of official policy from FEMA to rebut
14 its own findings. And that to me is a major mistake.

15 MR. EILPERIN: Are you saying that he wasn't author-
16 ized to speak for the national office? Or are you saying that
17 is essentially hearsay evidence which should not be admitted?

18 MR. MC CLUNG: He was definitely authorized, that
19 is transcript evidence on to that effect. I did object also
20 on the grounds of hearsay, yes.

21 MR. EILPERIN: So essentially what it comes down to,
22 then, it seems to me, what you are arguing is that Mr. Nauman's
23 testimony about what will or will not satisfy FEMA nationally
24 in terms of the Applicant's plan to fix up emergency planning,
25 that piece of testimony is hearsay evidence. It is the

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1 testimony of someone who is not subject to cross-examination,
2 and it is being submitted for the truth of the statement.

3 MR. MC CLUNG: That is one of the arguments, yes.

4 MR. EILPERIN: What more is there?

5 MR. MC CLUNG: My reading of the Memorandum of
6 Understanding indicates that the FEMA witness can come and
7 testify as to the nature and state of the ongoing plans, that
8 FEMA will also have findings which the NRC Board will use as
9 a rebuttable presumption. But this piece of evidence is a
10 hybrid between those two. And it is hearsay. And I objected
11 on that ground. But I also say that it is not the type of
12 evidence that is competent under the Memorandum of Understanding.
13 It has either got to be a finding, or it has got to be testimony.
14 But it can't be a fake piece of finding testimony -- pardon
15 the word "fake" -- it can't be an inbetween, but it is the
16 same point.

17 MR. EILPERIN: Okay, but by saying it either has to
18 be a finding or testimony, the reason you are unhappy about
19 it's not being testimony is because essentially it is your
20 position, I gather, that it violates the hearsay rule. If
21 someone from Washington, D.C. of FEMA had come down and testi-
22 fied, what would have been your problem?

23 MR. MC CLUNG: My problem would have been that that
24 was not a finding. If they could issue a finding in writing
25 and submit it to me with some kind of statement that this was

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1 an updated finding, I wouldn't be able to object on the grounds
2 of hearsay. But I would be objecting on the ground -- the
3 second ground that I haven't gotten into, which takes the
4 ex parte rule by analogy and says that because I made a motion
5 on the first day of the hearing to please give me notice of
6 these meetings with FEMA, and I think that we should have
7 notice -- I said at that time, in the record, that I would
8 object to a further finding of FEMA without some sort of
9 input into that decision-making process.

10 The Memorandum of Understanding does not contemplate
11 FEMA essentially rebutting their own finding with a later
12 finding.

13 MR. EILPERIN: Well, now, wait. Are you saying that
14 the structure of things is such that if FEMA makes some sort
15 of preliminary finding or interim finding, or what-have-you,
16 and evaluates the state of off-site preparedness, emergency
17 preparedness, that that is then frozen -- how can we get past,
18 how can the Licensing Board or the Nuclear Regulatory Commission
19 generally get past the point in time of the first evaluation?
20 What sense does it make to say that -- it seems to me that
21 your position then seems to imply that there just shouldn't
22 be any FEMA testimony at all. It is just -- here is a
23 finding, and you can't have anyone from FEMA talk about what
24 is going on in response to that finding in the hearing. Am
25 I mistaken?

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1 MR. MC CLUNG: No, I think that you can have FEMA
2 testimony as an expert like any NRC expert would testify as
3 to other safety matters. But I don't think that the testimony
4 can actually create a new set of findings.

5 MR. EILPERIN: It doesn't create a new set of
6 findings. But it seems to me that it goes to the legitimate
7 questions of here are some deficiencies. The question, then,
8 is what is being done about these deficiencies and what does
9 FEMA think those fixes, if you will, what effect those fixes
10 are going to have. It doesn't seem to me wrong or illegal
11 or strange that someone should be able to say, okay, there were
12 these deficiencies pointed out. Let me tell you what is going
13 on to fix them. And here is a witness who is going to testify
14 about it, his preliminary evaluations so far, about what he
15 thinks of these fixes. What is wrong with that?

16 MR. MC CLUNG: Nothing is wrong with that, Your Honor.
17 That part I didn't object to. The preliminary evaluation of
18 the testimony of the expert, Ken Nauman, has not been objected
19 to.

20 MR. EILPERIN: So the part that you are objecting
21 about is not -- what is the part you are objecting about?

22 MR. MC CLUNG: Once again, it is referred to -- Mr.
23 Nauman submitted testimony in a confusing manner with several
24 different pieces of evidence. I am objecting to two of those
25 pieces of prepared testimony which purport to state a new FEMA

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1 national view, which is to the effect that if the Applicants do
2 what they said in their Exhibit Number 144 everything will be
3 all right, and please ignore all our previous stuff. I object
4 to that piece of evidence only. I don't object to all his
5 pre-filed written testimony relating to the issues, because
6 it doesn't hurt me. It helps me. Everything he said in his
7 cross-examination bolstered the FEMA findings, the earlier ones.

8 MR. EILPERIN: So essentially, if I understand you,
9 then, your position is that that one-paragraph FEMA letter that
10 was introduced through Nauman cannot be taken as a FEMA finding?

11 MR. MC CLUNG: Incorporated into a FEMA finding, yes.

12 MR. EILPERIN: What the Board should look at are the
13 first findings that were made, and Mr. Nauman's testimony,
14 the Applicant's testimony about what fixes are going made,
15 and Mr. Nauman's testimony about what he as opposed to FEMA
16 in Washington thinks about that.

17 MR. MC CLUNG: That is correct. I think it is
18 important that the status of FEMA in these hearings be made
19 more clear. It was unclear at the beginning and all the way
20 through this thing whether they were an agent of the staff,
21 whether they were just another witness like the Geological
22 Survey, or whether their testimony and their findings carried
23 more weight. I think, in fact, a review of Mr. Kelly's opinion
24 shows that they did carry substantial weight in this proceeding.

