UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE NUCLEAR REGULATORY COMMISSION

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

APPENDIX TO

REQUEST OF PACIFIC GAS AND ELECTRIC COMPANY

FOR DIRECTED CERTIFICATION

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EXHIBIT 1

DIABLO CANYON CHRONOLOGY

EXHIBIT 1

DIABLO CANYON CHRONOLOGY

Jan. 16, 1967	PGandE files application with Atomic Energy Commission (AEC) for construction permit, Unit 1.
Feb. 20- Feb. 21, 1968	AEC public hearing on Unit 1 construction permit.
April 23, 1968	AEC issues construction permit, Unit 1.
June 28, 1968	PGandE files application with AEC for construction permit, Unit 2.
Jan. 13 - Jan. 14, 1970	AEC public hearings on construction permit, Unit 2.
Aug. 7, 1970	AEC hearings reopened to hear Intervenors alleged new evidence on geology.
Dec. 8, 1970	AEC Atomic Safety and Licensing Board (ASLB) directs AEC to issue construction permit, Unit 2.
Dec. 9, 1970	AEC issues construction permit, Unit 2.
June 14, 1971	Atomic Safety and Licensing Appeal Board (ALAB) affirms ASLB decision granting construction permit Unit 2.
July 21, 1971	AEC denies Intervenors appeal from ALAB order.
Aug. 16, 1971	AEC denies motion for reconsideration.
April 21, 1972	AEC order grants Intervenors request for hearing on suspension of construction permits pending National Environmental Policy Act (NEPA) review.
May 17 - May 20, 1972	Public hearings on whether construction permits should be suspended pending NEPA review.

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June 5, 1972	ASLB decision permits continued construction during NEPA review, with restrictions.
June 1, 1973	AEC issues "Final Environmental Statement" on Diablo Canyon, Units 1 and 2.
Sept. 17 - Sept. 21, 1973	AEC hearing on possible NEPA related suspension of construction permit, Unit 2.
Sept. 28, 1973	PGandE files revised application with AEC for operating license, Units 1 and 2.
	Final Safety Analysis Report (FSAR) as part of AEC operating license application reports indications of a possible fault offshore of Diablo Canyon.
Oct. 2, 1973	Application docketed by AEC.
Nov. 19, 1973	U.S. Geological Survey (USGS) notifies AEC of discovery of possible offshore fault.
Nov. 23, 1973	ASLB decision lifting June 5, 1972, construction restrictions.
March 26 - 27 April 20 May 1, 1974	First operating license prehearing conference before ASLB.
March 27 - 28 April 30 May 1 - May 2, 1974	Reopened NEPA hearing to consider energy conservation.
Aug. 2, 1974	ASLB decision on environmental effects (NEPA) affirming continuing validity of construction permits for Unit 2.
Sept. 12, 1974	Advisory Committee on Reactor Safeguards ("ACRS") subcommittee meeting, geology/seismology and emergency core cooling systems.
Oct. 16, 1974	AEC issues Safety Evaluation Report (SER).
Jan. 16, 1975	ALAB affirms ASLB NEPA decision. (ALAB - 254)

Jan. 28, 1975	USGS letter to Nuclear Regulatory Commission (NRC) concerning review of geology/seismology and additional seismic events on Hosgri fault must be considered.
Jan. 31, 1975	NRC issues supplement #1 to SER.
Feb. 18 - Feb. 19, 1975	ACRS subcommittee meeting, geology/ seismology/seismic design.
May 9, 1975	NRC issues supplement #2 to SER.
May 23, 1975	ACRS subcommittee meeting, issues other than geology/seismology/seismic design.
June 5, 1975	ACRS full committee meeting re: issues other than geology/seismology/seismic design.
June 12, 1975	ACRS letter issued - open items, geology/ seismology/seismic design not addressed.
Sept. 18, 1975	NRC issues supplement #3 to SER.
Dec. 9 - Dec. 12, 1975	Public hearings on receipt of nuclear fuel, Unit 1.
Dec. 23, 1975	ASLB order permitting receipt of nuclear fuel for Unit 1.
Dec. 24, 1975 Jan. 12, 1976	Draft reports sent to NRC by USGS.
Feb. 5, 1976	NRC order directing ALAB to hear appeal of ASLB order regarding receipt of fuel.
April 29, 1976	USGS final report on Diablo Canyon sent to NRC.
May 11, 1976	NRC issues supplement #4 to SER, NRC given criteria for reanalysis regarding USGS reports on geology/seismology.
May 21, 1976	ACRS subcommittee meeting, geology/ seismology/seismic design.
June 22, 1976	ALAB decision (ALAB - 334) affirming ASLB decision on receipt of nuclear fuel.

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June 25 - June 26, 1976	ACRS subcommittee meeting geology/seismology/seismic design.
July 8, 1976	ACRS full committee meeting, geology/ seismology/seismic design.
Sept. 10, 1976	NRC issues supplement #5 to SER.
Oct. 11, 1976	ACRS subcommittee meeting, geology/ seismology/seismic design.
Oct. 15, 1976	License issued for receipt of fuel, Unit 2.
Nov. 13, 1976	ACRS full committee meeting geology/ seismology/seismic design.
Dec. 7 - Dec. 17, 1976	Further public hearings before ASLB on NEPA Units 1 and 2.
Dec. 20, 1976	ACRS sends consultant's report to NRC Staff.
Dec. 29, 1976 - Jan. 5, 1977	PGandE/NRC meetings to discuss reevaluation criteria and response to ACRS consultant's concerns.
Feb. 4, 1977	PGandE/NRC meeting to try to resolve all issues concerning reevaluation criteria between PGandE and NRC and to discuss response to ACRS consultant's concerns.
June 5, 1977	ACRS subcommittee meeting, Hosgri amendment to operating license.
June 9, 1977	ALAB ruling regarding limited access to security plan.
June 21 - June 23, 1977	ACRS subcommittee meeting.
Aug. 2, 1977	ACRS subcommittee meeting, review of nonseismic issues.
Aug. 11 - Aug. 13, 1977	ACRS full committee meeting, issues other than geology/seismology.

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Aug. 19, 1977	ACRS letter, report on further partial review of open items other than seismic safety issues.
Oct. 18 - Oct. 19, 1977	ASLB hearings on remaining nonseismic safety issues other than adequacy of security plan.
June 12, 1978	ASLB finds Diablo Canyon plant meets environmental criteria of NEPA. Partial Initial Decision (environmental issues).
June 14, 15, June 21, 1978	ACRS subcommittee meeting, seismic issues.
July 6 - July 8, 1978	ACRS full committee meeting, seismic issues.
July 14, 1978	ACRS letter issued stating Diablo Canyon plant has been designed adequately to withstand the maximum postulated earthquake on the Hosgri fault and can operate without undue risk to public.
Nov. 1978	NRC Issues supplement #8 to SER, certifying that modified seismic design plan is adequate for a postulated 7.5 magnitude earthquake along Hosgri fault.
Dec. 4 - Dec. 23, 1978 Jan. 3 - Jan. 16, 1979 Feb. 7 - Feb. 15, 1979	ASLB hearings concerning seismic safety (final operating license hearings); operating license hearing record closed.
March 28, 1979	Three Mile Island Accident(TMI)
May 12, 1977	Intervenors file motion to reopen the environmental and emergency planning record on ground that TMI accident rendered the record inadequate.
May 24, 1979	NRC places three-month moratorium on issuing operating licenses and other permits.

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June 5, 1979	ASLB defers ruling on Intervenors' motion to reopen.
Sept. 27, 1979	ASLB Partial Initial Decision finds completed seismic modifications could enable Diablo Canyon plant to withstand an earthquake of 7.5 magnitude along Hosgri fault.
Nov. 5, 1979	NRC delays licensing of all new nuclear power plants pending resolution of TMI issues.
Nov. 29, 1979	NRC begins three day review of emergency plan to determine its adequacy in the wake of the TMI accident.
Jan. 23, 1980	NRC Appeal Board hears oral agreement on an appeal over the ASLB September 27, 1979, decision on seismic implications.
Feb. 15, 1980	NRC Appeals Board overturns ASLB decision that security plan is adequate.
April 3, 1980	NRC Appeals Board hears oral arguement on earthquake safety.
June 20, 1980	NRC orders PGandE to allow opponents of plant to see security plan.
June 24, 1980	NRC Appeals Board calls for reopening of earthquake safety hearings because of new evidence from the Oct. 1979 Imperial Valley earthquake.
July 14, 1980	PGandE files motion for fuel load and low power test license for Units 1 and 2.
Aug. 7, 1980	NRC issues supplement #10 to SER addressing the TMI accident related requirements for near term operating license applications for fuel loading and low power testing.

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Oct. 2, 1980	NRC announces new public hearings on seismic safety scheduled for Oct. 20. ASLB issues order accepting PGandE's motion for a low power test license for Units 1 and 2; rules that seismic and security issues need not be resolved before low power test license proceedings commence; identifies subject areas for hearings and sets schedule for filing contentions re low power test motion.
Oct. 3, 1980	NRC issues supplement #11 to SER concerning seismic modifications to safety equipment.
Oct. 20 - Oct. 25, 1980	Earthquake safety hearings to consider new evidence from Imperial Valley earthquake.
Nov. 10 - Nov. 15, 1980	Hearings on site security plans.
Dec. 3, 1980	Intervenors file statement of contentions with ASLB and request NRC to admit certain additional contentions in ASLB hearings on low-power test motion.
Dec. 22, 1980	NRC rules that ASLB has discretion to consider intervenors' Dec. 8, 1980, request that certain contentions be admitted in low-power hearings.
Jan. 28 - Jan. 29, 1981	ASLB holds prehearing conference re low-power test motion.
Feb. 13, 1981	ASLB admits certain contentions for litigation at hearings to commence May 19, 1981 re motion for a low-power license.

EXHIBIT 2

ORDER RELATIVE TO PGandE's

MOTION FOR LOW POWER TESTING

EXHIBIT 2

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Elizabeth S. Bowers, Chairman
Glenn O. Bright, Member
William E. Martin, Member

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In the Matter of	)	
	)	
PACIFIC GAS AND ELECTRIC COMPANY	)	Docket Nos. 50-275 (OL) 50-323 (OL)
	)	
(Diablo Canyon Nuclear Power Plant Units 1 and 2)	)	October 2, 1980

ORDER RELATIVE TO PGandE's
MOTION FOR LOW POWER TESTING

The Board is in receipt of the filings requested from the parties by its order of August 14, 1980. We agree with the Staff that while the PGandE motion could have been more comprehensive, it does meet the minimal requirements to commence the proceeding. We also agree with the Staff that the Licensing Board need not wait until the Appeal Boards have issued their decisions on the security and seismic issues before proceeding with preliminary matters as well as the hearing on fuel loading and low power testing.

The Staff has correctly identified the issues to be considered and we concur with the Staff's suggestion to defer considering Class 9 accidents until the Appeal Board reaches a conclusion on the seismic issue.

bcc: RPDavin MHFurbush JBHoch RFLocke JDShiffer JOSchuyler

The Staff tentatively suggested a schedule which we believe would not allow an orderly process. We have determined that contentions relative to fuel loading and low power testing should be filed by October 27, 1980. We will expect the Staff and PGandE to respond to any contention. We will then consider if a prehearing conference is appropriate. Subsequent scheduling will be considered at that time.

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Elizabeth S. Bowers
Elizabeth S. Bowers, Chairman

Dated at Bethesda, Maryland
this 2nd day of October 1980.

EXHIBIT 3

JOINT INTERVENORS'
REQUEST FOR DIRECTED CERTIFICATION

EXHIBIT 3

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

REQUEST FOR DIRECTED CERTIFICATION

The SAN LUIS OBISPO MOTHERS FOR PEACE, SCENIC SHORELINE PRESERVATION CONFERENCE, INC., ECOLOGY ACTION CLUB, SANDRA SILVER, GORDON SILVER, ELIZABETH APFELBERG, and JOHN J. FORSTER ("Joint Intervenors") hereby request that the United States Nuclear Regulatory Commission ("Commission") exercise its power of directed certification pursuant to 10 C.F.R. §2.718(i) to certify for its determination a question regarding application of the Commission's June 20, 1980 Statement of Policy, entitled "Further Commission Guidance for Power Reactor Operating Licenses," to the Diablo Canyon Nuclear Power Plant ("Diablo Canyon") licensing proceedings. This request arises out of the pending application of Pacific Gas and Electric Company ("PGandE") for a license to load fuel and conduct low power testing at the Diablo Canyon facility. In

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opposition to that license application, Joint Intervenors seek to submit certain contentions which, although beyond the scope of requirements contained in NUREG-0694, "TMI-Related Requirements for New Operating Licenses," bear directly upon the fundamental question of safety of operation of the Diablo Canyon facility and upon the Commission's obligation to protect the health and safety of the public. Atomic Energy Act of 1954 ("AEA"), 42 U.S.C. §2133(d); 10 C.F.R. §50.57(a)(3) and (6).

Although in its June 20, 1980 Statement of Policy the Commission appeared to limit admissible contentions to those relevant to requirements encompassed in NUREG-0694, the Commission has given several indications since that statement was issued that it was intended not as a binding norm but simply as general guidance. Indeed, several members of the Commission have stated explicitly that in appropriate cases the Commission would consider the admissibility of contentions going beyond NUREG-0694 and reply on the merits. (See Point I infra.)

Joint Intervenors submit that this is such a case and hence that a determination by the Commission is both warranted and necessary as to the admissibility of certain contentions which they seek to litigate with respect to PGandE's pending low power testing application. Accordingly, based upon the above-described statements of the Commission members and in the interest of assuring the health and safety of the public, Joint Intervenors hereby request that the Commission direct certification of the following question for its consideration:

> Whether the following issues, in addition to those based on requirements encompassed in NUREG-0694, "TMI-Related Requirements for New Operating

Licenses," should be admitted as contentions with respect to PGandE's motion for an operating license to load fuel and conduct low power tests at the Diablo Canyon Nuclear Power Plant:

1. Numerous studies arising out of the accident at TMI recognized the necessity of upgrading emergency response planning. Based upon these studies, the Commission has promulgated revised emergency planning regulations, effective November 3, 1980. The Applicant has failed to demonstrate that the combined Applicant, state and local emergency response plans for Diablo Canyon comply with those revised regulations ("Final Regulations on Emergency Planning," 45 Fed. Reg. 55402 (August 19, 1980)).

2. Neither the Applicant nor the NRC staff has presented an accurate assessment of the risks posed by operation of Diablo Canyon, contrary to the requirements of 10 C.F.R. 51.20(a) and 51.20(d). The design of Diablo Canyon does not provide protection against so-called "Class 9" accidents. There is no basis for concluding that such accidents are not credible. Indeed, the staff has conceded that the accident at TMI-2 falls within that classification. Therefore, there is not reasonable assurance that Diablo Canyon can be operated without endangering the health and safety of the public.

3. The Applicant has failed to demonstrate compliance at Diablo Canyon with 10 C.F.R. Part 50, Appendix B, regarding quality assurance.

The basis for this request is set forth below.

I

IN VIEW OF THE EXCEPTIONAL CIRCUMSTANCES OF THIS CASE, RELEVANT SAFETY ISSUES NOT ENCOMPASSED IN NUREG-0694 SHOULD BE ADMITTED AS CONTENTIONS WITH RESPECT TO PGandE'S MOTION FOR A LICENSE TO LOAD FUEL AND CONDUCT LOW POWER TESTS

The compelling nature of the special circumstances surrounding the Diablo Canyon Nuclear Power Plant -- namely, the

confirmation, after construction had begun, of the existence of the Hosgri fault offshore and running within only a few miles of the plant -- renders the requirements listed in NUREG-0694, "TMI-Related Requirements for New Operating Licenses," insufficient to assure the safety of operation of the Diablo Canyon facility at either low or full power. Although the Commission, in its June 20, 1980 Policy Statement, 45 Fed.Reg. 41738, entitled "Further Commission Guidance for Power Reactor Operating Licenses," has deemed those requirements a "necessary and sufficient" response to the March 1979 accident at TMI, the Commission has explicity acknowledged in recent months that it will broaden the scope of permissible contentions in appropriate cases. In a letter dated June 30, 1980 to Congressman Morris Udall, Chairman of the House Committee on Interior and Insular Affairs, NRC Chairman Ahearne stated that the Commission's Policy Statement "does not in any way diminish intervenors' present rights to litigate TMI-related issues" before the Licensing Boards, but, in fact, effects a change "in the direction of permitting parties to raise more issues, not fewer." In order to allay fears that the rights of a party to raise relevant contentions would be improperly limited, the Chairman concluded:

> The Commission recognizes that a policy statement does not have the force and effect of law but merely indicates a policy which the Commission intends to apply in the future. In the future should any question be raised before the Commission itself under Appendix B regarding the validity of any part of the policy statement as applied to a particular case, the Commission recognizes its obligation to consider the question and reply on the state of the record before it.

More recently, in In Re Statement of Policy: Further Commission Guidance for Power Reactor Operating Licenses, ___ N.R.C. ___ (Nov. 3, 1980), Commissioners Ahearne and Hendrie reiterated this position, stating that "[t]o the extent that intervenors present sound reasons for the Commission to address the merits of their contentions . . . the Commission should consider all relevant matters -- e.g., the pleadings before it, NUREG-0694, etc. -- in determining whether the contention should be litigated." Id. at n.5. Commissioners Gilinsky and Bradford filed separate views in which they restated their opinions that any limitation of contentions based on NUREG-0694 and the June 20, 1980 Policy Statement would be not only unfair and unwise, but illegal.

Further consideration by the Commission is appropriate in this case. The unique potential for earthquake damage stemming from seismic activity of significant magnitude at the plant site mandates special attention to design and safety which other plants in less seismically active areas might not require. In ALAB-519, ___ N.R.C. ___ (January 23, 1979), the Appeal Board in this case recognized the exceptional nature of the circumstances surrounding Diablo Canyon:

> We have here a nuclear plant designed and largely built on one set of seismic assumptions, an intervening discovery that those assumptions underestimated the magnitude of potential earthquakes, a re-analysis of the plant to take the new estimates into account, and a post hoc conclusion that the plant is essentially satisfactory as is -- but on theoretical bases partly untested and previously unused for those purposes. We do not have to reach the merits of those findings to conclude that the circumstances surrounding the need to make them are

exceptional in every sense of that word. (Id. at 12.) (Emphasis added.)

The significance of these circumstances must not be underestimated. Due to the extraordinary potential for earthquake damage to the plant and the area surrounding the site, this is not a case where safety issues can be neatly divided and separately considered for low and full power licensing as NUREG-0694 has been set up to accomplish. Although Joint Intervenors certainly do not dispute the Commission's finding that compliance with the requirements of NUREG-0694 prior to licensing is necessary. they submit that the public health and safety can be assured only if licensing of the facility is denied until the various Commission Boards have considered and resolved a number of safety related issues which Joint Intervenors seek to litigate as contentions in this proceeding. Accordingly, Joint Intervenors seek a determination by the Commission that these issues -- specifically relating to emergency response planning, Class 9 accident analysis, and quality assurance -- be admitted as contentions with respect to PGandE's motion for an operating license to load fuel and conduct low power testing. (The proposed contentions are set forth supra at 3.)

Chairman Ahearne's letter to Congressman Udall and the statements filed by Commissioners Ahearne, Hendrie, Gilinsky, and Bradford in In Re Statement of Policy etc., cited supra, indicate the Commission's understanding and intention that the June 20, 1980 Statement of Policy not be interpreted inflexibly or applied as a "binding limitation" on issues to be raised

in operating license proceedings. As Ahearne and Hendrie recognized in their statement of separate views in In Re Policy Statement, at 4:

> [W]e do not believe that . . . the Statement of Policy is likely to be viewed as having . . . "the same effect as that of a rule or regulation." The Statement of Policy is only an "announcement of what the agency seeks to establish as policy. A policy statement announces the agency's tentative intentions for the future." Pacific Gas & Electric Co. v. FPC, 506 F.2d 33, 38 (D.C. Cir. 1974). The Commission has changed nothing by the Statement of Policy itself, for it is a "pronouncement which acts prospectively . . ." American Bus Ass'n v. U.S., ___ F.2d ___ (D.C. Cir. No. 70-1207, June 25, 1980), slip op. at 9. The Statement of Policy genuinely leaves the agency free to exercise discretion. Regular Common Carrier Conference v. U.S., ___ F.2d ___ (D.C. Cir. No. 79-1249, June 30, 1980).

The failure of the Commission to submit the Statement of Policy for notice and comment as required by the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 553 et seq., clearly precludes its application as a substantive rule. Pacific Gas and Company v. Federal Power Commission, 506 F.2d 33, 38-39 (D.C. Cir. 1974); Guardian Federal Savings and Loan v. Federal Savings and Loan Insurance Corporation, 589 F.2d 658, 666 (D.C. Cir. 1978); Brown Express Inc. v. United States, 607 F.2d 695, 701 (5th Cir. 1979). To the extent that it might be interpreted to effect a change in the standard by which the Commission adjudicates substantive rights, it is invalid. Joseph v. United States Civil Service Commission, 554 F.2d 1140, 1153-54 (D.C. Cir. 1977); American Iron and Steel Institute v. Environmental Protection Agency, 568 F.2d 284, 292 (3d Cir. 1977); Dow Chemical, USA v. Consumer

Product Safety Commission, 459 F.Supp. 378, 390 (W.D. La. 1978); Crown Zellerbach Corp. v. Marshall, 441 F.Supp. 1110, 1119 (E.D. La. 1977); National Retired Teachers Ass'n v. United States Postal Service, 430 F.Supp. 141, 148 (D.D.C. 1977), aff'd, 593 F.2d 1360 (D.C. Cir. 1979); United States v. Daniels, 418 F.Supp. 1074, 1079 (D.S.D. 1976); Cerro Metal Products v. Marshall, 467 F.Supp. 869, 882 (E.D. Pa. 1979).

Thus, the law requires that Joint Intervenors be given an opportunity to challenge the Policy Statement to the extent that it proscribes contentions disputing the sufficiency for licensing purposes of the NUREG-0694 requirements. Such a limitation would plainly effect a significant change in the substantive rights of Joint Intervenors and other interested parties. The suggestion to the contrary by Commissioners Ahearne and Hendrie in In Re Statement of Policy, supra, that any limitation only restates existing policy established in Maine Yankee Atomic Power Co., ALAB-161, 6 AEC 1003, aff'd, 7 AEC 2 (1974), aff'd sub nom Citizens for Safe Power v. Nuclear Regulatory Commission, 524 F.2d 1291 (D.C. Cir. 1975), is a misstatement of the law. In Maine Yankee, the intervenors challenged the failure of the Licensing Board to make findings with respect to residual risks beyond the parameters of duly promulgated agency regulations and as to which, the Appeals Board found, "there has been an implicit Commission judgment that these risks are sufficiently low as not to represent a meaningful health and safety threat." The Court of Appeals affirmed the Licensing Board's issuance of an operating license and held that

> in the absence of some indication or showing on a case-by-case basis to the contrary, and subject to the weighing of risks-benefits under NEPA, it may be found that facilities complying with the rule[s] [automatically satisf[y] the 'reasonable assurance' and 'not inimical' tests]."

524 F.2d at 1299. Fundamental to this holding, however, was the court's finding that intervenors' failure to resort to the rule-making and amending procedures foreclosed their attack on the sufficiency of the regulations in an individual proceeding, absent a showing of special circumstances. Id. at 1300.

In this case, Joint Intervenors do not seek to litigate minimal residual risks beyond the scope of duly promulgated regulations. Quite the contrary, they seek to challenge the sufficiency of new TMI-related requirements with respect to which there has been no rulemaking and no opportunity to comment prior to their adoption by the Commission. In contrast to Maine Yankee, the issues in question here stem from the Class 9 accident at Three Mile Island and focus on the Commission's response to it. That event demonstrated graphically and irrefutably the inadequacy of existing Commission regulations and the need to establish additional, more stringent requirements, and it provided the impetus for numerous studies and reports which confirmed the urgent need for reform. In the face of lessons learned from TMI, any attempt by the Commission to rely upon existing regulations as a sufficient licensing standard would be ludicrous. As Commissioner Bradford stated recently in testimony concerning the Commission's Statement of Policy before the House Subcommittee on Environment, Energy and Natural

Resources, Committee on Government Operations:

> After Three Mile Island, the Kemeny Report, and other studies the Commission could not imaginably have continued to license on the basis of its pre-TMI regulations alone. It would have been jeered out of every legislative or judicial forum that it appeared before. Hence, its benign assertion that its policy statement is 'in the direction of permitting parties to raise more issues, not fewer' suggests nothing so much as the shopworn political adage that 'When you've got an angry mob after you, the thing to do is to walk a little faster and pretend you're leading a parade.'

In Re Statement of Policy, supra, Separate Views of Commissioner Bradford, n.1. The holding in Maine Yankee is in no way inconsistent with the right of interested parties to litigate the sufficiency of requirements as to which no notice and comment has been permitted.

Because the requirements embodied in NUREG-0694 and adopted by the Commission through its June 20, 1980 Statement of Policy alter the standard applicable to operating license applications by supplementing existing regulations, Joint Intervenors must be permitted to demonstrate the relevance of their contentions and are entitled to have them considered on their own merits by the Commission. Brown Express, Inc. v. United States, 607 F.2d at 701. For this reason, and recognizing the exceptional seismic danger associated with the Diablo Canyon plant, Joint Intervenors submit that the admission of relevant contentions beyond the requirements of NUREG-0694 is warranted.

