UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AN LICENSING APPEAL BOARD

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

NRC STAFF'S RESPONSE TO GOVERNOR BROWN'S AND JOINT INTERVENORS' BRIEFS IN SUPPORT OF EXCEPTIONS

Donald F. Hassell
Counsel for NRC Staff

Sherwin E. Turk
Counsel for NRC Staff

December 30, 1982

DESIGNATED ORIGINAL

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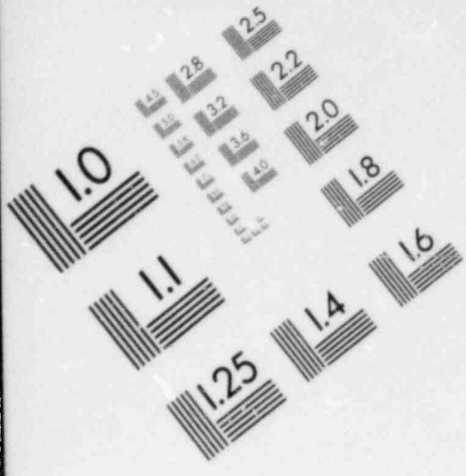

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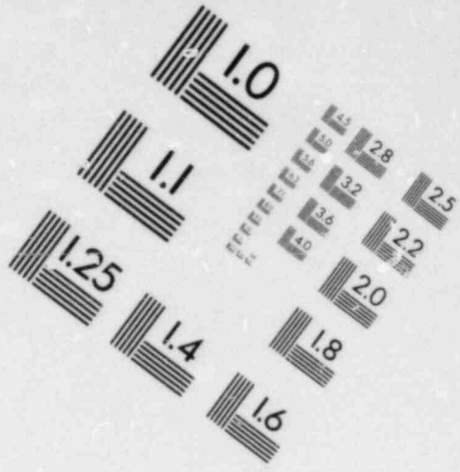

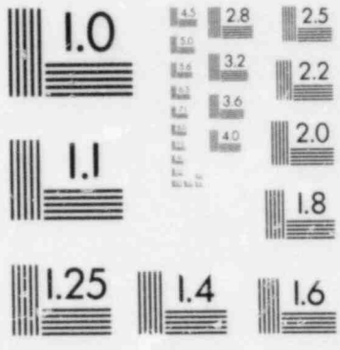

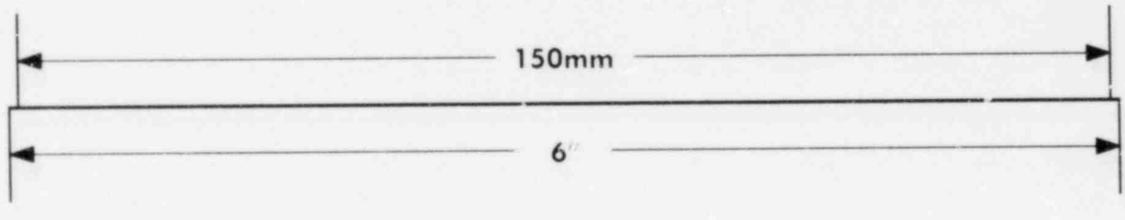

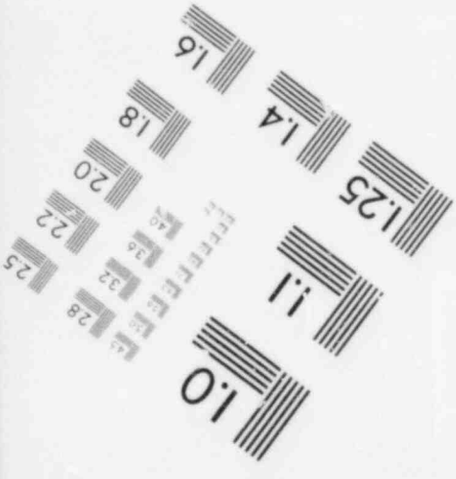

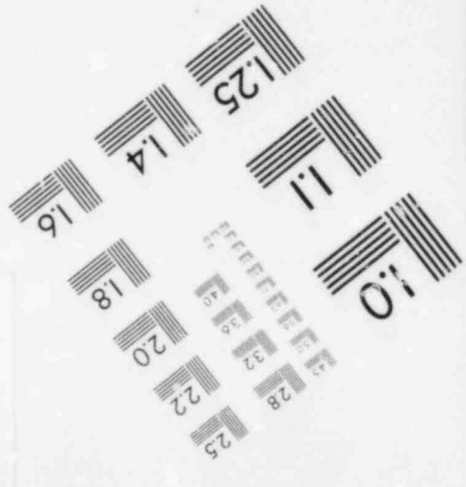

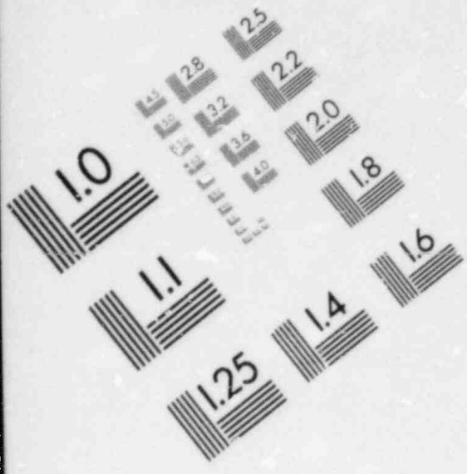

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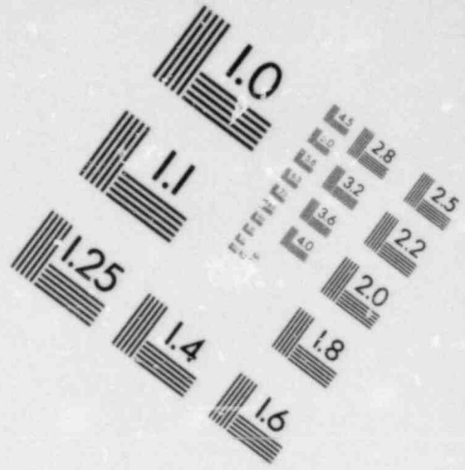

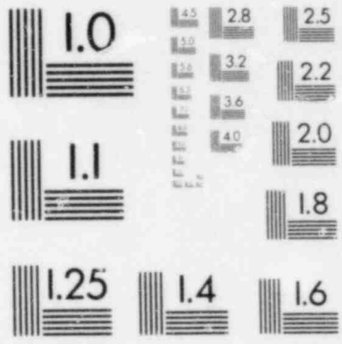

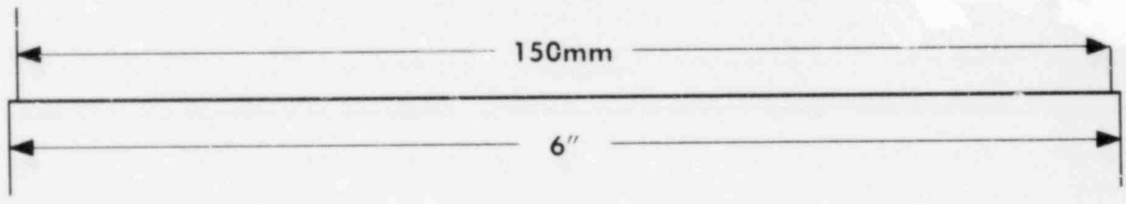

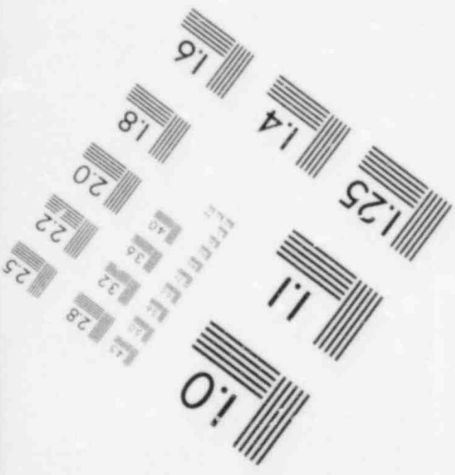

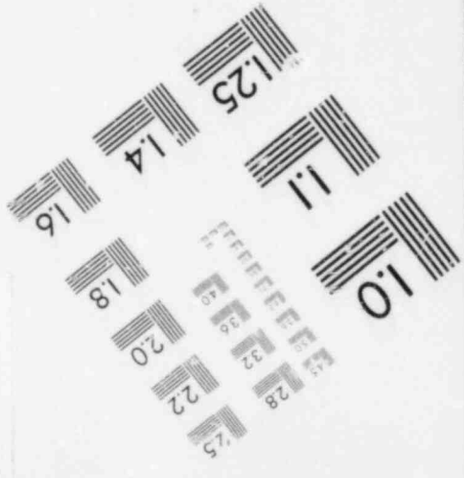

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I. STATEMENT OF THE CASE

Introduction

On August 31, 1982, the Atomic Safety and Licensing Board (Licensing Board) in this proceeding issued an Initial Decision, LBP-82-70, 16 NRC ____ (1982), which authorized the issuance of a full-power operating license for Diablo Canyon Nuclear Power Plant, Units 1 and 2 (Diablo Canyon), subject to certain conditions. All parties filed exceptions to the Initial Decision.

Pursuant to 10 C.F.R. § 2.762(b), the Staff hereby files its brief in response to the exceptions and supporting briefs filed by the San Luis Obispo Mothers for Peace, Scenic Shoreline Preservation Conference, Inc., Ecology Action Club, Sandra Silver, Gordon Silver, Elizabeth Apfelberg and John J. Foster (collectively known as "Joint Intervenors") and by Governor Edmund Brown, Jr. For the reasons set forth herein, the Staff opposes their appeals.[1/]

1/ The Staff is in substantial agreement with the position expressed by the Applicant in its brief in support of its exception. "Brief of Pacific Gas and Electric Company in Support of Exception to Initial Decision of August 31, 1982", filed on November 8, 1982. The Staff does not intend to file a brief in response thereto.

Background and Reference to Rulings

On September 26, 1973, Pacific Gas and Electric Company (Applicant or PG&E) filed a revised application with the Atomic Energy Commission for operating licenses for Diablo Canyon.[2/] The application was docketed by the Commission and a notice of opportunity for a hearing on the application was published in the Federal Register on October 19, 1973.[3/] The application has been contested by the Joint Intervenors and Governor Brown of the State of California participating as a representative of an interested State.

On June 12, 1978, the Licensing Board issued its Partial Initial Decision (PID) on environmental matters. LBP-78-19, 7 NRC 989 (1978). The Licensing Board completed safety hearings and closed the evidentiary record on March 12, 1979. On May 9, 1979, the Joint Intervenors filed a motion to reopen the record seeking to litigate additional contentions related to emergency planning and "Class-9 accidents", on the basis of the Three Mile Island (TMI) accident. In an Order dated June 5, 1979, and in its subsequent PID on safety issues, LBP-79-26, 10 NRC 453, 455 (1979), the Licensing Board deferred ruling on Joint Intervenors' motion until it had received the Staff's report as to the effects of the TMI accident on the Diablo Canyon operating license application. Subsequently, the Commission issued a policy statement providing guidance as

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2/ As required by the Atomic Energy Act of 1954, as amended, 42 U.S.C. §§ 2131-33, PG&E applied to the former U.S. Atomic Energy Commission (AEC) for an operating license for each unit at Diablo Canyon. Thereafter, the Energy Reorganization Act of 1974, (42 U.S.C. § 5814), abolished the AEC, established the Nuclear Regulatory Commission, and transferred the AEC's licensing functions under the Atomic Energy Act to the NRC.

3/ 38 Fed. Reg. 29105 (1973).

to the reopening of closed records and the admission of contentions based on TMI information.[4/]

On July 14, 1980, while its application for a full-power license for Diablo Canyon was being considered, the Applicant filed a motion with the Licensing Board requesting authorization pursuant to 10 C.F.R. § 50.57(c) to load fuel and conduct low-power testing up to 5% rated power at Diablo Canyon, Unit 1. The Licensing Board provided the Joint Intervenors and Governor Brown the opportunity to file contentions on the motion for low-power testing. Following hearings conducted on May 19-22, 1981, the Licensing Board authorized the issuance of an operating license limited to fuel loading and low-power testing, in a PID dated July 17, 1981.[5/] On September 21, 1981, the Commission authorized the NRC Staff to issue a low-power license to PG&E.[6/]

On March 24, 1981, the Joint Intervenors filed an additional motion to reopen the record in the full-power proceeding. On June 30, 1981, Joint Intervenors filed a statement of "Clarified Contentions" with the Licensing Board. Following a prehearing conference, the Licensing Board, on August 4, 1981, issued a Prehearing Conference Order which admitted Joint Intervenors' emergency planning contention, thereby reopening the record on that issue, but denied their other TMI-related

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4/ "Further Commission Guidance for Power Reactor Operating Licenses; Statement of Policy," 45 Fed. Reg. 41738 (1980).