25 I would like to briefly touch on --

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1 DR. GOTCHY: I just have a quick question. I am not
2 an attorney, but you talked about the Memorandum of Understand-
3 ing somehow as implying that the FEMA witnesses were agents
4 of the NRC. But there was, I believe, an executive order which
5 created the FEMA responsibility to do the kinds of things they
6 do. I mean, they carry on all these reviews of emergency plans
7 around the country and prepare findings on them. It seems to
8 me that rather than being an agent of the staff, they are an
9 agent of Congress, which is what the NRC is.

10 MR. MC CLUNG: I agree with you. I agree with you,
11 but I think they can be both. Don't you agree that they can
12 be the same, they can be both those? They are obviously an
13 independent agency, and they do lots of things outside the
14 scope of the Nuclear Regulatory Commission hearings, and most
15 of their work is directed towards other kinds of emergencies
16 not related to nuclear power plants.

17 But for this purpose in this hearing, in the Licens-
18 ing Board hearings, their work has been adopted by the Memorandum
19 of Understanding as an agency-type roll.

20 DR. GOTCHY: Well, there certainly is a regulation
21 which requires that the Commission accept their findings as
22 rebuttable presumptions. But I don't see how that makes them
23 an agent of the NRC.

24 MR. MC CLUNG: Okay, I will explain, just briefly.
25 The NRC has a duty to determine whether or not the licensing

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1 of a nuclear plant is going to be inimical to the health and
2 safety of the population surrounding that. One of the things
3 that they have been told to do by the NRC Appropriations Act
4 in 1980 and by the regulations is check out the emergency
5 planning. And there is regulations 50.47, 1 through 16.

6 The NRC, in its staff mode, does not look at those
7 things at all. They have asked FEMA to please look at those
8 things with respect to the outside jurisdiction's plans and
9 make sure they are there. "We will look at the licensee, you
10 look at the off-site. Bring us your evidence, bring us your
11 findings. We will take a look at them. If they look all right
12 to us, we will adopt those findings." So for the purposes of
13 those regulations, this very narrow part of the law, of the
14 emergency planning of off-site surrounding the nuclear plants
15 the NRC has delegated their responsibility to look at those
16 things. They still reserve the overall review. They haven't
17 said "Your decision is the only decision." They do review.
18 That is what we are doing here, today.

19 DR. GOTCHY: But has the NRC really delegated that,
20 or did Congress delegate that by the executive order which
21 created that responsibility for FEMA?

22 MR. MC CLUNG: I think that the President did, by
23 that executive order. I am not disputing that.

24 MR. EILPERIN: Let me ask you this question. What
25 is your problem if what Mr. Nauman's testimony means is that

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1 here are the deficiencies that were found. Here is the
2 Applicant's plan about how the off-site jurisdictions are
3 meeting them. I think that that will satisfy me, and I expect
4 that it will satisfy the national organization because usually
5 what satisfies me satisfies them.

6 MR. MC CLUNG: That is not the record.

7 MR. EILPERIN: You are saying here is that "That
8 satisfies me, and here is a letter which says it will satisfy
9 them"?

10 MR. MC CLUNG: It is not the record that he said
11 "That satisfies me."

12 MR. EILPERIN: He expressed no view from the regional
13 viewpoint about whether or not those deficiencies would be
14 cured by what was going on?

15 MR. MC CLUNG: I do not recall that being done. If
16 it was done it was probably done in an inferential manner,
17 in a reverse negative, saying that the national view wouldn't
18 have that view if I hadn't. But I don't recall that being part
19 of the record.

20 Just let me turn briefly to the other aspect of my
21 brief, which I think may be also unclear to you. That is my
22 quibble with the standard of adequacy with respect to the
23 school children, the homebound-type people, and the handicapped.

24 What I mean there, when I say that there lacks a
25 standard of adequacy is that there should be more, in my opinion,

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1 under the regulations than just saying that buses exist.
2 To give you an example, for evacuation of the school children,
3 the record indicates that there are 200 buses within South
4 Orange Country that are a part of the Orange County Transit
5 District. The mere fact that there exists 200 buses that are
6 part of the Orange County Transit District does not show that
7 there is any feasible way that those buses will be used to
8 actually help the school children or the handicapped people
9 in the event of an emergency.

10 Why do I say that? The only plan in the record
11 relating to the use of those buses is an appendice to the
12 Orange County plan, which is a one-page document, which was
13 in existence prior to any of the NRC licensing. It is a general
14 document related to the emergency requisition of buses. And
15 it is usually for one bus. You know, there is a fire in the
16 hills. There are some people that need to be evacuated. Can
17 we get one bus up there. The Orange Country Transit System
18 can be called upon in the event of an emergency. And they
19 recognize that. The drivers recognize that. Jan Goodwin, the
20 chairperson of the union came and testified that there is no
21 other plan besides that particular plan for general-type emergen-
22 cies for maybe one bus. And they practice maybe once a year
23 taking one bus to do something. But there is no general plan
24 for the requisitioning in place. Nor do the drivers know any-
25 thing about a massive evacuation envisioned, say, the first

sb
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1 five miles requiring, say, from 50 to 100 buses, maybe more.
2 There is no recorded demonstration that the people can actually
3 be moved. There is a record demonstration that there are buses.
4 And we don't --

5 MR. EILPERIN: That there are buses sufficient to
6 move the number of people who would be involved.

7 MR. MC CLUNG: If they somehow got there. They
8 could be filled with people, and there is enough buses. But
9 there has to be some kind of showing.

10 Now, I am grateful to the NRC for helping me with
11 this. Because I can clarify what I mean by adequacy. It is
12 the point that was made out by Mr. Chandler at the last hearing
13 when we were talking about the medical stuff. He says there
14 is a difference between planning and pre planning. You remember
15 that. He came up and said "If we can identify that there is
16 a bunch of hospitals, that is all that is required." And that
17 is essentially what they are doing here. They are saying
18 "Pre planning is what we have got for seniors and handicaps.
19 We have identified the fact that there are buses. We have
20 identified the fact that there are drivers, that there are
21 helicopters, if you will." But there is not planning. There
22 is no demonstration in the record that those people can actually
23 do the job.

24 Now you can cite Mr. Brothers' testimony. He is the
25 expert on behalf of the Applicants who was working on the

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1 time estimates. His time estimates assume that the buses come.
2 But somehow we have got to get from point A to point B.