II

ISSUES WHICH JOINT INTERVENORS SEEK TO RAISE AS CONTENTIONS IN THIS PROCEEDING ARE DIRECTLY RELEVANT TO THE SAFETY OF OPERATION OF THE DIABLO CANYON NUCLEAR POWER PLANT

The issues which Joint Intervenors seek to raise as contentions with respect to PGandE's motion to load fuel and conduct low power tests bear directly on the fundamental concern of safety of operation of the Diablo Canyon facility. As such, their adjudication prior to licensing of the plant at any level of power is essential. Power Reactor Development Company v. International Union of Electrical, Radio and Machine Workers, AFL-CIO, 367 U.S. 396, 397, 407-11, 81 S.Ct. 1529 (1961); In the Matter of Long Island Lighting Co. (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 844-45 (1973); 42 U.S.C. §2133(d); 10 C.F.R. §50.57(a)(3) and (6). These contentions (quoted supra at 3) focus on (1) the failure of PGandE to demonstrate compliance with the Commission's revised emergency planning regulations; (2) the failure of PGandE to demonstrate compliance with 10 C.F.R. Part 50, Appendix B, regarding quality assurance; and (3) the failure of of PGandE both to analyze the effects of a Class 9 accident at Diablo Canyon and to design the plant to withstand such an accident. Joint Intervenors submit that the failure to meet these contentions and resolve the safety issues with which they are concerned renders untenable the staff's basic conclusion in SER Supplement 10 (NUREG-0675) that PGandE has provided reasonable assurance that the Diablo Canyon facility can be operated safely

at low power. Moreover, as the discussion below indicates, the significance of these issues to plant safety has been recognized repeatedly in numerous reports and recommendations of responsible government agencies, particularly since the accident at TMI in March 1979. Because they are clearly relevant to safety, Joint Intervenors' contentions which are the subject of this application should be admitted in the Diablo Canyon low power testing proceeding.

A. Emergency Response Planning

The NRC staff's application of outdated and discredited emergency planning requirements to PGandE's request for an operating license to conduct low power tests is entirely inappropriate in this case. Three Mile Island demonstrated irrefutably the inadequacy of the emergency response planning requirements in effect at the time of that accident. Their inadequacy has been recognized as well by a number of government agencies and Commissions which have recommended significant changes. In December 1978, EPA and the NRC published a joint report to assist federal, state and local governments in formulating emergency response plans around nuclear plants. "Planning Basis ,for Development of State and Local Government Radiological Emergency Reserve Plants in Support of Light Water Nuclear Power Plants," NUREG-0396; EPA 520/1-78-016. In summary, the report concluded:

- A spectrum of accidents (not the source term from a single accident sequence) should be considered in developing a basis for emergency planning.

- The establishment of Emergency Planning Zones of about 10 miles for the plume exposure pathway and about 50 miles for the ingestion pathway is sufficient to scope the areas in which planning for the initiation of predetermined protective action is warranted for any given nuclear power plant.
- The establishment of time frames and radiological characteristics of releases provides supporting information for planning and preparedness.

Id. at 24. This joint task force report was endorsed by the Commission on October 23, 1979 (44 Fed.Reg. 61123).

On March 30, 1979, the General Accounting Office published a report entitled "Areas Around Nuclear Facilities Should Be Prepared for Radiological Emergencies," EMD-78-110. That report made the following recommendations to the NRC:

- Allow nuclear power plants to begin operation only where state and local emergency response plans contain all the Commission's essential planning elements. In addition, the Commission should require license applicants to make agreements with state and local agencies assuring their full participation in annual emergency drills over the life of the facility.
- Establish an emergency planning zone of about 10 miles around all nuclear power plants as recommended by the Environmental Protection Agency/Nuclear Regulatory Commission task force, and require licensees to modify their emergency plans accordingly.

Id. at V.

More recently, several major reports -- the "TMI-2 Lessons Learned Task Force Short Term Recommendations" (NUREG-0578), the "Report of the President's Commission on the Accident at Three Mile Island," and the Rogovin "Report to the Commissioners and to the Public on Three Mile Island" -- have identified emergency planning as an area in need of significant improvement. As a result, the NRC has promulgated new regulations -- effective November 3, 1980 -- for emergency planning in Appendix E of 10 C.F.R. Part 50. (45 Fed.Reg. 55402 (Aug. 19, 1980).) According to the preamble to the final regulations, the Commission instituted the reconsideration "in recognition of the need for more effective emergency planning and in response to the TMI accident and to reports issued by responsible offices of government and the NRC's oversight committees." Id. The preamble continues:

> In response to and guided by the various reports and public comments, as well as its own determination on the significance of emergency preparedness, the Commission has therefore concluded that adequate emergency preparedness is an essential aspect in the protection of the public health and safety.

Id. at 55404 (emphasis added). The introduction to Appendix E states that it "establishes minimum requirements for emergency plans for use in attaining an acceptable state of emergency preparedness." Id. at 55411 (emphasis added).

The NRC has informed operators and applicants that they must meet the new requirements. In a November 13, 1980 letter, the Director of the Office of Nuclear Reactor Regulation Division of Licensing, Darrell Eisenhut, notified operating

license applicants that

> Applicants should submit their radiological emergency response plans with their Final Safety Analysis Report and should submit their implementing procedures 180 days prior to scheduled issuance of an operating license. For applicants already at the operating license review stage, these plans should be submitted with sufficient lead time for staff review prior to the issuance of the Safety Evaluation Report supporting the NRC review of the application for operating license.
>
> The state of preparedness at and around your site will be determined by a review of your plan against the standards listed in 50.47(b), the requirements of 10 CFR 50, Appendix E issued in August 1980 and effective November 3, 1980, and the guidance found in the joint NRC/FEMA report, NUREG-0654/FEMA-REP-1, "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants," of January 1980.

According to an NRC News Release dated August 18, 1980, even owners of research or test reactors of 500 kilowatts or more -- only one percent of the low power test level proposed for Diablo Canyon -- will have to submit emergency plans complying with the revised rules. (6 NRC News Release #31, at 5 (August 18, 1980).)

In the face of this obvious consensus among concerned government agencies, the Commission's adoption of the outdated, discredited, and plainly inadequate requirements contained in NUREG-0694 as the standard to be applied to licensing for fuel loading and low power testing is completely inappropriate. Ignoring the lessons learned from TMI, NUREG-0694 requires compliance only with Reg. Guide 1.101 and the old version of Appendix E, both of which have been superceded, and on that basis the

staff, in SER Supplement 10, has concluded that PGandE's emergency plan provides sufficient assurance of safety for purposes of low power testing.

Those outdated requirements are materially deficient in that they do not require that state and local emergency plans be approved by the NRC prior to licensing. Thus, under NUREG-0694, a low power testing license may be issued without state and local plans having been prepared at all. Although the theoretical basis for the staff's conclusion that the requirements are adequate may be the belief that off-site emissions from a plant accident at low power will be minimal, no support for that premise has been supplied. Notwithstanding this, however, it ignores the very likely dangers which, in the event of a serious accident, may be posed to the public as a result of widespread panic or fear that substantial emissions from the disabled plant are unavoidable. Certainly, effective and tested emergency plans at the state and local levels are as essential in that case as they would be in the event of an accident at full power. Although the emissions themselves might pose a lesser hazard at low power, the public perception of danger may require equally effective emergency procedures. In addition, the dangers to workers on-site from a serious low power accident would in any event be substantial enough to require that all workers be evacuated as quickly as possible. Local plans would be critical in such a case.

Most important, the earthquake dangers associated with Diablo Canyon necessitate more stringent emergency procedures

because of the increased potential for a breach of containment at the site and destruction of roads and facilities off-site. Diablo Canyon, because it is more vulnerable to earthquake damage than virtually any other nuclear plant in the United States, poses a correspondingly higher risk of serious emissions, and particular attention to the sufficiency of its emergency plans is warranted as a result. Certainly, the recently revised Commission regulations, characterized in the introduction to Appendix E as the "minimum requirements for emergency plans for use in attaining an acceptable state of emergency preparedness," are essential. 45 Fed.Reg. 55411.

Joint Intervenors submit that the emergency planning requirements contained in NUREG-0694 are inadequate to protect the health and safety of the public. Their emergency response planning contention should be admitted in this proceeding with respect to PGandE's pending low power testing application.

B. Class 9 Accident Analysis

Diablo Canyon SER Supplement 10 contains no discussion of the effects of a Class 9 accident at the facility occurring after fuel loading and commencement of low power testing. Indeed, the consequences of an accident of such severity have never been addressed by the applicant or the NRC staff in connection with PGandE's operating license applications for Diablo Canyon. Although the Commission has in the past excluded consideration of core melt accidents on the premise that they were of such low probability that neither NEPA nor the AEA required their con-

sideration, the recent accident at TMI destroyed that premise and demonstrated that Class 9 accidents are far more than a mere theoretical possibility.

As a result, on June 13, 1980 the Commission issued a Statement of Interim Policy entitled "Nuclear Power Plant Accident Considerations Under the National Environmental Policy Act of 1969" (45 Fed.Reg. 40101) in which it withdrew the proposed Appendix D to 10 C.F.R. Part 50 -- which provided that the environmental effects of Class 9 accidents need not be considered in individual licensing proceedings -- and adopted the position that environmental impact statements

> shall include coordination of the site-specific environmental impacts attributable to accident sequences that lead to releases of radiation and/or radioactive materials, including sequences that can result in inadequate cooling of reactor fuel and to melting of the reactor core.

Id. This significant turnaround in policy was due not only to the TMI accident but also to the Commission's discovery that the accident probability estimates utilized in WASH-1400 on which it had previously based its Class 9 policy were greatly understated. Id. at 40102.

Last year the President's Council on Environmental Quality ("CEQ") initiated a study of the Commission's regulations and policy regarding the consideration of core melt accidents and their environmental consequences in its environmental impact statements. In a March 20, 1980 letter to Commission Chairman Ahearne, CEQ Chairman Speth described the Council's "very disturbing" findings that "[t]he discussion in these statements of potential

accidents and their environmental consequences was . . . largely perfunctory, remarkably standardized, and uninformative to the public, [containing] essentially identical, boilerplate language written in an unvarying format." The Council noted that Class 9 accidents, "which have the potential for greatest environmental harm and which have led to the greatest public concern," are not even considered, and it recommended that the Commission adopt a new policy "based on the sensible approach of discussing the environmental and other consequences of the full range of accidents that might occur at nuclear reactors, including accidents classified as Class 9."

On August 14, 1980, the CEQ Chairman again wrote Chairman Ahearne applauding the Commission's Statement of Interim Policy issued June 13, 1980 (discussed supra), but indicating the Council's strong disapproval of the Commission majority's assertion in the Interim Policy Statement that such new NEPA reviews "will lead to conclusions regarding the environmental risks of accidents similar to those that would be reached by a continuation of current practices. . . ." 45 Fed.Reg. 40103. This statement, Speth continued, "inappropriately prejudges the NEPA analysis yet to be performed on a site-by-site basis by staff [and is] contrary to the purposes of the NEPA to provide information which serves as a guide to the decision maker . . . ." The CEQ Chairman recommended that supplemental impact statements be prepared on the Class 9 issue and that these should "occur to the maximum extent possible where there is still time to correct earlier decisions based on the Commission's 'former erroneous

position on Class 9 accidents' (45 Fed.Reg. at 40103.)"

The foregoing recommendations of CEQ and the June 13, 1980 repudiation by the Commission of its "prior erroneous policy" on Class 9 accidents demonstrate plainly the need for (1) a thorough analysis of the consequences of such an accident at Diablo Canyon, and (2) redesign or modification of the facility where necessary prior to licensing for operations at either low or full power. This conclusion is mandated not only by the TMI accident and the consequent re-evaluation by government agencies of their official policies on the need for such studies, but, most importantly, by the special circumstances surrounding the Diablo Canyon plant itself (discussed supra). In view of the recognized danger of significant seismic activity in the vicinity of the Diablo Canyon site, the need for Class 9 accident analysis prior to licensing is more compelling with respect to Diablo Canyon than perhaps to any other comparable facility in the United States.

The Commission has a continuing obligation under the AEA and NEPA to review information which may indicate a need to reconsider or modify a construction permit or an operating license. 42 U.S.C. §2232(a); 40 C.F.R. §1502.9(c); Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission, 449 F.2d 1109, 1112 (D.C. Cir. 1971), cert. denied, 404 U.S. 942 (1972); Public Service Co. of New Hampshire v. Nuclear Regulatory Commission, 582 F.2d 77 (1st Cir. 1978), cert. denied, 439 U.S. 1046 (1979); Ft. Pierce Utilities Authority of the City of Fort Pierce v. United States Nuclear Regulatory Commission, ___ F.2d ___, ___ (D.C. Cir. 1979). Recognizing the Commission's

responsibility and the significance of the new developments arising out of the accident at TMI, Joint Intervenors submit that the special circumstances surrounding the Diablo Canyon facility warrant Class 9 analysis and, if necessary, plant modification prior to licensing of the plant. Accordingly, their Class 9 contention should be admitted in this proceeding and considered by the Licensing Board in opposition to PGandE's motion for a low power testing license.

C. Quality Assurance

NUREG-0694 is seriously deficient in that it inadequately addresses the issue of quality assurance. This deficiency is particularly significant in this case not only because of the additional level of stress to which piping and other plant components may be subjected as a result of increased seismic activity, but also because the Licensing Board has yet to issue any findings with respect to PGandE's compliance at the Diablo Canyon Nuclear Power Plant with the requirements of 10 C.F.R. Part 50, Appendix B, regarding quality assurance. Indeed, when Joint Intervenors sought to submit a contention in April 1977 challenging the adequacy of PGandE's quality assurance program at Diablo Canyon, the Licensing Board denied the motion, ruling instead that only those aspects of the quality assurance contention which related to seismic design could be raised. (Licensing Board Order, May 25, 1977.) Although the Board, on its own motion, requested that the NRC Staff and PGandE present evidence on the quality assurance program at the facility, its Partial

Initial Decision, issued on September 27, 1979, explicitly stated that "[i]t is not now known how the Lessons Learned from Three Mile Island-2 will impact on . . . Quality Assurance so [this] matter will be deferred and [is] not a part of this Partial Initial Decision." Id. at 9, 10 NRC at 459. Based on the Board's deferral of decision on this issue, even the NRC Staff has acknowledged that "a contention may be submitted as to how quality assurance experience from TMI will affect the low power testing application." "NRC Staff Response to Licensing Board's Order for Supplemental Positions on PGandE's Motion for Low Power Testing," September 25, 1980, at 15.

Since the Partial Initial Decision was issued in September 1979, there have been several significant developments which bear directly not only on PGandE's compliance with Appendix B of Part 50, but also on the adequacy of the Appendix B requirements generally. Arising out of the accident at TMI, numerous government reports have addressed the need for improvements in quality assurance programs. See, e.g., "Report of the President's Commission on the Accident at Three Mile Island";"Three Mile Island, A Report to the Commission and to the Public" (NUREG/CR-1250); "Report of Special Review Group, Office of Inspection and Enforcement, on Lessons Learned from Three Mile Island"(NUREG-0616); "TMI Action Plan" (NUREG-0660). For example, the "TMI Action Plan," which incorporates the findings of many of the studies conducted post-TMI, states the following quality assurance objective in Section I.F:

> Improve the quality assurance program for design, construction, and operations to provide greater assurance that plant design, construction, and operational activities are conducted in a manner commensurate with their imporatnce to safety.

In recognition of the need for increased attention to quality assurance, the Action Plan lists two categories of actions to be taken by the NRC: (1) expansion of the quality assurance lists, and (2) development of more detailed quality assurance criteria. These recommendations, as well as those of other studies, are virtually ignored by NUREG-0694 in its fuel loading and low power testing requirements.

The adequacy of PGandE's program at Diablo Canyon is brought into question by several other recent developments. First, in an April 17, 1980 letter to R. H. Engelken, Director of the NRC's Office of Inspection and Enforcement, Region Five, Richard Locke (PGandE) stated that a recent "as-built" audit conducted to "verify that actual configurations of safety-related piping agree with the models used to seismically analyze them" had uncovered a number of significant discrepancies. Specifically, Locke stated:

> The following types of discrepancies are typical of those found, in order of frequency of occurrence: valve weights not correct; weights of valve flanges not modelled; center of gravity of valve operator not adequately considered; support location differences of greater than one pipe diameter; supports missing or extra; presence of high density lead form or grout in penetrations; differences in pipe geometry; invalid assumptions in modeling of analysis endpoints; differences in insulation thickness and pipe diameter. It was decided that 49 of the 192 large diameter analyses and 8 of the 30 small diameter analyses had differences significant enough that the results were not obviously

conservative and that they should be reanalyzed. This amounted to approximately a 26 percent reanalysis rate. In addition, there were 10 large diameter and 4 small diameter analyses for which differences were resolved by a field hardware change.

These discrepancies cast serious doubt upon the analyses conducted by both the NRC Staff and PGandE with respect to seismic design of the plant, and they represent a significant breakdown in PGandE's quality assurance program. At a minimum, it undercuts the finding of the Licensing Board in its September 27, 1979 Partial Initial Decision, at 92, that the "Staff review of the seismic design of the Diablo Canyon plant was the most extensive ever undertaken by the Staff of the NRC . . . [and] [t]he Applicant's review was also extraordinarily thorough."

Equally as significant, on August 28, 1980 PGandE submitted Amendment 85 to the FSAR which completely revised Chapter 17, regarding quality assurance. Due to the extensiveness of the changes, PGandE omitted vertical change bars normally included to identify less substantial revisions. This new chapter, together with the revelations contained in Locke's letter cited supra, renders of questionable validity any findings which the Licensing Board may ultimately issue based on the limited hearing conducted several years ago and demonstrates plainly the need for a closer and more thorough examination of PGandE's quality assurance program at Diablo Canyon. Certainly, PGandE should be required to demonstrate that its revised program complies with the requirements of Appendix B.

Several Atomic Licensing Appeals Boards have emphasized the prime importance of compliance with the Commission's quality assurance standards. For example, in Consumers Power Company (Midland Plant Units 1 and 2), ALAB-106, 6 AEC 182 (March 26, 1972), the appeals panel noted, "One of the most significant elements of the Commission's 'defense-in-depth' approach to nuclear safety is its emphasis upon quality assurance and quality control in the construction of nuclear power plants." Id. at 183. Another Appeals Board, in Duke Power Company (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-128, 6 AEC 399 (June 13, 1973), observed, "In an area as significant as quality assurance, the record should leave no doubt as to whether the applicant is in full compliance with applicable criteria and, if not, the basis upon which the regulatory staff authorizes any departure from such criteria." Id. at 410.

If a Licensing Board is not reasonably assured that proper quality assurance practices have been or will be followed, it must act firmly to rectify the situation. In fact, the Appeals Board in Consumers Power Company, supra, stated that inadequate assurances regarding proper quality assurance practices provide grounds for an outright denial of a license. 6 AEC at 184. Significantly, the appeals panel in Duke Power Company, supra, stayed the Licensing Board's initial decision until the applicant clarified the quality assurance and other potentially conflicting responsibilities of the principal engineer.

Furthermore, when doubts arise regarding the quality assurance of certain design features, the Commission's boards are typically satisfied with the safety of the design feature only when the applicant does additional work to requalify the features in question to proper standards. For example, the Licensing Board in Consumers Power Company (Midland Plant Units 1 and 2), LBP 74-1, 8 AEC 584 (September 25, 1974), found that past quality assurance deficiencies regarding cadwelds did not justify revoking or suspending a construction license only because the applicant had requalified all prior cadwelds and implemented an extensive quality assurance program for all future cadwelds. Id. at 597-600. Similarly, in Commonwealth Edison Company (Zion Units 1 and 2), LBP-73-35, 6 AEC 861 (October 5, 1973), the Licensing Board found that a faulty quality assurance program for pipe welding no longer gave grounds for denying or staying an operating license, but only because the applicant and NRC staff had inspected most of the pipe welds in the plant, both visually and by magnetic particle methods, and had repaired the 121 welds that did not meet design specifications. Id. at 896.

These decisions recognize the importance of quality assurance in construction of a nuclear power plant and the necessity for requiring that the applicant demonstrate the adequacy of its program prior to licensing of a plant for operation. No such demonstration has been made in this case. Joint Intervenors submit that the unique seismic dangers surrounding the Diablo Canyon facility magnify the significance of quality

assurance and require that PGandE demonstrate compliance with Appendix B prior to issuance of either a low power testing license or a full term operating license. Given the obvious relevance of this issue to the fundamental question of the plant's safety and considering the developments discussed above which have occurred since the brief hearings were held in late 1977, Joint Intervenors should be permitted to raise quality assurance as a contention in opposition to PGandE's motion for a low power testing license.

III

DIRECTED CERTIFICATION IS APPROPRIATE AND NECESSARY IN THIS INSTANCE

Directed certification is specifically authorized in 10 C.F.R. §2.718(i) which provides that questions may be certified to the Commission "on direction of the Commission." Exercise of that authority is particularly appropriate in this case for several independent reasons. First, subsequent to issuance of the Commission's June 20, 1980 Statement of Policy, each of the Commissioners has recognized his obligation and intention to consider on the merits the admissibility of relevant contentions challenging the sufficiency of the requirements of NUREG-0694. (See discussion supra at Point I.) In so doing, they gave notice that, although the Policy Statement will provide general guidance for the various Commission boards, intervenors have a right in appropriate proceedings to demonstrate to the Commission the soundness of their reasons for contending

that NUREG-0694 does not impose a sufficiently high standard of safety. Directed certification is a proper method to obtain an expeditious ruling from the Commission concerning matters as to which it has reserved the sole right of adjudication.

Second, no purpose would be served by pursuing the normal route of appeal because the Commission made plain in its June 20 Statement of Policy that while the boards may entertain contentions that the NUREG-0694 requirements are unnecessary, "they may not entertain contentions asserting that additional supplementation is required." Thus, neither the Licensing Board nor the Appeal Board is authorized to broaden the ambit of permissible contentions. Because an application by an intervenor seeking such a ruling would be futile unless made to the Commission itself, directed certification to the Commission is the only available course which can provide a meaningful opportunity to be heard.

Third, administrative efficiency and economy favor a prompt resolution of the question to be certified prior to commencement of the low power testing proceedings. If a determination is postponed until after discovery, a hearing, and appeals have been completed with respect to NUREG-0694 contentions, there exists a real risk that repetition of the entire process may be necessary to consider other contentions going beyond NUREG-0694 in the event that the Commission should ultimately find them admissible. Such duplication of proceedings

would needlessly waste both the time and resources of all parties and the NRC boards, and it would impose a particular strain on intervenors, whose financial resources are typically insufficient even in the normal case. In addition, the public's interest in health and safety will best be served by a prompt determination because the contentions in question bear directly on the fundamental question of plant safety. (See discussion supra at Point II.)

Finally, although any Commission decision regarding the admissibility of contentions will be made on a case-by-case basis, resolution of the question submitted for certification here will have certain precedential value of a more general nature as well in that it may provide further clarification of the June 20 Statement of Policy as applied by the Commission. This clarification would be instructive to parties in other proceedings in which similar issues have arisen.

Accordingly, Joint Intervenors submit that certification in this case is proper and should be directed by the Commission.

IV

CONCLUSION

For the reasons stated herein, Joint Intervenors request that the Commission (1) grant the certification applied for herein, and (2) issue an order directing that the proposed contentions which are the subject of this request be admitted

in the Diablo Canyon proceedings in opposition to PGandE's application for a license to load fuel and conduct low power testing.

Dated: December 3, 1980

Respectfully submitted,

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of December, 1980, I have served copies of the foregoing REQUEST FOR DIRECTED CERTIFICATION, mailing them through the U.S. mails, first class, postage prepaid.

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EXHIBIT 4

PACIFIC GAS AND ELECTRIC COMPANY's
RESPONSE TO

JOINT INTERVENROS' REQUEST FOR DIRECTED CERTIFICATION

EXHIBIT 4

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

PACIFIC GAS AND ELECTRIC COMPANY'S
RESPONSE TO
JOINT INTERVENORS' REQUEST FOR DIRECTED CERTIFICATION

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PACIFIC GAS AND ELECTRIC COMPANY'S
RESPONSE TO
JOINT INTERVENORS' REQUEST FOR DIRECTED CERTIFICATION

I

INTRODUCTION

The Joint Intervenors' Request For Directed Certification of the three proposed contentions to be considered in any hearings which may be conducted on Pacific Gas and Electric Company's ("PGandE") motion for a license to load fuel and conduct low-power testing at the Diablo Canyon Nuclear Power Plant ("Diablo Canyon") is an effort to reopen closed hearing records and to litigate matters which are relevant, if at all, only to the ultimate issue of whether Diablo Canyon should receive full power operating licenses. Since the operating license hearing record on all issues is now closed, Joint Intervenors are not entitled to reopen this record and litigate additional contentions.

Under the Commission's rules and regulations, all rights which the Joint Intervenors have to litigate relevant contentions in the Diablo Canyon licensing proceedings expired nearly two years ago with the conclusion of the hearings on PGandE's operating license application.

PGandE's request for a low-power license does not alter the procedural rights of the parties. Since such a request is subsumed within PGandE's application for a full power license, PGandE's motion for a lesser relief following the conclusion of hearings on the broader relief simply cannot give rise to a right in Joint Intervenors to future hearings and additional contentions.

Joint Intervenors advance no convincing reason why PGandE's right to be protected from the delay of litigating their proposed contentions should not be sustained in this case. Indeed, all three contentions raise issues relevant only to the closed operating license record.

Two of the contentions merely reiterate a motion to reopen the environmental and emergency planning record that Joint Intervenors filed in May 1979, over a year before PGandE filed its motion to conduct low-power tests. The third contention (quality assurance) involves an issue fully litigated in October 1977 and whose record is now closed.

Contrary to Joint Intervenors' assertion, they are not challenging the sufficiency of the fuel-loading and low-power licensing requirements contained in NUREG-0694, "TMI-Related Requirements For New Operating Licenses." Not

one of their proposed contentions raises an issue concerning NUREG-0694. 1/

There is no basis for considering Joint Intervenors' proposed contentions. As we will discuss below, they have failed to meet the heavy burden imposed on those seeking to reopen closed hearing records, and the time for filing contentions has long since passed. In short, the Diablo Canyon hearings must come to an end sometime, and that time is now. 2/

1/ Contention 1 asserts that PGandE should be required to comply with the Commission's revised emergency response planning regulations prior to receiving a fuel-loading and low-power testing license. New emergency plan regulations were promulgated August 19, 1980, effective November 3, 1980, reflecting the Commission's response to the lessons learned from the Three Mile Island-2 ("TMI") accident concerning emergency planning. Joint Intervenors do not purport to challenge the sufficiency of these regulations, but rather assert that PGandE must demonstrate compliance with them as a condition to receiving a low-power license.