5/ Pacific Gas and Electric Co. (Diablo Canyon Nuclear Plant, Units 1 and 2), LBP-81-21, 14 NRC 107 (1981).

6/ CLI-81-22, 14 NRC 598 (1981). A low-power license was issued by the Director of Nuclear Reactor Regulation on September 22, 1981. License No. DPR-76. However, due to subsequently discovered design errors at Diablo Canyon, that license was suspended by the Commission on November 19, 1981. CLI-81-30, 14 NRC 950 (1981).

contentions. The Commission's Memorandum and Order of September 21, 1981 directed the Licensing Board to include in the full-power proceeding Contentions 10 and 12 raised in the low-power proceeding, pertaining to the safety-grade criteria for pressurizer heaters and valves.[7/] In the Licensing Board's September 30, 1981 Memorandum and Order, these contentions were admitted in the full-power hearing. The Appeal Board's Order of December 11, 1981 affirmed the Licensing Board's ruling on contentions for the full-power proceeding.

With regard to the emergency planning contentions, the Licensing Board issued a Memorandum and Order on December 23, 1981 which held, based on the Commission's holding in the San Onofre decision,[8/] that the Board has no jurisdiction "to consider impacts on emergency planning of earthquakes which cause or occur during an accidental radiological release."[9/] In addition, the Licensing Board (1) held that a memorandum from FEMA to the NRC dated November 17, 1981 constituted "the FEMA finding needed to carry out 10 C.F.R. § 50.47",[10/] (2) denied Joint Intervenors' request for certification of this matter to the Commission, and (3) denied Joint Intervenors' revised contention on environmental qualification of safety-related equipment.

7/ Pacific Gas and Electric Co. (Diablo Canyon Nuclear Plant, Units 1 and 2), CLI-81-22, 14 NRC 598, 600 (1981).

8/ Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-81-33, 14 NRC 1091 (1981).

9/ Governor Brown requested that the Commission take direct review of the Board's ruling, which request was denied by the Commission on March 5, 1982 as an impermissible interlocutory appeal.

10/ See also, "Memorandum and Order in Response to Joint Intervenor's Motion for Summary Disposition of Contention 1," slip op. at 2 (January 15, 1982), wherein the Licensing Board specifically rejected Joint Intervenors' challenge to this holding.

Hearings on the full-power application were held in San Luis Obispo, California on January 19-26, 1982. On August 2, 1982, Governor Brown filed with the Licensing Board a motion to reopen the record of the full-power license proceeding to consider PG&E's implementation of quality assurance requirements. The Licensing Board deferred ruling on that motion, noting that the issues it raised concerned the low-power record as to which the Board no longer had jurisdiction, and that any action the Board might take would be controlled by Commission answers to questions certified by the Appeal Board in ALAB-681 (July 16, 1982) concerning Joint Intervenors' previous motion to reopen the low-power proceeding (see Initial Decision, at 8-9).[11/] On August 31, 1982, the Licensing Board issued its Initial Decision, authorizing the Director of Nuclear Reactor Regulation to issue a full-power license "consistent with the Board's decision in this case, subject to the Commission's determination and order." (Id., at 218).

Exceptions to the Initial Decision were filed by the Staff on September 10, 1982, and by all other parties on September 15, 1982. Motions for clarification of the Initial Decision were filed by the Staff and Applicant on September 16 and 24, 1982, respectively. On September 27, 1982, responding to the Staff's motion for clarification, the Licensing Board clarified its rulings in the Initial Decision concerning preconditions to the issuance of a full-power license involving FEMA findings on the State plan, completion of standard operating procedures (SOPs) and acquiescence by appropriate State jurisdictions to the SOPs.

11/ The Commission ruled on the certified questions in a Memorandum and Order issued on December 23, 1982. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-82-39, 16 NRC ___ (December 23, 1982).

The Licensing Board issued a subsequent memorandum on October 26, 1982, in response to the Applicant's motion for clarification, which provided an explicit statement as to the adequacy of off-site emergency planning. Thereafter, the Staff and PG&E requested leave to withdraw certain exceptions and informed the Appeal Board of their intention to pursue an appeal of certain exceptions. Briefs in support of exceptions were filed by PG&E, Joint Intervenors, and Governor Brown on November 8, 1982; the Staff filed its brief in support of exception on November 12, 1982.12/

II. STATEMENT OF ISSUES

A. Whether the Licensing Board erred in finding that, subject to certain conditions, there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency notwithstanding the absence of a formal FEMA finding on the State plan and completed off-site plans.

B. Whether the Licensing Board erred in concluding that it did not have jurisdiction to consider the effects of a major earthquake on emergency preparedness.

12/ The Staff notes that Governor Brown and the Joint Intervenors have failed to brief many of the exceptions which they filed. In accordance with established precedent, all such exceptions which have not been briefed should be deemed to have been waived. See, e.g., Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-461, 7 NRC 313, 315 (1978).

In addition, we note that the Joint Intervenors have attached to and "incorporated by reference" as "Exhibit A" in their brief 28 pages from the proposed findings of fact which they filed before the Licensing Board. This "exhibit" should be stricken and/or disregarded by the Appeal Board, as (1) an impermissible attempt to exceed the 70-page limitation on appeal briefs and (2) a violation of the principle that all references are to be made and supported in the appeal brief, itself. See, e.g., Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-430, 6 NRC 457, 458 (1977); Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-424, 6 NRC 122, 127 (1977).

C. Whether the Licensing Board erred in declining to require compliance with the Commission's emergency planning regulations throughout the State of California's emergency planning zones.

D. Whether the Licensing Board erred in authorizing the issuance of a full-power license subject to certain conditions despite the existence of deficiencies in the San Luis Obispo County Plan.

E. Whether the Licensing Board erred in rejecting Joint Intervenors' request that the Board reopen the environmental record to consider the environmental consequences of a "Class 9" accident.

F. Whether the Licensing Board erred in finding that the PORV systems have been properly classified and qualified.

G. Whether the Licensing Board erred in ruling upon the admissibility of Joint Intervenors' contentions.

III. ARGUMENT

A. The Licensing Board Correctly Found that, Upon Satisfaction of Certain Specified Conditions, There Is Reasonable Assurance that Adequate Protective Measures Can and Will Be Taken in the Event of a Radiological Emergency Notwithstanding the Absence of a Formal FEMA Finding on the State Plan and Completed Off-Site Plans.

The Licensing Board found that FEMA had not issued its "finding" on the State plan.[13/] In light of this ruling, Governor Brown contends that the FEMA finding which carries a "rebuttable presumption" pursuant

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13/ The Licensing Board's position is contrary to Staff's position, set forth in our brief of November 12, 1982 (at 5-19), that the Licensing Board erred in requiring that additional FEMA findings on the adequacy of the State emergency response plan, as it applies to Diablo Canyon, is a matter to be completed prior to the issuance of a full-power operating license.

to 10 C.F.R. § 50.47(a)(2) does not yet exist. (Governor Brown's Brief, at 12-13). He then argues that the parties were denied an opportunity to rebut that finding -- thus obligating the Board to hold the record open until the FEMA finding is issued. (Id., at 13). In addition, Governor Brown alleges that the Board erred in having the Staff, an "adversarial party" in this proceeding, "secure" FEMA findings on the adequacy of the State plan and assure that planning for Santa Barbara County has been considered and integrated into the overall State-local emergency response capability. (Id., at 14).

Similarly, Joint Intervenors argue that their opportunity to rebut FEMA's finding at public hearings prior to a licensing decision was rendered meaningless since FEMA has not issued its formal finding as to the adequacy of the various off-site plans. (Joint Intervenors' Brief, at 17-18). Joint Intervenors also allege that (1) the Standard Operating Procedures for the State plan are only now being prepared, (2) there was little testimony concerning emergency preparedness for the County of Santa Barbara, and no testimony for Monterey and Ventura Counties, and (3) there was little testimony regarding the special State jurisdictions (i.e., California Polytechnic University at San Luis Obispo ("Cal Poly") and California Men's Colony ("CMC")). (Id., at 18-19). Joint Intervenors allege that because the planning process is evolving in nature and has not been completed for these counties and jurisdictions, the Licensing Board was precluded from making the finding required by 10 C.F.R. § 50.47(a)(1). (Id.).

1. Opportunity to Rebut Presumption.

Under the Commission's emergency planning regulations, FEMA findings on the adequacy of off-site emergency plans carry a rebuttable presumption in NRC licensing proceedings. 10 C.F.R. § 50.47(a)(2); cf. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), LBP-81-59, 14 NRC 1211, 1462-63 (1981). Section 50.47(a)(2) provides, in pertinent part, as follows:

> The NRC will base its finding on a review of the Federal Emergency Management Agency (FEMA) findings and determinations as to whether State and local emergency plans are adequate and whether there is reasonable assurance that they can be implemented, and on the NRC assessment as to whether the applicant's onsite emergency plans are adequate and whether there is reasonable assurance that they can be implemented, . . . In any NRC licensing proceeding, a FEMA finding will constitute a rebuttable presumption on questions of adequacy and implementation capability.

FEMA may provide interim findings and determinations on the status of State and local emergency plans to the NRC for use in the NRC licensing process pursuant to a "Memorandum of Understanding Between NRC and FEMA Relating to Radiological Emergency Planning and Preparedness" (MOU) entered into on November 4, 1980. 45 Fed. Reg. 82713 (December 16, 1980). The MOU provides that:

> [N]otwithstanding the procedures which may be set forth in 44 CFR 350 for requesting and reaching a FEMA administrative approval of State and local plans, findings and determinations on the current status of emergency preparedness around particular sites may be requested by the NRC through the NRC/FEMA Steering Committee and provided by FEMA for use as needed in the NRC licensing process. These findings and determinations may be based upon plans currently available to FEMA or furnished to FEMA by the NRC.

Id., at 82714.

In this proceeding, FEMA has issued findings in accordance with the procedure established by the MOU, and all parties were provided ample opportunity to rebut FEMA's findings prior to the close of the record. The legal effect of FEMA's findings on the adequacy of the State plan was raised by Joint Intervenors and Governor Brown before the Licensing Board. In addressing this issue, the Licensing Board held that "[o]n the basis of established and approved procedure, the Board will look to the Richard W. Krumm [sic] memorandum of November 17, 198[1] as the FEMA finding needed to carry out 10 C.F.R. § 50.47," ordered that that finding "may be used by NRC as a rebuttable presumption", and denied Joint Intervenor's request for certification to the Commission.[14/] The Licensing Board's ruling was disputed by the Joint Intervenors in their motion for summary disposition dated January 7, 1982. Therein, which they asserted that FEMA had made no finding on the adequacy of the State plan and whether it is capable of being implemented; that motion was denied by the Licensing Board in its Memorandum and Order of January 15, 1982.[15/]

Any doubt as to the nature of the FEMA finding to be used in this proceeding is clearly dispelled by an examination of FEMA's prefiled testimony, which was served by express mail on the Board and parties on

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14/ Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Memorandum And Order, slip op. at 3, 9 (December 23, 1981).

15/ Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Memorandum And Order In Response To Joint Intervenor's Motion For Summary Disposition Of Contention 1, slip op. at 2 (January 15, 1982).

January 11, 1982.[16/] Mr. John Eldridge, Emergency Management Specialist for FEMA Region IX, stated in his testimony that the November 2, 1981 evaluation and status report together with the accompanying memoranda, which included the November 17, 198[1] memorandum from Richard W. Krimm of FEMA, did constitute FEMA's findings and determinations as to whether State and local emergency plans were adequate and capable of being implemented (Eldridge Testimony, ff. Tr. 12682, at 4-5). Mr. Eldridge also testified that FEMA's findings and determinations for Diablo Canyon were provided under the terms of the MOU, based on its review and evaluation of, among other things, the State of California Nuclear Power Plant Emergency Response Plan, the San Luis Obispo County Nuclear Power Plant Emergency Response Plan, and FEMA Region IX Evaluation Findings, Diablo Canyon Nuclear Power Plant Offsite Emergency Response Plans Exercise, August 19, 1981. (Id., at 2-5). Those findings and determinations were admitted into evidence in this proceeding. (Attachments 2 and 3 to Applicant's Panel #1 Testimony, ff. Tr. 11782). This administrative practice of providing interim findings pursuant to the MOU is well established and is not unique to this proceeding, as is reflected in Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), LBP-81-59, 14 NRC 1211, 1461 (1981), where the Licensing Board stated: "Pursuant to this MOU, FEMA has provided

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16/ Letter from George E. Johnson, Counsel for NRC Staff, to the Licensing Board, dated January 11, 1982 with "Testimony of John W. Eldridge, Jr." attached.

interim findings and determinations to NRC for at least nine facilities, three of which were granted NRC operating licenses."17/

In sum, the record in this proceeding demonstrates that Section 50.47(a)(2) was not ignored, that FEMA's "findings" were provided, and that the parties were provided an opportunity to rebut the FEMA findings.