3 MR. EILPERIN: Is your point that there is no plan
4 about how to get the bus drivers in to man the buses in a
5 nuclear accident? Is that essentially what it comes down to?
6 I mean, the buses are there. The buses are sufficient to
7 carry the number of people who are going to be there. And
8 we know where the schools are. So the question is how do you
9 get the buses to those schools. And presumably they go to
10 those school every day to deliver the kids --

11 MR. MC CLUNG: No, no, these aren't school buses,
12 Your Honor. These are Orange Country Transit District buses.
13 The school buses are insufficient, and they don't all go to
14 the same schools down there.

15 MR. EILPERIN: Okay, I stand corrected. So then the
16 question is how do we get those bus drivers to go to those
17 schools?

18 MR. MC CLUNG: Yes. And I think it involves more
19 than just saying that the buses exist. Because somebody that
20 is driving a bus, has never heard of this, and all of a sudden
21 the beeper goes off on his little thing, or the phone goes off,
22 and the dispatcher says "Please drop off all your passengers
23 and proceed to Camino de Austraiia in San Clemente."

24 He goes, "I have never been to San Clemente. I don't
25 know what you are talking about."

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1 She says, "Well, go to the school there. It is an
2 evacuation for an emergnecy."

3 There is nothing, absolutely nothing. Not only is
4 it not on the record, but the record shows that there isn't
5 any planning of that type.

6 And the same point can be made for the homebound.
7 All we have in the record the fact that certain ambulance
8 company exist, and that these ambulance company's facilities
9 can be requisitioned by the State authorities and by the County
10 authorities in the even of an emergency. There needs to be
11 more than just the identification of the pre planning. There
12 needs to be an actual plan, if you will, for how the people
13 that are homebound would be taken away from the emergency plan-
14 ning zone. There needs to be some kind of pre contact made
15 with those ambulance facilities saying, "Hey, we have got to
16 have a little agreement. In case there is a radiological
17 emergency, let's have a little SOP here, and figure out what
18 we are going to do. Let's get together, let's meet. Let's not
19 wait for the day of the emergency and then say, 'hey, I have
20 got a list of numbers from the phone book of ambulance com-
21 panies.'"

22 What I am saying is there has to be a standard of
23 adequacy applied which demonstrates more than just pre planning.
24 There has to be actual planning.

25 Mr. Chairman, how am I doing on my time?

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1 MR. EILPERIN: I think you are over, but we have
2 interrupted you with questions. So if you have some other
3 things you want to cover, why don't you go ahead.

4 MR. MC CLUNG: Briefly I wanted to say that this is
5 the same point that we made with respect to the sirens. I
6 think that all we have got in the sirens, both in the extended
7 EPZ and the notification for boaters in the ocean-going EPZ,
8 if you will, is pre planning. We know that helicopters
9 exist. We don't even know how many helicopters exist. We
10 know that one boat exists, and the fact that the Coast Guard
11 exists. But we don't have anything in the record, and there
12 isn't anything in fact that ties those things together so that
13 the people can actually be notified and actually be protected
14 in the event of an emergency.

15 MR. EILPERIN: So would you like the license condition
16 to impose a condition that prior to San Onofre staying a full
17 power there has to be a plan in existence covering these things?

18 MR. MC CLUNG: That is exactly correct, Your Honor.

19 MR. EILPERIN: Do you think there has to be a further
20 evidentiary hearing on whether such a plan is adequate? Or
21 what?

22 MR. MC CLUNG: I don't think an evidentiary hearing
23 is required. I think that this matter could be submitted on
24 the basis of written findings that we could comment on. If
25 we saw the need at that point to have additional hearings, we

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1 could make a motion as provided in the regulations. It is
2 possible that the upcoming hearing could address these issues,
3 though, if the facts have changed since the time of our
4 hearing was closed, since we are all going to be out here
5 anyway. Thank you.

6 MR. EILPERIN: Thank you, Mr. Mc Clung.

7 MR. Pigott:

8 ORAL ARGUMENT OF DAVID PIGOTT ON BEHALF OF APPLICANT,
9 SOUTHERN CALIFORNIA EDISON, et al.

10 MR. PIGOTT: Thank you, Mr. Chairman. Once again
11 I believe we will confine ourselves to responding to Intervenor's
12 arguments, and submit the other issues on the brief.

13 First of all, with respect to the use of FEMA findings
14 and our dealings with FEMA, at least as far as the Applicants
15 are concerned, we have never understood that we were under
16 any restriction with respect to discussing FEMA findings or
17 FEMA review of our plans at any level. We have always felt
18 that we were free to contact them to discuss relevant matters
19 concerning our emergency planning.

20 Our reading of the ex parte rule as set forth in
21 2.780 of the NRC's regulations would clearly not put such per-
22 sonnel within the ex parte rule.

23 MR. EILPERIN: What do you think was the gist of
24 Mr. Nauman's testimony?

25 MR. PIGOTT: Mr. Nauman's testimony?

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1 MR. EILPERIN: In terms of whether deficiencies
2 that had been noted and interim findings were being satisfied?

3 MR. PIGOTT: Mr. Nauman, first of all, testified
4 with respect to the findings of the May 15, 1981 exercise.
5 He then testified concerning the corrective actions that were
6 then under way. He was cross-examined on both aspects of that.
7 And he also put forward a national policy that if the corrective
8 actions that had been agreed upon were met, that FEMA would
9 find those to have met the level of the emergency planning
10 required.

11 MR. EILPERIN: Did he ever say what he thought about
12 the matter, or did he just purport to speak on behalf of
13 FEMA in Washington?

14 MR. PIGOTT: No, he did not speak on less-than-final
15 positions of FEMA national. He would speak to FEMA national
16 established positions and regional positions that were evolving,
17 and of which he had first-hand knowledge. But he did not --

18 MR. EILPERIN: I am not sure what that answer means.

19 MR. PIGOTT: Well, we had difficulty following Mr.
20 Nauman sometimes too.

21 MR. EILPERIN: No, in terms of -- you say he spoke
22 about the deficiencies and he spoke about what was being done
23 to correct them. Did he then state any opinion about whether he
24 thought those corrective actions would satisfy him?