Contention 2 seeks to require an analysis of unspecified "Class 9 accidents," an issue which is not addressed in NUREG-0694.

Contention 3 would require PGandE to demonstrate compliance with the Commission's quality assurance regulations prior to receiving a low-power license. Again, this does not involve a challenge to NUREG-0694.

2/ An obvious defense to Joint Intervenors' Request For Directed Certification is that they have failed to present this matter first to the Licensing Board for the required action of the presiding officer. 10 C.F.R. §§ 2.718(i), 2.758(b) and (c). However, PGandE has elected not to raise this procedural defense because of

[continued on next page]

II

THE DIABLO CANYON HEARINGS--A SUMMARY

A brief review of the hearings which have already been conducted on PGandE's application to operate both units of the Diablo Canyon facility will assist in placing Joint Intervenors' Request For Directed Certification in context. PGandE applied for licenses to operate both units in July, 1973, and the application was docketed in October 1973. After environmental hearings, the Licensing Board issued its Partial Initial Decision on environmental issues in 1978, concluding that the environmental balance weighs in favor of operating the facility. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-78-19, 7 NRC 989 (1978). The environmental record is therefore closed.

2/ [continued from previous page]

its overriding interest in avoiding delay. Apart from the interest in ensuring that the proper procedures are followed, there would seem to be little benefit in referring this matter back to the Licensing Board, which would ultimately result in this matter being presented again to the Commission some weeks from now after Joint Intervenors have followed the prescribed procedure. Instead, we urge the Commission to cut to the heart of this matter now, ruling that the Joint Intervenors should not be permitted to litigate their proposed contentions.

In May, 1979 the Joint Intervenors filed a motion with the Licensing Board to reopen the environmental record to consider the environmental consequences of so-called class 9 accidents and to reopen the emergency plan record on the ground that the accident at TMI rendered these records inadequate. (Alternatively, Joint Intervenors requested directed certification of those issues to the Commission.) The two issues raised by that motion are the identical issues presented in Joint Intervenors' proposed contentions 1 and 2 herein. The Licensing Board deferred its ruling on these issues until it had received and evaluated the staff's report on the implications of the TMI accident to the Diablo Canyon proceedings.

Hearings were held in October, 1977 on non-seismic safety issues and in December, 1978, January and February, 1979, on seismic design issues. In September, 1979 the Licensing Board issued its Partial Initial Decision regarding all safety issues contested in those hearings, finding that the plant's "Category I structure [sic], systems, and components will perform as required during the seismic load of the safe shutdown earthquake." Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-79-26, 10 NRC 453, 507 (1979).

According to the Licensing Board, "[t]he record was closed at the end of the seismic hearing except for the

generic safety issues and Table S-3 issues. . . ." Id. at 459. (Shortly after the seismic hearings ended, the record was closed on generic safety issues. ASLB Orders dated Feb. 26, 1979 and March 12, 1979.) However, although the hearing record on emergency plan and quality assurance issues was closed. the Licensing Board withheld findings on those issues because it was not known how the lessons learned from the TMI accident might impact those issues. Findings on Table S-3 are now deferred due to the Appeal Board's decision in Philadelphia Electric Company, ALAB-562, 10 NRC 437 (1979), but can easily be handled generically. Ibid.

On February 15, 1980, the Atomic Safety and Licensing Appeal Board ("Appeal Board") directed a de novo review of PGandE's security plan. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-580, 11 NRC 227 (1980). These hearings have been concluded, and therefore the security plan record has been closed (subject to the filing of concluding pleadings by the parties).

On June 24, 1980, the Appeal Board directed that the seismic hearings be reopened to consider the implications, if any, on the Licensing Board's seismic findings of data generated from an earthquake which occurred in the California Imperial Valley in October 1979, after the seismic hearing record closed and the Licensing Board's

Partial Initial Decision had issued. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 876 (1980). These seismic hearings have also been concluded, and therefore the seismic record is closed (again, subject to the filing of concluding pleadings).

On July 14, 1980, PGandE filed its motion to load fuel and conduct low-power tests up to 5% power. On October 2, 1980, the Licensing Board ruled that it need not await the Appeal Board decisions on the security plan and seismic issues before proceeding with PGandE's motion and also deferred its determination of Joint Intervenors' May 1979 motion to reopen the environmental record to consider class 9 accidents until after the Appeal Board's seismic decision is issued.

In August 1980, the staff submitted its Supplement 10 to the Safety Evaluation Report ("SER") which addressed PGandE's compliance with NUREG-0694 for issuance of a license to load fuel and conduct low-power testing. In that Supplement, the staff concluded that PGandE is in compliance with the existing Commission regulations regarding emergency planning for the issuance of a low-power testing license and assessed the TMI implications on quality assurance insofar as relevant to low-power operation.

Thus all hearings on PGandE's application for an operating license have now been concluded, and no further hearings are scheduled on any operating license issue. 3/ More importantly, the record is now complete for the Licensing Board to reach a decision on PGandE's motion to load fuel and to conduct low-power tests. There is no basis either in law or fact to consider any new contentions, much less the proposed contentions Joint Intervenors are attempting to place before this Commission.

3/ If PGandE had not filed the instant motion, the only remaining steps for issuance of a full power license would be: the completion of the staff's TMI report; the Licensing Board's ruling on Joint Intervenors' request to reopen the record on the class 9 and emergency planning issues; and the resolution of any remaining issues by the staff. As the Appeal Board stated:

> [O]nce an operating license board has resolved any contested issues and any issues raised sua sponte, the decision as to all other matters which need to be considered prior to the issuance of the requested license is the responsibility of the staff and it alone. [Consolidated Edison Company of New York, Inc. (Indian Point, Units 1, 2 & 3), ALAB-319, 3 NRC 188, 190 (1976).]

There is simply no right in an operating license proceeding to have all matters resolved by the board in contested hearings. "[A]n operating license board is neither required nor expected to pass upon all the items which the staff must consider and resolve before it approves a license." Ibid. Merely because Joint Intervenors have thought up more issues, therefore, does not give them any right to have them litigated.

III

JOINT INTERVENORS HAVE FAILED TO MEET THE HEAVY BURDEN REQUIRED TO REOPEN THE CLOSED FULL POWER HEARINGS.

A. Joint Intervenors Must Present Newly Discovered Evidence Or A Material Change In Circumstances Appearing To Affect The Hearings' Outcome To Warrant Reopening Closed Hearings.

Joint Intervenors seek to litigate their proposed contentions apparently on the assumption that because they say they are entitled to litigate them, it must be so. But in order to contest any issues, Joint Intervenors must first establish that they are entitled to a hearing at all. Then they must show that the issues they seek to litigate are relevant to the purpose for which the hearings are reopened.

The Commission's regulation governing the issuance of a license for fuel loading and low-power testing does not contemplate additional hearings or the admission of new contentions on a motion for a low-power testing license where the hearings have been concluded on full power issues. Section 50.57(c) of 10 C.F.R. states in pertinent part:

> An applicant may, in a case where a hearing is held in connection with a pending proceeding under this section make a motion in writing . . . for an operating license authorizing low-power testing (operation at not more than 1 percent of full power for the purpose of testing the facility), and further operations short of full power operation. Action on such a motion by the presiding officer shall be taken with due regard to the rights of the parties to the proceedings, including

> the right of any party to be heard to the extent that his contentions are relevant to the activity to be authorized. . . .

Rather than permitting a party to reopen hearings to consider anew issues which were (or could have been) litigated during operating license hearings, this section must be viewed as operating to limit and narrow the contentions which may be considered in deciding a low-power testing application. When such a motion is made prior to completion of the full power hearings, the contentions being litigated in the full power proceedings are to be narrowed so that they are relevant only to the issues raised by the low-power motion. This ensures that the low-power motion will be expeditiously resolved without becoming bogged down by contesting the pending broader full power contentions.

However, when the low-power motion is filed after conclusion of the operating license hearings, with the broader contentions relevant to full power having been fully litigated, there are no issues remaining to be litigated relevant to the low-power motion.

Section 50.57(c) cannot be read to expand the rights of intervenors beyond the rights which they have in operating license hearings to litigate issues which, had the low-power motion not been made, they would have no right to litigate because the hearing record is closed. Section 50.57(c) says nothing about permitting "new" or "additional"

contentions. This is logical since all low-power issues must necessarily be subsumed within the full power issues.

Although Joint Intervenors have not specifically moved to reopen the record, a review of their Request For Directed Certification reveals its clear intention. 4/ However their Request is framed, Joint Intervenors are not entitled to further hearings regarding any contentions unless they meet the Commission's traditional standard for reopening closed hearing records.

Because litigation must come to an end at some point, a heavy burden is placed on those who seek to reopen a closed hearing record:

4/ Surprisingly, Joint Intervenors are quite candid in admitting that the purpose to be served by these contentions is to reopen the closed full power hearing record and to litigate issues relevant only to full power operation. They claim that "this is not a case where safety issues can be neatly divided and separately considered for low and full power licensing as NUREG-0694 has been set up to accomplish" (Request For Directed Certification at 6), basing this assertion on their fallacious argument that Diablo Canyon poses "the extraordinary potential for earthquake damage to the plant." Id. Joint Intervenors further argue that "the public health and safety can be assured only if the licensing of the facility is denied until the various Commission Boards have considered and resolved a number of safety related issues which joint intervenors seek to litigate as contentions in this proceeding." Id. (emphasis added). Such a statement could not be a clearer admission that they are now seeking to litigate issues relevant to the ultimate full power licensing of Diablo Canyon. As the admitted basis for their proposed contentions, they must be denied.

> [I]t must appear that reopening the proceeding might alter the result in some material respect. In the case of a motion which is untimely without good cause, the movant has an even greater burden; he must demonstrate not merely that the issue is significant but, as well, that the matter is of such gravity that the public interest demands its further exploration. [Citations omitted.] These criteria govern each issue to be reopened; the fortuitous circumstance that a proceeding has been or will be reopened on other issues has no significance. [Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 2), ALAB-486, 8 NRC 9, 21-22 (1978).]

See Kansas Gas & Electric Company (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 337-38 (1978); Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 386 (1979) (limitations could even be placed on contentions submitted by new intervenors which are related to issues litigated in earlier hearings); Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-80-33, ___ NRC ___, CCH Nuc. Reg. Rep. ¶ 30, 533 at 29, 600 (September 25, 1980) (Chairman Ahearne stating the Commission's test for reopening closed records while dissenting).

A record may be reopened only where there is newly discovered evidence or a material change in circumstances. Moreover, a motion to reopen must be accompanied with supporting evidence to show that it can affect the result of the earlier hearings. Allens Creek Nuclear Generation

Station, supra, 9 NRC at 386; Carolina Power and Light Company (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-79-10, 10 NRC 675 (1979).

This Commission just recently reaffirmed the standard for reopening closed records and considering late-filed contentions in the context of its policy statement concerning TMI-related licensing requirements. "Further Commission Guidance For Power Reactor Operating Licenses; Statement Of Policy," 45 Fed. Reg. 41738, 41740 (June 20, 1980) ("TMI Policy Statement"). As this Commission stated:

> The Commission believes that where the time for filing contentions has expired in a given case, no new TMI-related contentions should be accepted absent a showing of good cause and balancing of the factors in 10 CFR 2.714(a)(1). The Commission expects strict adherence to its regulations in this regard.
>
> Also, present standards governing the reopening of hearing records to consider new evidence on TMI-related issues should be strictly adhered to. Thus, for example, where initial decisions have been issued, the record should not be reopened to take evidence on some TMI-related issue unless the party seeking reopening shows that there is significant new evidence, not included in the record, that materially affects the decision. [Emphasis added.] 5/

5/ This quoted position of the Commission does not reflect a new policy, but is merely a reaffirmation of its long-standing policy which has been applied consistently by licensing boards, appeal boards and the

[continued on next page]

The time for filing contentions has clearly expired. 10 C.F.R. § 2.714(c). All full power hearings are concluded. Joint Intervenors must present "significant new evidence, not included in the record, that materially affects the decision" in order to reopen the hearings. This they have not done.

B. The Hosgri Fault Does Not Present Significant New Evidence Warranting Reopening The Record.

Joint Intervenors' sole premise for why they should be permitted to litigate these proposed contentions is that the existence of the Hosgri fault approximately three miles offshore from the facility constitutes "exceptional circumstances," rendering the facility much more vulnerable to earthquake damage than other facilities. Request For Directed Certification at 3-10. This premise is false.

5/ [continued from previous page]

Commission. The Joint Intervenors' challenge to this policy statement as ostensibly restricting their right to litigate the sufficiency of NUREG-0694 does not relate to this quoted standard for reopening closed hearing records. In any event, such a standard, even if constituting a new rule, would not be subject to notice and comment since it merely establishes Commission practice or procedure. 5 U.S.C. § 553(b) (3)(A).

Joint Intervenors have successfully used the Hosgri fault to delay licensing of Diablo Canyon beyond all reasonable limits. They have cried "exceptional circumstances" at every conceivable opportunity in an effort to delay, obfuscate and to impose their notion of absolute safety far beyond that necessary to provide reasonable assurance that the public health and safety will not be endangered. This constant cry of "exceptional circumstances," like the Diablo Canyon hearings, must end now.

The facts are that the Hosgri fault has been intensively analyzed. The Diablo Canyon facility has been exhaustively reanalyzed and substantially modified to comply with the Commission's seismic design criteria on the basis of the safe shutdown earthquake ("SSE") now postulated for the Hosgri fault.

In short, as the Licensing Board has determined, the Hosgri fault no longer is an "exceptional circumstance." (We are confident that this decision will shortly be affirmed by the Appeal Board.) 6/ Such a decision necessarily

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6/ PGandE's motion requests authorization to load fuel and to conduct low-power tests up to 5 percent power. While we agree that fuel-loading and low-power tests should not begin until the pending Appeal Board decisions on Diablo Canyon's security plan and seismic safety are issued, we feel that the Licensing Board need not await those decisions before proceeding with consideration of PGandE's motion.

implies that there is no more risk of earthquake damage at Diablo Canyon from a Hosgri SSE than at other nuclear plants from the safe shutdown earthquakes postulated for their seismic design. Thus, the Hosgri postulated SSE is a design-basis earthquake which, by definition, is an earthquake the plant is designed to withstand as required by the Commission's seismic design criteria.

The "exceptional circumstances" cry cannot, on the one hand, be used to require a seismic reanalysis and modification of the facility and, on the other hand, after such redesign and modification has been completed, be used to require additional hearings and contentions as if the facility had never been modified. 7/

7/ Joint Intervenors' reference to the statement made by the Appeal Board in ALAB-519, 9 NRC 42, 46 (1979), is inapposite. Request For Directed Certification at 5. The issue before the Appeal Board was whether two consultants to the ACRS, whose views diverged from the ACRS report on Diablo Canyon's seismic qualifications, could be subpoenaed by the Licensing Board on the Joint Intervenors' behalf to testify on the seismic issues. The Appeal Board concluded that exceptional circumstances existed which justified such subpoenas in light of the prohibition contained in 10 C.F.R. § 2.720(h)(1). This was necessary, according to the Appeal Board, to determine whether the Hosgri reanalysis and modifications would be sufficient to withstand the postulated SSE, the plant's original seismic design criteria having been premised on a lesser SSE. Importantly, the fact that the seismic reanalysis of Diablo Canyon was subjected to such intense scrutiny -- including the extraordinary step of permitting testimony of ACRS consultants critical of the ACRS report -- should permit even greater confidence to be placed in an Appeal Board's finding that the plant is adequately designed to withstand the SSE.

With the discarding of Joint Intervenors' Hosgri "exceptional circumstances" argument, there is no support whatsoever for reopening the closed hearing record, nor to permit litigation of these proposed contentions. The Request for Directed Certification should be denied on that basis alone.

There are, however, additional reasons why Joint Intervenors' Request should not be granted. We will discuss below the specific reasons as to each proposed contention why Joint Intervenors have failed to carry their heavy burden to reopen the closed hearing record.

IV

NONE OF THE JOINT INTERVENORS' PROPOSED CONTENTIONS ARE SUPPORTED BY SIGNIFICANT NEW EVIDENCE WARRANTING REOPENING THE CLOSED HEARING RECORD.

A. Emergency Planning

Joint Intervenors argue that in order to obtain a license to load fuel and conduct low-power tests PGandE must demonstrate compliance with the Commission's revised emergency planning regulations effective November 3, 1980. "Final Regulations On Emergency Planning," 45 Fed. Reg. 55402 (August 19, 1980). However, the existing state of PGandE's emergency preparedness is sufficient to meet the statutory requirement of providing adequate protection for the public health and safety for the limited purpose of fuel-loading and low-power testing.

As the NRC has found, PGandE has complied with the former appendix E to 10 C.F.R. Part 50 and Reg. Guide 1.101. Supplement 10 to SER at III.B-2. 8/ Although the revised emergency planning regulations became effective subsequent to the promulgating of NUREG-0694 and the staff's submission of SER Supplement 10, these regulations expressly contemplate that a plant may be licensed on less than full compliance with the new regulations.

> Failure to meet the standards set forth in paragraph (b) of this subsection may result in the Commission declining to issue an Operating License; however, the applicant will have an opportunity to demonstrate to the satisfaction of the Commission that deficiencies in the plans are not significant for the plant in question, that adequate interim compensating actions have been or will be taken promptly, or that there are other compelling reasons to permit plant operation. [10 C.F.R. § 50.47(c).]

We submit that this provision authorizes the Licensing Board to approve issuance of a low-power license on less than full compliance with these regulations, provided there is adequate protection for the public health and safety. Both the Federal Emergency Management Agency and the NRC Steering Committee have agreed that PGandE's present state of emergency preparedness is sufficient to

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8/ In order to obtain a fuel-loading and low-power testing license, NUREG-0694 requires compliance with the then-existing Appendix E of 10 C.F.R. Part 50, Reg. Guide 1.101 and the off-site emergency plans as set forth in NUREG-75/111.

provide this protection for purposes of the low-power testing proposed by PGandE. Supplement 10 to SER at III.B-2; NRC Memorandum with enclosure from FEMA/NRC Steering Committee re Emergency Preparedness Criteria For Low-power Testing, a copy of which is attached as exhibit A hereto.

Such a lesser standard is appropriate in this case. Low-power tests do not result in sufficient fission products to cause enough residual heat for a core melt to occur. There is, accordingly, significantly less risk to the public health and safety from such low-power testing than even the minimal risks associated with full power operation. Therefore, full compliance with the revised regulations should not be necessary to obtain a low-power license. Duke Power Company (William B. McGuire Nuclear Station, Units 1 and 2), ASLAB Order dated Nov. 25, 1980, slip op. at 3, a copy of which is attached as Exhibit B hereto.

Moreover, the Commission authorized the issuance of fuel loading and low-power testing licenses to the Sequoyah, North Anna 2 and Salem 2 facilities on the basis of the staff's finding that each applicant had complied with the requirements of NUREG-0694, including its emergency response requirements. NUREG-0694 at 9. The staff seeks to apply the same standard to PGandE as it did to those facilities. Supplement 10 to SER. PGandE recognizes that

the Sequoyah, North Anna 2 and Salem 2 licenses were uncontested and granted prior to the effective date of the Commission's revised regulations. Nevertheless, we urge the Commission not to require compliance with the more stringent standard proposed by Joint Intervenors simply because this is a contested proceeding subsequent to the adoption of the revised regulations. The ultimate standard -- whether the facility may be operated at the requested level of low power with reasonable assurance that the public health and safety will not be endangered -- is the same in any event.

In addition to arguing that the existence of the Hosgri fault constitutes "exceptional circumstances" (notwithstanding the reanalysis and modification of the plant to accommodate the postulated safe shutdown earthquake), Joint Intervenors argue that full compliance with the new emergency response regulations is required because of possible "widespread panic or fear that substantial emissions from the disabled plant are unavoidable." Request For Directed Certification at 16. Such speculation can hardly provide the basis for requiring full compliance with the new regulations.

Joint Intervenors have submitted absolutely no evidence -- nor could they -- of how the public might react

to a hypothetical low-power testing accident. 9/ Moreover, the new regulations focus on such factors as the plume exposure and ingestion pathways, factors which are intended to protect against actual releases, and not on conjectured panic and fear. 10/

The Joint Intervenors have advanced no evidence to support their argument that the emergency planning record should be reopened. Admission of Joint Intervenors' proposed contention would result in the application of a stricter standard to PGandE than was applied in other recently issued low-power test licenses without any substantial basis for doing so. This contention should be rejected.

9/ On December 5, 1980, the Commission refused to permit the issue of the public's psychological stress to be litigated in the TMI-1 restart hearings. ___ NRC ___ (Dec. 5, 1980). Certainly if such an issue is not a proper matter for litigation in those proceedings, it can hardly be a significant factor warranting reopening the emergency planning record with regard to PGandE's low-power motion.

10/ Joint Intervenors' argument that the Hosgri fault poses a substantial risk of off-site destruction which might inhibit emergency response is equally fallacious. Since the plant is capable of withstanding the Hosgri SSE, the possibility that the SSE may cause off-site damage is irrelevant since it would not in conjunction with that damage also cause damage at the plant necessitating an emergency response.

B. Class 9 Accident Analysis

There is no basis for considering the question of class 9 accidents on PGandE's motion for fuel loading and low-power testing. 11/ The issue of class 9 accidents is simply not relevant to the merits of PGandE's present motion. This is because there is no significant risk of core melt or breach of containment associated with fuel loading and low-power testing as requested by PGandE.

In a case such as this where a final environmental impact statement has been approved and circulated and the environmental record is closed, the Commission's recent NEPA policy statement specifically requires that a showing of special circumstances be made in order to justify reopening the environmental record to require the performance of any kind of class 9 analysis. "Nuclear Power Plant Accident Considerations Under The National Environmental Policy Act of 1969," 45 Fed. Reg. 40101, 40103 (June 13, 1980) ("NEPA

11/ The Diablo Canyon final environmental impact statement ("EIS") did not consider the environmental consequences of a "class-9" accident because, in accordance with the Proposed Annex to Appendix D, 10 C.F.R. Part 50, the likelihood that such beyond-design basis accidents would occur was considered to be very remote. See Offshore Power Systems (Floating Nuclear Power Plants), CLI-79-9, 10 NRC 257 (1979). The Commission's recent NEPA Policy Statement withdrew the Annex, but did not require class 9 analyses in those cases where final EIS's have been issued.

Policy Statement"). 12/ This standard is, of course, a specific application of the general Commission standard governing the reopening of closed records discussed above.

Joint Intervenors' argument boils down to two points: (1) the NEPA Policy Statement should be made retroactive to require a class 9 analysis in plants with closed environmental records such as Diablo Canyon; and (2) the "special circumstances" of Diablo Canyon require a class 9 analysis. Their argument fails on both points.

12/ As the Commission stated:

> 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 stage where a Final Environmental Impact Statement has not yet been issued. . . . It is expected that these revised treatments will lead to conclusions regarding the environmental risks of accidents similar to those that would be reached by a continuation of current practices, particularly for cases involving special circumstances where Class 9 risks have been considered by the staff, as described above. Thus, 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 proceedings. [45 Fed. Reg. at 40103.]

First, by its very nature a policy statement is prospective in operation, representing a general statement announcing the agency's tentative intentions for the future. As applied in a given case, the agency must be prepared to support the policy just as if the policy statement had never been issued. Pacific Gas and Electric Company v. Federal Power Commission, 506 F.2d 33, 38-39 (D.C. Cir. 1974). Thus, if the Commission had made the policy statement retroactive to include such cases as Diablo Canyon, arguably the statement could be challenged as rulemaking without notice and comment.

Even if the NEPA policy statement had never been promulgated, no class 9 analysis would be required for Diablo Canyon. This is because the NEPA legal standard has long required a description only of the reasonably foreseeable environmental effects of the proposed action. Natural Resources Defense Council, Inc. v. U. S. Nuclear Reg. Com'n, 606 F.2d 1261, 1269 (D.C. Cir. 1979); Warm Springs Dam Task Force v. Gribble, 565 F.2d 549, 552 (9th Cir. 1977); Realty Income Trust v. Eckerd, 564 F.2d 447, 454 n. 20 (D.C. Cir. 1977); Swain v. Brinegar, 542 F.2d 364, 368 (7th Cir. 1976); Carolina Environmental Study Group v. United States, 510 F.2d 796, 798 (D.C. Cir. 1975); Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 837-38 (D.C. Cir. 1972). Therefore, in order to warrant reopening the environmental record in this case, this

Commission must be prepared to conclude that Joint Intervenors have submitted evidence of significant new circumstances which make the likelihood of occurrence of a particular type of class 9 accident with serious environmental consequences reasonably foreseeable at Diablo Canyon. Joint Intervenors have offered nothing which would rise to this level.

Second, the Director of Nuclear Reactor Regulation, in denying a petition under 10 C.F.R. § 2.206, has determined that no special circumstances exist which would warrant a reopening of the record to consider class 9 accidents at Diablo Canyon. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), DD-80-22, 11 NRC 191 (1980), a copy of which is attached as Exhibit C hereto. On August 11, 1980 the Commission declined to exercise its discretion to review this Decision.

The 2.206 petition alleged as the bases for its requested relief the same factors urged by Joint Intervenors as support for their motion to reopen. Nevertheless, although the staff may have concluded that the TMI accident was a class 9 accident, it did not regard TMI as a special circumstance warranting a class 9 review for Diablo Canyon. This Commission in its NEPA Policy Statement has also

concluded that TMI was not such an event as to require the reopening of closed records. 13/

In an attempt to justify their class 9 contention, Joint Intervenors place primary reliance on their assertion that Diablo Canyon is particularly vulnerable to earthquake damage. As we have discussed earlier, the seismic design of Diablo Canyon is sufficient to withstand the safe shutdown earthquake postulated to occur on the Hosgri fault, just as all nuclear power plants must be designed to withstand the particular safe shutdown earthquakes governing their seismic design criteria. Thus, no special circumstances exist by reason of the Hosgri fault.