2. Staff Role.

Governor Brown argues that the Licensing Board improperly delegated to the Staff, "an adversarial party", fact-finding responsibility as to the adequacy of the State plan and integration of the Santa Barbara County plan with the other plans. (Governor Brown's Brief at 14). This argument, however, is flawed. The Licensing Board never required the Staff to evaluate the adequacy of the State plan, but only directed the Staff to "secure FEMA findings on the adequacy of the State Emergency Response Plan." (Initial Decision, at 218). This condition can be accomplished simply by the Staff's obtaining such findings through FEMA -- which has the responsibility for evaluating off-site emergency preparedness -- and does not require a judgmental evaluation by the Staff.

The Licensing Board suggested that the Staff "should assure itself based on FEMA findings on the adequacy of the State plan, that planning for Santa Barbara County has been considered and integrated into the overall State-local emergency response capability." However, such actions

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17/ A further discussion of the legal effect of FEMA's interim findings, and of the lack of any need in NRC license proceedings for formal FEMA findings under 44 C.F.R. § 350, is set forth in "NRC Staff Brief In Support Of Exception To Initial Decision (10 C.F.R. § 2.762)" at 5-13, dated November 12, 1982.

are not required under the Commission's regulations since Santa Barbara County is not within the plume exposure pathway emergency planning zone (EPZ) defined in the Commission's regulations. As the Licensing Board stated (Initial Decision, at 100):

> [T]he borders of Santa Barbara lie some 18 miles in a northeasterly direction from Diablo Canyon. The County is outside the Federally defined plume emergency pathway zone but within the EPZ. An emergency plan is not required of Santa Barbara County since the State of California has emergency responsibility for the ingestion pathway planning. (Eldridge Testimony, ff. Tr. 1268[2], p. 16, Tr. 12721-723) Santa Barbara County contracted for preparation of a plan since it lies within the BEPZ [Basic Emergency Planning Zone] as defined by the State. The plan is expected to be complete in July 1982. A plan appropriate for the plume emergency pathway zone is not required of Santa Barbara County by Federal standards. (Eldridge, Tr. 12723)

These findings were correct and supported by the record. Thus, the existence of a Santa Barbara County plan is not a requirement for issuance of a full-power license, and assuring the integration of such a plan is not a matter that must be litigated on the record in this proceeding. Further, the Licensing Board found reasonable assurance, based upon facts in the record, that the Santa Barbara County plan will be integrated with the other plans. Thus, the Licensing Board did not delegate any fact-finding responsibility in this area to the Staff:

> While the Santa Barbara plan is not yet complete, the County has contracted to have such a plan prepared. The plan will be completed by mid-1982. It is being prepared by the same contractor who developed the plan for San Luis Obispo County. (citation omitted) Thus there exists reasonable assurance that an emergency plan for Santa Barbara County will be integrated into the overall emergency response capability contemplated by the State even though not required by 10 C.F.R § 50.47.

(Initial Decision, at 15).

Requiring the NRC Staff to confirm or verify matters to be completed after close of a hearing is not in itself inappropriate and is consistent with established practice. As the Commission itself has stated: "To be sure, the Staff is a party to the proceeding before us. But it is also an arm of the Commission and is the primary instrumentality through which we carry out our statutory responsibilities."[18/] The Staff's role ordinarily includes responsibilities that extend beyond its being a party in adjudicatory proceedings. For example, the Staff is responsible for ". . . [i]nspecting licenses to ascertain whether they are complying with NRC regulations, rules, orders, and license provisions, and to determine whether the licensees are taking appropriate actions to protect . . . the environment, and the health and safety of the public . . . ." (10 C.F.R. § 1.64). Similarly, the Staff often is responsible for verifying the post-hearing resolution of matters, as it was, for example, in the San Onofre full-power operating license proceeding involving emergency planning issues.[19/] While recognizing that there are limits on the approach of leaving matters for Staff resolution, the San Onofre Licensing Board cited Commission precedent in holding as follows:

> [I]t has long been recognized in other areas of reactor regulation that not all matters have to be definitively resolved on the hearing record. Certain matters may be "left for the Staff to resolve following the hearings." . . . These matters typically are of a minor nature and/or are such that on the record procedures, including cross-examination, would be unlikely to affect the result.

18/ Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-76-17, 4 NRC 451, 462 (1976).

19/ Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-82-39, 15 NRC 1163 (1982).

15 NRC at 1216, citing Consolidated Edison Co. of New York (Indian Point Station, Unit 2), 7 AEC 947, 951-952 (1974). The Licensing Board's direction to the Staff in this proceeding to perform certain activities subsequent to the close of the hearing, is consistent with the Staff's normal regulatory responsibilities and with the post-hearing resolution approach enunciated in the San Onofre and Indian Point decisions.

3. Status of Review of Off-site Plans.

The Licensing Board concluded that "[t]here is reasonable assurance, upon discharge of the conditions established elsewhere in this Initial Decision, that adequate off-site protective measures can and will be taken in the event of a radiological emergency."[20/] The Joint Intervenors allege that the Licensing Board "charged ahead" and gave "premature and anticipatory approval" to emergency preparedness at Diablo Canyon absent required reviews and approvals by FEMA, the State of California and the County of San Luis Obispo. (Joint Intervenors' Brief, at 11-12, 20). They further allege that the Licensing Board nullified FEMA's role by issuing its decision prior to obtaining FEMA's review of the State Plan and the most recent version of the San Luis Obispo County Plan. (Id., at 17).

In this regard, we note that the Commission's emergency planning regulations do not impose any requirement that particular offsite plans be reviewed by FEMA, or that particular local plans be reviewed by the State. As the November 4, 1980 MOU makes clear, FEMA interim findings "may be based upon plans currently available to FEMA" (45 Fed. Reg. 82714).

20/ "Memorandum In Response to PG&E's Motion For Clarification Of The Licensing Board's Initial Decision Dated August 31, 1982," slip op. at 2 (October 6, 1982).

In the instant proceeding, FEMA reviewed those plans which were currently available to it, and rendered its interim findings based upon those plans. As the following discussion illustrates, those plans were sufficiently advanced to permit FEMA to arrive at its interim findings and determinations. The status of each of those plans and FEMA's evaluation thereof is as follows.

a. San Luis Obispo County Plan

The May 1981 San Luis Obispo County Plan has been reviewed and evaluated by FEMA against each of the criteria in NUREG-0654. (Attachment 2 to Applicant's Panel #1 Testimony, ff. Tr. 11782, at 2). Emergency planning under the FEMA regulation is a process involving plan development, training, drills, exercises, and plan revision culminating in a formal FEMA review. (Attachment 2 to Applicant's Panel #1 Testimony, ff. Tr. 11782, at 2). The November 2, 1981 evaluation constitutes a review of that process, and evaluates plan changes developed in response to the June 1981 FEMA comments, SOPs developed and exercised in August 1981, and further plan revisions. (Id.). Moreover, Mr. Eldridge's written testimony was authorized by FEMA and that testimony, in essence, constitutes an update to the November evaluation, based on the October 1981 County plan and other information then available to FEMA (Eldridge Testimony, ff. Tr. 12682, at 3, 5); the same is true for Mr. Eldridge's oral testimony.[21/] (Eldridge at Tr. 12694). Mr. Eldridge stated that he

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21/ See San Onofre, supra, LBP-82-39, 15 NRC at 1213-14, wherein the Licensing Board stated: ". . . the best available evidence on the current status of emergency plans and FEMA's view of them was the most current evidence available from a knowledgeable FEMA witness."

worked with the County and the State on plan revisions made following the exercise, and that he reviewed the County plan as it stood at the time of the hearing to assure that the corrective actions recommended after the exercise had been incorporated. (Eldridge, Tr. 12696-97). Further, Mr. Eldridge testified that although FEMA had not performed a critique of the October 1981 version of the plan, he had reviewed that plan twice and had read all of the SOPs under that plan (except those pertaining to health physics, which were provided to a health physicist in FEMA for technical review) (Eldridge, Tr. 12706). Thus, FEMA has reviewed the plans that were currently available.

The Joint Intervenors' allegation that the San Luis Obispo County Plan has not been approved by the County (Joint Intervenors' Brief, at 12) is incorrect. As the Licensing Board found (Initial Decision, at 98), based on the testimony of Mr. MacElvaine (Vice-Chairman of the San Luis Obispo County Board of Supervisors (Tr. 12238)), the County plan was approved conceptually by the Board of Supervisors on January 18, 1982. While that did not constitute a final approval, it is an indication that planning was progressing satisfactorily but remained incomplete in some respects and was still subject to revision. (Initial Decision, at 98). Further, based on the testimony of Mr. Ness, who is responsible for coordinating the development of the County plan (Ness, Tr. 12449), the Licensing Board found that the County and its agencies consider the plan final and could implement it even though no final signature approval was provided.

(Initial Decision, at 99).[22/] The Board noted that the signature spaces in the County plan were for the purpose of authentication by the drafters of individual SOPs, but were not intended to secure approval by some reviewing authority (Id., at 99-100). Consequently, the Licensing Board found it reasonable to defer the administrative act of authentication of the SOPs until later, since the SOPs are continually being revised (Id., at 100); as with other matters which have been left for Staff/FEMA resolution, this approach is consistent with the concept of "predictive findings" in the emergency planning area, as recognized by the Licensing Board in San Onofre, supra, LBP-82-39, 15 NRC at 1216:

> [Applicants] must demonstrate to a board a "reasonable assurance" of adequacy based in part upon future actions. The Commission has recognized this problem and has addressed it in part by amending the rule to provide for full-scale emergency preparedness exercises after the hearing. (See 46 Fed. Reg. 61134, amendment to 10 CFR 50.47(a) and Appendix E) In so doing, the Commission recognized that "the findings on emergency planning required prior to license issuance are predictive in nature and do not need to reflect the actual state of preparedness at the time the finding is made." A licensing board is to find a "reasonable assurance . . . that there are no barriers to emergency planning implementation . . .," but that consideration "can be adequately accounted for by predictive findings." Id. at 63345.

22/ The issue of whether the County plan was approved is effectively moot; although not in the record, the San Luis Obispo County Board of Supervisors approved the County plan at their meeting on September 27, 1982. See Letter from Philip A. Crane to the Licensing Board, dated October 6, 1982, transmitting a copy of an Order of the Board of Supervisors, County of San Luis Obispo, dated September 27, 1982, approving the San Luis Obispo County Nuclear Power Plant Emergency Response Plan.

Joint Intervenors assert that none of the 31 necessary SOPs had been approved or adopted (Joint Intervenors' Brief, at 39). However, based on the testimony of Mr. Ness, the Licensing Board correctly found that of the 31 SOPs to be incorporated into the County plan, 21 are complete. (Initial Decision, at 12, 99). Further, the Board observed that the completed SOPs apply to cities, fire districts and school districts within the 10-mile plume exposure pathway EPZ, while the incomplete SOPs apply to organizations which are outside the Federal zone but within the State BEPZ (Id., at 99). Moreover, the Licensing Board noted that the evidence shows there are no insurmountable difficulties in completing the remaining SOPs. (Id., at 12-13).

Accordingly, contrary to Joint Intervenors' assertion, the record reflects that the County plan was approved conceptually and considered to be final and implementable by the responsible County agencies. For these reasons, the Licensing Board's rulings as to the County plan are supported by an adequate basis in the record.

b. State Plan

With respect to the State of California plan, Joint Intervenors argue that critical Standard Operating Procedures are only now being prepared and that the full plan was not expected to be complete until July 1982 (Joint Intervenors' Brief, at 18, 19). These assertions, however, do not accurately reflect the status of the State's planning.

The Licensing Board correctly found that "[t]he State has completed approximately 85 to 90 percent of the State agency SOP's, and it is expected that the remainder will be completed along with the basic plan

by July 1982." (Initial Decision, at 16). This finding is consistent with the testimony of Mr. Eldridge (Tr. 12708, 12710), who also testified that the State's primary role involves ingestion pathway sampling, interdiction of foodstuffs, and re-entry and recovery -- matters which do not require an immediate emergency response (Tr. 12709-10). Moreover, as the Licensing Board found, based on Mr. Eldridge's testimony, these responsibilities are addressed in the State plan, and it is FEMA's view that the State could respond even in these areas, if necessary. (Initial Decision, at 16, 18; Eldridge, Tr. 12708-10).