25 MR. PIGOTT: Whether he came specifically out and

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1 said that I cannot recall. I would say that the corrective
2 actions were agreed upon by the region which he represented
3 as being the corrective actions necessary to bring emergency
4 planning up to their standard. So by looking at it that way,
5 that these were the agreed-upon actions to meet the FEMA
6 requirements, and since he was the one essentially that was
7 signing off on that for the region, I would have to conclude
8 that that in fact represented his position.

9 MR. EILPERIN: Why wouldn't any testimony that he
10 purported to give about a national position, whether he was
11 authorized or not to give it, why wouldn't any such testimony
12 be plain hearsay?

13 MR. PIGOTT: That probably would be hearsay. But
14 hearsay has been admissible before in these kinds of proceedings.

15 MR. EILPERIN: Why should it admissible? Are you
16 saying that the NRC administrative proceedings any hearsay
17 testimony should be admitted?

18 MR. PIGOTT: No, I certainly won't agree with that.

19 MR. EILPERIN: Any reliable hearsay evidence?

20 MR. PIGOTT: You are drawing the lines that we battle
21 over day-by-day in these hearings. Certainly there is a level
22 of hearsay that is reliable, probative, the kind of information
23 that reasonable men rely on, et cetera.

24 MR. EILPERIN: No, but let's take it as a given that
25 Mr. Nauman is an honest fellow, and if he says that this is

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53 1 going to satisfy FEMA in Washington, by God, it will satisfy
2 FEMA in Washington. The issue in Washington really isn't so
3 much did he utter correctly those words. The question is
4 how does Mr. McClung get behind that very, very general state-
5 ment without some witness from FEMA Washington coming in to
6 explain why he thinks that the corrections are okay with him?

7 MR. PIGOTT: First of all, he was authorized. And
8 to that extent I don't think it was hearsay that he put into
9 the record the testimony that the FEMA national position was
10 that if the corrections were made, that they as a policy matter
11 at least would satisfy FEMA national. I don't think that that
12 is a hearsay problem.

13 MR. EILPERIN: . The question is what weight should
14 be given to that, and does it really amount to anything if
15 Mr. McClung cannot find out why FEMA Washington should be
16 satisfied?

17 MR. PIGOTT: Then I have to look back at Mr. McClung's
18 activities to see whether or not he in effect attempted to
19 get that information. Did he attempt to subpoena a national
20 representative of FEMA? Did he send interrogatories?

21 MR. EILPERIN: How did he know that that testimony
22 would be presented prior to the day it was presented?

23 MR. PIGOTT: I think he was given full opportunity
24 to -- well, he was given a pretty full explanation of how the
25 system worked at what he has referred to as the informal

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1 discovery conference which was attended by all parties, and in
2 part by the Chairman of the Board. That was the purpose.
3 Because the findings had just come down. As I recall he was
4 given a list of names of people that he could either interview
5 or call for depositions from that would have got him back into
6 the machinery of FEMA.

7 MR. EILPERIN: So you are saying that all hearsay
8 testimony is admissible, and the burden of trying to counter
9 it falls upon the other side?

10 MR. PIGOTT: No, I am certainly not saying that at
11 all. I am saying that in this context that if Mr. McClung
12 had been -- Mr. McClung could have gone after national repre-
13 sentative if he was interested in finding out the background
14 of national positions.

15 MR. EILPERIN: I am not really sure that it is Mr.
16 McClung's burden to put on FEMA's case. Why can't Mr. McClung
17 sit back and say to himself, "I have got these interim findings
18 which say that things are in pretty lousy shape, and that
19 suits me just fine. I am not going to budge about what is
20 being done about it"?

21 MR. PIGOTT: He could. And so then the question
22 arises what kind of a case do we get. We would get a case
23 where we have the interim findings, we would have information
24 from the region concerning corrective actions. We would have
25 information concerning the status of those corrective actions.

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1 If we assume that the national letter was left out, then we
2 would have the Board in a position where it determines whether
3 or not the findings plus the corrective actions and all the
4 testimony that is brought together renders the overall plan
5 adequate. And I believe that responsibility still lies with
6 the Board and the NRC.

7 MR. EILPERIN: What is wrong with that? Say we
8 disregard the national letter, or at least we don't give it
9 any sort of special weight, and the record is left as to interim
10 findings and then testimony about what corrective actions are
11 being taken and testimony about what FEMA thinks on a regional
12 basis of those corrective actions.

13 MR. PIGOTT: I would think that would be an adequate
14 record for the Licensing Board of the trier of fact to deter-
15 mine whether or not there is in fact adequate planing has been
16 made and implemented.

17 MR. EILPERIN: Do you think the Licensing Board's
18 decision depended upon ~~the~~ the existence of that national
19 okay, if you will?

20 MR. PIGOTT: I would have to go back and reread it
21 with that excerpt taken out. So I can't really say, as I
22 stand here now, could not tell you what I think the decision
23 would read. I would think the record would certainly support
24 that kind of a finding, if, for instance, this Board in its
25 discretion determined to approach the question that way.

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1 MR. EILPERIN: Why don't we turn to Mr. McClung's
2 argument that the Orange County buses, the existence of the
3 Orange County buses does not give us assurance that they will
4 actually reach the school children.

5 MR. PIGOTT: Mr. McClung apparently is not contesting
6 that there are adequate buses, adequate facilities to move
7 people. I would just have to respond that in each of the
8 principle response agency plans, where it is relevant, there is
9 a particular component for the special populations.

10 There are plans, and the record reflects that the
11 Applicants are working with the people in, for instance, the
12 rest homes, the hospitals, surveys for the shut-in to determine
13 where they are and be in a position to provide that.

14 MR. EILPERIN: Let's get back to the school children.
15 Say I am Orange County bus driver, and I haven't been up to
16 San Clemente School District, that is not my normal route.
17 What does the record show about how those bus drivers are
18 going to find their way to the right schools?