The failure of Joint Intervenors to submit significant new evidence which could alter the 1978 environmental decision is seen with even greater clarity in the context of PGandE's motion for low-power testing. The activities PGandE seeks to conduct will result in a proportionately lower inventory of fission products than will full power operation. Accordingly, the consideration

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13/ Joint Intervenors (as did the 2.206 petitioners) also argue that the Commission's withdrawal of reliance on the numerical estimates of the probability of occurrence of a core melt in the Rasmussen Report undermines the conclusion that the probability of occurrence of a class 9 accident is remote. However, in Carolina Power and Light Company (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-79-10, 10 NRC 675 (1979), the Commission concluded that this circumstance did not warrant reopening the record in that case.

of class 9 accidents is not relevant to PGandE's motion for a license to load fuel and to conduct low-power testing. 14/

Finally, the bare assertion that class 9 accidents must be evaluated fails to meet the requirement that the basis for each contention must be "set forth with reasonable specificity." 10 C.F.R. § 2.714(b). As one Appeal Board stated,

> "Class 9 accidents" - defined as "sequences of postulated successive failures more severe than those postulated for the design basis for protective systems and engineered safety features . . ." - represent an indefinable number of conceivable types of accidents which are more severe than the design basis accidents of class 8. [Long Island Lighting Company (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 835 (1973), affd., Lloyd Harbor Study Group v. NRC, No. 73-2266 (D.C. Cir. Nov. 9, 1976) revd. on other grounds, 435 U.S. 964 (1978), confirmed on this ground, (D.C. Cir. November 26, 1978) (unpub. order).]

See Metropolitan Edison Co. (Three Mile Island Nuclear Station Unit 1), LBP-79-34, 10 NRC 828 (1979).

This Commission and various appeal and licensing boards have consistently required that in order to warrant analyzing a class 9 accident from an environmental or a

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14/ The fuel-loading and low-power testing licenses of Sequoyah, North Anna 2 and Salem 2 were approved by this Commission without requiring consideration of class 9 accidents. Joint Intervenors have presented no circumstances warranting a departure from the standard applied in those cases.

design safety standpoint, the proponent must make "a showing that, with respect to the reactor in question, there is a reasonable possibility of the occurrence of a particular type of accident generically regarded as being in class 9. . ." and the licensing board is not required "to exhaust all theoretical possibliities." Shoreham Nuclear Power Station, supra, 6 AEC at 836 (emphasis added). See Consolidated Edison Company of New York (Indian Point Unit No. 2), CLI-72-79, 5 AEC 20, 21 (1972) ("[T]he subject of pressure vessel integrity could, in special circumstances, be a proper area of inquiry during a licensing proceeding," but "protection against the consequences of vessel failure need not be required for a particular facility 'unless it has been determined that for such facility there are special considerations that make it necessary that potential pressure vessel failure be considered.'").

Not only have Joint Intervenors failed to establish the existence of special circumstances, they have failed to identify, with specificity or otherwise, any particular accident sequence which they wish considered. Their contention, as proposed, would embark the parties and the Licensing Board on an exhausting and perhaps never ending review of a virtually infinite number of possible accident sequences without the slightest evidence that the result of such an undertaking could affect the environmental or safety records. Their contention must be rejected.

C. Quality Assurance

Joint Intervenors' proposed contention 3 asserts that PGandE "has failed to demonstrate compliance at Diablo Canyon with 10 C.F.R. part 50, appendix B, regarding quality assurance." Request For Directed Certification at 3. However, Joint Intervenors requested and were denied admission of such a contention in the October 1977 hearings on non-seismic safety issues, primarily for lack of timeliness. ASLB Order dated May 25, 1977. Nevertheless, the Licensing Board invited evidence on quality assurance from all parties, which was presented by PGandE and the staff. Joint Intervenors elected to present none. Joint Intervenors should not now be permitted to use PGandE's low-power test motion to escape the consequences of that earlier failure.

The quality assurance hearing record is now closed, although the Licensing Board did not make findings on quality assurance in its September 1979 Partial Initial Decision because of uncertainties concerning the implications, if any, of TMI on that issue. The Board held the record open only to receive the staff report on the TMI implications. Diablo Canyon Nuclear Power Plant, supra, 10 NRC at 459. It was not held open for Joint Intervenors to attempt to resubmit a contention which they had declined to litigate in earlier hearings.

The staff has now submitted its analysis of the low-power implications of TMI on quality assurance. SER Supplement 10. 15/ The Licensing Board now has before it all of the evidence on quality assurance which it needs to render its deferred findings at least as far as the low-power license is concerned. 16/

Again, Joint Intervenors' attempt at showing significant new evidence since the record closed falls far short of the mark. Their Request For Directed Certification is accompanied by no evidence whatsoever, new or otherwise, and on that basis alone the contention must be rejected.

15/ The NRC staff in its response to PGandE's low-power test motion filed with the Licensing Board on September 25, 1980 stated that "a contention may be submitted as to how quality assurance experience from TMI will affect the low-power testing application." At 15. PGandE disagrees with the staff that this contention should be admitted. We do not believe that the contention should be entertained in this regard since the staff has adequately addressed this issue in its SER supplement. In any event, the staff's contention is a far more limited contention than that proposed by Joint Intervenors.

16/ Joint Intervenors claim that "NUREG-0694 is seriously deficient in that it inadequately addresses the issue of quality assurance" (Request For Directed Certification at 21), offering as support only their assertion that Diablo Canyon will be subjected to greater seismic stresses and that the Licensing Board has not issued its quality assurance findings. As can easily be seen, neither of these points places into issue the sufficiency of NUREG-0694. Moreover, both these points are easily accounted for. First, as discussed in the text, the Board is able to issue its findings. Second, since the plant is now designed to withstand the safe shutdown earthquake, the greater seismic stresses to which Diablo Canyon components may be subjected are accommodated for in the plant's seismic modifications.

Moreover, the referenced April 17, 1980 letter from R.F. Locke and Amendment 85 to the Final Safety Analysis Report ("FSAR") raise matters which are within the province of the staff to consider, particularly since the operating license hearings are closed. See Consolidated Edison Company of New York, Inc. (Indian Point, Units 1, 2 & 3), supra, 3 NRC at 189-90. Joint Intervenors are simply attempting to seize upon PGandE's low-power motion as a vehicle to reopen this closed issue. Hearings would never end if every plant inspection and FSAR amendment could be the predicate for new hearings.

Joint Intervenors have not carried their heavy burden to reopen the quality assurance record, particularly considering that they are merely resubmitting a contention rejected when the record was open. 17/

The Licensing Board's 1977 decision not to entertain Joint Intervenors' late-filed quality assurance contention should stand today.

17/ At one point in their Request For Directed Certification, Joint Intervenors argue that the Commission's quality assurance regulations are inadequate. At 22. Joint Intervenors, however, propose a contention which places into issue only PGandE's compliance with existing regulations. To the extent Joint Intervenors challenge the adequacy of quality assurance regulations, they have failed to meet the requirements of 10 C.F.R. § 2.758, setting forth the circumstances and procedures under which a party may challenge the sufficiency of a Commission regulation.

V

CONCLUSION

The hearings conducted on PGandE's application for full power operating licenses for Diablo Canyon are concluded. PGandE's low-power motion seeks a lesser form of relief than that considered in these hearings. Therefore, since this motion necessarily raises no significant new issues, there is no basis in law or fact for reopening the closed hearing record. PGandE's motion creates in Joint Intervenors no new procedural rights.

In order to warrant reopening the record, Joint Intervenors are required to present significant new evidence

or a material change in circumstances since the record closed. This they have not done. Accordingly, Joint Intervenors' proposed contentions should be rejected.

Respectfully submitted,

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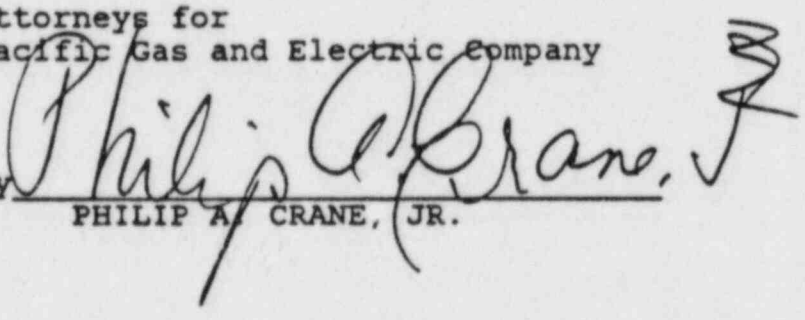
By 
PHILIP A. CRANE, JR.

Dated: December 18, 1980.

ATTACHMENT 1

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

MEMORANDUM FOR: Harold R. Denton, Director, Office of Nuclear Reactor Regulation, NRC

John W. McConnell, Assistant Associate Director for Population Preparedness, FEMA

FROM: FEMA/NRC Steering Committee

SUBJECT: EMERGENCY PREPAREDNESS CRITERIA FOR LOW POWER TESTING

In accordance with your exchange of letters, both dated February 14, 1980, the joint FEMA/NRC Steering Committee has made a determination on whether specific emergency preparedness criteria should be developed for low power testing authorizations at new commercial nuclear power facilities. The Steering Committee has determined that the position in the enclosure with regard to emergency preparedness for low power testing is adequate and can serve as an interim basis for licensing facilities for low power testing. The Steering Committee concludes that in view of the minimal nature of the potential hazard, the development of specific low power testing criteria is not warranted.

We conclude that an appropriate objective for those facilities beyond North Anna, Salem and Diablo Canyon is to assess against the upgraded NRC/FEMA criteria and making findings with regard to the significance of any deficiencies for low power testing authorizations.

Brian K. Grimes, Director
Emergency Preparedness Task Group
Office of Nuclear Reactor
Regulation - NRC

Robert Ryan, Director
Division of Radiological Emergency
Preparedness - FEMA

Co-Chairmen
of the
FEMA/NRC Steering Committee

Enclosure:
Criteria for Low Power Testing

cc w/enclosure:
FEMA/NRC Steering Committee
K. Cornell
F. Camm

8101050388

FEMA/NRC INTERIM AGREEMENT ON CRITERIA FOR LOW POWER TESTING AT NEW COMMERCIAL NUCLEAR FACILITIES

The FEMA/NRC Steering Committee has agreed that for the purposes of low power testing (up to 5% power) at new commercial nuclear facilities that the public health and safety is adequately protected if such facility is located in a State which had received a concurrence under the previous voluntary concurrence program, administered by the NRC and based on evaluation by a multi-agency Federal Regional Advisory Committee. In addition, operator plans at individual sites must be consistent with both the existing NRC Appendix E to 10 CFR Part 50 and NRC Regulatory Guide 1.101 in order to assure adequate protection of the public health and safety prior to low power testing.

NRC and FEMA agree that State, local and nuclear facility operator plans must be adequate when judged against the criteria contained in NUREG-0654 and FEMA/REP-1 prior to full scale commercial operation.

This agreement is based on the considerations discussed in the exchange of letters between H. Denton, NRC and J. McConnell, FEMA, both dated February 14, 1980.

The parties note that the North Anna, Salem and Diablo Canyon sites are located in Virginia, New Jersey and California respectively, all of which have received prior NRC concurrence in State Plans. The Salem facility is located near the Delaware border; the radiological emergency plan of the State of Delaware has also received prior NRC concurrence. NRC stipulates that individual nuclear facility operator plans at these plants are in compliance with Appendix E and are consistent with Regulatory Guide 1.101.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Robert M. Lazo, Esq., Chairman.
~~Dr. Kenneth A. Luebke, Member~~
Dr. Cadet H. Hand, Jr., Member

In the Matter of DUKE POWER COMPANY (William B. McGuire Nuclear Station, Units 1 and 2)	: Docket Nos. 50-369-OL 50-370-OL November 25, 1980

MEMORANDUM AND ORDER REGARDING
APPLICANT'S MOTION FOR SUMMARY DISPOSITION

On September 30, 1980, Duke Power Company (Applicant) filed "Applicant's Motion for Summary Disposition Regarding Application for License Authorizing Fuel Loading, Initial Criticality, Zero Power Physics Testing and Low-Power Testing for McGuire Unit 1; Request for Expedited Consideration" (hereafter "Motion for Summary Disposition"). In its Motion for Summary Disposition, Applicant moves the Atomic Safety and Licensing Board (the Board) for summary disposition with respect to issuance of a license authorizing fuel loading, initial criticality, zero power physics testing and low-power testing of Unit 1 of the William B. McGuire Nuclear Station. In support of its motion, Applicant has also filed "Applicant's Memorandum in Support of its Motion for Summary Disposition" and "Statement of Material Facts as to Which There Is No Genuine Issue To Be Heard". All three documents address the Carolina Environmental Study Group's (CESG) proposed

contentions relating to excessive generation of hydrogen.[1/]

Answers to Applicant's Motion for Summary Disposition were filed by the NRC Staff (Staff) and by CESG on November 7, 1980.[2/]

In the view of the Staff, the affidavit of Norman Lauben, which the Staff attached to its answer, together with Applicant's motion and supporting documents, demonstrates that there is not a sufficient factual basis for CESG's proposed contentions and that there are no issues of fact worthy of adjudication at a hearing to consider the application for a license to authorize fuel loading and low-power testing for McGuire Unit 1.

1/ On June 9, 1980, CESG moved to reopen the record and add contentions regarding the possibility of excessive hydrogen generation resulting from a TMI-type accident. CESG revised its motion on August 15, 1980. See "CESG's Motions to Admit New Contentions and to Reopen the McGuire Operating License Hearing", dated June 9, 1980, and "CESG's Revised Motion to Reopen the Operating License Proceeding Motion; Motion to Deny Applicant's Request for Fuel Loading, Etc., Revised Contentions" dated August 15, 1980. As Applicant notes in its Motion for Summary Disposition, "such contentions are presently awaiting Board action as to their admissibility; the Board must also decide whether CESG has satisfied the reopening standards of the Commission." Applicant's Motion for Summary Disposition, at 1, 2.

2/ The original filing date for answers to Applicant's Motion for Summary Disposition was October 21, 1980. That date was extended by stipulation of all parties until October 28, 1980. Thereafter, during a telephone conference between the parties and the Board on October 28, 1980, the Board granted the request of the Staff and CESG for an extension of time until November 7, 1980, to file their answers to Applicant's Motion.

Accordingly, the Staff urges the Board to dismiss CESG's proposed contentions as a matter of law and to grant Applicant's Motion for Summary Disposition.

In its answer to Applicant's motion, CESG does not dispute paragraphs 1, 2, 3, 6, 7, 10, 11, 12 and 16 of Applicant's "Statement of Material Facts as to Which There Is No Genuine Issue To Be Heard". Thus, with respect to three of the four phases of activities requested in the low power operating license motion,[3/] viz., fuel loading, initial criticality, and zero power physics testing, CESG does not dispute Applicant's statement that even in the unlikely event of a LOCA coupled with the complete failure or termination of the ECCS, the extremely small buildup of fission products resulting in little or no heat generation precludes excessive hydrogen generation. Accordingly, as a matter of law, Applicant is entitled to a favorable decision regarding the first three of the four phases of activities requested in its motion for a lower power operating license.

With regard to the low-power testing phase (i.e., up to five percent of full power), CESG has set forth specific facts showing that there is a genuine issue of fact. Specifically, it is accepted that there is a possibility (however remote) that hydrogen in quantities exceeding 10 CFR §50.44 design bases could be generated during low power testing (Affidavit

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[3/] See "Applicant's Motion for License Authorizing Fuel Loading, Initial Criticality, Zero Power Physics Testing and Low Power Testing" dated August 1, 1980.

of W. H. Rasin). For such hydrogen to be generated, there must be a LOCA, a failure or premature operator termination of the ECCS, and failure to restore cooling water to the reactor prior to generation of hydrogen (Id.).

Applicant maintains that (1) the ECCS will not fail if called upon to operate and (2) the ECCS will not be prematurely terminated by operator action. Further, Applicant maintains that even in the event of a LOCA, coupled with the failure of the ECCS, there is sufficient time to assure a flow of cooling water to the core prior to initiation of significant hydrogen gereration.

CESG does not dispute Applicant's statement that there will be a minimum of one hour and five minutes (3900 seconds) until hydrogen generation begins after a postulated LOCA absent ECCS operation (Affidavit of W. H. Rasin). However, CESG controverts the fact that operators will within such time easily be able to restore sufficient flow of water to the core to prevent uncovering of the core and potential hydrogen generation and asserts that electrical power for pump operation will not necessarily be available. In that event, according to CESG, the containment would be filled with hydrogen at the four percent level (the lower limit for self-propagating combustion) approximately 18 hours after the onset of the LOCA (Affidavit of Jesse L. Riley). In view of the above, the Board cannot rule as a matter of law that no genuine issue of material fact exists with respect to whether excessive amounts of hydrogen will be generated during low-power operations.

Conclusion and Order

Pursuant to the Commission regulation 10 CFR 2.749, the Board concludes on the basis of the record in the proceeding that so far as the activities regarding (1) fuel loading, (2) initial criticality, and (3) zero power physics testing are concerned, there is no genuine issue of any material fact and that Applicant is entitled as a matter of law to a decision granting its motion for summary disposition as to these three phases of the activities for which a license is requested. Accordingly, it is hereby ordered that Applicant's motion for summary disposition is granted in part so as to permit the Commission, if it desires, to issue a license authorizing fuel loading, initial criticality and zero power physics testing of McGuire Unit 1.

The Board believes that it has been clearly demonstrated that there is a genuine issue as to material facts regarding the issue of hydrogen generation sought to be adjudicated by CESG with respect to the application for a license authorizing low power testing at a maximum of five percent of full power. McGuire is a thin-shelled reactor, and the hydrogen issue is related to the pressure capability of the containment structure. The Board is of the opinion that current studies by the Applicant and by the NRC on this topic relate to CESG's concerns. We will hear evidence on this issue. Applicant's motion for summary disposition regarding low power testing is denied.

The parties are directed to confer regarding a proposed schedule leading to the commencement of an evidentiary hearing on the issue of the generation

of excessive amounts of hydrogen during low power testing operations and to submit such proposed schedule to the Board by December 15, 1980.

In its November 7, 1980, reply to Applicant's motion for summary disposition, CESG has advanced two additional contentions (Contentions 5 and 6). Applicant and Staff are directed to respond to CESG's proposed further contentions by December 15, 1980.

It is so ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Robert M. Lazo

Robert M. Lazo, Chairman

Dated at Bethesda, Maryland,
this 25th day of November, 1980.

EXHIBIT 5

JOINT INTERVENORS' STATEMENT OF CONTENTIONS

EXHIBIT 5

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

STATEMENT OF CONTENTIONS

Pursuant to 10 C.F.R. §2.715(c) and this Board's orders of October 24, 1980 and November 5, 1980, the SAN LUIS OBISPO MOTHERS FOR PEACE, SCENIC SHORELINE PRESERVATION CONFERENCE, INC., ECOLOGY ACTION CLUB, SANDRA SILVER, GORDON SILVER, ELIZABETH APFELBERG, and JOHN J. FORSTER ("Joint Intervenors") hereby specify the contentions which they intend to litigate with respect to PGandE's ("Applicant's") motion for a license to load fuel and conduct low power testing at the Diablo Canyon Nuclear Power Plant ("Diablo Canyon"). Joint Intervenors contend that neither the short nor long term requirements contained in NUREG-0694, "TMI-Related Requirements for New Operating Licenses," nor the Applicant's proposed implementation measures are sufficient to provide reasonable assurance that

the Diablo Canyon facility can be operated without endangering the health and safety of the public and that each of the following contentions must be satisfactorily resolved prior to issuance of a license to load fuel and conduct low power testing.

1. No final decision has been rendered by the Commission as to the Applicant's compliance at Diablo Canyon with 10 C.F.R. Part 100, Appendix A, regarding seismic safety. Because of the exceptional nature of the seismic danger associated with the Diablo Canyon facility, such a definitive determination by the Commission must be issued prior to fuel loading.

2. No final decision has been rendered by the Commission as to the Applicant's compliance at Diablo Canyon with 10 C.F.R. Part 73, regarding physical protection of nuclear plants and materials. Such a definitive determination by the Commission must be issued prior to fuel loading.

3. The Applicant has failed to demonstrate compliance at Diablo Canyon with 10 C.F.R. Part 50, Appendix B, regarding quality assurance.

4. Numerous studies arising out of the accident at TMI recognized the necessity of upgrading emergency response planning. Based upon these studies, the Commission has promulgated revised emergency planning regulations, effective November 3, 1980. The Applicant has failed to demonstrate that the combined Applicant, state, and local emergency response plans for Diablo Canyon comply with those revised regulations ("Final Regulations on Emergency Planning," 45 Fed. Reg. 55402 (August 19, 1980)).

5. The Applicant has failed to demonstrate that the combined Applicant, state, and local emergency response plans for Diablo Canyon comply with the requirements of Sections III.A.1.1 and III.A.1.2 of NUREG-0694.

6. The Applicant has failed to demonstrate that the containment at Diablo Canyon can withstand pressures resulting from the combustion of hydrogen likely to be generated by the reaction of zirconium cladding with water during a loss-of-coolant accident at the facility.

7. The Applicant has failed to address adequately safety considerations designed as high priority and/or high risk in Table B.2 of NUREG-0660, "TMI Action Plan."

8. The accident at TMI Unit 2 demonstrated that reliance on natural circulation to remove decay heat is inadequate. During the accident, it was necessary to operate at least one reactor coolant pump to provide forced cooling of the fuel. However, the Applicant's testing program does not demonstrate a reliable method for forced cooling of the reactor in the event of a small loss-of-coolant accident ("LOCA"), particularly with regard to two-phase flow and with voids such as occurred at TMI-2. This is a threat to health and safety and a violation of both General Design Criterion ("GDC") 34 and GDC 35 of 10 C.F.R., Part 50, Appendix A.

9. Using existing equipment at Diablo Canyon, there are three principal ways of providing forced cooling of the reactor: (1) the reactor coolant pumps; (2) the residual heat removal system; and (3) the emergency core cooling system in a "bleed and feed" mode. None of these methods meets the NRC's regulations applicable to systems important to safety and is sufficiently reliable to protect public health and safety:

a. The reactor coolant pumps do not have an adequate on-site power supply (GDC 17), their controls do not meet IEEE 279 (10 C.F.R. 50.55a(h)) and they are not adequately qualified (GDC 2 and 4).

b. The residual heat removal system is incapable of being utilized at the design pressure of the primary system.

c. The emergency core cooling system cannot be operated in the bleed and feed mode for the necessary period of time because of inadequate capacity and radiation shielding for the storage of the radioactive water bled from the primary coolant system.

10. The staff recognizes that pressurizer heaters and associated controls are necessary to maintain natural circulation at hot stand-by conditions. Therefore, this equipment should be classified as "components important to safety" and required to meet all applicable safety-grade design criteria, including but not limited to diversity (GDC 22), seismic and environmental qualification (GDC 2 and 4), automatic initiation (GDC 20), separation and independence (GDC 3 and 22), quality

assurance (GDC 1), adequate, reliable on-site power supplies (GDC 17) and the single failure criterion. The Applicant's proposal to connect two out of four of the heater groups to the present on-site emergency power supplies does not provide an equivalent or acceptable level of protection.

11. The Applicant has proposed simply to add the pressurizer heaters to the on-site emergency power supplies. It has not been demonstrated that this will not degrade the capacity, capability and reliability of these power supplies in violation of GDC 17. Such a demonstration is required to assure protection of public health and safety.

12. 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.

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

> To the extent feasible and practical protection system inputs shall be derived from signals which are direct measures of the desired variables.

Diablo Canyon has no capability to directly measure the water level in the fuel assemblies. The absence of such instrumentation delayed recognition of a low water level condition in the

reactor for a long period of time. Nothing proposed by the staff would require a direct measure of water level or provide an equivalent level of protection. The absence of such instrumentation poses a threat to public health and safety.

14. 10 C.F.R. 50.46 requires analysis of ECCS performance "for a number of postulated loss-of-coolant accidents of different sizes, locations, and other properties sufficient to provide assurance that the entire spectrum of postulated loss-of-coolant accidents is covered." For the spectrum of LOCAs, specific parameters are not to be exceeded. At TMI, certain of these were exceeded. For example, the peak cladding temperature exceeded 2200° fahrenheit (50.45(b)(1)), and more than 1% of the cladding reacted with water or steam to produce hydrogen (50.46(b)(3)). The measures proposed by the staff address primarily the very specific case of a struck-open power operated relief valve. However, any other small LOCA could lead to the same consequences. Additional analyses to show that there is adequate protection for the entire spectrum of small break locations for the Diablo Canyon design have not been performed. Therefore, there is no basis for finding compliance with 10 C.F.R. 50.46 and GDC 35. None of the corrective actions to date have fully addressed the demonstrated inadequacy of protection against small LOCAs.

15. The accident at TMI-2 was substantially aggravated by the fact that the plant was operated with a safety system inoperable, to wit: two auxiliary feedwater system valves were closed which should have been open. The principal reason why this condition existed was that TMI does not have an adequate

system to inform the operator that a safety system has been deliberately disabled. To adequately protect the health and safety of the public, a system meeting the Regulatory Position of Reg. Guide 1.47 or providing equivalent protection is required.

16. The design of the safety systems at TMI was such that the operator could prevent the completion of a safety function which was initiated automatically; to wit: the operator could (and did) shut off the emergency core cooling system prematurely. This violated §4.16 of IEEE 279 as incorporated in 10 C.F.R. 50.55 (a)(h) which states:

> The protection system shall be so designed that, once initiated, a protection system action shall go to completion.

The Diablo Canyon design is similar to that at TMI and must be modified so that no operator action can prevent the completion of a safety function once initiated.

17. The design of the hydrogen control system at TMI was based upon the assumption that the amount of fuel cladding that could react chemically to produce hydrogen would, under all circumstances, be limited to less than 5%. The accident demonstrated both that this assumption is not justified and that it is not conservative to assume anything less than the worst case. Therefore, the Diablo Canyon hydrogen control systems should be designed on the assumption that 100% of the cladding reacts to produce hydrogen.