With respect to the completion of the State plan,[23/] the Licensing Board concluded that "there is reasonable assurance that the State plan will be substantially complete and capable of being implemented prior to full power operation of Diablo Canyon." (Initial Decision, at 17). This conclusion is consistent with the evidence of record. Mr. Eldridge testified that the State plan was adequate and capable of being implemented. (Eldridge Testimony, ff. Tr. 12682, at 4-50). Mr. Eldridge also testified and the Board determined that FEMA has reviewed and commented on an earlier version of the State plan, which the State has since revised using those comments. (Eldridge Testimony, ff. Tr. 12682 at 2, 3; Tr. 12704-05; Initial Decision, at 16). In addition, the Licensing Board found that San Luis Obispo County has the primary responsibility for emergency preparedness and that the State has only back-up responsibility (except as to planning for the ingestion pathway zone

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23/ See "NRC Staff Brief In Support Of Exception To Initial Decision (10 C.F.R. § 2.762)", dated November 12, 1982 at 5-19, wherein the Staff sets forth in detail its position regarding this issue.

and recovery and reentry). (Initial Decision, at 16, 95, 97-98). Relying in part upon FEMA's testimony, the Licensing Board determined that (1) the State plan is in effect although 10 percent of its SOPs are incomplete; (2) it is capable of implementation; and (3) FEMA is keeping abreast of the developments in the State plan. (Initial Decision, at 97-98). Governor Brown's witness, Mr. Hubbard, supported the Board's findings in this area -- he testified that, aside from earthquake planning, there was nothing wrong with the State plan. (Hubbard, Tr. 12344).

In sum, the record demonstrates that the State plan was considered by FEMA to the extent necessary, given the State's limited role in emergency preparedness, and the parties were provided a meaningful opportunity to rebut the findings and testimony of the knowledgeable FEMA witness concerning the State plan. The Licensing Board's findings and conclusions in this area are supported by substantial, probative and reliable evidence.

c. Other County Plans and Special State Jurisdictions

Joint Intervenors assert that there was little testimony concerning emergency preparedness for the County of Santa Barbara and no testimony for Monterey and Ventura Counties . (Joint Intervenors' Brief, at 19, 38). However, undisputed evidence establishes that the Counties of Santa Barbara, Monterey and Ventura are all outside the Federally defined plume exposure EPZ,[24/] and therefore emergency plans are not required for these counties.

24/ The Licensing Board recognized that these counties are within the limits of the 50-mile Federal ingestion pathway zone. (Initial Decision at 15, 100-01). However, the State of California has principal responsibility for emergency planning within these zones and the State will assume responsibility for interdiction of contaminated food and water in the ingestion pathway should such action be needed. (Id.).

(See Initial Decision, at 15, 100-01).[25/] For Santa Barbara County, moreover, the Board found that while the plan is not yet complete, the County has contracted to have a plan prepared by mid-1982, by the same contractor who developed the San Luis Obispo County Plan. (See Id., at 15, 100).

Similarly, Joint Intervenors argue that there was little testimony regarding the special State jurisdictions, i.e., California Polytechnic University and California Men's Colony. (Joint Intervenors' Brief, at 19, 38). However, both of these special State jurisdictions are outside of the plume EPZ where evacuation would not normally be planned. (Initial Decision, at 17). Nevertheless, although not required by the Commission's regulations, the record shows that planning is taking place for both of these institutions. (Ness, Tr. 12495-12497).

For the foregoing reasons, there is no basis for Joint Intervenors' claim that the Licensing Board's rulings in these areas were erroneous. The Staff submits that the Licensing Board correctly found that, subject to certain conditions, there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency notwithstanding the absence of a formal FEMA finding on the State plan and given the status of the off-site plans.

B. The Licensing Board Properly Held That It Did Not Have Jurisdiction To Consider the Effects of an Earthquake on Emergency Preparedness.

On December 8, 1981, in Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-81-33, 14 NRC 1091 (1981),

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25/ With respect to the appropriateness of the 10-mile and 50-mile EPZs, see the discussion infra, at 28-36.

the Commission held that "its current regulations do not require consideration of the impacts on emergency planning of earthquakes which cause or occur during an accidental radiological release." In addition, the Commission stated (Id., at 1092):

> The Commission will consider on a generic basis whether regulations should be changed to address the potential impacts of a severe earthquake on emergency planning. For the interim, the proximate occurrence of an accidental radiological release and an earthquake that could disrupt normal emergency planning appears sufficiently unlikely that consideration in individual licensing proceedings . . . is not warranted.

On December 23, 1981, the Licensing Board in this proceeding issued a Memorandum and Order concerning, inter alia, the effect of the Commission's San Onofre decision on this proceeding. Therein, Licensing Board concluded that "under the Commission's ruling no licensing board, including this one, has jurisdiction to consider impacts on emergency planning of earthquakes which cause or occur during an accidental radiological release." (Memorandum and Order at 2; see also Tr. 11445-51). Both Governor Brown and the Joint Intervenors appeal from this decision.

Governor Brown postulates an earthquake that does not impair the plant but, nevertheless, renders the emergency plan incapable of implementation by impairing evacuation routes, communication facilities and evacuation capabilities. (Governor Brown's Brief, at 3). Such an earthquake, however, occurring apart from a radiological emergency at Diablo Canyon, is outside the scope of the admitted emergency planning contention, which concerns only planning and preparedness for radiological emergencies. Consequently, this postulated scenario is irrelevant to this

proceeding. Further, seismic issues, apart from the context of radiological emergency planning, have been litigated, considered and decided (see LBP-79-26, 10 NRC 543 (1979)). The Appeal Board itself held extensive hearings in which Joint Intervenors and Governor Brown participated, resulting in a decision finding the Diablo Canyon seismic design adequate.[26/] Accordingly, relitigation of the seismic issues should not be permitted.

Governor Brown's argument concerning the complications for emergency preparedness arising from an earthquake which initiates a radiological accident (Governor Brown's Brief, at 3-4) is misdirected, since it raises the very matter that the Commission has determined may not be considered (San Onofre, supra, CLI-81-33, 14 NRC at 1091). The Governor's assertion that PG&E "claims to have planned to respond to the effects of such earthquakes" (Governor Brown's Brief, at 4), is erroneous. Contrary to the Governor's assertion, the cited references to Table 4.1-1 (Applicant's Exhibit 73, Table 4.1-1 at i-20) do not purport to reflect planning for the complications of an earthquake but, rather, reflects that earthquakes are included in the emergency plan (in Table 4.1-1 at 11 and 15) as "initiating conditions" -- as is recommended in NUREG-0654, Appendix 1. Accordingly, Governor Brown's argument that the Board's ruling denied him "the opportunity to confront evidence which has been introduced" (Governor Brown's Brief, at 4) is incorrect.

Governor Brown further argues that the Commission's ruling in San Onofre is not controlling since (1) the central issue of the Diablo Canyon

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26/ Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-644, 13 NRC 903 (1981). The Commission declined to review ALAB-644 on March 18, 1982.

proceeding concerns the effects of an earthquake on public health and safety, and (2) the Commission did not intend its San Onofre ruling to bind the Licensing Board, as demonstrated by the fact that the Commission did not provide Governor Brown an opportunity to comment in the San Onofre proceeding as he requested. (Governor Brown's Brief, at 5-6). These arguments are not well taken. The Governor's argument that the central issue of this proceeding involves the effects of an earthquake on the public health and safety is irrelevant; as set forth supra at 24, the seismic adequacy of the Diablo Canyon plant has already been fully litigated and found to be adequate by the Appeal Board. Further, his argument that the Commission did not intend its San Onofre decision to be binding in this proceeding ignores the clear language of the Commission that this issue "is a question to be addressed on a generic, as opposed to case-by-case basis" (14 NRC at 1092).27/ The mere fact that the Commission did not grant discretionary leave to the Governor, a non-party to the San Onofre proceeding, to offer comment (Governor Brown's Brief, at 6), does not warrant an inference that the Commission was "suggesting that [it] did not intend its San Onofre ruling to bind the Licensing Board in the Diablo Canyon proceeding" (Id.).

27/ In view of this directive by the Commission, the Licensing Board was compelled to rule as it did, consistent with the established principle that where a matter has been considered by the Commission, the boards are bound thereby. Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 463-65 (1980). With respect to matters which are or are about to become the subject of rulemaking and which are not already the subject of an existing regulation, see Potomac Electric and Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79 (1974).

Governor Brown and Joint Intervenors have presented no information about the evacuation of the EPZ at Diablo Canyon which would justify treating Diablo Canyon any differently than any other plant located in an area subject to earthquakes. With respect to the TERA report referred to by Governor Brown (Governor Brown's Brief, at 7), that report was prepared for PG&E in response to a Staff request dated December 16, 1980. In its request, the Staff sought to obtain information for all nuclear facilities in California and Oregon regarding the complicating effects on emergency planning of earthquakes and volcanic activity, respectively, as part of an effort to consider this matter prior to the Commission's San Onofre decision. The existence of this report has no bearing on the propriety of considering the emergency planning/earthquake issue, nor could it vest the Licensing Board with the authority to consider a matter beyond its jurisdiction.

Further, while the Joint Intervenors allege that reliance on the Commission's San Onofre decision is erroneous because the Commission did not provide any factual basis for its decision (Joint Intervenors Brief, at 24, 28), the Commission's decision does, in fact, have a factual basis. The Commission's conclusion that "the proximate occurrence of an accidental radiological release and an earthquake that could disrupt normal emergency planning appears sufficiently unlikely that consideration in individual licensing proceedings pending generic consideration of the matter is not warranted" (14 NRC at 1091), is directly supported by the affidavit of Mr. Brian K. Grimes, Director, Division of Emergency Preparedness, NRC Office of Inspection and Enforcement, wherein he stated that consideration need not be given to a seismic event coincident with a

significant radiological accident at the plant due to the very low likelihood of such a coincidence.[28/]

Joint Intervenors argue that the risk of significant seismic activity around the Diablo Canyon site raises an issue of safety significance unique to this plant, thus demanding special consideration of the complications to emergency preparedness likely to result from a major earthquake (Joint Intervenors Brief, at 22, 29). However, the Joint Intervenors do not provide any basis for creating jurisdiction in the Licensing Board to consider a matter which the Commission's San Onofre decision made clear should not be considered.

Relying on NRDC v. NRC,[29/] Governor Brown and Joint Intervenors challenge the Commission's San Onofre decision, arguing that the Commission has not commenced a rulemaking proceeding to consider the issue of earthquakes in the context of emergency planning, and that until an adequate generic proceeding is held the issue should be considered in this proceeding. (Governor Brown's Brief, at 6; Joint Intervenors' Brief, at 24-29). However, the factual and legal situation in NRDC v. NRC is inapposite to the situation present here. Further, the Commission's ruling in San Onofre was binding on the Licensing Board in this proceeding, as discussed supra, at 25.

28/ See Grimes Affidavit attached to "NRC Staff Views With Respect To Questions Posed By The Atomic Safety And Licensing Board In The Area Of Emergency Planning" filed before the Licensing Board in the San Onofre proceeding on June 22, 1981, at 4 and 6.

29/ Natural Resources Defense Council, Inc. v. NRC, 547 F.2d 633 (D.C. Cir. 1976), rev'd on other grounds sub nom. Vermont Yankee Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978), on remand, Natural Resources Defense Council, Inc., v. NRC 685 F.2d 459 (D.C. Cir. 1982), cert. granted, 51 U.S.L.W. 3402 (November 29, 1982).

For all of these reasons, the Staff submits that the Licensing Board did not err in relying upon the Commission's San Onofre decision in declining to consider the effects of earthquakes on emergency planning and preparedness for Diablo Canyon.[30/]

C. The State's Emergency Planning Zones Were Given Proper Consideration by the Licensing Board.

In its Initial Decision, the Licensing Board noted that the State of California has established EPZs which differ substantially from those required by the Commission's regulations, but that the Licensing Board lacked the authority to enforce those zones:[31/]

> The State of California has established its emergency planning zones (EPZ's) around Diablo Canyon in a manner which differs substantially from the Federal zones defined in 10 C.F.R. 50.47(c)(2). . . . The Board did not inquire into the technical basis for the California zones since they are larger than the Federal zones and encompass them. . . .
>
> We conclude that the Federal requirements are minimum standards for planning and not inflexible targets which must not be exceeded. This Board, however, has no authority to enforce State standards which exceed those required by Federal regulations. That is for the State to do. . . .

(Initial Decision, at 11-12). The Licensing Board observed, however, that "notwithstanding Federal requirements for planning zones, it is the State defined BEPZ which is to be implemented by the State, County and

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30/ The Staff does not agree with the due process assertions made by Joint Intervenors. (Joint Intervenors' Brief, at 21-30). However, in view of the discussion set forth herein, the Staff believes that the Appeal Board need not reach those issues.

31/ The State has established three emergency planning zones: the California Basic EPZ (BEPZ), the Extended EPZ, and the California Ingestion Pathway EPZ.

Applicant at Diablo Canyon" (Id., at 13). Accordingly, the Licensing Board determined that while the Federal EPZs should be treated as "minimum requirements", it proceeded to inquire into the status of planning beyond those zones in order to "assure integration of licensee, State and local planning as stated in NUREG-0654" (Id., at 14).

The Licensing Board's actions in this regard were fully consistent with the Commission's regulations. 10 C.F.R. § 50.47(c)(2) specifies that the plume exposure pathway EPZ and ingestion pathway EPZ generally shall consist of areas 10 miles in radius and 50 miles in radius, respectively -- although these boundaries are not invariable:

> The exact size and configuration of the EPZs surrounding a particular nuclear power reactor shall be determined in relation to local emergency response needs and capabilities as they are affected by such conditions as demography, topography, land characteristics, access routes, and jurisdictional boundaries. . . .