19 MR. PIGOTT: The record will show that the first line
20 of evacuating those school children is their regular buses.

21 DR. GOTCHY: That is 55; right?

22 MR. PIGOTT: That is 55 buses, so you have a good
23 core of people. You also have to keep in mind the time
24 constraints that we are dealing with. It doesn't have to be
25 an instantaneous-kind of an air lift of every child in the area.

sb 57 1 So you have a core of 55 buses that are working known routes.
2 I think that you also find that a number of the buses of the
3 Orange County District are headquartered in the southern part
4 of the county. I would think bus drivers associated with
5 those buses would be fairly familiar with the area, plus --

6 DR. JOHNSON: Familiarity notwithstanding, familiarity
7 with the area, what about the statement of Mr. McClung that
8 these drivers, according to the union leader's testimony, that
9 the drivers are unaware that their buses might at some point
10 be utilized in an evacuation exercise, or an evacuation, period?
11 In other words, is that the state of the planning, that you are
12 counting on buses to move people, but the bus drivers don't
13 know that?

14 MR. PIGOTT: I don't think it is quite that blatant.
15 I think the situation is probably that the bus drivers know
16 that they are subject to being called upon for emergency
17 services. The Orange County Office of Emergency Services has
18 the power to, in effect, commandeer the bus system for any
19 kind of an emergency. So I would think --

20 DR. JOHNSON: That is a pretty empty statement in
21 my view, the fact that they have the power. Is the bus driver
22 aware of the sorts of things that they may be called upon to
23 do? Are there plans presented or training provided for bus
24 drivers? That is what I am saying.

25 MR. PIGOTT: I don't know what their particular

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1 level of training is. They do have the communications to the
2 bus drivers. And the planers have the routes and the
3 assembly points and the implementation of how they would use
4 those. I cannot state that the bus drivers of Orange County
5 know that they are subject to being called on for a San
6 Onofre evacuation. I just don't know that. But I do know
7 that they are subject to being used for evacuations in general.

8 DR. JOHNSON: How does the evacuation proceed if
9 it is 2:00 o'clock in the morning when the County official
10 determines that an evacuation is necessary? How are the buses
11 mobilized? What does the record say about that?

12 MR. EILPERIN: Presumably the children are doing
13 homework at 2:00 a.m.

14 DR. JOHNSON: Children are not the ones I am talking
15 about, the homebound or immobile population.

16 MR. PIGOTT: My understanding is that there are
17 arrangements with the Orange County Transit District. The
18 dispatchers have home numbers and have the capability of get-
19 ting through to the drivers. There would be a time lag in
20 getting them to their buses and getting them to the points where
21 they are directed, but certainly the plans exist.

22 DR. JOHNSON: Do these things appear in the record
23 in the County plans and things of that sort?

24 MR. PIGOTT: I believe they would be in the County
25 plan, and I believe they may even be in the testimony of Mr.

s59 59 1 Burt Turner, I believe that is correct.

2 DR. JOHNSON: In your view are you aware of partici-
3 pation by people like the bus drivers in the emergency plan
4 drills. Are they included in those?

5 MR. PIGOTT: I don't know if bus drivers were included
6 in, like for instance, the May 15 drill. But I do understand
7 that the ambulance drivers and the medical transportation
8 people have gone through training and have been drilled.

9 DR. JOHNSON: Those are being relied on for movement
10 of housebound people?

11 MR. PIGOTT: Yes.

12 DR. JOHNSON: Go ahead. That is the end of my
13 questions.

14 MR. PIGOTT: I do believe that about covers it.
15 We have put the plans in. There are the assembly points for
16 the people who would be relying on buses. So there is a plan.
17 There is a place for them to go to. We think there is the
18 appropriate communication between the people who would imple-
19 ment evacuation and those who would actually call for the
20 evacuation.

21 I think the record also reflects that this is an
22 ongoing effort. A number of people testified, as a matter of
23 fact, being subpoenaed by the Intervenors. And as a result
24 of the hearing they became even more aware of the problems
25 that we are facing. And I think each one of them on the stand

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1 stated that they would in fact be cooperative in putting together
2 programs to make sure that their special populations were
3 well taken care of.

4 We, of course, at the time had the basic plans
5 and the basic implementing procedures. But those were still
6 being brought to an even better level, as reflected in the
7 post card and the post card response program that at that time
8 was just getting under way. So I would say that based on that
9 kind of testimony, plus the existence of the basic plans, and
10 no question that the equipment is available, that the Board
11 is well-justified in finding that there is a reasonable
12 assurance that these people were going to be adequately pro-
13 tected in the event of an emergency.

14 MR. EILPERIN: Thank you, Mr. Pigott.

15 MR. PIGOTT: Thank you.

16 MR. EILPERIN: Mr. Chandler. I would appreciate it
17 if you would address the question of the adequacy of the plans
18 for evacuation of school children.

19 ORAL ARGUMENT OF LAWRENCE CHANDLER ON BEHALF OF STAFF,
20 NUCLEAR REGULATORY COMMISSION

21 MR. CHANDLER: I think, Mr. Chairman, that we have
22 laid out a great deal of information in the Staff's brief on
23 that matter. With respect to the questions that have been
24 discussed just now, I think one finds more in the Orange
25 County plan than merely an agreement with the Orange County

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1 Transit District, recognizing that their resources will be
2 called upon in an emergency. I think within the County plan
3 itself, pages v-14, v-13, v-15, we find specific recognition
4 in the plan itself that discuss the use of the Orange County
5 Transit District for the transportation of school children.

6 DR. JOHNSON: Mr. Chairman, the telling part, though,
7 you can have the group in the County planning agency figure
8 out these plans, and you can have the plans on paper. But I
9 think it is very well established now that plans aren't very
10 much good unless the people who are intended to implement the
11 plan know what they are supposed to do, have got an idea of
12 what their responsibilities are going to be at the time that
13 that the ball goes up, as it were. And absent that, all
14 the plans on paper are really not worth very much. That is
15 what we are looking for, some demonstration that the people
16 who are going to be called upon to do this transportation
17 have an idea of what their job is, what they might be expected
18 to do.

19 MR. CHANDLER: I think the only response I can give
20 you on that, Dr. Johnson, is that to my knowledge the only
21 testimony specifically bearing on that is that of Ms. Jan
22 Goodwin. She indicated at that point in time the then cur-
23 rent state of knowledge as she understood it with respect to
24 the drivers. I will not pretend to tell this Board that it
25 indicated a vast degree of knowledge on the part of bus drivers,

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1 or that everybody was fully knowledgeable as to what their
2 obligations would be if called upon.