18. The TMI-2 accident demonstrated that the severity of the environment in which equipment important to safety must operate was underestimated and that equipment previously deemed

to be environmentally qualified failed. One example was the pressurizer level instruments. The environmental qualification of safety-related equipment at TMI is deficient in three respects: (1) the parameters of the relevant accident environment have not been identified; (2) the length of time the equipment must operate in the environment has been underestimated; and (3) the methods used to qualify the equipment are not adequate to give reasonable assurances that the equipment will remain operable. Diablo Canyon should not be permitted to load fuel until all safety-related equipment has been demonstrated to be qualified to operate as required by GDC 4. The criteria for determining qualification should be those set forth in Regulatory Guide 1.89 or equivalent.

19. Neither the Applicant nor the NRC staff has presented an accurate assessment of the risks posed by operation of Diablo Canyon, contrary to the requirements of 10 C.F.R. 51.20(a) and 51.20(d). The design of Diablo Canyon does not provide protection against so-called "Class 9" accidents. There is no basis for concluding that such accidents are not credible. Indeed, the staff has conceded that the accident at TMI-2 falls within that classification. Therefore, there is not reasonable assurance that Diablo Canyon can be operated without endangering the health and safety of the public.

20. The TMI-2 accident demonstrated that there are systems and components presently classified as non-safety-related which can have an adverse effect on the integrity of the core because they can directly or indirectly affect temperature, pressure, flow and/or reactivity. This issue is discussed at length in Section 3.2, "System Design Requirements," of NUREG-

0578, the TMI-2 Lessons Learned Task Force Report (Short Term). The following quote from page 18 of the report describes the problem:

> There is another perspective on this question provided by the TMI-2 accident. At TMI-2, operational problems with the condensate purification system led to a loss of feedwater and initiated the sequence of events that eventually resulted in damage to the core. Several nonsafety systems were used at various times in the mitigation of the accident in ways not considered in the safety analysis; for example, long-term maintenance of core flow and cooling with the steam generators and the reactor coolant pumps. The present classification system does not adequately recognize either of these kinds of effects that nonsafety systems can have on the safety of the plant. Thus, requirements for nonsafety systems may be needed to reduce the frequency of occurrence of events that initiate or adversely affect transients and accidents, and other requirements may be needed to improve the current capability for use of nonsafety systems during transient or accident situations. In its work in this area, the Task Force will include a more realistic assessment of the interaction between operators and systems.

The Staff proposes to study the problem further. This is not a sufficient answer. All systems and components which can either cause or aggravate an accident or can be called upon to mitigate an accident must be identified and classified as components important to safety and required to meet all safety-grade design criteria.

21. The accident at TMI-2 was caused or aggravated by factors which are the subject of Regulatory Guides not used in the design of TMI. For example, the absence of an automatic indication system as required by Regulatory Guide 1.47 contributed to operation of the plant with the auxiliary feedwater system completely disabled. The public health and safety require that

this record demonstrate conformance with or document deviations from the Commission's regulations and each Regulatory Guide presently applicable to the plant.

22. The design of Diablo Canyon has not been demonstrated as complying with the Commission's regulations concerning fire protection, including GDC 3 and Appendix R. Therefore, unless the plant systems are demonstrated to comply with all latest applicable Commission regulating requirements, operation of Diablo Canyon will endanger public health and safety.

23. The accident at TMI-2 was a multiple failure accident involving independent and dependent failures. The multiple failure sequences exceeded the single failure criterion utilized in the Diablo Canyon design basis accident assessment. Therefore, comprehensive studies of the interaction of nonsafety grade components, equipment, systems, and structures with safety systems and the effect of these interactions during normal operation, transients, and accidents need to be made by the Diablo Canyon Applicant in order to assure that the plant can be operated without endangering the health and safety of the public.

24. Reactor coolant system relief and safety valves form part of the reactor coolant system pressure boundary. Appropriate qualification testing has not been done to verify the capabilities of these valves to function during normal, transient and accident conditions. In the absence of such testing and verification, compliance with GDC 1, 14, 15 and 30 cannot be found and public health and safety are endangered.

25. The measures identified by the staff in NUREG-0578 include many which will not be implemented until after the plant has resumed operation and some which will not even be identified until some unspecified time in the future. No justification has been provided for concluding that the Diablo Canyon plant can safely operate in the period while these corrective actions are being identified and prior to their implementation. The public health and safety demands that all safety problems identified by the accident be corrected prior to fuel loading.

26. The events at TMI-2 showed the inadequacy of NRC emergency planning requirements. Emergency planning beyond the LPZ is a recognition of the residual risk associated with major reactor accidents whose consequences could exceed those associated with so-called design basis events. Such planning should be based on a worst case analysis of the potential accident consequences of a core melt with breach of containment. The public health and safety require that there be in place prior to fuel loading at Diablo Canyon a feasible plan to evacuate the public in the event of such an accident.

27. The accident at TMI-2 was caused or aggravated by factors which are under study as so-called "generic unresolved safety issues." For example, interaction between non-safety and safety systems created demands on the safety system that exceeded the latter's design basis. This problem is listed as A-17 in NUREG-0410 and is more fully described therein as well as in Appendix A-17/1 of testimony dated September 27, 1978 of staff members Aycock, Crocker and Thomas in Docket Nos. STM 50-556,

50-557, Public Service Co. of Oklahoma, et al. (Black Fox Station, Units 1 and 2) (hereinafter "Black Fox testimony"). At TMI-2, the failures of the pressurizer power operated relief valve and the condensate system, both non-safety systems were principle contributors to the accident.

Another example of an unresolved safety problem directly involved at TMI-2 is A-24, "Qualification of Class IE Safety-Related Equipment," found at Appendix A-24/1 of the Black Fox testimony. The pressurizer level instruments which failed at TMI-2 were previously deemed to be qualified to function in the accident environment.

The Appeal Board in Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-491, 8 NRC 245 (1978) ruled that, as a requirement for the issuance of an operating license, the record must demonstrate either that each applicable generic safety issue has been resolved for the particular reactor or the existence of measures employed at the plant to compensate for the lack of a solution to the problem. There is a clear need for this procedure to be undertaken prior to fuel loading at Diablo Canyon. The public health and safety require a finding that each applicable unresolved safety problem at Diablo Canyon has been addressed. (The generic issues relevant to Diablo Canyon are those in NUREG-0410 which are designated by the staff in the Black Fox testimony as applicable to either all LWRs, all PWRs, or all Westinghouse reactors.

In addition to the above contentions, Joint Intervenors hereby reserve the right to cross-examine witnesses and submit testimony or other evidence with respect to any contentions filed by Governor Edmund G. Brown, Jr. in opposition to PGandE's license application.

Dated: December 3, 1980

Respectfully submitted,

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

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RESPONSE OF
APPLICANT PACIFIC GAS AND ELECTRIC COMPANY
TO
JOINT INTERVENORS' STATEMENT OF CONTENTIONS
AND STATEMENT OF SUBJECTS ON WHICH
GOVERNOR BROWN INTENDS TO PARTICIPATE

EXHIBIT 6

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

RESPONSE OF
APPLICANT PACIFIC GAS AND ELECTRIC COMPANY
TO
JOINT INTERVENORS' STATEMENT OF CONTENTIONS
AND STATEMENT OF SUBJECTS ON WHICH
GOVERNOR BROWN INTENDS TO PARTICIPATE

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RESPONSE OF
APPLICANT PACIFIC GAS AND ELECTRIC COMPANY
TO
JOINT INTERVENORS' STATEMENT OF CONTENTIONS
AND STATEMENT OF SUBJECTS ON WHICH
GOVERNOR BROWN INTENDS TO PARTICIPATE

I

INTRODUCTION

Joint Intervenors' Statement of Contentions setting forth proposed contentions which they seek to litigate in any hearings which may be conducted on Pacific Gas and Electric Company's ("PGandE") motion for a license to load fuel and conduct low power testing at the Diablo Canyon Nuclear Power Plant ("Diablo Canyon") suffers from a fundamentally erroneous premise: that Joint Intervenors are entitled to have any contentions litigated. However, the operating license record is now closed, the time for filing contentions has long passed, and the Licensing Board has before it sufficient information upon which to base its decision on the low power testing issues. 1/ Joint Inter-

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1/ PGandE's motion requests authorization to load fuel and to conduct low-power tests up to 5 percent power. While we agree that fuel-loading and low-power tests should not begin until the pending Atomic Safety and Licensing Appeal Board ("Appeal Board") decisions on Diablo Canyon's security plan and seismic design are issued, this Licensing Board need not await those decisions before proceeding with consideration of PGandE's motion. The Licensing Board can and should begin procedures and issue the license contingent on Appeal Board affirmation of the September 1979 decision.

venors, therefore, are not entitled to reopen the record and litigate additional contentions.

Under the Commission's regulations, all rights which the Joint Intervenors had to litigate contentions in the Diablo Canyon licensing proceedings expired with the conclusion of the operating license hearings. PGandE would have been entitled to a decision issuing it a license without further hearings if the Appeal Board found in its favor. Other than the suspension of the immediate effectiveness rule and the Commission's decision to itself review license decisions, these procedures have not changed. Joint Intervenors' rights were, on conclusion of the hearings, governed by the Commission's appellate procedures, and do not extend to submitting new contentions and demanding further hearings.

That the Commission's procedures in this regard have not changed was made abundantly clear by the Commission's recent policy statement on Three Mile Island-related licensing requirements, in which it reaffirmed its long-standing policy against reopening closed records and entertaining late-filed contentions. "Further Commission Guidance for Power Reactor Operating Licenses; Statement of Policy," 45 Fed. Reg. 41738, 41740 (June 20, 1980) ("TMI Policy Statement").

PGandE's request for a low-power license does not alter the procedural rights of the parties. Since such a

request is subsumed within PGandE's application for a full power license, PGandE's motion for a lesser relief following the conclusion of hearings on the broader relief simply cannot give rise to a right in Joint Intervenors to future hearings and additional contentions.

Joint Intervenors advance no convincing reason why PGandE's right to be protected from the delay of litigating their proposed contentions should not be sustained in this case. Joint Intervenors' contentions must therefore be summarily rejected.

II

JOINT INTERVENORS' SHOULD NOT BE PERMITTED TO LITIGATE ANY ISSUES IN CONNECTION WITH PGandE'S LOW-POWER MOTION BECAUSE THE HEARING RECORD IS CLOSED.

A. The Diablo Canyon Proceedings--A Summary.

A brief review of the hearings which have already been conducted on PGandE's application to operate both units of the Diablo Canyon facility will assist in placing Joint Intervenors' Statement of Contentions in context. PGandE applied for licenses to operate both units in July, 1973, and the application was docketed in October 1973. After environmental hearings, the Licensing Board issued its Partial Initial Decision on environmental issues in 1978, concluding that the environmental balance weighs in favor of operating the facility. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2),

LBP-78-19, 7 NRC 989 (1978). The environmental record is therefore closed.

In May, 1979 the Joint Intervenors filed a motion with the Licensing Board to reopen the environmental record to consider the environmental consequences of so-called class 9 accidents and to reopen the emergency plan record on the ground that the accident at TMI rendered these records inadequate. (Alternatively, Joint Intervenors requested directed certification of those issues to the Commission.) The Licensing Board deferred its ruling on these issues until it had received and evaluated the staff's report on the implications of the TMI accident to the Diablo Canyon proceedings.

Hearings were held in October, 1977 on non-seismic safety issues and in December, 1978, January and February, 1979, on seismic design issues. In September, 1979 the Licensing Board issued its Partial Initial Decision regarding all safety issues contested in those hearings, finding that the plant's "Category I structure [sic], systems, and components will perform as required during the seismic load of the safe shutdown earthquake." Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-79-26, 10 NRC 453, 507 (1979).

According to the Licensing Board, "[t]he record was closed at the end of the seismic hearing except for the generic safety issues and Table S-3 issues. . . ." Id. at

459. (Shortly after the seismic hearings ended, the record was closed on generic safety issues. ASLB Orders dated Feb. 26, 1979 and March 12, 1979.) However, although the hearing record on emergency plan and quality assurance issues was closed, the Licensing Board withheld findings on those issues because it was not known how the lessons learned from the Three Mile Island-2 ("TMI") accident might impact those issues. Findings on Table S-3 are now deferred due to the Appeal Board's decision in Philadelphia Electric Company, ALAB-562, 10 NRC 437 (1979), but can easily be handled generically. Ibid.

On February 15, 1980, the Appeal Board directed a de novo review of PGandE's security plan. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-580, 11 NRC 227 (1980). These hearings have been concluded, and therefore the security plan record has been closed (subject to the filing of concluding pleadings by the parties).

On June 24, 1980, the Appeal Board directed that the seismic hearings be reopened to consider the implications, if any, on the Licensing Board's seismic findings of data generated from an earthquake which occurred in the California Imperial Valley in October 1979, after the seismic hearing record closed and the Licensing Board's Partial Initial Decision had issued. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1

and 2), ALAB-598, 11 NRC 876 (1980). These seismic hearings have also been concluded, and therefore the seismic record is closed (again, subject to filing of concluding pleadings).

On July 14, 1980, PGandE filed its motion to load fuel and conduct low-power tests up to 5% power. On October 2, 1980, the Licensing Board ruled that it need not await the Appeal Board decisions on the security plan and seismic issues before proceeding with PGandE's motion and also deferred its determination of Joint Intervenors' May 1979 motion to reopen the environmental record to consider class 9 accidents until after the Appeal Board's seismic decision is issued.

In August 1980, the staff submitted its Supplement 10 to the Safety Evaluation Report ("SER") which addressed PGandE's compliance with NUREG-0694 for issuance of a license to load fuel and conduct low-power testing. In that Supplement, the staff concluded that PGandE is in compliance with the existing Commission regulations regarding emergency planning for the issuance of a low-power testing license and assessed the TMI implications on quality assurance insofar as relevant to low-power operation.

Thus all hearings on PGandE's application for an operating license have now been concluded, and no further hearings are scheduled on any operating license issue. 2/ More importantly, the record is now complete for the Licensing Board to reach a decision on PGandE's motion to load fuel and to conduct low-power tests. There is no basis either in law or fact to consider any new contentions.

2/ If PGandE had not filed the instant motion, the only remaining steps for issuance of a full power license would be: the completion of the staff's TMI report; the Licensing Board's ruling on Joint Intervenors' request to reopen the record on the class 9 and emergency planning issues; and the resolution of any remaining issues by the staff. As the Appeal Board stated:

> [O]nce an operating license board has resolved any contested issues and any issues raised sua sponte, the decision as to all other matters which need to be considered prior to the issuance of the requested license is the responsibility of the staff and it alone. [Consolidated Edison Company of New York, Inc. (Indian Point, Units 1, 2 & 3), ALAB-319, 3 NRC 188, 190 (1976).]

There is simply no right in an operating license proceeding to have all matters resolved by the board in contested hearings. "[A]n operating license board is neither required nor expected to pass upon all the items which the staff must consider and resolve before it approves a license." Ibid. Merely because Joint Intervenors have thought up more issues, therefore, does not give them any right to have them litigated.

B. Joint Intervenors Are Not Entitled To Reopen The Closed Operating License Record.

1. The Legal Standard.

Joint Intervenors seek to litigate their proposed contentions apparently on the assumption that because they say they are entitled to litigate them, it must be so. But in order to contest any issues, Joint Intervenors must first establish that they are entitled to a hearing at all. Then they must show that the issues they seek to litigate are relevant to the purpose for which the hearings are reopened.

The Commission's regulation governing the issuance of a license for fuel loading and low-power testing does not contemplate additional hearings or the admission of new contentions on a motion for a low-power testing license where the hearings have been concluded on full power issues. Section 50.57(c) of 10 C.F.R. states in pertinent part:

> An applicant may, in a case where a hearing is held in connection with a pending proceeding under this section make a motion in writing . . . for an operating license authorizing low-power testing (operation at not more than 1 percent of full power for the purpose of testing the facility), and further operations short of full power operation. Action on such a motion by the presiding officer shall be taken with due regard to the rights of the parties to the proceedings, including the right of any party to be heard to the extent that his contentions are relevant to the activity to be authorized. . . .

Rather than permitting a party to reopen hearings to consider anew issues which were (or could have been) litigated during operating license hearings, this section must be viewed as operating to limit and narrow the contentions which may be considered in deciding a low-power testing application. When such a motion is made prior to completion of the full power hearings, the contentions being litigated in the full power proceedings are to be narrowed so that they are relevant only to the issues raised by the low-power motion. This ensures that the low-power motion will be expeditiously resolved without becoming bogged down by contesting the pending broader full power contentions.

However, when the low-power motion is filed after conclusion of the operating license hearings, with the broader contentions relevant to full power having been fully litigated, there are no issues remaining to be litigated relevant to the low-power motion.

Section 50.57(c) cannot be read to expand the rights of intervenors beyond the rights which they have in operating license hearings to litigate issues which, had the low-power motion not been made, they would have no right to litigate because the hearing record is closed. Section 50.57(c) says nothing about permitting "new" or "additional" contentions. This is logical since all low-power issues must necessarily be subsumed within the full power issues.

Although Joint Intervenors have not specifically moved to reopen the record, their Statement of Contentions plainly contemplates a wholesale reopening of the operating license hearings. They have, however, failed to meet the Commission's traditional standard for reopening closed hearing records.

Because litigation must come to an end at some point, a heavy burden is placed on those who seek to reopen a closed hearing record:

> [I]t must appear that reopening the proceeding might alter the result in some material respect. In the case of a motion which is untimely without good cause, the movant has an even greater burden; he must demonstrate not merely that the issue is significant but, as well, that the matter is of such gravity that the public interest demands its further exploration. [Citations omitted.] These criteria govern each issue to be reopened; the fortuitous circumstance that a proceeding has been or will be reopened on other issues has no significance. [Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 2), ALAB-486, 8 NRC 9, 21-22 (1978).]

See Kansas Gas & Electric Company (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 337-38 (1978); Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 386 (1979) (limitations could even be placed on contentions submitted by new intervenors which are related to issues litigated in earlier hearings); Public Service Company of New Hampshire

(Seabrook Station, Units 1 and 2), CLI-80-33, ___ NRC ___, CCH Nuc. Reg. Rep. ¶ 30, 533 at 29, 600 (September 25, 1980) (Chairman Ahearne stating the Commission's test for reopening closed records while dissenting).

A record may be reopened only where there is newly discovered evidence or a material change in circumstances. Moreover, a motion to reopen must be accompanied with supporting evidence to show that it can affect the result of the earlier hearings. Allens Creek Nuclear Generating Station, supra, 9 NRC at 386; Carolina Power and Light Company (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-79-10, 10 NRC 675 (1979).

The Commission just recently reaffirmed the standard for reopening closed records and considering late-filed contentions in the context of its policy statement concerning TMI-related licensing requirements. As the Commission stated:

> The Commission believes that where the time for filing contentions has expired in a given case, no new TMI-related contentions should be accepted absent a showing of good cause and balancing of the factors in 10 CFR 2.714(a)(1). The Commission expects strict adherence to its regulations in this regard.
>
> Also, present standards governing the reopening of hearing records to consider new evidence on TMI-related issues should be strictly adhered to. Thus, for example, where initial decisions have been issued, the record should not be reopened to take evidence on some TMI-related issue unless the party

> seeking reopening shows that there is significant new evidence, not included in the record, that materially affects the decision. [Emphasis added.] 3/

The time for filing contentions clearly has expired. 10 C.F.R. § 2.714(c). All full power hearings are concluded. Joint Intervenors must present "significant new evidence, not included in the record, that materially affects the decision" in order to reopen the hearings. This they have not done.

2. The Hosgri Fault Does Not Present Significant New Evidence Warranting Reopening The Record.

If they are true to form, Joint Intervenors will argue as the premise for why they should be permitted to litigate these proposed contentions that the existence of the Hosgri fault approximately three miles offshore from the facility constitutes "exceptional circumstances," rendering the facility much more vulnerable to earthquake damage than other facilities. See Request For Directed Certification at 3-10. This premise is false.

3/ Indeed, even in those situations where hearings are not concluded and TMI-related contentions could be admitted, the Commission strongly discourages contesting those contentions in the hearings.

> [T]he Commission instructs its staff to utilize, to the maximum extent practicable, the Commission's existing summary disposition procedures in responding to TMI-related contentions. [TMI Policy Statement, 45 Fed. Reg. at 41740.]

Joint Intervenors have successfully used the Hosgri fault to delay licensing of Diablo Canyon beyond all reasonable limits. They have cried "exceptional circumstances" at every conceivable opportunity in an effort to delay, obfuscate and to impose their notion of absolute safety far beyond that necessary to provide reasonable assurance that the public health and safety will not be endangered. This constant cry of "exceptional circumstances," like the Diablo Canyon hearings, must end now.

The facts are that the Hosgri fault has been intensively analyzed. The Diablo Canyon facility has been exhaustively reanalyzed and substantially modified to comply with the Commission's seismic design criteria on the basis of the safe shutdown earthquake ("SSE") now postulated for the Hosgri fault.

In short, as the Licensing Board has determined, the Hosgri fault no longer is an "exceptional circumstance." (We are confident that this decision will shortly be affirmed by the Appeal Board.) Such a decision necessarily implies that there is no more risk of earthquake damage at Diablo Canyon from a Hosgri SSE than at other nuclear plants from the safe shutdown earthquakes postulated for their seismic design. Thus, the Hosgri postulated SSE earthquake is a design-basis earthquake which, by definition, is an

earthquake the plant is designed to withstand as required by the Commission's seismic design criteria.

The "exceptional circumstances" cry cannot, on the one hand, be used to require a seismic reanalysis and modification of the facility and, on the other hand, after such redesign and modification has been completed, be used to require additional hearings and contentions as if the facility had never been modified 4/

With the discarding of Joint Intervenors' Hosgri "exceptional circumstances" argument, there is no support whatsoever for reopening the closed hearing record, nor to permit litigation of these proposed contentions. In view of

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4/ Joint Intervenors' customary reference to the statement made by the Appeal Board in ALAB-519, 9 NRC 42, 46 (1979), is inapposite. See Request For Directed Certification at 5. The issue before the Appeal Board was whether two consultants to the ACRS, whose views diverged from the ACRS report on Diablo Canyon's seismic qualifications, could be subpoenaed by the Licensing Board on the Joint Intervenors' behalf to testify on the seismic issues. The Appeal Board concluded that exceptional circumstances existed which justified such subpoenas in light of the prohibition contained in 10 C.F.R. 2.720(h)(1). This was necessary, according to the Appeal Board, to determine whether the Hosgri reanalysis and modifications would be sufficient to withstand the postulated SSE, the plant's original seismic design criteria having been premised on a lesser SSE. Importantly, the fact that the seismic reanalysis of Diablo Canyon was subjected to such intense scrutiny -- including the extraordinary step of permitting testimony of ACRS consultants critical of the ACRS report -- should permit even greater confidence to be placed in an Appeal Board's finding that the plant is adequately designed to withstand the SSE.

the Commission's recent reaffirmation of its strong policy against reopening closed hearing records and not considering late-filed contentions (TMI Policy Statement), these hearings must not be reopened. Their Statement of Contentions should be denied on that basis alone. However, there are additional reasons why Joint Intervenors should not be permitted to advance their proposed contentions.

III

JOINT INTERVENORS' CONTENTIONS PRESENT NO LITIGABLE ISSUES.

A. Joint Intervenors Have Set Forth No Basis For Litigating TMI-related Licensing Requirements.

Joint Intervenors are seeking to litigate contentions which purport to (but almost universally do not) question PGandE's compliance with TMI-related licensing requirements (NUREG-0694) and that these new requirements are insufficient to warrant licensing. However, under prevailing Commission policy and logic, Joint Intervenors should not be permitted to litigate such issues.

Generally, compliance with Commission regulations entitles an applicant to the requested license. Maine Yankee Atomic Power Company (Maine Yankee Nuclear Power Plant, Unit 2), ALAB-161, 6 AEC 10003 (1973), affd., CLI-74-2, 7 AEC 2 (1974), affd. sub nom. Citizens for Safe Power v. NRC, 524 F.2d 1291 (D.C. Cir. 1975); TMI Policy Statement, 45 Fed. Reg. at 41740. Parties have not been

permitted to challenge the sufficiency of Commission regulations absent a showing of special circumstances. Id; 10 C.F.R. § 2.758. Of course, intervenors are free to challenge the adequacy of an applicant's compliance.

Notwithstanding Maine Yankee, however, the Commission has also imposed additional licensing requirements which, although not formal regulations adopted through rulemaking, are nevertheless viewed by the Commission as conditions precedent to obtaining a license. The recent TMI-related NUREG's are examples of such additional requirements. NUREG-0660, NUREG-0694. In such circumstances where the Commission generically is demanding more than is required by its regulations, the applicant has been accorded the right to challenge the necessity for such supplementary requirements and intervenors have been permitted to challenge the adequacy of compliance. TMI Policy Statement, 45 Fed. Reg. at 41740. As set forth in that Policy Statement, however, intervenors are not allowed to challenge the sufficiency of these additional supplementary requirements, just as they are not allowed to challenge the sufficiency of formal regulations, absent a showing of special circumstances. 10 C.F.R. 2.758.

Accordingly, Joint Intervenors are not permitted to challenge the sufficiency of the TMI-related supplemental licensing requirements. The TMI Policy Statement simply reaffirms the Commission's general policy in this regard as

specifically applied to the TMI-requirements. In short, the Licensing Board should not entertain any contentions which challenge the sufficiency of any licensing requirements going beyond those formalized in existing regulations.

Joint Intervenors are being denied no rights whatsoever by being precluded from challenging the sufficiency of these additional TMI-related licensing requirements. Had these requirements not been imposed, the Joint Intervenors would have the identical right which they now have: to challenge compliance with existing regulations. However, they have had that opportunity, and the hearing record on compliance with existing regulations is now closed.

B. PGandE Has Sufficiently Complied With Emergency Planning Requirements To Adequately Protect The Public Health And Safety.

A major thrust of Joint Intervenors' proposed contentions is that PGandE must be required to demonstrate compliance with the Commission's revised emergency planning regulations effective November 3, 1980 as a condition to obtaining a license to load fuel and conduct low-power testing. 10 C.F.R. Part 50, "Emergency Planning," 45 Fed. Reg. 55402 (Aug. 19, 1980). However, the existing state of PGandE's emergency preparedness is sufficient to meet the statutory requirement of providing adequate protection for the public health and safety for the limited purpose of fuel-loading and low-power testing.