10 C.F.R. § 50.47(c)(2). The Commission's determination as to the adequacy, in general, of the 10 mile and 50 mile EPZs followed intensive study by the Commission over several years of relevant considerations, including worst-case Class 9 accidents and adverse meteorological conditions.[32/] In the Statement of Consideration which accompanied the adoption of the new emergency planning regulations, the Commission noted that the regulatory basis for the 10 mile and 50 mile boundaries reflects "the

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32/ See "Planning Basis for Development of State and Local Government Radiological Emergency Response Plans in Support of Light Water Nuclear Power Plants," NUREG-0396-EPA 520/1-78-016 (December 1978), at 16-17, I-6 to I-7, and I-20; see also, "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants," NUREG-0654/FEMA-REP-1, Rev. 1 (November 1980), at 10-13.

Commission's decision to have a conservative emergency planning policy in addition to the conservatism inherent in the defense-in-depth philosophy." 45 Fed. Reg. 55402, 55406 (August 19, 1980). In addition, the Commission observed (Id.):

> The exact size and shape of each EPZ will be decided by emergency planning officials after they consider the specific conditions at each site. These distances [10 miles and 50 miles] are considered large enough to provide a response base that would support activity outside the planning zone should this ever be needed.

While 10 C.F.R. § 50.47(c)(2) specifies that "the exact size and configuration of the EPZs surrounding a particular nuclear power reactor" are to be determined upon consideration of site-specific factors, the variations permitted by the regulation should not be permitted to abrogate the generic determination that 10-mile and 50-mile EPZs are adequate. Thus, in Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-82-39, 15 NRC 1163, 1178 (1982), the Licensing Board rejected a contention which would have required a 20-mile plume exposure EPZ for the San Onofre facility, on the grounds that it constituted "an impermissible attack on the Commission's rule establishing the boundary of the plume EPZ at 'about 10 miles'" -- although it recognized that minor variations might be found to be appropriate:

> In light of the parties' submissions and our own research, we ruled that site-specific studies are not required to establish the plume EPZ boundary. (Tr. 3497-99) Rather, those boundaries are to be established in the first instance at "about 10 miles," subject to their possible adjustment inward or outward based upon the judgment of local emergency planning officials. Such judgments would be made with reference to the factors enumerated in the rule that applies in the particular case.

15 NRC at 1178-81. As the Licensing Board further observed, while the regulation "would clearly allow leeway for a mile or two in either direction, based on local factors," the rule nonetheless "equally clearly precludes a plume EPZ radius of, say, 20 or more miles." Id., at 1181.33/

Similarly, the 10 mile and 50 mile EPZs established by the Commission have been held to deprive a Licensing Board of the jurisdiction to consider other boundaries, absent site-specific information requiring a modification of the EPZs defined by regulation:

> The Board's job with respect to definition of the EPZ is to determine whether there has been compliance with the Commission's regulation. We have no jurisdiction to challenge as a matter of policy whether the approximately 10- and 50-mile EPZs are too small or too large. The Board's major area of responsibility is determination of whether "local emergency response needs and capabilities as they are affected by such conditions as demography, topography, land characteristics, access routes, and jurisdictional boundaries" have been properly considered.

Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), LBP-81-59, 14 NRC 1211, 1555 (1981). As the Licensing Board further observed in that proceeding, both the State and local jurisdictions "are free to develop plans going beyond the requirement set forth in 10 C.F.R. Part 50. . . . [H]owever, the Board has no responsibility to either review any such plans or determine their adequacy." Id., at 1559.34/

33/ The Licensing Board in San Onofre recognized that there may be instances in which "a 20-mile radius plume EPZ in one direction, or even longer, may be appropriate, based, for example, on prevailing wind conditions," and that in such an instance, "a variance in the rule should be granted pursuant to 10 C.F.R. § 2.758." 15 NRC at 1181 n.14.

34/ In TMI, the Licensing Board found that "[t]o the extent that any work has been done on 20-mile plans, that effort provides additional assurance that the planning within the plume exposure pathway EPZ is adequate." 14 NRC at 1559.

In the instant proceeding, the Applicant, State and San Luis Obispo County adopted plume exposure pathway EPZs which extend well beyond the 10 mile radius surrounding the facility -- for instance, the BEPZ extends 22 miles to the Southeast of the facility and somewhat shorter distances to the East and North.[35/] The BEPZ and the Extended EPZ which have been adopted are those which were set out in a document published by the California Office of Emergency Services, entitled "Emergency Planning Zones for Serious Nuclear Power Plant Accidents" (November 1980) (Governor Brown's Ex. 8), which established such EPZs for each of the nuclear power plants in California. That document was developed as the result of a study commissioned by the State of California pursuant to Section 25880.4 of the California Health and Safety Code adopted in 1980. The California study[36/] replicated the study conducted by the NRC/EPA Task Force, based on accident scenarios and methods used in the Commission's Reactor Safety Study, WASH-1400 (NUREG 75/014, October 1975). It was the California study, and not the Commission's regulations, which served as the starting point for arriving at the EPZs adopted by the State for the Diablo Canyon facility;[37/] the resulting EPZ boundaries reflect that independent analysis, rather than any effort to adjust the 10-mile and 50-mile EPZ boundaries to account for site-specific factors, as set forth in 10 C.F.R. § 50.47(c)(2).

35/ See Applicant's Ex. 80, "San Luis Obispo County Nuclear Power Plant Emergency Response Plan," (Revision B, October 1981), Figure I.5-6.

36/ Science Applications, Inc., "A Study of Postulated Accidents at California Nuclear Power Plants" (July 1980).

37/ See Applicant's Ex. 73, App. C, at 5-6, 8.

At no time during this proceeding did the Joint Intervenors or Governor Brown offer testimony to justify either the selection of the State's EPZs or a departure from the Commission's mandated EPZs of about 10 miles and 50 miles. While the Joint Intervenors cite Governor Brown's Exhibit 8 as "the most appropriate basis for a determination of the areas in which emergency preparedness is necessary" (Joint Intervenors' Brief, at 34),[38/] that exhibit was admitted only for the limited purpose of identifying the State's EPZ boundaries and not to justify or provide a basis for EPZs which extend beyond those mandated by the Commission. See Tr. 12522-23, 12545-48.[39/] Accordingly, any reliance upon Governor Brown's Exhibit 8 for the proposition that the State's EPZs are founded upon a proper site-specific analysis is improper.[40/]

The Joint Intervenors assert that the Licensing Board's refusal to require compliance with the Commission's emergency preparedness standards throughout the State's EPZs "contravenes established principles of federal-state comity,"[41/] and that the Licensing Board erred in refusing, "if necessary, to defer licensing until such preparedness is adequate" (Joint Intervenors' Brief, at 32, 33-34). In addition, they assert that

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38/ Governor Brown similarly relies upon his Exhibit 8 to support the validity of the State's EPZs. See Governor Brown's Brief, at 9 n.2 and 10.

39/ At no time did the Joint Intervenors or Governor Brown attempt to demonstrate special circumstances which would warrant a departure from the Commission's regulations, pursuant to 10 C.F.R. § 2.758.

40/ The Licensing Board, itself, correctly ruled that it would not consider any proposed findings as to the propriety of the State's EPZs (Tr. 12548).

41/ Similar arguments are made by Governor Brown. See Governor Brown's Brief, at 8-12.

the State has "legitimate interests" in the field of emergency preparedness, and that "[t]his is not a situation where the subject of state concern has been preempted by federal law" (Id., at 34, 35).42/

Joint Intervenors' arguments, however, miss the point. Pursuant to § 274(c) of the Atomic Energy Act,43/ the Commission is to retain full authority and responsibility with respect to regulation of nuclear power plants, and may not delegate any such authority to a State. Pursuant to the Act, the Commission has adopted regulations pertaining to emergency planning and preparedness in the event of a radiological emergency, which regulations are binding upon an applicant or licensee absent a showing of special circumstances under 10 C.F.R. § 2.758. Regardless of any State's decision to adopt its own emergency planning and preparedness requirements, it is compliance with the Commission's regulations that determines whether an operating license should be issued by the Commission. The Licensing Board properly recognized this principle in declining to require compliance with the Commission's regulations throughout the State's EPZs. Indeed, the Appeal Board has recognized in other proceedings that the Commission lacks jurisdiction to require compliance with State law, and that licensing by

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42/ The Joint Intervenors also argue that "[t]he Board's assumption that the state can enforce its own emergency preparedness requirements is simply unrealistic in light of the fact that the NRC has sole responsibility for licensing of the facility" (Joint Intervenors' Brief, at 34). The Governor, however, asserts that "the state has independent authority to enforce its emergency planning zones" (Governor Brown's Brief, at 9-10).

43/ 42 U.S.C. § 2021.

the Commission need not be deferred until compliance with State law has been demonstrated.[44/] Accordingly, the Licensing Board's rulings in this regard were manifestly correct.

Finally, Governor Brown asserts that "there was no basis for the Board to conclude that the offsite and onsite emergency plans can be integrated or that they are capable of being implemented," given the differences between the State and Federal EPZs and the potential "confusion" as to "the enforcement of the remainder of 10 C.F.R. § 50.47 requirements", remarked upon by the Licensing Board (Governor Brown's Brief, at 11). However, the Licensing Board's Initial Decision carefully evaluates the state of offsite emergency planning and preparedness, to the extent necessary, in the 10-mile and 50-mile EPZs as well as in the areas which lie outside those EPZs but within the State's EPZs. Having reviewed the state of such offsite preparedness -- noting, where appropriate, areas in which planning remains incomplete -- the Licensing Board concluded, to its satisfaction, that the offsite plans were capable of being integrated and implemented. Governor Brown fails to indicate how any potential "confusion" has not been adequately resolved by the Licensing Board's decision, nor does he point to any facts which would indicate that these matters pre-

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44/ See, e.g., Northern States Power Co. (Tyrone Energy Park, Unit 1), ALAB-464, 7 NRC 372, 375 (1978); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 748 (1977); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-189, 7 AEC 410, 412 (1974).

clude a finding of reasonable assurance as to the adequacy of offsite emergency preparedness. Absent any indication as to how the Licensing Board erred in reaching its determinations in this regard, Governor Brown's unsupported assertion of error should be rejected.

D. The Licensing Board Did Not Err in Authorizing the Issuance of a Full-Power License Despite the Existence of Deficiencies In Off-site Plans.

In their brief on appeal, the Joint Intervenors contend that "the Licensing Board's authorization of licensing despite numerous significant deficiencies in compliance with the Commission's emergency planning standards constitutes an abuse of discretion" (Joint Intervenors' Brief, at 36). In particular, they contend that emergency planning deficiencies in five areas warrant a reversal of the Initial Decision: (1) State preparedness; (2) county standard operating procedures and letters of agreement; (3) public education; (4) "public response and plan implementation" (i.e., surveys); and (5) emergency communications (Id., at 36-47). We have addressed certain of these alleged deficiencies, concerning State preparedness and County standard operating procedures, supra at 15-22, and those areas are not addressed further herein. As to the remaining areas of alleged deficiency, the Staff's views are set forth in the discussion which follows. With respect to all five of the areas of alleged deficiency, the Staff believes that these matters were properly considered to the extent appropriate by the Licensing Board, and that a reversal of the Initial Decision is not warranted.

1. Letters of Agreement.

Joint Intervenors argue that the failure of San Luis Obispo County to prepare letters of agreement results in non-compliance with 10 C.F.R. § 50.47(b). (Joint Intervenors' Brief, at 39, 40). In this regard, the Staff notes that the letters of agreement which are to be obtained by the Applicant have been provided; the Licensing Board concluded, based on undisputed evidence, that the Applicant has "submitted letters of agreement between itself and various . . . specified interfaces among various onsite and offsite response activities . . ." (Initial Decision at 17, 22). In support of this conclusion, the Board found that "[i]nterfaces between onsite functional areas of emergency activity and Applicant's headquarters, local services and State and local governments have been specified" and that "[t]he services that offsite organizations would provide have been specified, agreements reached are appended to the plan and authorities and responsibilities of organizations are specified." (Id., at 107). Finally, it found that written agreements between the Applicant and State, local, private and Federal organizations have been developed. (Id., at 95).

With respect to Joint Intervenors' assertion that the County has failed to prepare letters of agreement, the Licensing Board, itself, has concluded that the County has not yet incorporated letters of agreement in its emergency plans. Based on the testimony of Mr. Ness, the Board observed that "[t]he County plans to contact Federal and State agencies and private businesses such as contractors, banks, and gas stations for the purpose of obtaining supporting agreements", but "[t]he number and nature of these agreements have not yet been worked out." (Id., at 18).