3 DR. JOHNSON: What about school bus drivers at
4 11:00 o'clock in the morning? My colleague objected to 2:00
5 a.m. I know nothing about what school bus drivers do between
6 the morning run and the afternoon run. How long does it take
7 to mobilize school buses in the middle of the day?

8 MR. CHANDLER: I don't recall if there are specific
9 time estimates in the record of mobilization time. There is
10 an indication that there are, I believe, as many as 400 buses
11 available at the OCTD's facilities in Irvine and Garden Grove,
12 about 200 each, I believe, which are radio dispatched. And
13 I cannot recall a specific mobilization time being associated
14 with --

15 DR. JOHNSON: These are transit buses you are refer-
16 ring to now?

17 MR. CHANDLER: That is my recollection, yes.

18 DR. JOHNSON: Okay, fine.

19 MR. EILPERIN: If you could also at some point address
20 what the record reflects as to the adequacy of emergency
21 planning for housebound people.

22 MR. CHANDLER: I think there we have testimony that
23 indicates generally that in the past the Applicants have con-
24 ducted a program to identify individuals who would be home-
25 bound and requiring transportation assistance. There was some

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1 turnout in response to that post card-type of program to
2 identify these individuals, and that is an ongoing effort
3 which involves both County and voluntary organizations. As
4 Mr. Pigott just alluded to a moment ago, the individuals
5 testifying indicated a continuing desire to work with the
6 applicants to assure the prompt identification of these people
7 so that transportation could be provided for them.

8 MR. EILPERIN: How was this post card program started
9 up? How did people learn about it?

10 MR. CHANDLER: I believe there were packets of
11 information mailed out.

12 I would like to, if I may, turn to the question of
13 FEMA's involvement in this process, and the question of whether
14 the communications between the Applicants and FEMA have violated
15 any ex parte provisions.

16 As we have laid out more fully in the brief, clearly
17 it is Staff's position that such communications are not violative
18 of the Commission's regulations prohibiting ex parte communica-
19 tions. And to our knowledge they don't violate any regulations
20 under which FEMA operates.

21 DR. JOHNSON: Regarding this, Mr. McClung has just
22 mentioned that he made a motion that he be notified when FEMA
23 and Applicant and Staff representatives were going to have
24 meetings. Presumably that motion or that request was denied.

25 My understanding of the way things work in the

1 Commission now, that the Intervenor representatives were
2 allowed to attend meetings between the Applicant and Staff
3 and their various consultants. What was the basis for the
4 denial of Mr. McClung's request?

5 MR. CHANDLER: I think one has to look at the
6 type of meeting we are talking about. It is the staff's policy,
7 which has -- certainly in this proceeding been consistently
8 adhered to -- that to the extent the staff has a meeting with
9 the Applicants for purposes of its technical review of the
10 Application, public notice is provided. And the public at
11 large is able to attend and observe the proceeding, as it
12 were.

13 I don't know the context of Mr. McClung's motion.
14 If we are discussing a meeting which the Applicants may have
15 with FEMA at which the Staff is not a participant, but merely
16 an observer, that wouldn't fall, necessarily under our policy
17 guidance. And for that reason --

18 DR. JOHNSON: Wouldn't that same policy that guided
19 the Nuclear Regulatory Commission also guide its sister
20 government agency, the Federal Emergency Management Agency?

21 MR. CHANDLER: This guidance that I referred to a
22 moment ago is a Staff policy guidance. It is not a Commission
23 policy directive at all, not the explicit language.

24 MR. EILPERIN: So what you are saying is to the
25 best of your knowledge the staff did not meet with FEMA

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1 without giving notice to the public that it would do so?

2 MR. CHANDLER: I can't recall what meeting Staff
3 would have had with FEMA specifically concerning its technical
4 review prior to its participation. The policy statement,
5 however, is not directed at that kind of a meeting. The policy
6 statement is directed to meetings between the Applicants and
7 the the Staff, not necessarily FEMA.

8 DR. JOHNSON: Do you recall the request that Mr.
9 McClung made? He mentioned the request that he be notified
10 of meetings between FEMA and Staff.

11 MR. CHANDLER: I am sorry. I do not.

12 DR. JOHNSON: Then you would not know whether or not
13 the staff supported or opposed that motion?

14 MR. CHANDLER: I don't recall that it was made as
15 a formal written motion. I am not personally familiar with
16 it. That is not to say that wasn't made. I just don't --
17 I can't speak to it.

18 MR. EILPERIN: Do you recall the meeting after this
19 first meeting that Mr. McClung referred to broke up, involving
20 just the Applicant, the Staff, and FEMA?

21 MR. CHANDLER: I don't believe it involved the Staff.
22 I am aware that -- and I don't recall when I became aware --
23 that such a meeting had been held.

24 I think it has already been pointed out, but I would
25 like to emphasize one more time that the Staff has not delegated

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1 to and the Commission has not delegated to FEMA responsibility
2 for its review. FEMA's responsibilities are derived from the
3 Executive Order and are indicated in the 1980 Authorization
4 Bill which Mr. McClung, himself, referred to earlier in his
5 discussion. It makes clear that the overall decision-making
6 role with respect to the state of off-site and on-site
7 emergency preparedness is left to the Commission. FEMA simply
8 is not an agent of the Staff. It has its independent respon-
9 sibilities, and those responsibilities are merely recognized
10 in the Memorandum of Understanding with the Commission.

11 DR. JOHNSON: Would you or could you make a distinc-
12 tion between the role of FEMA and its representatives regarding
13 emergency planning and the role of the U.S.G.S. representatives
14 with regard to seismic evaluation?

15 MR. CHANDLER: The role, I think is very straight
16 forward. The Geological Survey does not have an independent
17 role to do a site-specific evaluation of geology or seismology.
18 It does so at the request of the Commission staff under Memorandum
19 of Understanding between the two which recognizes that the
20 GS will serve as consultants and advisors to the Staff as
21 part of its review.

22 There is, in a sense, a recognition of expertise on
23 the part of the GS to, not necessarily supplant the Staff's
24 review, but to become a very significant contributor to resolv-
25 ing one in the same question, namely the geology and seismology

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1 associated with a given site.