As the NRC has found, PGandE has complied with the former appendix E to 10 C.F.R. Part 50 and Reg. Guide 1.101. Supplement 10 to SER at III.B-2. 5/ Although the revised emergency planning regulations became effective subsequent to the promulgating of NUREG-0694 and the staff's submission of SER Supplement 10, these regulations expressly contemplate that a plant may be licensed on less than full compliance with the new regulations.

> Failure to meet the standards set forth in paragraph (b) of this subsection may result in the Commission declining to issue an Operating License; however, the applicant will have an opportunity to demonstrate to the satisfaction of the Commission that deficiencies in the plans are not significant for the plant in question, that adequate interim compensating actions have been or will be taken promptly, or that there are other compelling reasons to permit plant operation. [10 C.F.R. § 50.47(c).]

We submit that this provision authorizes the Licensing Board to approve issuance of a low power license on less than full compliance with these regulations, provided there is adequate protection for the public health and safety. Both the Federal Emergency Management Agency

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5/ In order to obtain a fuel-loading and low-power testing license, NUREG-0694 requires compliance with the then-existing Appendix E of 10 C.F.R. Part 50, Reg. Guide 1.101 and the off-site emergency plans as set forth in NUREG-75/111.

and the NRC Steering Committee have agreed that PGandE's present state of emergency preparedness is sufficient to provide this protection for purposes of the low-power testing proposed by PGandE. Supplement 10 to SER at III.B-2; NRC Memorandum with enclosure from FEMA/NRC Steering Committee re Emergency Preparedness Criteria For Low Power Testing, a copy of which is attached for the Board's convenience.

Such a lesser standard is appropriate in this case. Low-power tests do not result in sufficient fission products to cause enough residual heat for a core melt to occur. There is, accordingly, significantly less risk to the public health and safety from such low-power testing than even the minimal risks associated with full power operation. Therefore, full compliance with the revised regulations should not be necessary to obtain a low-power license. Duke Power Company (William B. McGuire Nuclear Station, Units 1 and 2), ASLB Order dated Nov. 25, 1980, slip op. at 3, a copy of which is attached for the Board's convenience.

Moreover, the Commission authorized the issuance of fuel-loading and low-power testing licenses to the Sequoyah, North Anna 2 and Salem 2 facilities on the basis of the staff's finding that each applicant had complied with the requirements of NUREG-0694, including its emergency response requirements. NUREG-0694 at 9. The staff seeks to

apply the same standard to PGandE as it did to those facilities. PGandE recognizes that the Sequoyah, North Anna 2 and Salem 2 licenses were uncontested and granted prior to the effective date of the Commission's revised regulations. Nevertheless, the Licensing Board should not require compliance with the more stringent standard proposed by Joint Intervenors simply because this is a contested proceeding subsequent to the adoption of the revised regulations. The ultimate standard -- whether the facility may be operated at the requested level of low-power with reasonable assurance that the public health and safety will not be endangered -- is the same in any event.

In addition to arguing that the existence of the Hosgri fault constitutes "exceptional circumstances" (notwithstanding the reanalysis and modification of the plant to accommodate the postulated safe shutdown earthquake), Joint Intervenors may also argue that full compliance with the new emergency response regulations is required because of possible "widespread panic or fear that substantial emissions from the disabled plant are unavoidable." See Request For Directed Certification at 16. Such speculation can hardly provide the basis for requiring full compliance with the new regulations.

Joint Intervenors have submitted absolutely no evidence -- nor could they -- of how the public might react

to a hypothetical low power testing accident. 6/ Moreover, the new regulations focus on such factors as the plume exposure and ingestion pathways, factors which are intended to protect against actual releases, and not on conjectured panic and fear. 7/

Joint Intervenors have established no basis for litigating emergency response contentions, and such proposed contentions must be rejected.

IV

GOVERNOR BROWN'S STATEMENT CANNOT PROVIDE THE BASIS FOR FURTHER HEARINGS OR FOR ADDITIONAL CONTENTIONS.

As the representative of an interested state (10 C.F.R. § 2715(c)), the Governor has not submitted contentions. Rather, he has submitted only a Statement of Subjects on which he intends to participate. As such, the

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6/ On December 5, 1980, the Commission refused to permit the issue of the public's psychological stress to be contested in the TMI-1 restart hearings. Certainly if such an issue is not a proper matter for litigation in those proceedings, it can hardly be a significant factor warranting reopening the emergency planning record with regard to PGandE's low-power motion.

7/ Joint Intervenors' argument that the Hosgri fault poses a substantial risk of off-site destruction which might inhibit emergency response is equally fallacious. Since the plant is capable of withstanding the Hosgri SSE, the possibility that the SSE may cause off-site damage is irrelevant since it would not in conjunction with that damage also cause damage at the plant necessitating an emergency response.

Governor's Statement cannot provide the basis for admitting contentions or for holding hearings.

The Governor's Statement assumes that (a) there will be hearings, and (b) there will be contentions admitted by parties -- Joint Intervenors -- (or issues raised sua sponte by this Board) on subjects on which he can participate. Accordingly, the Governor will be able to participate, if at all, only to the extent (a) the Joint Intervenors are successful in obtaining a hearing, and (b) they are successful in having contentions admitted (or the Board sua sponte raises issues) on PGandE's motion for low-power tests.

This result should come as no surprise to the Governor, since it is mandated by Commission regulations. 10 C.F.R. §§ 2.714, 2.715(c). Moreover, his participation was expressly conditioned upon his "tak[ing] the proceeding as he finds it." Licensing Board Order dated November 16, 1979; ALAB-583 11 NRC 447 (1980).

The record as the Governor now finds it is closed on all operating license issues. We have showed that Joint Intervenors are not entitled to a hearing on PGandE's motion, much less to have any of their contentions admitted. These reasons apply with at least equal force to the Governor, who is not a party. The Governor's statement therefore sets forth no basis for litigating any issues in connection with PGandE's instant motion.

V

IN THE ALTERNATIVE, CERTAIN CONTENTIONS AND "SUBJECTS" SHOULD BE REJECTED INDIVIDUALLY.

The contentions of Joint Intervenors ("contentions") and subjects of Governor Brown ("subjects") fall into one or more of five categories. Those categories are as follows:

A. Alleged contentions or subjects which are legal arguments and not factual in nature.

B. Contentions or subjects which were or should have been litigated previously in these proceedings and are not required by the low power testing requirements set forth in NUREG-0694.

C. Contentions or subjects requesting action by the staff and/or PGandE which is neither required by applicable regulations nor by low-power testing requirements of NUREG-0694.

D. Contentions challenging PGandE's conformance with low-power testing requirements of NUREG-0694.

E. Contentions which are legally deficient, e.g., not specific, overly-broad, vague, etc.

A. Contentions Or Subjects Which Are Legal Arguments.

Contentions 1 and 2 of Joint Intervenors argue that this Board should not issue a low-power license until

definitive determinations by the Commission are made regarding the questions of seismic safety and the security plan. These "contentions" are clearly questions of law on which no evidence need be taken whatsoever. As set forth in the first part of this response, PGandE recognizes that the loading of fuel and low-power testing would indeed be contingent upon a favorable finding by the Appeal Board as respects those two issues. A finding by the Appeal Board is, of course, a finding of the "Commission" unless expressly overruled by the Commission itself. This Board may, and should, issue the low-power license subject to 10 C.F.R. § 50.57.

Subjects 1, 1A, 2, and 2A, as proposed by Governor Brown, are, in essence, the same arguments as set forth in Joint Intervenors' proposed contentions 1 and 2. The response to Joint Intervenors' contentions 1 and 2 is, of course, equally applicable to the like subjects as proposed by Governor Brown.

Contentions 4 and 26 and subjects 3 and 3A deal with emergency response planning. We have demonstrated at some length that this topic is not a proper subject for contentions, supra, at 17-21.

B. Contentions Or Subjects Which Were Or Should Have Been Litigated Previously In These Proceedings.

Many of the contentions of Joint Intervenors and one of the proposed subjects of Governor Brown fall into

this category. As stated previously, Intervenors clearly have no right to raise contentions in these proceedings on matters which have been litigated and the record has been closed. A motion for low-power testing does not, under any applicable regulations, rules, policy statements, or otherwise, give rise to a right to relitigate those issues which were or could have been litigated in prior hearings.

Joint Intervenors' contention 3 states as follows:

> The Applicant has failed to demonstrate compliance at Diablo Canyon with 10 CFR Part 50, Appendix B, regarding quality assurance.

As we discussed (supra at 4-5, 6), the question of quality assurance was litigated before this Board in October of 1977, and the record was closed. The sole reason that this Board withheld findings on quality assurance -- the unknown implications of TMI -- has now been satisfied with the staff's submission of Supplement 10 to the SER. Quality assurance is not mentioned in NUREG-0694 either for low power-testing, near term operating licenses or operating reactors.

Joint Intervenors' contention 6 states:

> The applicant has failed to demonstrate that the containment at Diablo Canyon can withstand pressures resulting from the combustion of hydrogen likely to be generated by the reaction of zirconium cladding with water during a loss-of-coolant accident at the facility.

Again, this topic is not addressed in NUREG-0694. If Intervenors desired to raise this issue, they should have

done so in the October 1977 hearing. There is no allegation that PGandE does not comply with all applicable regulations, regulatory guides, and policy statements. In fact, PGandE does comply with all such requirements.

Joint Intervenors' contention 8 states:

> The accident at TMI Unit 2 demonstrated that reliance on natural circulation to remove decay heat is inadequate. During the accident, it was necessary to operate at least one reactor coolant pump to provide forced cooling of the fuel. However, the Applicant's testing program does not demonstrate a reliable method for forced cooling of the reactor in the event of a small loss-of-coolant accident ("LOCA"), particularly with regard to two-phase flow and with voids such as occurred at TMI-2. This is a threat to health and safety and a violation of both General Design Criterion ("GDC") 34 and GDC 35 of 10 C.F.R. Part 50, Appendix A.

Again, this item is not required for low-power testing under NUREG-0694. Intervenors had the opportunity to raise compliance with GDCs 34 and 35 in the October 1977 hearings. It would seem, however, that Joint Intervenors are requesting that PGandE do something that is not required by regulations, regulatory guides or policy statements of the Nuclear Regulatory Commission.

Joint Intervenors' contention 9 states:

> Using existing equipment at Diablo Canyon, there are three principal ways of providing forced cooling of the reactor: (1) the reactor coolant pumps; (2) the residual heat removal system; and (3) the emergency core cooling system in a "bleed and feed" mode. None of these

methods meets the NRC's regulations applicable to systems important to safety and is sufficiently reliable to protect health and safety:

a. The reactor coolant pumps do not have an adequate on-site power supply (GDC 17), their controls do not meet IEEE 279 (10 C.F.R. 50.55a (h)) and they are not adequately qualified (GDC 2 and 4).

b. The residual heat removal system is incapable of being utilized at the design pressure of the primary system.

c. The emergency core cooling system cannot be operated in the bleed and feed mode for the necessary period of time because of inadequate capacity and radiation shielding for the storage of the radioactive water bled from the primary coolant system.

As stated in the contention itself, it is the position of the Joint Intervenors that "none of these methods meets the NRC's regulations. . . ." This is not a NUREG-0694 issue for low-power testing. Intervenors had the opportunity to litigate this issue if they so desired, in the hearings held in October of 1977.

Joint Intervenors' contention 18 states:

The TMI-2 accident demonstrated that the severity of the environment in which equipment important to safety must operate was underestimated and that equipment previously deemed to be environmentally qualified failed. One example was the pressurizer level instruments. The environmental qualification of safety-related equipment at TMI is deficient in three respects: (1) the parameters of the relevant accident

> environment have not been identified; (2) the length of time the equipment must operate in the environment has been underestimated; and (3) the methods used to qualify the equipment are not adequate to give reasonable assurances that the equipment will remain operable. Diablo Canyon should not be permitted to load fuel until all safety-related equipment has been demonstrated to be qualified to operate as required by GDC 4. The criteria for determining qualification should be those set forth in Regulatory Guide 1.89 or equivalent.

Again, this issue was before the Board in the safety hearings for which the record has been closed. It is not contained in NUREG-0694 as a requirement for low-power testing.

Joint Intervenors' contention 22 states:

> The design of Diablo Canyon has not been demonstrated as complying with the Commission's regulations concerning fire protection, including GDC 3 and Appendix R. Therefore, unless the plant systems are demonstrated to comply with all latest applicable Commission regulating requirements, application of Diablo Canyon will endanger public health and safety.

This proposed contention does not, as far as PGandE can ascertain, even arguably have anything whatsoever to do with Three Mile Island, low-power testing, or anything presently pending before this Board. The question of fire protection was reviewed by this Board during the October 1977 hearing. Findings as to the adequacy of PGandE's fire protection system have been made by this Board. The issue certainly is not even mentioned in NUREG-0694.

Joint Intervenors' proposed contention 27, which shall not be quoted here as it is a rather lengthy and disjointed rehash of contentions set forth elsewhere and, additionally, a discourse on apparent reasons as to why those issues should be contentions, is not, insofar as PGandE is able to understand it, required for low-power testing under NUREG-0694. Several of the issues which Joint Intervenors may be attempting to raise in the alleged contention were indeed covered in the full power hearings and closed by the Board's Orders dated February 26 and March 12, 1979.

Joint Intervenors' contention 14 states as follows:

> 10 C.F.R. 50.46 requires analysis of ECCS performance "for a number of postulated loss-of-coolant accidents of different sizes, locations, and other properties sufficient to provide assurance that the entire spectrum of postulated loss-of-coolant accidents is covered." For the spectrum of LOCAs, specific parameters are not to be exceeded. At TMI, certain of these were were exceeded. For example, the peak cladding temperature exceeded 2200° fahrenheit (50.45(b)(1)), and more than 1% of the cladding reacted with water or steam to produce hydrogen (50.46(b)(3)). The measures proposed by the staff address primarily the very specific case of a struck[sic]-open power operated relief valve. However, any other small LOCA could lead to the same consequences. Additional analyses to show that there is adequate protection for the entire spectrum of small break locations for the Diablo Canyon design have not been performed. Therefore,

> there is no basis for finding compliance with 10 C.F.R. 50.46 and GDC 35. None of the corrective actions to date have fully addressed the demonstrated inadequacy of protection against small LOCAs.

A subject upon which Governor Brown has expressed his desire to participate (expressed as subject number 12) is as follows:

> Whether the small break loss of coolant analyses and tests, including computer code verification, required for Westinghouse PWRs are sufficiently complete and accurate to permit issuance of the requested licenses.

The subject of LOCAs is indeed found in NUREG-0694. However, the contention as phrased, and the subject as phrased, are not. Indeed, as will be seen in the motion for summary disposition to be filed by PGandE shortly, the premise of Joint Intervenors' contention is indeed false and the "additional analyses" requested by Joint Intervenors have indeed been performed, submitted to the NRC staff, and reviewed by the staff.

C. Contentions Or Subjects Requesting Action By The Staff And/Or Applicant Which Is Neither Required By Applicable Regulations Nor By Low-Power Testing Requirements Of NUREG-0694.

Joint Intervenors' contention 10 states:

> The staff recognizes that pressurizer heaters and associated controls are necessary to maintain natural circulation at hot stand-by conditions. Therefore, this equipment should be classified as "components important to

safety" and required to meet all applicable safety-grade design criteria, including but not limited to diversity (GDC 22), seismic and environmental qualification (GDC 2 and 4), automatic initiation (GDC 20), separation and independence (GDC 3 and 22), quality assurance (GDC 1), adequate, reliable on-site power supplies (GDC 17) and the single failure criterion. The Applicant's proposal to connect two out of four of the heater groups to the present on-site emergency power supplies does not provide an equivalent or acceptable level of protection.

Joint Intervenors' contention 11 states

The Applicant has proposed simply to add the pressurizer heaters to the on-site emergency power supplies. It has not been demonstrated that this will not degrade the capacity, capability and reliability of these power supplies in violation of GDC 17. Such a demonstration is required to assure protection of public health and safety.

Joint Intervenors' contention 12 states

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.

Joint Intervenors' contention 13 states

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

> To the extent feasible and practical protection system inputs shall be derived from signals which are direct measures of the desired variables.

Diablo Canyon has no capability to directly measure the water level in the fuel assemblies. The absence of such instrumentation delayed recognition of a low water level condition in the reactor for a long period of time. Nothing proposed by the staff would require a direct measure of water level or provide an equivalent level of protection. The absence of such instrumentation poses a threat to public health and safety.

Joint Intervenors' contention 15 states

The accident at TMI-2 was substantially aggravated by the fact that the plant was operated with a safety system inoperable, to wit: two auxiliary feedwater system valves were closed which should have been open. The principal reason why this condition existed was that TMI does not have an adequate system to inform the operator that a safety system has been deliberately disabled. To adequately protect the health and safety of the public, a system meeting the Regulatory Position of Reg. Guide 1.47 or providing equivalent protection is required.

Joint Intervenors' contention 16 states

The design of the safety systems at TMI was such that the operator could prevent completion of a safety function which was initiated automatically; to wit: the operator could (and did) shut off the emergency core cooling system prematurely. This violated § 4.16 of IEEE 279 as incorporated in 10 C.F.R. 50.55(a)(h) which states:

> The protection system shall be so designed that. once intiated, a protection system action shall go to completion.

The Diablo Canyon design is similar to that at TMI and must be modified so that no operator action can prevent the completion of a safety function once initiated.

Joint Intervenors' contention 17 states

The design of the hydrogen control system at TMI was based upon the assumption that the amount of fuel cladding that could react chemically to produce hydrogen would, under all circumstances, be limited to less than five percent. The accident demonstrated both that this assumption is not justified and that it is not conservative to assume anything less than the worst case. Therefore, the Diablo Canyon hydrogen control systems should be designed on the assumption that 100% of the cladding reacts to produce hyrdrogen.

Joint Intervenors' contention 19 states

Neither the Applicant nor the NRC staff has presented an accurate assessment of the risks posed by the operation of Diablo Canyon, contrary to requirments of 10 C.F.R. 51.20(a) and 51.20(d). The design of Diablo Canyon does not provide protection against so-called "Class 9" accidents. There is no basis for concluding that such accidents are not credible. Indeed, the staff has conceded that the accident at TMI-2 falls within that classification. Therefore, there is not reasonable assurance that Diablo Canyon can be operated without endangering the health and safety of the public.

Joint Intervenors' contention 20 states

The TMI-2 accident demonstrated that there are systems and components presently classified as non-safety-related which can have an adverse effect on the integrity of the core because they can

directly or indirectly affect temperature, pressure, flow and/or reactivity. This issue is discussed at length in Section 3.2, "System Design Requirements," of NUREG-0578, the TMI-2 Lessons Learned Task Force Report (Short Term). The following quote from page 18 of the report describes the problem:

> There is another perspective on this question provided by the TMI-2 accident. At TMI-2, operational problems with the condensate purification system led to a loss of feedwater and initiated the sequence of events that eventually resulted in damage to the core. Several nonsafety systems were used at various times at the mitigation of the accident in ways not considered in the safety analysis; for example, long-term maintenance of core flow and cooling with the steam generators and the reactor coolant pumps. The present classification system does not adequately recognize either of these kinds of effects that nonsafety systems can have on the safety of the plant. Thus, requirements for nonsafety systems may be needed to reduce the frequency of occurrence of events that initiate or adversely affect transients and accidents, and other requirements may be needed to improve the current capability for use of nonsafety systems during transient or accident situations. In its work in this area, the Task Force will include a more realistic assessment of the interaction between operators and systems.

The Staff proposes to study the problem further. This is not a sufficient answer. All systems and components which can either cause or aggravate an accident or can be called upon to mitigate an accident must be identified and classified as components important

to safety and required to meet all safety-grade designed criteria.

Joint Intervenors' contention 21 states

The accident at TMI-2 was caused or aggravated by factors which are the subject of Regulatory Guides not used in the design of TMI. For example, the absence of an automatic indication system as required by Regulatory Guide 1.47 contributed to operation of the plant with the auxiliary feedwater system completely disabled. The public health and safety require that this record demonstrate conformance with or document deviations from the Commission's regulations and each Regulatory Guide presently applicable to the plant.

Joint Intervenors' contention 23 states

The accident at TMI-2 was a multiple failure accident involving independent and dependent failures. The multiple failure sequences exceeded the single failure criterion utilized in the Diablo Canyon design basis accident assessment. Therefore, comprehensive studies of the interaction of nonsafety grade components, equipment, systems, and structures with safety systems and the effect of these interactions during normal operation, transients, and accidents need to be made by the Diablo Canyon Applicant in order to ensure that the plant can be operated without endangering the health and safety of the public.

Joint Intervenors' contention 24 states

Reactor coolant system relief and safety valves form part of the reactor coolant system pressure boundary. Appropriate qualification testing has not been done to verify the capabilities of these valves to function during normal, transient and accident conditions. In the absence of such testing and verifi-

cation, compliance with GDC 1, 14, 15 and 30 cannot be found and public health and safety are endangered.

Joint Intervenors' contention 25 states

The measures identified by the staff in NUREG-0578 include many which will not be implemented until after the plant has resumed operation and some which will not even be identified until some unspecified time in the future. No justification has been provided for concluding that the Diablo Canyon plant can safety operate in the period while these corrective actions are being identified and prior to their implementation. The public health and safety demands that all safety problems identified by the accident be corrected prior to fuel loading.

Governor Brown's subject 5 states

Whether the seven tests proposed by PG&E in its Motion are a complete list of necessary tests.

A. Whether, in addition to the seven stated tests, there must be tests designed to demonstrate 2-phase natural circulation cooling capability that are representative of actual accident conditions.

Governor Brown's subject 6 states

Whether the activities sought by PG&E to be authorized under the licenses are "vital to demonstrate the effectiveness of the augmented reactor operator training program, improved management organization and operating procedures and controls, and certain changes in design and equipment implemented by PG&E to meet the NTOL Requirements." (Motion, p. 2)

Governor Brown's subject 7 states

Whether the requested licenses and the activities authorized thereby "will provide meaningful technical information beyond that obtained in the normal startup test program." (Motion, p. 2).

Governor Brown's subject 9 states

Whether the requested licenses will result in radiation levels within the plant that would preclude or impede implementation of any later changes ordered by the NRC (Ref. Motion, p. 2).

A. Whether these levels would expose workers to unacceptable exposures beyond ALARA levels.

Governor Brown's subject 11 states

Whether early operation of Diablo Canyon units 1 and 2 will contribute in any meaningful way toward the national objective of reducing dependence on imported oil and/or reduce in any meaningful way the risks or consequences to the public of inadequate generating resources and/or allow generation of power using less expensive fuels. (Ref. Motion, p. 3).

Governor Brown's subject 13 states

Whether the licenses should issue prior to installation by PG&E of a reliable and unambiguous method of measuring reactor vessel water level.

A. Whether PG&E's proposed system to measure water level in the reactor vessel is adequate for all conditions, including level swell, 2-phase flow, flow blockage and system dynamics. (SER, Supp. 10, p. II. F-9).

Governor Brown's subject 14 states

Whether the licenses should issue prior to completion of qualification tests and analyses on relief and safety valves.

Governor Brown's subject 16 states

Whether additional TMI Action Plan items should be completed before the licenses are issued, including:

(a) NRC audit of emergency procedures (NUREG-0660, p. I. C-7).

(b) Performance of an Integrated Reliability Evaluation Program (IREP) for Diablo Canyon. A related issue concerns the completeness of PG&E's systems interaction study, and the need for a systematic evaluation program for Diablo Canyon. (Id. II.C-2).

(c) Implementation of reactor coolant vents. (Id. II.B-1).

(d) Completion of plant shielding to provide access to vital areas to allow post-accident operation and accident mitigation. (Id. II.B-2).

(e) Establishment and demonstration of post-accident sampling capabilities and radiation monitoring. (Id. II.B-2).

(f) Completion of upgraded training and qualification requirements. (Id. I.A.2-1.)

(g) Completion of reevaluation of AFW reliability. (Id. II.E.1-1).

The numerous contentions and subjects quoted above are neither required by existing Commission regulations nor are they requirements of the Commission under NUREG-0694. Assuming, arguendo, that the Joint Intervenors would somehow

be entitled to any hearing on the question of low-power testing, these alleged contentions should not and indeed could not be properly before the Board. They are, in essence, an attack upon existing regulations of the Commission. Such an attack is proscribed by the rules under which this Board must operate.

Joint Intervenors' contentions 21 and 25 have been set forth above. In addition to being contentions which request action by the staff and/or PGandE which is not required by applicable regulations or NUREG-0694, contentions 21 and 25 are overly broad in scope. They fail for lack of specificity. Contention 21 is familiar to this Board as similar to a proposed contention raised by the Joint Intervenors during the spring and summer of 1977 which they attempted to put before the Board in the then upcoming October 1977 nonseismic safety hearings. That proposed contention was rejected then as overly-broad, as it should be now. Contention 25 is, like contention 21, overly-broad. Joint Intervenors seem to be arguing that a contention should exist which would require that all possible safety implications from TMI must be identified and all possible corrective measures must be implemented prior to any fuel loading at Diablo Canyon. The proposed contention assumes that at some point in time, someone, and just who that might be is not made clear, will magically waive his wand and say that all such issues have been identified and all possible

corrective actions have been taken. On its face such an overly-broad contention must be rejected.

Governor Brown's final subject, number 17, states:

> Whether the NRC and PG&E have complied with all obligations under the National Environmental Policy Act, the regulations of the Council on Environmental Quality and the NRC's regulations in Part 51.
>
> A. Whether an environmental impact statement, or at the very minimum, an environmental impact appraisal must be prepared.

Governor Brown, subsequent to the filing of his proposed subjects on December 3, 1980, filed, on December 8, 1980, a motion to stay the low-power testing license proceedings on the basis that an environmental impact statement or an environmental impact appraisal must be prepared. PGandE has until December 23 to file a response to that motion and fully intends to oppose it. It is respectfully submitted that proposed contention 17 is not a proper contention, but should be disposed of by this Board after reviewing PGandE's to-be-filed response to Governor Brown's December 8, 1980 motion.