Further, the Licensing Board found, based on Mr. Ness' testimony, that: (1) agreement letters are used for noncritical elements of emergency support; (2) critical elements are contained in County SOPs; and (3) no evidence of difficulty obtaining signatures on letters of agreement was produced at the hearing. (Id., at 101). The Board concluded that County letters of agreement with supporting organizations are not critical to successful implementation of the emergency, but are important, and therefore "the Staff should assure itself through consultation with FEMA that the effort to develop significant letters of agreement is concluded promptly." (Id.). In addition, the Licensing Board determined that these letters of agreement should be obtained prior to full-power operation. (Id., at 18).

The Staff submits that the Licensing Board fully recognized the need for letters of agreement to be obtained, and specifically accounted for them in its decision. The Licensing Board's resolution of this matter is consistent with the Commission's concept of predictive findings embraced in the San Onofre decision, supra, LBP-82-39, 15 NRC 1163, and the Licensing Board correctly concluded that this matter could properly be resolved by Staff verification following the close of hearings. See discussion supra, at 14-15.

2. Public Education.

It is undisputed that the County of San Luis Obispo's public information booklet has not yet been published and that public understanding of emergency response is very low -- as the Licensing Board, itself, has found. (Initial Decision, at 145). The Board found that the

County information document has been prepared in draft form but has not yet gone into final printing since the County had not yet given final approval to the County plan at the time of the hearing. (Id., at 145-46).45/

This deficiency in emergency preparedness was fully recognized. Both the Licensing Board and FEMA found that the required public information program ". . . must be completed to be sure that emergency response instructions are made available to both resident and transient populations." (Id., at 145). As a consequence, the Licensing Board concluded that the public information pamphlet being prepared by the County is important to the education of the County's citizens and it should be made available to the public well in advance of start-up of the Diablo Canyon plant since public understanding of emergency response is low. (Id., at 146). The Licensing Board indicated that the Staff should assure itself that this document is published and disseminated promptly. (Id.). More importantly, in recognition of the importance the Licensing Board attached to this matter, the Board imposed the requirement, as a condition to be met before the full-power license is issued, that the Director of Nuclear Reactor Regulation verify that "[t]he public information program required under [Section 50.47(b)(7)] be carried out to ensure that emergency response instructions are made available to both resident and transient populations." (Id., at 217, A-2). Thus the Licensing Board took specific measures to assure that the deficiency in the public education program is

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45/ As discussed supra at n.22, the Board of Supervisors has since given final approval to the San Luis Obispo Nuclear Power Plant Emergency Response Plan.

corrected. The Staff submits that the Licensing Board's action fully comports with the Commission's "predictive finding" approach, and that this matter was properly left for post-hearing resolution by the Staff.

3. Surveys of Emergency Workers and the Public.

a. Survey of Emergency Workers

The Licensing Board's Initial Decision recognizes the possibility that some "role conflict" may arise whereby an individual emergency worker may perceive a conflict "between his duties to assure the safety of his family and his emergency duties," resulting in "the possibility that a person might resolve the conflict in a radiological emergency by evacuating along with his family rather than reporting for emergency duty" (Id., at 18-19). The Licensing Board found, however, that "this concern can be reduced for most workers through assurance that their families' safety has been provided for," and concluded as follows (Id., at 19):

> We accept that some general workers might not report for duty in a radiological emergency; however, we have found sufficient mitigating circumstances to conclude that defections would not be of such magnitude as to jeopardize the successful implementation of the plan. We are convinced that most responsible workers would resolve their conflicts in a common-sense fashion by seeing to their families' safety and then reporting for duty. (Findings 42, 43, 44)

Having so concluded, the Licensing Board determined that a "scientific survey" of emergency workers, requested by the Joint Intervenors, would not "add anything of significance to practical emergency planning" (Id.), concluding instead that the problem of role conflict could adequately be addressed in the instructions given to emergency workers (Id., at 20, 21).

In support of its conclusions, the Licensing Board cited evidence that role conflict would not affect the performance of trained professional emergency workers, such as the California Highway Patrol, the County Sheriff, physicans, nurses and other medical personnel (Id., at 102; Erikson testimony, ff. Tr. 124076, at 7). As to volunteer emergency workers, whose principal occupations do not involve protecting the public health and safety, the Licensing Board relied upon evidence that such persons could verify the safety of their families and then report for duty, and that experience in actual emergencies does not indicate that such persons fail to perform their duties in an emergency (Initial Decision, at 102-03; Mileti, Tr. 12264-65; Erikson, Tr. 12425; Eldridge, Tr. 12729-30).

Governor Brown asserts that the Licensing Board improperly failed to order a survey of emergency workers "to develop the facts necessary to deal with the role conflict problem," as was suggested by Joint Intervenors' expert, Dr. Kai Erikson; further, Governor Brown asserts that in the absence of such a survey, "the 'dimension' of the role conflict problem at Diablo Canyon cannot be known" (Governor Brown's Brief, at 16). However, there is no evidence in the record to suggest that such a problem may exist to the extent that it might adversely affect emergency preparedness -- indeed, Dr. Erikson, himself, was unaware of any such data (Erikson, Tr. 12425). Accordingly, it was entirely reasonable for the Licensing Board to accord greater weight to the testimony which established that, with proper instructions and training, emergency workers will generally carry out their assigned responsibilities (see Initial Decision, at 103-04).

For these reasons, the Licensing Board correctly determined that a scientific study of emergency workers is not needed to assure their availability during a radiological emergency.

b. Surveys of the Affected Population

In evaluating the adequacy of compliance with Planning Standard (b)(7) (public education and information), the Licensing Board made numerous findings as to the adequacy of emergency planning in this area, but rejected the Joint Intervenors' proposed requirement that a social and psychological survey of local populations be taken in order to determine in advance the public's attitudes toward a radiological emergency; the Licensing Board stated that it did not believe "a social survey would offer useful improvement in public information planning . . . ." (Initial Decision, at 43). The Board found that while the Joint Intervenors' witness, Dr. Johnson, urged the gathering of a wide variety of sociological data, the suggested types of data are "irrelevant to the task of informing the public" about the need to evacuate in an emergency (Id., at 46). Further, the Board found that studies of past (non-radiological) disasters have provided "sufficient knowledge . . . to conduct an adequate public information program," citing the testimony of Applicant's witness, Dr. Mileti (Id., at 46, 146-47). The Board concluded that 10 C.F.R. § 50.47 (b)(7) and Standard G of NUREG-0654 have been or will be satisfied, and declined to order a social survey since "it is doubtful that the results of a survey could be used to improve public information planning" (Id., at 47; see Id., at 146-47).

The Licensing Board's determination that a sociological survey would not improve public information planning is amply supported by the evidence. As noted by the Licensing Board (Id., at 150-51), Dr. Mileti testified that there have been numerous studies of how humans respond to disaster warnings (Tr. 12166, 12145-46), and that the factors which shape human behavior in one type of disaster or emergency situation apply in others (Mileti testimony, ff. Tr. 12184 at 6-9). He further testified that a person's answers given to hypothetical survey questions may point to entirely different actions than those which are actually taken in the face of an emergency situation (Tr. 12163-65), and that, in any event, emergency planning can adequately account for various pyschological attitudes without knowing in advance the exact number of persons who will exhibit those attitudes (Tr. 12177-78). Dr. Mileti concluded that a social survey would provide no information which would require modification of a well-designed public information program (Tr. 12177-78; Mileti testimony, ff. Tr. 12118, at 2-11).

The Licensing Board agreed with Dr. Mileti's observations concerning the practical utility of responses given to hypothetical questions in a sociological survey, and noted that Dr. Erikson, himself, was "unconvincing" on this point (Initial Decision, at 150). On balance, after taking the testimony of Drs. Johnson, Erikson and Mileti "fully into account," the Licensing Board found that sufficient qualitative data had been factored into emergency planning, and that "quantification of public attitudes . . . while interesting, would not add substantially to the effectiveness of the plan" (Id., at 151). Accordingly, the Licensing Board concluded "that the existing public information program, when implemented, will

provide reasonable assurance that the public can be notified effectively in the event of a radiological accident and that no public surveys are required" (Id.).

The Joint Intervenors argue that a survey should be ordered, relying in particular on the testimony of their witness, Dr. Johnson. Dr. Johnson testified that far more people evacuated from the TMI area than were directed to do so, that most of those persons did not utilize evacuation shelters, and that many of them evacuated further distances than directed (see Joint Intervenors' Brief, at 44 n.60). The Joint Intervenors then assert that the TMI evacuation demonstrated "that the public does not necessarily respond reasonably," notwithstanding the Licensing Board's reliance upon NUREG-0654 to the contrary, and that the Licensing Board "simply ignored the TMI experience" (Id., at 44); in their view, only by conducting a survey to determine the "social and psychological profile of the population in the evacuation zones" will it be possible to predict the "probable public response to a radiological emergency at Diablo Canyon" (Id., at 42).

Notwithstanding Joint Intervenors' assertion to the contrary, the Licensing Board did give adequate consideration to the TMI experience. The Licensing Board took notice of Dr. Johnson's testimony, finding that "[t]he data presented by Dr. Johnson are credible research results and we have no trouble accepting them" (Initial Decision, at 149). The Board concluded, however, that it had trouble in "assigning significance" to those results (Id.):

> The fact that populations evacuated from TMI in larger numbers than expected or went further than expected or failed to use public shelter areas has no apparent bearing on public health and safety. We are unable to ascertain that

> the proposed sociological survey could be used to enhance the effectiveness of public notification or education in the Diablo Canyon area since over-response, although unnecessary, appears harmless to public health and safety and the data that would be collected in a survey would be of limited relevance to a public information program. (Johnson Testimony ff. Tr. 12407, p.6; Tr. 12419-420).

(Id., at 149-50). Since no reason has been demonstrated as to how a sociological survey would assist in protecting the public health and safety, the Licensing Board properly refused to order that such a survey be undertaken.

4. Emergency Communications.

In its Initial Decision, the Licensing Board carefully reviewed the status of compliance with Planning Standard (b)(6) (Emergency Communications), as to both the onsite and the offsite communications systems. The Licensing Board concluded that "the record reveals no serious deficiencies in the onsite emergency communications system" (Initial Decision, at 36); as to the offsite communications sytem, the Licensing Board found that certain deficiencies do exist in the microwave transmission system upon which radio communications partially depend. The Licensing Board described these deficiencies as follows:

> The system would be vulnerable to failure if the sheriff's microwave system failed or if one of the mountain repeater stations were to fail. The history of the microwave system reflects a number of both design and maintenance problems. . . . Having studied the problems in the County communication system (Governor Brown Ex. 10), the Board is convinced that the communication system contains a number of design and maintenance difficulties which should be upgraded. However, the problems with the general system are of a noncritical nature for emergency response. (Findings 148, 149)

(Id., at 36-37).

In support of its conclusion that the problems in the offsite communications system are non-critical, the Licensing Board cited evidence that the Applicant has committed to purchase new radio transmitters for use by the local government VHF channel, and that "when these systems are in place the local government VHF system will be in excellent condition to handle communication needs for many years. (Findings 150-153)" (Id., at 37). Further, the Licensing Board cited evidence which indicated that the microwave transmission system used for UHF communications is being supplemented with another repeater radio, and that since "the microwave system has not had a major failure in seven years, we are unable to find the system inadequately reliable at present, although it may well require future upgrading. . . ." (Id., at 38).[46/] Accordingly, the Licensing Board concluded that "the offsite communication system for San Luis Obispo County is or will be adequate to cope with a radiological emergency at Diablo Canyon and the plans for emergency communications meet the requirements of 10 C.F.R. 50.47 b(6) and the criteria of Part F of NUREG-0654" (Id., at 38-39).[47/]

46/ The Licensing Board further observed that "[t]he equipment needed to activate sirens, backup systems, pagers and tone monitors is on order and expected to be installed by May 20, 1982" (Initial Decision, at 38).

47/ Although it determined that the communication system is or will be in compliance with 10 C.F.R. § 50.47(b)(6) and the criteria of Part F of NUREG-0654, the Licensing Board suggested that the Staff should continue to keep abreast of factual developments in this area, recommending that "the Staff . . . should assure itself of the continuing reliability of emergency communication systems which are dependent on the County microwave system since the microwave system could be a weak link in County radio communications" (Id., at 39).

The Joint Intervenors now assert that the Licensing Board ignored evidence, principally contained in the San Luis Obispo County Five Year Communications Plan (Governor Brown's Ex. 10), which set out in detail various deficiencies in the County's communications system (see Joint Intervenors' Brief, at 45-46). The Joint Intervenors assert that the Licensing Board "conced[ed] the existence of these deficiencies," but then improperly relied upon the Applicant's "commitments to supply improvements to the system at some future date" (Id., at 47). The Joint Intervenors contend that this reliance upon the Applicant's commitments "is an insufficient basis for licensing" and that the Licensing Board's conclusion as to the adequacy of the communications system "is not supported by substantial evidence in the record" (Id., at 47).