2 FEMA, on the other hand, is also an independent agency,
3 has a very independent role to play. It is charged with
4 evaluating and assuring emergency preparedness for a wide
5 variety of matters, not only nuclear power plants. It also,
6 however, with respect to NRC licensed facilities, has an
7 independent role. It does not consult with the Staff. Its
8 evaluation of off-site preparedness is performed, again,
9 wholly independent of the Staff, and this is recognized by
10 the fact that its findings are entitled to a rebuttable
11 presumption. That is not in any way comparable to the treat-
12 ment accorded to the GS findings for that matter.

13 MR. EILPERIN: What do you think the state of the
14 record would be on emergency planning if we disregarded the
15 letter from FEMA Washington?

16 MR. CHANDLER: Again, I also would have to look at
17 the record just to get an overall picture of the significance
18 of the national statement. However, I think by and large the
19 record would be adequate. Because what we have would be
20 findings from FEMA, interim findings, submitted under cover
21 of June 3rd, 1981. And then we would have the expert testimony
22 of Mr. Nauman reflecting his expert judgment, as well as
23 the views of the region, certainly, as to the adequacy of
24 the proposed corrective measures. I don't think that what is
25 required at that point is some updated findings from FEMA

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1 to resolve those.

2 MR. EILPERIN: Did any of the testimony or did
3 the interim findings at all deal with the adequacy of plans
4 to evacuate school children, and take care of people who
5 might be housebound?

6 MR. CHANDLER: I have no recollection that they did.

7 MR. EILPERIN: They didn't say anything on the
8 subject at all as far as you know?

9 MR. CHANDLER: I don't think that was involved in
10 the exercise at that point.

11 DR. JOHNSON: The findings relate specifically to
12 parts of the plan which are exercise, do they not?

13 MR. CHANDLER: The June 3rd findings really address
14 two matters. They address the plan findings, and the exercise
15 findings, as I recall, and spoke to both of them. To the
16 extent they address the exercise, it would be only those
17 matters addressed within the exercise. I don't believe --
18 well, let me stop at that point.

19 DR. JOHNSON: Do you have any advice to give this
20 Board relative to the fact that we are forgetting the fact
21 that the emperor really doesn't have any clothes on, properly
22 stated, that time has passed, and there are new sets of FEMA
23 findings. In other words, we have been talking about FEMA
24 findings that are 18 months old. There has been another
25 exercise. FEMA has different findings. The parties have been

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1 served. To what extent are we -- to change the metaphor a
2 little bit -- beating a dead horse, and not focusing on
3 what the actual state of affairs is, and how does this Board
4 or anybody, the Intervenor included, get to dealing with the
5 actual state of affairs, rather than what was in existence in
6 May, 1981?

7 MR. CHANDLER: I don't think I would use the term
8 beating a dead horse in that regard. But I think certainly
9 one of the points that we try to make, perhaps not as force-
10 fully as we should have in our brief, was the fact that indeed
11 we are dealing with an everchanging state of emergency prepar-
12 edness, that as time goes on matters previously found efficient
13 will be resolved. In fact, it would not be wholly unexpected
14 that over the course of time, with another exercise, one
15 area once found deficient may in fact turn up some small
16 deficiency which itself would require further examination and
17 corrective action.

18 But I think the Commission has recognized, for that
19 matter, in its recent amendments to 50-47 that deal with the
20 need for consideration of exercises in the context of our
21 licensing proceedings. Although not wholly applicable to this
22 proceeding, I would suggest that the Commission has recognized
23 that fundamentally the determination to be made by the Boards
24 are to be made on the basis of plans. And that exercises,
25 although a very important ingredient of emergency preparedness,

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1 are conducted as part of the Commission's inspection process,
2 and certainly must be completed before full power operation
3 is to be authorized.

4 But it removes that, fundamentally, from the litiga-
5 tion process. So a case starting off today would be in a
6 very different posture, perhaps, than the San Onofre proceeding.
7 I think certainly that doesn't deprive an Intervenor or a
8 member of the public from any assurance that major problems
9 in that state of emergency preparedness will go unresolved.

10 I think provisions of of the Commission's regulations
11 in 10 C.F.R. 2.206 clearly would indicate that if some
12 deficiency arose in the future, and someone believed it was
13 sufficient, that it warranted under the Commission's regulations
14 the initiation of a proceeding, that could be requested and
15 reviewed by the Commission, initially through the Director
16 of the Office of Nuclear Reactor Regulation or inspection
17 enforcement.

18 MR. EILPERIN: You are saying you have a fuller
19 record here than might be expected in later cases?

20 MR. CHANDLER: I think, in a sense, yes, because
21 we have taken into account not only the state of emergency
22 preparedness based on the state of the plans, the paper plans,
23 but in fact we have had the benefit of the exercise that was
24 conducted thereafter.

25 I point out that if the regulations were in place

sb 71 1 then that are in place today, this proceeding would have a
2 very different complexion, because the FEMA findings regarding
3 the adequacy of the plan was that they were acceptable, margin-
4 ally accpetable. The deficiencies noted really are derived
5 from the exercise critique.

6 I would like to just wrap up, then, and indicate
7 that I think the Intervenors have really pointed to nothing
8 which warrants that the initial decision of Licensing Board
9 be in any way modified. Thank you.

10 MR. EILPERIN: Mr. McClung, you have some time for
11 rebuttal.

12 REBUTTAL ORAL ARGUMENT OF CHARLES MC CLUNG ON BEHALF OF INTERVENOR
13 FRIENDS OF THE EARTH, et al.

14 MR. MC CLUG: I would just want to tie up a few
15 loose ends and not bring up anything new. For your information
16 I wanted to tell you about the post card that was mailed out
17 to identify the homebound. It was part of the Emergency Pre-
18 paredness Public Information Program. It was sent to everyone.
19 In the packet it contains a map that shows you where to go,
20 and also a little booklet telling you about the hazards of
21 radiation. There was also a card in there that said "Please
22 send this back to the local jurisdiction if you have any
23 problems or if you are immobile.

24 And we think that is good and laudable for helping
25 to identify those people. What we are concerned with is

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1 actually helping them once they have been identified, what
2 happens after that.