D. Contentions Challenging PGandE's Conformance With Low Power Testing Requirements As Stated In NUREG-0694.

As stated supra, Joint Intervenors and Governor Brown are not entitled to a hearing on the question of the low-power testing license. Assuming, again, arguendo, that a hearing were to be held, Joint Intervenors' contentions 4

and 5 and Governor Brown's subjects 3, 4, 7, 8, 10, 15, and 16(f) deal with requirements for low-power testing as contained in NUREG-0694. In addition to the arguments set forth herein, PGandE is filing a motion for summary disposition to deal with these contentions and subjects. As stated by the Commission in its June 16, 1980 Policy Statement, ". . . the commission instructs its staff to utilize, to the maximum extent practicable, the Commission's existing summary disposition procedure in responding to TMI-related contentions."

E. Contentions Which Are Legally Deficient.

Joint Intervenors' contention 7 states

> The applicant has failed to address adequately safety considerations designed as high priority and/or high risk in Table B.2 of NUREG-0660, "TMI Action Plan."

This proposed contention fails for lack of specificity. In the first place, NUREG-0660, as published, does not contain a Table B.2. A draft version of NUREG-0660 did contain a Table B.2, but that table did not designate high priority and/or high risk safety considerations as would be suggested by the Joint Intervenors' proposed contention. However, even assuming the table did exist in NUREG-0660 as published, and further, that the table sets forth what the Joint Intervenors allege it does, the contention would fail for lack of specificity as not pointing out which safety considerations are not adequately addressed. Finally, there

is nothing in NUREG-0694 requiring such an assessment prior to the issuance of a low power test license.

Joint Intervenors' contention 19 states

> Neither the Applicant nor the NRC staff has presented an accurate assessment of the risks posed by operation of Diablo Canyon, contrary to the requirements of 10 C.F.R. 51.20(a) and 51.20(d). The design of Diablo Canyon does not provide protection against so-called "Class 9" accidents. There is no basis for concluding that such accidents are not credible. Indeed, the staff has conceded that the accident at TMI-2 falls within that classification. Therefore, there is not reasonable assurance that Diablo Canyon can be operated without endangering the health and safety of the public.

Joint Intervenors are apparently requiring this Board to reopen the construction permit stage of these proceedings. 10 C.F.R. §§ 51.20(a) and 51.20(d) deal solely with construction permits. Clearly it cannot even be reasonably argued that the construction permit stage of these proceedings, which was closed well over ten years ago, is now subject to reopening on the basis of Three Mile Island. Additionally, NUREG-0694 does not, in either its operating license or low-power testing license requirement sections state anything regarding "design . . . providing protection against so-called "Class 9" accidents."

Finally, the Commission Policy Statement on Nuclear Power Plant Accident Considerations Under the National Environmental Policy Act of 1969 (45 Fed. Reg.

40101) provides that in a proceeding such as Diablo Canyon where the Final Environmental Impact Statement has been issued "special circumstances" must be shown:

> . . . as a basis for opening, reopening, or expanding any previous or ongoing proceeding. [Id. at 40103.]

The NRC staff, in a proceeding under 10 C.F.R. § 2.206, examined the Diablo Canyon application and found that the requisite special circumstances did not exist. The staff also noted that the matter was pending before the Licensing Board in the form of a motion on which the Board has deferred its ruling pending receipt of a report from the Staff on TMI (DD-80-22).

VI

CONCLUSION

Joint Intervenors have not established any basis for holding hearings or for admitting any contentions on PGandE's motion for a low-power license. Since the operating license hearing record is closed, no hearings should be held. Moreover, even if this Board concludes that hearings may be appropriate, Joint Intervenors (and, of course, Governor Brown) have also failed to submit any valid

contentions which may be admitted in those hearings. All their contentions must be rejected as inappropriate.

Respectfully submitted,

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PHILIP A. CRANE, JR.

Dated: December 18, 1980.

EXHIBIT A

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

801218

MEMORANDUM FOR: Harold R. Denton, Director, Office of Nuclear Reactor Regulation, NRC

John W. McConnell, Assistant Associate Director for Population Preparedness, FEMA

FROM: FEMA/NRC Steering Committee

SUBJECT: EMERGENCY PREPAREDNESS CRITERIA FOR LOW POWER TESTING

In accordance with your exchange of letters, both dated February 14, 1980, the joint FEMA/NRC Steering Committee has made a determination on whether specific emergency preparedness criteria should be developed for low power testing authorizations at new commercial nuclear power facilities. The Steering Committee has determined that the position in the enclosure with regard to emergency preparedness for low power testing is adequate and can serve as an interim basis for licensing facilities for low power testing. The Steering Committee concludes that in view of the minimal nature of the potential hazard, the development of specific low power testing criteria is not warranted.

We conclude that an appropriate objective for those facilities beyond North Anna, Salem and Diablo Canyon is to assess against the upgraded NRC/FEMA criteria and making findings with regard to the significance of any deficiencies for low power testing authorizations.

Brian K. Grimes, Director
Emergency Preparedness Task Group
Office of Nuclear Reactor
Regulation - NRC

Robert Ryan, Director
Division of Radiological Emergency
Preparedness - FEMA

Co-Chairmen
of the
FEMA/NRC Steering Committee

Enclosure:
Criteria for Low Power Testing

cc w/enclosure:
FEMA/NRC Steering Committee
K. Cornell
F. Camm

8101050388

FEMA/NRC INTERIM AGREEMENT ON CRITERIA FOR LOW POWER TESTING AT NEW COMMERCIAL NUCLEAR FACILITIES

The FEMA/NRC Steering Committee has agreed that for the purposes of low power testing (up to 5% power) at new commercial nuclear facilities that the public health and safety is adequately protected if such facility is located in a State which had received a concurrence under the previous voluntary concurrence program, administered by the NRC and based on evaluation by a multi-agency Federal Regional Advisory Committee. In addition, operator plans at individual sites must be consistent with both the existing NRC Appendix E to 10 CFR Part 50 and NRC Regulatory Guide 1.101 in order to assure adequate protection of the public health and safety prior to low power testing.

NRC and FEMA agree that State, local and nuclear facility operator plans must be adequate when judged against the criteria contained in NUREG-0654 and FEMA/REP-1 prior to full scale commercial operation.

This agreement is based on the considerations discussed in the exchange of letters between H. Denton, NRC and J. McConnell, FEMA, both dated February 14, 1980.

The parties note that the North Anna, Salem and Diablo Canyon sites are located in Virginia, New Jersey and California respectively, all of which have received prior NRC concurrence in State Plans. The Salem facility is located near the Delaware border; the radiological emergency plan of the State of Delaware has also received prior NRC concurrence. NRC stipulates that individual nuclear facility operator plans at these plants are in compliance with Appendix E and are consistent with Regulatory Guide 1.101.

EXHIBIT B

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Robert M. Lazo, Esq., Chairman.
Dr. Kenneth A. Luebke, Member
Dr. Cadet H. Hand, Jr., Member

In the Matter of DUKE POWER COMPANY (William B. McGuire Nuclear Station, Units 1 and 2)	: Docket Nos. 50-369-OL 50-370-OL November 25, 1980

MEMORANDUM AND ORDER REGARDING
APPLICANT'S MOTION FOR SUMMARY DISPOSITION

On September 30, 1980, Duke Power Company (Applicant) filed "Applicant's Motion for Summary Disposition Regarding Application for License Authorizing Fuel Loading, Initial Criticality, Zero Power Physics Testing and Low-Power Testing for McGuire Unit 1; Request for Expedited Consideration" (hereafter "Motion for Summary Disposition"). In its Motion for Summary Disposition, Applicant moves the Atomic Safety and Licensing Board (the Board) for summary disposition with respect to issuance of a license authorizing fuel loading, initial criticality, zero power physics testing and low-power testing of Unit 1 of the William B. McGuire Nuclear Station. In support of its motion, Applicant has also filed "Applicant's Memorandum in Support of its Motion for Summary Disposition" and "Statement of Material Facts as to Which There Is No Genuine Issue To Be Heard". All three documents address the Carolina Environmental Study Group's (CESG) proposed

contentions relating to excessive generation of hydrogen.[1/]

Answers to Applicant's Motion for Summary Disposition were filed by the NRC Staff (Staff) and by CESG on November 7, 1980.[2/]

In the view of the Staff, the affidavit of Norman Lauben, which the Staff attached to its answer, together with Applicant's motion and supporting documents, demonstrates that there is not a sufficient factual basis for CESG's proposed contentions and that there are no issues of fact worthy of adjudication at a hearing to consider the application for a license to authorize fuel loading and low-power testing for McGuire Unit 1.

1/ On June 9, 1980, CESG moved to reopen the record and add contentions regarding the possibility of excessive hydrogen generation resulting from a TMI-type accident. CESG revised its motion on August 15, 1980. See "CESG's Motions to Admit New Contentions and to Reopen the McGuire Operating License Hearing", dated June 9, 1980, and "CESG's Revised Motion to Reopen the Operating License Proceeding Motion; Motion to Deny Applicant's Request for Fuel Loading, Etc., Revised Contentions" dated August 15, 1980. As Applicant notes in its Motion for Summary Disposition, "such contentions are presently awaiting Board action as to their admissibility; the Board must also decide whether CESG has satisfied the reopening standards of the Commission." Applicant's Motion for Summary Disposition, at 1, 2.

2/ The original filing date for answers to Applicant's Motion for Summary Disposition was October 21, 1980. That date was extended by stipulation of all parties until October 28, 1980. Thereafter, during a telephone conference between the parties and the Board on October 28, 1980, the Board granted the request of the Staff and CESG for an extension of time until November 7, 1980, to file their answers to Applicant's Motion.

Accordingly, the Staff urges the Board to dismiss CESG's proposed contentions as a matter of law and to grant Applicant's Motion for Summary Disposition.

In its answer to Applicant's motion, CESG does not dispute paragraphs 1, 2, 3, 6, 7, 10, 11, 12 and 16 of Applicant's "Statement of Material Facts as to Which There Is No Genuine Issue To Be Heard". Thus, with respect to three of the four phases of activities requested in the low power operating license motion,[3/] viz., fuel loading, initial criticality, and zero power physics testing, CESG does not dispute Applicant's statement that even in the unlikely event of a LOCA coupled with the complete failure or termination of the ECCS, the extremely small buildup of fission products resulting in little or no heat generation precludes excessive hydrogen generation. Accordingly, as a matter of law, Applicant is entitled to a favorable decision regarding the first three of the four phases of activities requested in its motion for a lower power operating license.

With regard to the low-power testing phase (i.e., up to five percent of full power), CESG has set forth specific facts showing that there is a genuine issue of fact. Specifically, it is accepted that there is a possibility (however remote) that hydrogen in quantities exceeding 10 CFR §50.44 design bases could be generated during low power testing (Affidavit

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3/ See "Applicant's Motion for License Authorizing Fuel Loading, Initial Criticality, Zero Power Physics Testing and Low Power Testing" dated August 1, 1980.

of W. H. Rasin). For such hydrogen to be generated, there must be a LOCA, a failure or premature operator termination of the ECCS, and failure to restore cooling water to the reactor prior to generation of hydrogen (Id.).

Applicant maintains that (1) the ECCS will not fail if called upon to operate and (2) the ECCS will not be prematurely terminated by operator action. Further, Applicant maintains that even in the event of a LOCA, coupled with the failure of the ECCS, there is sufficient time to assure a flow of cooling water to the core prior to initiation of significant hydrogen gereration.

CESG does not dispute Applicant's statement that there will be a minimum of one hour and five minutes (3900 seconds) until hydrogen generation begins after a postulated LOCA absent ECCS operation (Affidavit of W. H. Rasin). However, CESG controverts the fact that operators will within such time easily be able to restore sufficient flow of water to the core to prevent uncovering of the core and potential hydrogen generation and asserts that electrical power for pump operation will not necessarily be available. In that event, according to CESG, the containment would be filled with hydrogen at the four percent level (the lower limit for self-propagating combustion) approximately 18 hours after the onset of the LOCA (Affidavit of Jesse L. Riley). In view of the above, the Board cannot rule as a matter of law that no genuine issue of material fact exists with respect to whether excessive amounts of hydrogen will be generated during low-power operations.

Conclusion and Order

Pursuant to the Commission regulation 10 CFR 2.749, the Board concludes on the basis of the record in the proceeding that so far as the activities regarding (1) fuel loading, (2) initial criticality, and (3) zero power physics testing are concerned, there is no genuine issue of any material fact and that Applicant is entitled as a matter of law to a decision granting its motion for summary disposition as to these three phases of the activities for which a license is requested. Accordingly, it is hereby ordered that Applicant's motion for summary disposition is granted in part so as to permit the Commission, if it desires, to issue a license authorizing fuel loading, initial criticality and zero power physics testing of McGuire Unit 1.

The Board believes that it has been clearly demonstrated that there is a genuine issue as to material facts regarding the issue of hydrogen generation sought to be adjudicated by CESG with respect to the application for a license authorizing low power testing at a maximum of five percent of full power. McGuire is a thin-shelled reactor, and the hydrogen issue is related to the pressure capability of the containment structure. The Board is of the opinion that current studies by the Applicant and by the NRC on this topic relate to CESG's concerns. We will hear evidence on this issue. Applicant's motion for summary disposition regarding low power testing is denied.

The parties are directed to confer regarding a proposed schedule leading to the commencement of an evidentiary hearing on the issue of the generation

of excessive amounts of hydrogen during low power testing operations and to submit such proposed schedule to the Board by December 15, 1980.

In its November 7, 1980, reply to Applicant's motion for summary disposition, CESG has advanced two additional contentions (Contentions 5 and 6). Applicant and Staff are directed to respond to CESG's proposed further contentions by December 15, 1980.

It is so ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Robert M. Lazo

Robert M. Lazo, Chairman

Dated at Bethesda, Maryland,
this 25th day of November, 1980.

EXHIBIT C

Cite as 11 NRC 919 (1980) DD-80-22

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Harold R. Denton, Director

In the Matters of

ARIZONA PUBLIC SERVICE COMPANY
(Palo Verde Nuclear Generating Station, Units 1, 2, and 3)

Docket No. 50-528 CP
50-529 CP
50-530 CP

PACIFIC GAS AND ELECTRIC COMPANY
(Diablo Canyon Nuclear Power Plant, Units 1 and 2)

Docket No. 50-275 CP
50-323 CP

SACRAMENTO MUNICIPAL UTILITY DISTRICT
(Rancho Seco Nuclear Generating Station, Unit 1)

Docket No. 50-312 OL

June 19, 1980

The Director of Nuclear Reactor Regulation denies a request under 10 CFR 2.206 that the Commission prepare supplemental environmental impact statements to consider the impact of "Class 9" accidents at three power reactor sites.

NEPA: SEVERE ACCIDENT CONSIDERATIONS
RULES OF PRACTICE: REOPENING OF PROCEEDINGS

As provided in the Commission's June 1980 "Statement of Interim Policy," the Staff will not take action to reopen past NEPA reviews in response to a petition under 10 CFR 2.206 in the absence of some "special circumstances."

RULES OF PRACTICE: SHOW CAUSE PROCEEDING

Where an issue is pending before one of the Commission's adjudicatory panels, the Staff will not take action under 10 CFR 2.206 to institute another proceeding to consider the same issue.

NRC: ENVIRONMENTAL RESPONSIBILITIES

The Commission is empowered to revise its past policies in an evolutionary process as it gains experience in the application of the laws which it is charged to administer. A change in policy to allow broader consideration of accidents in future NEPA reviews does not invalidate the findings in past reviews, particularly in view of judicial approval of the Commission's past practices.

DIRECTOR'S DECISION UNDER 10 CFR 2.206

By petition dated October 24, 1979, W. Andrew Baldwin on behalf of the Friends of the Earth (FOE), San Francisco, California, requested that the Director of Nuclear Reactor Regulation take action pursuant to 10 CFR 2.206 to require preparation of supplemental environmental impact statements on Class 9 accidents at the Diablo Canyon, Palo Verde, and Rancho Seco nuclear plants. Notice of receipt of the FOE's petition was published in the *Federal Register*, 44 FR 70241 (December 6, 1979). Counsel for the Sacramento Municipal Utility District (SMUD), the licensee of the Rancho Seco Nuclear Generating Station, submitted on December 21, 1979, a response opposing the FOE's petition. Arizona Public Service Company responded to the petition on February 27, 1980.

The petition requests relief with respect to power reactors under various stages of construction or operation licensed to three primary licensees at three different sites. The Arizona Public Services Company holds construction permits authorizing construction of the Palo Verde Nuclear Generating Station, Units 1, 2, and 3, located at the Winterburg site in Arizona. The Pacific Gas and Electric Company is constructing the Diablo Canyon

Nuclear Power Plant, Units 1 and 2, at its site in California, and has applied for operating licenses for those two units. The Sacramento Municipal Utility District is authorized by the Commission to operate the Rancho Seco Nuclear Generating Station, Unit 1, also located in California.

The FOE asks that the Commission prepare supplemental environmental impact statements on each of these facilities for the following reasons:

1. The environmental impact statements summarily discuss consideration of Class 9 accidents, based on early estimates of reactor accidents probabilities and on the Reactor Safety Study, WASH-1400, which has since been repudiated by the Commission; and
2. The accident at Three Mile Island, which the NRC concedes constituted a Class 9 accident, emphasized the need to evaluate the possible impact of a serious (Class 9) accident and to prepare to meet the possible consequences.

For the reasons stated in this decision, the FOE's petition is denied.

I. COMMISSION POLICY ON ACCIDENT CONSIDERATIONS

The term "Class 9 accident" was employed in a Commission rulemaking which had been proposed in December 1971: "Consideration of Accidents in Implementation of the National Environmental Policy Act of 1969," 36 FR 22851 (1971). The proposed rulemaking would have added an Annex to Appendix D of 10 CFR Part 50 to set forth the manner in which various categories of accidents should be taken into account in the environmental review for a nuclear power plant. Since the FOE's petition was filed, the Commission has withdrawn the proposed Annex and has provided in its place new interim guidance for the treatment of accident risk considerations in NEPA reviews. *See* "Nuclear Power Plant Accident Considerations under the National Environmental Policy Act of 1969," 45 FR 40101 (June 13, 1980). This decision has been made in light of the Commission's new interim policy. It is useful, however, to briefly review the now withdrawn Annex and other events leading to the Commission's new interim policy.

In the proposed Annex, the Commission divided a theoretical spectrum of accidents into classes ranging in severity from "trivial" (Class 1) to "very serious" (Class 9). Each class of accidents, except Classes 1 and 9, was required to be analyzed in evnironmental reports and statements. According to the Annex, Class 1 accidents need not be considered because of their trivial consequences. Accidents within Classes 2 through 8 which were "found to have significant adverse environmental effects shall be evaluated as to probability, or frequency of occurrence, to permit estimates to be made of environmental risk or cost arising from accidents of the given

class." 36 FR 22852 (1971). With regard to "Class 9" accidents, the proposed Annex stated:

> "The occurences in Class 9 involve sequences of postulated successive failure more severe than those postulated for the design basis for protective systems and engineered safety features. Their consequences could be severe. However, the probability of their occurrence is so small that their environmental risk is extremely low. Defense in depth (multiple physical barriers), quality assurance for design, manufacture, and operation, continued surveillance and testing, and conservative design are all applied to provide and maintain the required high degree of assurance that potential accidents in this class are, and will remain, sufficiently remote in probability that the environmental risk is extremely low." 36 FR 22862 (1971).

Accordingly, the Annex did not require discussion of Class 9 accidents in environmental reports and statements.

Although the Annex was never formally adopted by the Commission, the Commission noted upon publication that the Annex would be useful as "interim guidance" until the Commission took further action on the Annex. 36 FR 22851 (1971). Upon promulgation of 10 CFR Part 51 in 1974, the Commission stated that the adoption of Part 51 did not affect the proposed Annex, which was "still under consideration by the Commission." 39 FR 26279 (1974). The staff consistently applied the proposed Annex from 1971 to 1979 as not requiring the consideration of Class 9 accidents in its environmental statements. Reliance on the Annex has been upheld by decisions of the Commission's adjudicatory panels and by federal courts.[1]

In September 1979, the Commission announced in *Offshore Power Systems* (Floating Nuclear Power Plants), CLI-79-9, 10 NRC 257 (1979), that it intended to complete the rulemaking begun by the Annex and to re-examine the Commission's policy regarding accident considerations.[2] The Commission requested additionally that the staff:

> "1. Provide us with its recommendations on how the interim guidance of the Annex might be modified, on an interim basis and until the rule making on this subject is completed, to reflect development since 1971 and to accord more fully with current staff policy in this area; and

[1] *See cases cited in Offshore Power Systems* (Floating Nuclear Power Plants), CLI-79-9, 10 NRC 257, 259 nn. 5 and 6 (1979) *and* ALAB-489, 8 NRC 194, 210 n. 52 (1978).

[2] In *Offshore Power Systems*, the Commission determined that consideration of a Class 9 accident in the environmental review for floating nuclear power plants was appropriate. 10 NRC at 260-61. The Commission did not use the proceeding to resolve the generic issue of consideration of Class 9 accidents at land-based reactors, but noted that "[s]uch a generic action is more properly and effectively done through rulemaking proceedings in which all interested persons may participate." *Id.* at 262. *See also Public Service Company of Oklahoma* (Black Fox Station, Units 1 and 2), CLI-80-8, Docket Nos. 50-556 and 50-557, at 434 - 435 (March 21, 1980).

2. In the interim, pending completion of the rule making on this subject, bring to our attention, any individual cases in which it believes the environmental consequences of Class 9 accidents should be considered." 10 NRC 262-63. *See also Public Service Company of Oklahoma, supra* note 2, at 3-4.

In response to the Commission's first request, the staff sent to the Commission recommendations on accident considerations under NEPA in SECY-80-131, dated March 11, 1980. On May 16, 1980, the Commission issued a statement of interim policy in which it withdrew the proposed Annex and suspended the rulemaking that began in 1971 with the publication of the proposed Annex. "Nuclear Power Plant Accident Considerations under the National Environmental Policy Act of 1969," 45 FR 40101 (June 13, 1980). The Commission also provided guidance on accident considerations in on-going NEPA reviews in licensing proceedings where a Final Environmental Statement has not yet been issued. Under the Commission's new guidance, environmental impact statements for on-going and future NEPA reviews will give consideration to a broader spectrum of accidents including severe accidents that may have been designated "Class 9" under the Annex. For the consideration of environmental risks, or impacts, attributable to accidents at a facility, the Commission gave the following guidance:

> "In the analysis and discussion of such risks, approximately equal attention shall be given to the probability of occurrence of releases and to the probability of occurrence of the environmental consequences of those releases....
>
> "Events or accident sequences that lead to releases shall include but not be limited to those that can be expected to occur. In-plant accident sequences that can lead to a spectrum of releases shall be discussed and shall include sequences that can result in inadequate cooling of reactor fuel and to melting of the reactor core." 45 FR at 40103.

With respect to plants for which Final Environmental Statements have been issued, the Commission stated in its new interim policy that

> "It is expected that these revised treatments will lead to conclusions regarding the environmental risks of accidents similar to those that [illegible] ched by a continuation of current practices, particularly for cases [illegible] al circumstances where Class 9 risks have been considered by the [illegible] his change in policy is not to be construed as any lack of confidence [illegible] 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 on-going proceeding."[8]

[8]Commissioners Gilinsky and Bradford disagree with the inclusion of the preceding two sentences. They feel that they are absolutely inconsistent with an evenhanded reappraisal of the former, erroneous position on Class 9 accidents. 45 Fed. Reg. at 40103.

"However, it is also the intent of the Commission that the staff take steps to identify additional cases that might warrant early consideration of either additional features or other actions to prevent or to mitigate the consequences of serious accidents. Cases for such consideration are those for which a Final Environmental Statement has already been issued at the Construction Permit stage but for which the Operating License review stage has not yet reached. In carrying out this directive, the staff should consider relevant site features, including population density, associated with accident risk in comparison to such features at presently operating plants. Staff should also consider the likelihood that substantive changes in plant design features which may compensate further for adverse site features may be more easily incorporated in plants when construction has not yet progressed very far.

The staff has reviewed information concerning the Diablo Canyon, Palo Verde and Rancho Seco plants to determine whether "special circumstances" exist which would warrant "opening, reopening, or expanding any previous or on-going proceeding" concerning these facilities.

II. STAFF'S REVIEW FOR SPECIAL CIRCUMSTANCES

As the Commission noted in its new statement of interim policy, the staff has identified in the past special circumstances which would warrant more extensive consideration of Class 9 accidents. The special circumstances fell within three categories: (1) high population density around the proposed site, *i.e.*, above the trip points in the Standard Review Plan (NUREG 74-087, September 1975) and Regulatory Guide, 4.7, *General Site Suitability Criteria for Nuclear Power Stations* (November 1974); (2) a novel reactor design (a type of power reactor other than a light water reactor); or (3) a combination of a unique design and a unique siting mode.[3]

[3] *See* 45 FR 40102 (June 13, 1980), *Public Service Electric and Gas Company* (Salem Nuclear Generating Station, Unit 2), DD-80-17, Docket No. 50-311, "Director's Denial of Request under 10 CFR 2.206," at 33 n. 21 (April 16, 1980). In the first category fell the Perryman site, for which the staff performed an informal assessment in the early site review of the relative differences in Class 9 accident consequences among the alternative sites. The Clinch River Breeder Reactor, a liquid metal cooled fast breeder reactor which is different from the more conventional light water reactor, fell within the category of novel reactor design, and the staff included a discussion in the final environmental statement (NUREG-0139, February 1977) of its consideration of Class 9 accidents.

The floating nuclear power plants represented the third category of special circumstances, a combination of unique design and a unique siting mode. Because the plants would be mounted on a floating barge, there would be no soil structure to retard the release and dispersal of activity beneath the plant following a core melt accident as would be the case for land-based plants. The staff concluded that the most likely exposure to the population from the liquid pathway for a floating nuclear plant is significantly greater than for a land-based plant.