The Joint Intervenors' argument ignores any distinction between items in the communication system which are considered essential to an emergency response for Diablo Canyon and those which would provide long-range improvement of County communications generally. Such a distinction is important; the evidence demonstrated that virtually all "priority one" items -- those recommended by FEMA -- were in place or on order (Ness, Tr. 12556, 12566-67, 12492, 12494; Governor Brown's Ex. 9). In sum, those items considered by FEMA to be essential for conformance with Planning Standard (b)(6) have been identified and, where not yet in place, are the subject of specified corrective actions (see Attachment 2 to Applicant's Panel #1 Testimony, ff. 11782, at 3-5; Joint Intervenors' Ex. 127). Further, the Licensing Board expressly conditioned issuance of a full-power license upon verification by the Staff that the deficiencies in the County emergency plan which were noted by FEMA have been corrected

(Initial Decision, at 217 and Appendix A). Accordingly, upon satisfaction of this condition, there is reasonable assurance that the state of the offsite communication system will satisfy the requirements of 10 C.F.R. § 50.47(b)(6) and Planning Standard F of NUREG-0654.

Governor Brown contends that the Licensing Board should not have authorized licensing until all deficiencies have been corrected and the corrections have been presented "to the Board for review by the Board and parties" (Governor Brown's Brief, at 15). Governor Brown further contends that the Licensing Board erred in "leaving to the Staff, an adversarial party in this proceeding, the responsibility to make requisite findings of fact," by recommending that the Staff assure itself of the continuing reliability of the communication system (Id.). Governor Brown's argument, however, ignores the principle recognized by the Commission in promulgating recent revisions to 10 C.F.R. § 50.47, that "the findings on emergency planning required prior to license issuance are predictive in nature and do not need to reflect the actual state of preparedness at the time the finding is made." "Emergency Planning and Preparedness; Notice of Proposed Rulemaking," 46 Fed. Reg. 61134, 61135 (1981). A Licensing Board's finding of "reasonable assurance," accordingly, "can be adequately accounted for by predictive findings" (Id.). Further, the Licensing Board's treatment of this issue is consistent with decisions in other proceedings which have left certain matters to be resolved by the Staff following hearings, as discussed supra at 14-15. Thus, in Southern

California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-82-39, 15 NRC 1163, 1216 (1982), the Licensing Board left for Staff confirmation whether certain emergency equipment has been purchased and delivered to the offsite response organizations, since the "delivery of emergency equipment is not a subject on which further hearing and cross-examination is likely to be productive, because the details about it are unimportant. . . . What matters . . . is a Staff confirmation that equipment suitable for its emergency purpose has been delivered" (Id.). For these reasons, here as in San Onofre, the Licensing Board's treatment of these matters was entirely proper and consistent with applicable precedent.

E. The Licensing Board Was Correct in Rejecting Joint Intervenors' Request that the Board Consider the Environmental Consequences of A "Class 9" Accident.

Joint Intervenors argue that the Licensing Board in its Memorandum and Order of June 19, 1981 incorrectly rejected Joint Intervenors' motion to reopen the record for further consideration of "Class 9" accidents, since "Class 9" accidents have never been addressed. (Joint Intervenors' Brief, at 47-53). Joint Intervenors assert that the Licensing Board did not apply the Commission's Statement of Interim Policy[48/] and ignored applicable regulations of the Council on Environmental Quality (CEQ).

The Commission's Statement of Interim Policy revised the NRC's policy for considering Class 9 accidents for purposes of implementing

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48/ "Nuclear Power Plant Accident Considerations Under the National Environmental Policy Act of 1969", 45 Fed. Reg. 40101 (June 13, 1980), hereafter "Statement of Interim Policy".

the National Environmental Policy Act (NEPA). (45 Fed. Reg. 40101). A review of Statement of Interim Policy discloses that its directive to consider Class 9 accidents is not applicable to Diablo Canyon. In the Statement of Interim Policy, the Commission stated (45 Fed. Reg. 40103):

> It is the intent of the Commission in issuing this Statement of Interim Policy that the staff will initiate treatments of accident considerations, in accordance with the foregoing guidance, in its ongoing NEPA reviews, i.e., for any proceeding at a licensing state where a Final Environmental Impact Statement has not yet been issued.
>
> * * *
>
> . . . this change in policy is not to be construed as any lack of confidence in conclusions regarding the environmental risks of accidents expressed in any previously issued Statements, nor, absent a showing of similar special circumstances, as a basis for opening, reopening, or expanding any previous or ongoing proceeding (footnote omitted).
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> * * *
>
> Environmental Reports submitted by applicants for construction permits and for operating licenses on or after July 1, 1980 should include a discussion of the environmental risks associated with accidents that follows the guidance given herein.

Against this background, the Staff notes that the final environmental statement for Diablo Canyon was issued in May 1973, with an addendum prepared in May 1976. Hearings were held on the environmental issues resulting in the Licensing Board's PID on environmental matters in 1978.[49/] Thus, the Statement of Interim Policy, on its face, does not require consideration of Class 9 accidents with respect to Diablo Canyon, and

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49/ Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-78-19, 7 NRC 989 (1978).

reopening of the Diablo Canyon environmental record is unwarranted unless special circumstances can be shown.

On June 19, 1981, the Licensing Board issued its "Memorandum and Order Denying Joint Intervenors Motion to Reopen Environmental Record For Consideration Of Class Nine Accident", LBP-81-17, 13 NRC 1122 (1981). In its Memorandum and Order, the Licensing Board made explicit reference to the Commission's Statement of Interim Policy as providing guidance that consideration of Class 9 accidents need not be addressed for plants in which an FES had been issued, absent a showing of special circumstances. (Id., at 1123). The Board delineated the three categories of special circumstances identified by the Commission and by the Staff, and noted that Diablo Canyon did not fall into any of those categories. (13 NRC at 1123). The Licensing Board reviewed the Commission's Black Fox decision (which held that the proximity of a plant to a "man-made or natural hazard" might also constitute "the type of exceptional case that might warrant additional consideration"),[50/] and concluded that the known seismicity of the State of California might constitute such a natural hazard. (13 NRC at 1123). The Licensing Board noted the extensive record that had been developed as to the effects of seismic forces on Diablo Canyon, including the thorough in-depth review conducted by the Appeal Board in ALAB-644, which found the Diablo Canyon seismic design to be adequate.

50/ Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), CLI-80-8, 11 NRC 433, 434-435 (1980). The correctness of the Licensing Board's holding as to the categories of special circumstances to be applied, is confirmed by a recent decision by the Appeal Board. See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-705, (December 10, 1982).

(Id.). Relying on that extensive record, the Licensing Board concluded that although Diablo Canyon is located in a region of known seismicity, the probability of it sustaining a Class 9 accident is no greater than for any other reactor and, therefore, no special circumstances exist. (13 NRC 1124).

Finally, Joint Intervenors' argument concerning the failure to follow CEQ regulations is erroneous. The CEQ regulations concerning environmental impact statements provides, in pertinent part, that:

> Agencies:
>
> (i) Shall prepare supplements to either draft or final environmental impact statements if:
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> * * *
>
> (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

40 C.F.R. § 1502.9(c)(1). In this instance, the Licensing Board and Staff have reviewed this matter and have determined that new circumstances or information did not exist, and thus the preparation of a supplemental EIS was not required. The Joint Intervenors have not provided any information which would support a contrary conclusion.

For the foregoing reasons, the Staff submits that the Licensing Board's June 19, 1981 Memorandum and Order properly denied Joint Intervenors' motion to reopen the environmental record to consider the consequences of a Class 9 accident.

F. The Licensing Board Correctly Found that the Power-Operated Relief Valve Systems Have Been Properly Classified and Qualified.

In its Initial Decison, the Licensing Board concluded that the Joint Intervenors and Governor Brown "failed to prove that changes are required in the classification of . . . block valves or PORV's" (Initial Decision, at 87), thereby finding against Joint Intervenors' Contention 12.[51/]

51/ Joint Intervenors' Contention 12, as admitted by the Licensing Board's Memorandum and Order of September 27, 1981, asserted as follows:

> Proper operation of power-operated relief valves, associated block valves and the instruments and controls for these valves is essential to mitigate the consequences of accidents. In addition, their failure can cause or aggravate a LOCA. Therefore, these valves must be classified as components important to safety and required to meet all safety-grade design criteria.

The Appeal Board observed in its Order of December 11, 1981, that, in its view, the acceptance of Contention 12 had "the practical effect of admitting intervenors' clarified contention 8 and 9" (Order at 3). Contentions 8 and 9 asserted as follows:

> Relief and Block Valves. Joint Intervenors contend that the present classification of Diablo Canyon relief valves and associated block valves, instruments and controls does not comply with 10 CFR Part 50, Appendix A, criterion 1, 10 CFR Part 50, Appendix B, Reg. Guide 1.26 and SRP (Reg. Guide 1.70), Section 3.22. Joint Intervenors also contend that General Design Criteria 1, 14, 15 and 30 are violated because relief and block valves have not been qualified under all transient and accident conditions.
>
> Proper operation of power operated relief valves, associated block valves and the instruments and control for these valves is essential to mitigate the consequences of accidents. The TMI accident demonstrated this fact. In addition, their failure

(FOOTNOTE CONTINUED ON NEXT PAGE)

In support of its conclusion, the Licensing Board cited and relied upon evidence which established that the Diablo Canyon facility's PORVs and related block valves have been adequately classified and qualified as appropriate (Id., at 212-15). The Licensing Board found that each pressurizer is equipped with three PORVs and three associated block valves (Id., at 212). Only one of the PORVs is necessary to perform its intended pressure relief function, while a second PORV is provided for redundancy; both of these PORVs are safety grade (Id., at 213). The third PORV performs no safety-related function, but is constructed to safety-grade standards with the exception of its instrumentation and controls; all three block valves are safety grade (Id.). In addition, the Licensing Board found that "the valves were considered to be seismically qualified prior to the institution of the seismic reverification

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(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

51/ can cause or aggravate a LOCA. Therefore, these valves must be classified as components important to safety and required to meet all safety-grade design criteria. However, the Diablo Canyon block and relief valves do not meet all safety-grade design criteria, in violation of the regulatory practices listed above. In addition, reactor coolant system relief valves form part of the reactor coolant system pressure boundary. When relief valve operation is unreliable, series block valves are relied upon to maintain the integrity of the pressure boundary. Despite these important safety functions, appropriate qualification testing has not been done to verify the capabilities of these block valves to function during normal, transient and accident conditions. In the absence of such testing and verification, the public health and safety are endangered.

The Licensing Board's Initial Decision treats these contentions along with Contention 12 in combined form (Initial Decision, at 82, 211).

program," and noted that "the Applicant is reviewing this qualification and has committed itself to whatever steps are necessary to maintain qualification of the valves" (Id., at 214). In these respects, the Licensing Board's findings were correct and fully supported by the record.

The Joint Intervenors do not dispute the Licensing Board's findings as to the classification of the facility's PORVs and block valves and their proper qualification prior to the conduct of the seismic reverification program.[52/] Rather, they take issue solely with the Licensing Board's conclusion "that the PORV systems have been adequately designed, constructed and tested" notwithstanding the pendency of the Applicant's seismic reverification program. The Joint Intervenors note that the Applicant has informed the Licensing Board that "[a]s a result of the seismic reverification program PG&E recently has determined that the spectra for the 140-foot level used in the piping analyses may not have been conservative in respect to some of the piping above that level . . . ." (Joint Intervenors' Brief, at 53),[53/] and they note that Governor Brown has

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52/ While the Joint Intervenors filed numerous exceptions with respect to the Licensing Board's findings concerning Contention 12, they have briefed only the single issue discussed in the text above. Similarly, Governor Brown filed several exceptions with respect to Contention 12 (see Governor Brown's Exceptions, nos. 4, 7, 75, 76, and 77); however, the "Brief of Governor Brown in Support of Exceptions," filed on November 8, 1982, fails to address any of those exceptions. Accordingly, as discussed supra at n.12, all of the unbriefed exceptions concerning Contention 12 should be deemed to have been waived.

53/ See Letter from Philip A. Crane, Jr., Esq., to the Licensing Board, dated February 24, 1982 (attached to Joint Intervenors' Brief as "Exhibit B").

moved for a deferral of any decision by the Licensing Board on the full-power license application pending completion of PG&E's evaluation and supplementation of the record (Id., at 54).[54/] The Joint Intervenors cite the Licensing Board's Memorandum and Order of April 2, 1982, which stated that "[n]o final judgment will be taken in this matter until such time as a thorough evaluation can be made of any newly discovered, relevant information" (Id.),[55/] and complain that in issuing its Initial Decision, the Licensing Board was "[a]pparently ignoring its previously expressed concern" (Id.) and disregarded its obligation to base a decision upon "substantial evidence" (Id., at 55). Accordingly, the Joint Intervenors assert that "the Appeal Board must vacate the findings of the Licensing [Board] regarding Joint Intervenors' Contention 12 pending a thorough evaluation of the significance of the errors in question and completion of all plant modifications which are necessary to correct them" (Id., at 55-56).