3 I want to agree with Mr. Chandler when he said
4 that the new regulations and the regulations as they have
5 existed for our hearing contemplate a predictive showing.
6 That is why the emergency planning is slightly different than
7 other aspects. The emergency planning Intervenors have a
8 different focus. We have many little subtle discrete issues.
9 And we can improve the emergency plans in many of these dif-
10 ferent areas. We know that they are going to keep working on
11 them. But we think that the Licensing Board imposed several
12 conditions that were very appropriate and that further
13 conditions would also be appropriate with respect to the
14 special populations.

15 With that, I want to refer you -- I referred to it
16 in my brief, but my citation form was not very good -- to the
17 decision before the Appeal Board in this case in December 24,
18 1974 on the construction aspect of this case. It is ALAB 248.
19 The Appeals Board at that time was discussing in the NRC volume
20 -- sorry I don't have the accurate cite, because it is cut off
21 the top of my thing -- but at page 964, the SchoolDistrict
22 -- now, as you know, unit 1 has been around for ten years at
23 San Onofre. And there is supposed to be emergency planning
24 going on for unit 1 for the low population zone under the old
25 guidelines. And there is a school right outside that area.

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1 And there was testimony in the record at the construction
2 hearing in this case back in 1974 or '73 that nothing had been
3 done for that school. On that page that I have quoted to you,
4 the Appellate Court said "the Licensing Board in this case was
5 obviously concerned over this development"-- the development
6 being lack of emergency plans for that school -- "for our part
7 we can say that disclosure of this nature does not aid in our
8 confidence that satisfactory detailed plans will in fact be
9 prepared in implemented prior to the operation of the reactors
10 at bar." That is our reactors, okay. We came down to hearing
11 at this, and finally, during the hearings, a one-page or
12 two-page, I may be exaggerating, but a small plan was adopted
13 by the school board and put into this hearing process during
14 the hearings in 1981. Nothing had happened since 1974 with
15 respect to that thing. What we are saying here is with respect
16 to these special groups, it would be very very helpful to give
17 them a little prodding, the Applicant is very busy with many
18 many different issues, but to give them a little prodding in
19 the direction of these special groups to make sure that this
20 stuff happens within a reasonable time after the plan has been
21 put on line.

22 MR. EILPERIN: Have there been a condition imposed
23 in ALB 248 dealing with that?

24 MR. MC CLUNG: No, there was not, because it was
25 determined at that time that the emergency planning was more

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1 properly an issue for this particular hearing. So they let
2 it go. But they would have, obviously, had it been in their
3 opinion that it was subject to review.

4 A couple other brief points I want to point out.
5 Also for emphasis -- and I was too emphatic in my description
6 of the meeting between the FEMA representatives that immediately
7 followed our discovery session. I want to clarify what I can
8 see is a misinterpretation of what I meant to be doing there
9 by way of effect. I don't know who was at that meeting. I
10 don't have a record. Applicants' Exhibit 144 does not refer
11 to the staff having been there. I don't want to say on this
12 record that the staff was there or that the chairman was there.
13 I just know there was a meeting.

14 MR. EILPERIN: I appreciate the clarification.

15 DR. JOHNSON: Could you describe your request to
16 be notified about these meetings? To whom was the request
17 made? And what was the response to that request?

18 MR. MC CLUNG: Yes. The request was made during
19 the second day of the hearings after I had become aware that
20 these things were happening, and I wanted to have further
21 notice if there were going to be further meetings in the future.

22 DR. JOHNSON: Refresh my memory as to what date the
23 second day of the hearing was.

24 MR. MC CLUNG: I have the transcript, it is 7422.

25 DR. JOHNSON: Is this July sometime?

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1 MR. PIGOTT: It is August 26.

2 DR. JOHNSON: So August 26, sometime after, then,
3 these meetings had taken place?

4 MR. MC CLUNG: Right. And I refresh my recollection
5 on the chairman's question with respect to when I found out.
6 I now know how I found out. I found out through NRC service
7 documents approximately a week before the hearing. I was
8 served with the letter. Applicant's Exhibit 144 is a letter
9 from the Applicants directly to Brian Grimes. And I got that
10 through the normal document room distribution of all corres-
11 pondence. That is the only time I found out about that.

12 DR. JOHNSON: Prior to August 25 or 26, the second
13 day of the hearing, had you made it known that you would like
14 to be notified of FEMA Applicant meetings?

15 MR. MC CLUNG: That was the time that I made it
16 known. I didn't realize, Your Honor, that it was happening
17 until right about that time. It may have been a week, but we
18 were preparing for our trial, and we didn't make any extra-
19 ordinary motions. We waited until we came before the Licensing
20 Board.

21 DR. JOHNSON: The possible existence of such meetings
22 was not discovered or discussed at your informal discovery
23 session?

24 MR. MC CLUNG: No.

25 DR. JOHNSON: The fact that FEMA and the Applicant

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1 would be talking about fixes.

2 MR. MC CLUNG: Yes. I was a little discouraged that
3 we weren't told that at the time. We asked questions relating
4 to that, and maybe not the point blank question -- are you
5 going to meet later on this afternoon. But we did ask what
6 was going to be done, and those meetings were not described
7 to us.

8 DR. JOHNSON: Okay.

9 MR. MC CLUNG: Thank you, Your Honors. That will
10 conclude my rebuttal.

11 MR. EILPERIN: Mr. McClung, your case is submitted,
12 thank you very much, gentlemen. Off the record.

13 (Thereupon, at 1:05, the hearing was adjourned.)
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NUCLEAR REGULATORY COMMISSION

This is to certify that the attached proceedings before the
U.S. NUCLEAR REGULATORY COMMISSION, APPEAL BOARD

in the matter of: SOUTHERN CALIFORNIA EDISON COMPANY, et al.,
(San Onofre Nuclear Generating Station, Units 2 and 3)

Date of Proceeding: October 6, 1982

Docket Number: 50-361 and 50-362

Place of Proceeding: San Diego, California

were held as herein appears, and that this is the original transcript thereof for the file of the Commission.

Horace W. Briggs

Official Reporter (Typed)

Horace W. Briggs

Official Reporter (Signature)