The Joint Intervenors' argument raises a matter which is not properly before the Appeal Board. Throughout the litigation of Contention 12, the issue in controversy concerned whether the PORVs and block valves were classified properly or required reclassification as "safety-grade"; the question as to whether the valves had been adequately qualified to their

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54/ "Motion for Deferral of Board Decision Pending Evaluation of Newly Discovered PG&E Design Errors Involving Block and Relief Valves and Pressurizer Heaters," filed on March 18, 1982.

55/ "Memorandum and Order in Response to 'Motion for Deferral of Board Decision Pending Evaluation of Newly Discovered PG&E Design Errors Involving Block Valves and Pressurizer Heaters,'" issued on April 2, 1982.

classification was not directly at issue during the litigation below.[56] The question of proper seismic qualification had never been encompassed in Contention 12. Governor Brown's motion of March 18, 1982 sought to defer issuance of an initial decision until the reverification program is complete, but he presented no evidence which would support a motion to reopen. Subsequently, on August 2, 1982, the Governor filed a motion to reopen on QA/QC issues generally, but it is not clear that he has complied with the standards for reopening including, inter alia, a demonstration of timeliness.[57] In any event, however, the resolution of that motion was deferred by the Licensing Board and is not now before the Appeal Board. Accordingly, the issue raised on appeal was never properly placed before the Licensing Board and is not ripe for appeal at this time.

Further, the Joint Intervenors incorrectly conclude that the Licensing Board's issuance of the Initial Decision demonstrates that the Board was "apparently ignoring its previously expressed concern" (Joint Intervenors' Brief, at 54). The Licensing Board's observation that "no final judgment will be taken in this matter until such time as a thorough evaluation can be made of any newly discovered, relevant information" did not amount to

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56/ The Staff's testimony addressed only the question of proper classification for the valves, and did not discuss the qualification of the valves (Jensen testimony, ff. Tr. 11621, at 9-14). The Applicant's testimony posited that all of the block valves and two of the three PORVs were qualified to meet safety-grade requirements (Hoch/Crawford testimony ff. Tr. 11590, at 5; Burns, et al. testimony ff. Tr. 11590, at 12). Governor Brown provided testimony which primarily discussed valve classification, but included a brief discussion of valve qualification (Bridenbaugh/Minor testimony regarding Contention 12, ff. Tr. 11671, at 8-9). No testimony on Contention 12 was provided by the Joint Intervenors.

57/ In this regard, see the Memorandum and Order issued by the Commission in this proceeding on December 23, 1982. CLI-82-39, 16 NRC ____ (1982).

a reopening of the record or an indication that the Board would receive evidence on this issue. Rather, the Licensing Board was simply observing that a full-power operating license will not be issued by the Commission until the seismic verification matter has been resolved, based upon evidence to be submitted to the Commission as part of the ongoing Independent Design Verification Program (IDVP).[58/] This observation is eminently correct.

Accordingly, inasmuch as the seismic verification program was not the subject of any contention pending before it, the Licensing Board correctly declined to stay its issuance of the Initial Decision to consider that matter. For this reason, the Licensing Board's finding that the PORVs

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58/ The correctness of this reading of the Licensing Board's order of April 2, 1982, is demonstrated by events which ensued thereafter. On May 13, 1982, Governor Brown filed a motion seeking an order compelling the Applicant "to provide full information to the Board and parties on (1) the status of PG&E's investigation into the errors identified in Board Notification PNO-5-82-09," which Board Notification had raised the issue of seismic qualification of the valves. ("Motion for Board Order Directing PG&E to Provide Information on Implications of Errors Identified in Board Notification PNO-5-82-09 and I&E Information Notice 82-11," at 1). On June 14, 1982, the Licensing Board issued a "Memorandum and Order" which denied that motion, relying, in part, upon the fact that the Commission will be addressing this matter directly:

> The Board is informed by PG&E that its "investigation into the errors identified in Board Notification PNO-5-82-09 is not yet complete. When it is complete the results will be included in the next regular bimonthly report submitted to the Commission and all parties as a part of the independent design verification program."

Memorandum and Order, dated June 14, 1982, at 1. Thus, the Licensing Board was well aware of the IDVP proceeding pending before the Commission, and indicated it would not reopen the record to consider matters which were already being addressed therein by the Commission.

and block valves have been adequately designed, constructed and tested -- notwithstanding the pendency of the seismic verification program before the Commission -- was proper and should be affirmed.

G. The Licensing Board Properly Ruled Upon the Admissibility of Joint Intervenors' Contentions.

In its Memorandum and Order of August 4, 1981, the Licensing Board admitted Joint Intervenors' Contention 1 (emergency planning), and rejected all of the Joint Intervenors' other TMI-related contentions -- although it indicated that it would permit a later resubmittal of one of those contentions, Contention 14.[59/] Following the issuance of a Commission directive on September 21, 1981,[60/] the Licensing Board admitted for litigation in the full-power proceeding two other contentions which had been filed in the low-power operating license proceeding (Contentions 10 and 12). On October 29, 1981, the Commission directed the Appeal Board "to review promptly, on an interlocutory basis, the Licensing Board's

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59/ The rejected contentions were as follows: Combined Contentions 2 and 3 (Hydrogen); Contention 4 (Decay Heat Removal); Combined Contentions 8 and 9 (Relief and Block Valves); Contention 10 (Reactor Vessel Level Instrumentation System); Contention 11 (Small Break LOCA Analysis); Contention 14 (Environmental Qualification of Safety Related Electrical Equipment); Combined Contentions 15 and 16 (Systems Interaction); and Contention 17 (Documentation of Deviations). These contentions had been reformulated by the Joint Intervenors in their "Statement of Clarified Contentions," dated June 30, 1981, and superseded the TMI-related contentions previously filed by the Joint Intervenors.

60/ Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-22, 14 NRC 598 (1981). In directing the Licensing Board to admit these contentions in the full-power proceeding, the Commission stated that it did so "without prejudice to the Appeal Board review (and later Commission review) of the exclusion of these and other contentions in both the low-power and the full-power proceeding." 14 NRC at 600.

rulings on the admissibility of Joint Intervenors' [TMI-related] contentions in the full-power proceeding."[61/]

On December 11, 1981, after hearing oral argument, the Appeal Board expressly affirmed the Licensing Board's rejection of Contentions 2/3, 4, 10, 11, 15/16, and 17, on the grounds that "[n]one of these contentions meet the standards for reopening the record enunciated by the Commission in its policy statements of June 20 and December 18, 1980 and further explained in its April 1, 1981 order in this proceeding."[62/] Further, the Appeal Board observed that, "[i]n our view, the Commission's action in admitting joint intervenors' low power contention 12 had the practical effect of admitting intervenors' clarified contention 8 & 9," in view of the similarity between those contentions.[63/] Finally, the Appeal Board withheld judgment on the Licensing Board's rejection of Clarified Contention 14, since the Joint Intervenors had recently submitted a revised contention raising the issues previously addressed by Contention 14, which revised contention was then pending before the Licensing Board;[64/] that revised contention was later rejected by the Licensing Board in a "Memorandum and Order" issued on December 23, 1981 (at 3-5).

61/ Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Order (October 29, 1981).

62/ Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Order (December 11, 1981), at 2 (footnotes omitted).

63/ Id., at 3. In view of the Appeal Board's ruling of December 11, 1981, and the Licensing Board's subsequent inclusion of Clarified Contentions 8 & 9 in considering Contention 12, no appeal can lie from the Licensing Board's earlier rejection of Contentions 8 & 9.

64/ Id., at 3-4. See "Joint Intervenors' Revised Contention on Environmental Qualification of Safety-Related Electrical Equipment," filed on October 23, 1981.

At this time, the Joint Intervenors[65/] seek to appeal from the Licensing Board's rejection of their Clarified Contentions 2/3, 4, 10, 11, 15/16, and 17[66/] -- although they candidly admit that the Appeal Board has already affirmed the Licensing Board's actions in this regard (Joint Intervenors' Brief, at 7, 57), and they concede that "[i]n light of this Board's prior decision, no purpose would be served by rearguing the issue here" (Id., at 57).[67/]

65/ While Governor Brown filed exceptions to the Licensing Board's August 4, 1981, rejection of Joint Intervenors' contentions (Governor Brown's Exceptions, Nos. 79 and 80 at p. 19), he has failed to brief those exceptions; accordingly, these exceptions should be deemed to have been waived. See discussion supra, at n.12.

66/ The Joint Intervenors filed an exception to the Licensing Board's rejection, on December 23, 1981, of their revised contention on environmental qualification of safety-related equipment -- which replaced their Clarified Contention 14 (Joint Intervenors' Exceptions, No. 16 at p. 5); however, they have failed to brief this exception. Accordingly, this exception should be deemed to have been waived. See discussion supra, at n.12.

In addition, the Joint Intervenors' revised contention reiterated matters raised in Clarified Contention 14, notwithstanding the Licensing Board's directive to the contrary. (See Memorandum and Order, dated December 23, 1981, at 5). Those matters were rejected outright by the Licensing Board's Order of August 4, 1981, and have not previously been reviewed by the Appeal Board. Accordingly, the Joint Intervenors' failure to brief this exception waives for all time their eligibility to appeal from the rejection of both their initial and revised contentions on the environmental qualification of equipment.

67/ While the Joint Intervenors concede that reargument would serve no purpose, they seek to "incorporate by reference" two entire pleadings which have previously been filed on this issue: (1) their "Request for Directed Certification," filed before the Commission on October 8, 1981, and (2) their "Supplemental Brief in Support of Request for Reversal of Atomic Safety and Licensing Board's August 4, 1981 Memorandum and Order," filed on November 6, 1981. (See Joint Intervenors' Brief, at 57). For the reasons discussed supra at n.12, this attempt to bootstrap other entire pleadings into the Joint Intervenors' Brief should be rejected outright.

In essence, the Joint Intervenors seek reconsideration by the Appeal Board of its prior decision affirming the Licensing Board's rejection of these contentions. However, they have provided no facts or arguments in support of their request that have not already been considered and rejected by the Appeal Board. The Appeal Board's ruling of December 11, 1981, was entirely correct, and no reasons have been provided which would demonstrate that it should be set aside.[68/] Accordingly, the Joint Intervenors' appeal on these matters should be rejected.

IV. CONCLUSION

For all of the foregoing reasons, the NRC Staff opposes the appeals filed by Joint Intervenors and Governor Brown, and recommends that they be denied.

Respectfully submitted,

Donald F. Hassell
Counsel for NRC Staff

Sherwin E. Turk
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 30th day of December, 1982

68/ The Joint Intervenors assert that the Appeal Board's Order of December 11, 1981 "explicitly disavow[ed] the reasoning relied upon by the Licensing Board" albeit "without detailed opinion," and complain that the Appeal Board has never issued a further opinion on this subject (Joint Intervenors' Brief, at 57). However, an examination of the Order of December 11, 1981, demonstrates that the Appeal Board simply withheld comment on the Licensing Board's reasoning (Order, at 2 n.1), and that the Appeal Board never expressed an intention to issue any further order on this subject.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO GOVERNOR BROWN'S AND JOINT INTERVENORS' BRIEFS IN SUPPORT OF EXCEPTIONS" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 30th day of December, 1982:

Dr. John H. Buck
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

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

Mr. Thomas S. Moore, Member
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

John F. Wolf, Esq.
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

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

Elizabeth Apfelberg
1415 Cozadero
San Luis Obispo, CA 93401

Dr. Jerry Kline
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

Philip A. Crane, Jr., Esq.
Pacific Gas and Electric Company
P.O. Box 7442
San Francisco, CA 94120

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

Mrs. Raye Fleming
1920 Mattie Road
Shell Beach, CA 93449

Richard E. Blankenburg, Co-publisher
Wayne A. Soroyan, News Reporter
South County Publishing Company
P.O. Box 460
Arroyo Grande, CA 93420

Byron S. Georgiou
Legal Affairs Secretary
Governor's Office
State Capitol
Sacramento, CA 95814

Mr. Gordon Silver
Mrs. Sandra A. Silver
1760 Alisal Street
San Luis Obispo, CA 93401

Joel R. Reynolds, Esq.
John R. Phillips, Esq.
Center for Law in the Public Interest
10951 West Pico Boulevard
Third Floor
Los Angeles, CA 90064

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

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

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

David S. Fleischaker, Esq.
P.O. Box 1178
Oklahoma City, Oklahoma 73101

Richard B. Hubbard
MHB Technical Associates
1723 Hamilton Avenue - Suite K
San Jose, CA 95125

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

Herbert H. Brown
Kirkpatrick, Lockhart, Hill, Christopher & Phillips
1900 M Street, N.W.
Washington, DC 20036

Harry M. Willis
Seymour & Willis
601 California St., Suite 2100
San Francisco, CA 94108

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

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

Mark Gottlieb
California Energy Commission
MS-18
1111 Howe Avenue
Sacramento, CA 95825

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

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

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

Mr. Thomas H. Harris, Energy Writer
San Jose Mercury News
750 Ridder Park Drive
San Jose, CA 95190

Donald F. Hassell
Counsel for NRC Staff