In view of the Commission's intention in *Offshore Power Systems*, *supra* note 1, that the staff bring to the Commission's attention individual cases in which the staff believes environmental consequences of Class 9 accidents should be considered, the

(FOOTNOTE CONTINUED ON NEXT PAGE)

In *Public Service Company of Oklahoma* the Commission noted in addition to these three criteria that proximity of a plant to a "man-made or natural hazard" might also represent "the type of *exceptional* case that *might* warrant additional consideration." The results of the staff's review for "special circumstances" follow.

Diablo Canyon

As described in Section 4 of the Safety Evaluation Report[2] and Section 1.3 of the Final Safety Analysis Report[3] the Nuclear Steam Supply System for each unit of the Diablo Canyon plant is a Westinghouse pressurized water reactor using a four-loop coolant system. The reactor design is basically similar to that of several other Westinghouse reactor designs (Trojan, Zion 1 and 2, and D.C. Cook plants). The Diablo Canyon plant is, therefore, a typical light water reactor facility and the design is not novel.

The Diablo Canyon plant is located in a remote, undeveloped and relatively uninhabited region of San Luis Obispo County. Within 10 miles of the plant, the 1970 resident population density was about 20 person per square mile. Within radii of 20 and 30 miles, the densities were 55 and 40 residents per square mile, respectively. The population densities were projected to approximately double by the year 2000. Thus remaining well within the guidelines of Regulatory Guide 4.7 and 10 CFR Part 100. Therefore, population distribution near the plant is not an unusual circumstance warranting reopening or expanding proceedings on Diablo Canyon.

The Diablo Canyon plant also does not represent a "combination of a unique design and a unique siting mode." The Diablo Canyon site is located adjacent to the Pacific Ocean, which is the only surface water body which could be affected by liquid releases from a Class 9 accident.[4] Ground water near the site is limited to the streambed of Diablo Canyon Creek, an intermittent stream which empties into the ocean. The sandstone bedrock underlying station foundation if, at most, partially saturated (i.e., no water

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[1](FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

staff reviewed these categories of special circumstances for purposes of responding to two other petitions under 10 CFR 2.206 which requested consideration of Class 9 accidents. *Public Service Electric and Gas Company*, *supra*, and *Public Service Company of New Hampshire* (Seabrook Station, Units 1 and 2), DD-80-6, Docket Nos. 50-443 and 50-444, "Director's Decision under 10 CFR 2.206" (February 11, 1980).

[2]Safety Evaluation Report for Diablo Canyon Station, Units 1 and 2 (October 1977).

[3]Final Safety Analysis Report for the Diablo Canyon Station, Units 1 and 2.

[4]The staff uses the term "Class 9 accident" in the ensuing discussion only for the purposes of evaluating, as provided in the Commission's new interim policy, whether "special circumstances" that would warrant reopening or expanding proceedings exist for plans which were reviewed under the now withdrawn Annex.

table) for a considerable vertical distance. Its low permeability, combined with the lack of a near surface water table, would preclude lateral movement of contaminated water from the station toward the ocean at more than an extremely slow rate. As a minimum, many years would be available to interdict any such flow. Therefore, there are no unusual hydrogeologic features of the site which would warrant consideration of the environmental consequences of a Class 9 accident.

The staff analyzed the site characteristics and other nearby features to assure the potential for impairment of safety-related portions of station facilities due to natural or man-made hazards occurring nearby. The Safety Evaluation Report states the staff conclusion that there are no industrial, transportation, or military facilities in the area of the site which have potential to adversely affect plant safety systems. The staff review specifically ensures that station design is adequate to accommodate other natural characteristics of the site environs. The staff review has not identified any unusual circumstances with respect to external hazards that would warrant reopening or expanding proceedings on Diablo Canyon.

Briefly stated, none of the "special circumstances" which would warrant reopening or expanding proceedings is present for the Diablo Canyon plant. An additional factor would weigh in favor of not considering special regulatory action under 10 CFR 2.206. Following the occurrence of the Three Mile Island accident, the Joint Intervenors filed on May 9, 1979, a motion with the Atomic Safety and Licensing Board currently sitting in the case to reopen the record for further consideration of "Class 9" accidents at Diablo Canyon. On May 24, the NRC staff proposed that the Board defer implications for Diablo Canyon. On May 24, the NRC staff proposed that the Board defer ruling on the motion pending completion of the staff report on TMI and its specific implications for Diablo Canyon. On June 5, the Board agreed to defer its ruling. The staff report has not been completed and consequently the Board has not yet ruled on the motion to reopen the record for further consideration of "Class 9" accidents. In view of the pendency of the proceedings before the Licensing Board, the staff believes that it would be inappropriate to institute another proceeding at the FOE's request.[7]

Palo Verde

The Palo Verde Nuclear Generating Station, currently under construction, will have three Combustion Engineering, Inc. "system 80" type pressurized water reactors to provide steam for the turbogenerator system.

[7]This view is consistent with the Commission's decision in *Consolidated Edison Co.* (Indian Point Station, Units 1-3), CLI-75-8, 2 NRC 173, 177 (1975). The staff also notes the Commission has ordered that no new operating licenses may b

Heat will be transferred from each reactor core to steam generators by circulating pressurized water in two closed loops containing two pumps in each loop. The reactors are described in detail in the Safety Evalution Report for this station (NUREG 75-098, issued on October 10, 1975) and in the Preliminary Safety Analysis Report. Reactors of similar design were used in the Perkins and Cherokee plants. The Palo Verde reactors may, therefore, be considered typical light water reactors not of a novel design.

The desert area in the immediate vicinity of the Palo Verde site is very sparsely inhabited. The 1970 population densities within radii of 10, 20, and 30 miles were 6, 7, and 7 residents per square mile, respectively. The corresponding projected densities in the year 2000 were 18, 23, 21 residents per square mile, respectively. These population densities are well within the guidelines of Regulatory Guide 4.7 and 10 CFR Part 100. Therefore, population distribution near the plant is not a "special circumstance."

The Palo Verde plant is located in an arid region which had been irrigated before 1975. Return flows from this irrigation percolated through the upper granular soils and perched on top of thick zone of relatively impermeable material. This perch water mound is slowly spreading laterally and downward. If this water were contaminated by severe accident, it would migrate slowly downward through the aquitard to the regional aquifer about 200 feet below the surface. The staff estimated that it would take about 5000 years for the contaminated liquid to reach water wells 2 miles south of the station. Due to this slow rate of groundwater movement, there would be less than average difficulty in interdicting any radioactivity releases from a Class 9 accident by the groundwater pathway, should such action be necessary. In view of the above considerations, there is not, in the case of the Palo Verde Station, a "combination of unique design and unique siting mode."

The staff analyzed the site characteristics and other nearby features to assess the potential for impairment of safety-related portions of station facilities due to natural or man-made hazards. The Safety Evaluation Report states the staff's conclusion that there were no off-site hazards which required special consideration in the design of the proposed Palo Verde facilities, except the military aircraft training flights operating out of Luke Air Force Base. The staff has analyzed the existing Air Force program for such flights, the Air Force arrangements for notification of the applicant of changes in flight routes or training programs at Luke Air Force Base as they may relate to the Palo Verde station, the probability of aircraft impacts on the station facilities, and experience from other sites. Supplement No. 1 to the Safety Evaluation Report states the staff conclusion that existing arrangements are acceptable. The staff review has not identified any unusual circumstances with respect to external hazards that would warrant

special considerations of Class 9 accidents. These matters would be given further consideration by the staff in the event that there is a significant change in circumstances. The aircraft impact issue and other safety considerations will be examined again during operating license review.

In sum, then, there are no unusual circumstances which would warrant reopening the construction permit proceeding for Palo Verde. The staff notes, however, that the final environmental statement for the Palo Verde operating licenses will be subject to the more extensive accident analysis prescribed by the Commission's new interim policy.

Rancho Seco

The Rancho Seco Nuclear Generating Station consists of a single Babcock and Wilcox pressurized water reactor with a net electrical power capacity of 913 Mw. Heated pressurized water is circulated from the reactor to two steam generators which provide steam to drive a Westinghouse turbine generator. The reactor design is generally similar to that of other Babcock and Wilcox reactors such as are used at the Davis-Besse, Arkansas 1, Indian Point 1, Oconee 1-3, Crystal River 3, and Three Mile Island plants.

Following the March 28, 1979, accident at Three Mile Island, Unit 2, the NRC has placed a number of special requirements on all operating reactors, particularly Babcock and Wilcox reactors, to minimize the probability of an accident of the Three Mile Island type. Pursuant to its Order of May 7, 1979, 44 FR 27779, the Commission imposed requirements on the Rancho Seco facility which involve changes in reactor design, in operator training and in operating procedures. A hearing, to which FOE was a party (FOE has since withdrawn) is currently being conducted on the Order. In addition, the Rancho Seco facility is subject to an Order, 45 FR 2447 (January 11, 1980), imposing the short-term "Lessons Learned" requirements described in NUREG-0578. The Rancho Seco plant is currently undergoing staff review to assure that its design and operation satisfy these requirements. (The Diablo Canyon and Palo Verde units will also have to meet similar requirements and undergo staff review.) When the required changes in reactor design, operator training and operating procedures have been carried out and approved, the staff believes that there will be reasonable assurance that the Rancho Seco facility can be safely operated. In view of these required changes and general similarity of Babcock and Wilcox design to that of other pressurized water reactors, the Rancho Seco design is not considered novel, but rather typical for a land-based pressurized water reactor.

The Rancho Seco vicinity is sparsely populated with 1970 population densities of 19 residents per square mile within a radius of 10 miles and 95 residents per square mile within 20 miles. However, the cities of Sacramento and Stockton, about 25 miles away, raise the 1970 population density to about 320 residents per square mile within a radius of 30 miles. In 1972, the Sacramento County Planning Commission estimated a population increase rate of 5.2% per year, as reported in the FES. At this high rate of increase, the population in the year 2000 would quadruple that in 1970, exceeding the population density guidelines for a 30-mile radius in Regulatory Guide 4.7. However, the FES also reports that the California Department of Finance predicted growth rates of 1.3% per year and 1.8% per year for Sacramento and San Joaquin Counties, the most populous counties near Rancho Seco. These growth rates resulted in population densities well within the guidelines for the year 2000. In reviewing the FOE's petition, the staff investigated population growth data from the Sacramento County Planning Commission for the years 1975 and 1979 for the populous counties around Rancho Seco. These factual data through the year 1979 indicate that a more realistic growth rate estimate is less than 3% per year. On this basis, the projected population in the year 2000 within 30 miles will remain within the guidelines of Regulatory Guide 4.7 and 10 CFR Part 100. Consequently, population distribution would not warrant re-opening proceedings on the Rancho Seco facility.

The Rancho Seco Station is located on gently rolling terrain about 25 miles southeast of Sacramento. Water bodies in the vicinity are small streams which are normally dry except during periods of high rainfall. The intermittent flow characteristics of these streams indicate that they are not fed by groundwater. Liquid releases from a Class 9 accident would migrate slowly downward and southwestward into the groundwater. Using conservative assumptions, the staff estimates that it would take tens of years for contaminated groundwater to migrate to the nearest well which is located at the site boundary. Due to this slow rate of groundwater movement, the staff concludes that there are no unusual features or special circumstances with regard to the roundwater contamination interdiction characteristics of this site that would distinguish it from other land-based light water reactor sites to the extent that, under the present Commission policy, warrants reopening environmental proceedings on Rancho Seco. The Rancho Seco Station does not represent a "combination of unique design and unique siting mode."

The staff analyzed the site characteristics and other nearby features to assess the potential for impairment of safety-related portions of the station facilities due to natural or man-made hazards. The Safety Evaluation Report states the staff conclusion that the nature and remoteness of

industrial, transportation and military facilities in the region of the site preclude their posing a hazard to the safety features of the station. The staff also concluded that the station design is acceptable in relation to the geologic, seismic, and foundation conditions of the site. The staff review has not, therefore, identified any unusual circumstances with respect to external hazards. The staff would conduct further assessments and actions in the event of significant changes in these circumstances.

In summary, there are no special or unusual circumstances surrounding the Rancho Seco Station which would warrant re-opening environmental proceedings on the facility.

The staff has proposed a further detailed NRC study of the hydrologic features of all reactor sites, according to the task action plans described in Draft NUREG-0660. The liquid pathway interdiction study is designated Task Action III.D.2. The brief discussions given above, based on currently available data, indicate that there is small likelihood of any hydrologic problems at Diablo Canyon, Palo Verde and Rancho Seco. In the event that significant possible impacts are identified in the more thorough study, methods of interdiction and mitigation will be specified. A number of mitigation methods are available, including pumping and construction of slurry walls.

III. OTHER CONSIDERATION GIVEN TO SEVERE ACCIDENTS

The FOE emphasizes in its petition the need "to prepare to meet the possible consequences" of a serious accident at reactor sites. The staff believes that the Commission is taking positive measures to prevent severe accidents and to mitigate their consequences. The Commission noted a number of these measures in its new statement of interim policy on accident considerations. Among these measures taken or under consideration by the Commission and the staff are:

A proposed rule issued for public comment, 44 FR 75167 (December 19, 1979), which would significantly revise requirements in 10 CFR Part 50 for emergency planning at nuclear power plants.

Recommendations of the Siting Policy Task Force (*see* NUREG-0625, August, 1979) with respect to possible changes in the reactor siting policy and criteria set forth in 10 CFR Part 100. One goal of the recommendations is to consider in siting the risk associated with accidents beyond the design basis (*i.e.*, Class 9) by establishing population density and distribution criteria.

Proposed "Action Plans" (*see* Draft NUREG-0660, December 1979) for implementing recommendations made by bodies that have investigated the Three Mile Island accident. Among other matters these plans incorporate recommendations for rulemaking related to degraded core cooling and core melt accidents.

Imposition of additional requirements on operating reactors, e.g., the short-term "lessons-learned" recommendations. *See* "TMI-2 Lessons Learned Task Force Status Report and Short-term Recommendations," NUREG-0578 (1979), and Orders published in 45 FR 2427-2455 (January 11, 1980).

As the Commission stated in its new interim policy, "It is the Commission's policy and intent to devote NRC's major resources to matters which the Commission believes will make existing and future nuclear power plants safer, and to prevent a recurrence of the kind of accident that occurred at Three Mile Island." 45 FR at 40104.

IV. CONCLUSION

The staff has concluded that no "special circumstances" exist which would warrant reopening environmental proceedings for the Diablo Canyon, Palo Verde, and Rancho Seco nuclear plants. In the staff's view, the "special circumstances" standard under the Commission's new interim policy is appropriate for judging whether past NEPA reviews should be reopened. An administrative agency is empowered to revise its policies in an evolutionary process as it gains experience in the application of the laws which the agency is charged to administer. *See NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265-67 (1975); *cf. Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council*, 435 U.S. 519 (1978). Thus, a change in policy to allow broader consideration of accidents in future NEPA reviews does not invalidate the findings in past reviews under the Annex, particularly in light of judicial approval of the Commission's past practice. *See* note 1 *supra*. By establishing a "special circumstances" standard for reopening completed environmental reviews, the Commission has recognized that it may be appropriate to supplement a past environmental review under certain circumstances in view of the transformation in policy which the Commission is undertaking. The staff does not believe, however, that such "special circumstances" are present in the three instant cases. In all events, NEPA does not require an agency to reopen the environmental record unless new information or circumstances would clearly mandate a change in result. *Greene County Planning Board v. FPC*, 559 F.2d 1227, 1233 (2d Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

With respect to the Commission's "repudiation" of WASH-1400 as a basis for FOE's request that supplemental environmental statements be issued, the staff notes that WASH-1400 published in draft form in 1974 did not form the bases for the 1971 Annex's conclusion that the probability of occurrence of Class 9 accidents was too low to warrant their site-specific consideration under NEPA. *See* 45 FR at 40102; *Pennsylvania Power and Light Company* (Susquehanna Steam Electric Station, Units 1 and 2), LBP 79-29, 10 NRC 586, 589 (1979). The Commission's policy statement on

EXHIBIT 7

NRC STAFF'S RESPONSE TO INTERVENORS' STATEMENT OF CONTENTIONS RELATIVE TO FUEL LOADING AND LOW POWER TESTING

EXHIBIT 7

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION 12/23/80

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S RESPONSE TO INTERVENORS' STATEMENT OF CONTENTIONS RELATIVE TO FUEL LOADING AND LOW POWER TESTING

I. STATEMENT OF THE CASE

In the Board's Order of June 5, 1979, the Board deferred ruling on matters relating to Three Mile Island until the completion of the Staff report on Three Mile Island. On July 14, 1980, the Applicant filed a motion to authorize fuel loading and low power testing pursuant to 10 C.F.R. § 50.57(c). In an Order of October 2, 1980, the Board set October 27, 1980 as a deadline for filing contentions relative to low power testing and fuel loading. On October 24, 1980, the Board extended the time for filing contentions relative to fuel loading and low power testing until December 3, 1980.

On December 3, 1980, the Intervenors, the San Luis Obispo Mothers for Peace, Scenic Shoreline Preservation Conference, Inc., Ecology Action Club, Sandra Silver, Gordon Silver, Elizabeth Apfelberg, and John J. Forster (hereinafter Intervenors) filed a Statement of Contentions. The following is the NRC Staff response to that Statement of Contentions.

II. DISCUSSION

Pacific Gas & Electric Company (hereinafter PG&E) filed, on July 4, 1980, for a license for fuel loading and low power testing at the Diablo Canyon Nuclear Power Plant, Units 1 and 2. This application was made pursuant to 10 C.F.R. § 50.57(c). That section provides:

> an applicant may, in a case where a hearing is held in connection with a pending proceeding under this section make a motion in writing, pursuant to this paragraph (c), for an operating license authorizing low power testing . . . and further operation short of full power operation. Action on such a motion by the presiding officer shall be taken with due regard to the rights of the parties to the proceedings, including the right of any party to be heard to the extent that his contentions are relevant to the activity to be authorized. [emphasis added]

Under normal circumstances, this section would authorize consideration, in a hearing on a low power testing and fuel loading application, of those contentions which have been presented by intervenors in the operating license proceeding, which are related to the authorization of low power testing and fuel loading. In the present proceeding, the Board has deferred ruling on matters relating to TMI.[1/]

In its October 2, 1980 Order in which the Licensing Board set the due date for filing contentions, the Board adopted the issues as identified by the Staff as being appropriate areas for contentions in the fuel loading and low power testing proceeding.[2/] The issues identified by the Staff as appropriate areas for contentions were "those already in issue in the full

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1/ See Board Order of June 5, 1979.

2/ Order Relative to PG&E's Motion for Lower Power Testing, October 2, 1980, p. 1.

application plus any contention submitted concerning the low power test requirements set forth in NUREG-0694 'TMI-Related Requirements for New Operating Licenses'" which the Commission has noted in its Statement of Policy are "necessary and sufficient for responding to the TMI-2 accident" [cite omitted].[3/] NUREG-0694 has been superceded by NUREG-0737. Contentions would, therefore, also be appropriate which concern the requirements of NUREG-0737.

Subsequent to the Licensing Board's October 2, 1980 Order, the Commission issued a revised Policy Statement.[4/] This Policy Statement clarified the Board's earlier policy statement on treatment of TMI-related requirements. While making clear that intervenors may litigate the sufficiency of the NUREG-0737 requirements, the Commission added that it would be "useful if the parties in taking a position on such [TMI-related] requirements stated (a) the nexus of the issue to the TMI-2 accident, (b) the significance of the issue, and, (c) any differences between their positions and the rationale underlying the Commission consideration of additional TMI-related requirements." The Staff believes the Licensing Board should require intervenors to modify any contentions not otherwise found objectionable to address the above three clarifications the Commission suggests.

3/ "NRC Staff Response to Licensing Board's Order For Supplemental Positions on PG&E's Motion for Low Power Testing," September 25, 1980, p. 6.

4/ "Revised Statement of Policy" entitled "In re Statement of Policy: Further Commission Guidance for Reactor Operating Licenses" CLI-80-42, 45 Fed. Reg. ____ (December 18, 1980).

To the extent the intervenors in this proceeding wish to argue contentions going beyond NUREG-0737, these contentions would be beyond those reserved by the Licensing Board, and intervenors would have to comply with the procedural requirements of 10 C.F.R. § 2.714(a)(1) for late filings in addition to addressing the matters identified in the Policy Statement.

10 C.F.R. § 2.714(b) requires that contentions which intervenors seek to have litigated be filed along with the bases for those contentions set forth with reasonable specificity. A contention must be rejected where:

(a) it constitutes an attack on applicable statutory requirements;

(b) it challenges the basic structure of the Commission's regulatory process or is an attack on the regulations;

(c) it is nothing more than a generalization regarding the intervenor's views of what applicable policies ought to be;

(d) it seeks to raise an issue which is not proper for adjudication in the proceeding or does not apply to the facility in question; or

(e) it seeks to raise an issue which is not concrete or litigable.

Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974).

The purpose of the bases requirement of 10 C.F.R. § 2.714 is to assure that the contention in question does not suffer from any of the infirmities listed above, to establish sufficient foundation for the contention to warrant further inquiry of the subject matter in the proceeding, and to put the other parties sufficiently on notice "so that they will know at least

generally what they will have to defend against or oppose." Peach Bottom, supra at 20. From the standpoint of bases, it is unnecessary for the petition "to detail the evidence which will be offered in support of each contention." Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 426 (1973). Furthermore, in examining the contentions and bases therefore, a licensing board is not to reach the merits of the contentions. Duke Power Company (Amendment to Materials License SNM01773 - Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146, 151 (1979); Peach Bottom, supra at 20; Grand Gulf, supra at 426. Nonetheless, it is encumbent upon the intervenors to set forth contentions which are sufficiently detailed and specific to demonstrate that the issues raised are admissible and that further inquiry is warranted, and to put the other parties on notice as to what they will have to defend against or oppose.

Contention One alleges that a final decision must be rendered by the Commission as to Applicant's compliance with 10 C.F.R. Part 100, Appendix A prior to fuel loading. Contention Two alleges that a final decision must be rendered by the Commission as to Applicant's compliance with 10 C.F.R. Part 73 prior to fuel loading. The NRC Staff believes both of these contentions are acceptable as written and would be appropriate legal brief or arguments.

Contention Three alleges the failure of the Applicant to demonstrate compliance with 10 C.F.R. Part 50, Appendix B, regarding quality assurance. The Staff believes this contention is unacceptable for litigation in this proceeding. This contention is not related to requirements which arose as a

result of the Three Mile Island accident as identified in NUREG-0694 or NUREG-0737. This contention has not been admitted in the OL proceeding, a contention substantially the same having been rejected by the Licensing Board in its Order of May 25, 1977. In addition, ample opportunity for the intervenors to put forth quality assurance contentions was present when the Licensing Board held evidentiary hearings on quality assurance on October 18-19, 1977.

Contentions Four, Five, and Twenty-Six relate to emergency planning requirements. However, both are extremely non-specific. In neither contention does intervenor identify which of the various alleged requirements are applicable to a proceeding involving limited issues, such as this portion of the present proceeding which relates only to fuel loading authorization. Similarly, neither contention specifies which of such requirements, if any, intervenors assert applicant fails to satisfy, nor in what manner. Thus, these contentions are not sufficiently specific to be acceptable contentions.

Contention Six alleges the Applicant has failed to demonstrate that the containment at Diablo Canyon can withstand pressures resulting from hydrogen combustion during a loss-of-coolant accident. Contention Seventeen relates to the design of the hydrogen control system being based on the improper assumption of hydrogen production levels as evidenced by the Three Mile Island accident. Although the Staff does not object to contentions on the adequacy of the design of the Diablo Canyon Hydrogen Control System, these contentions lack specificity in that it appears they assume the design of the TMI system and associated assumptions are the same at Diablo Canyon. The systems are, in fact, not the same. Three Mile Island was a Babcock and

Wilcox designed system whereas Diablo Canyon is a Westinghouse system. For the contention to be admissible the Board should require it to clearly state 1) the nexus of the issue to the TMI accident; 2) the significance of the issue and 3) the difference between the intervenors position and the Commission's rational in considering the TMI-related requirements. This would conform with the suggestion of the Commission in its revised statement of policy. The contention to be admissible, therefore, should specifically identify the Diablo Canyon design assumptions which are believed to be inadequate as a result of the accident at TMI-2.5/

Contention Seven alleges the Applicant has failed to adequately address the safety considerations designated as high priority and/or high risk in Table B.2 of NUREG-0660. Table B.2 consists of 14 pages of items. Some are designated as Priority I items, but do not constitute pre-fuel loading and low power testing considerations. Others are pre-fuel loading and low power testing considerations, but are not Priority I. Some items are both Priority I and are pre-fuel loading and low power testing requirements. Contention Seven fails to identify which, if any, of this last group has been inadequately addressed and in what way their treatment was inadequate. In addition, Table B.2 does not represent requirements which are specifically identified as low power requirements, although many of the items in that table do appear in NUREG-0694 or NUREG-0737 and might be appropriate areas for contentions in this proceeding. The Staff believes this contention is not sufficiently specific to be an acceptable contention.

5/ See also, Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1) CLI-80-16, 11 NRC 674 (May 16, 1980).

Contention Eight questions the adequacy of Applicant's test program for "demonstrating a reliable method" for forced cooling of the reactor in the event of a small LOCA, particularly with regard to two-phase flow and with voids such as occurred at TMI. The quoted language above does not reflect NRC requirements for the testing program. It is unclear whether this is intended to be an assertion that applicant fails to satisfy a requirement of NUREG-0737, in which case it does not correctly state such requirements, or whether it asserts that a further requirement should be imposed, in which case no basis at all is provided.

Contention Nine alleges: (1) reactor coolant pumps; (2) residual heat removal system; and (3) the emergency core cooling system in the "bleed and feed" mode do not meet the NRC's regulations applicable to systems important to safety and are not sufficiently reliable to protect public health and safety. The Staff believes this contention is unacceptable for litigation in this proceeding, since the contention does not relate to requirements arising from the Three Mile Island accident as identified in NUREG-0694 and NUREG-0737. The contention also is not presently an accepted contention in the OL proceeding for Diablo Canyon. The contention is therefore late and unacceptable.

Contention Ten alleges that pressurizer heaters and associated controls should be classified as "components important to safety" and required to meet all applicable safety-grade design criteria. The contention alleges that the Applicant's proposal to connect two out of four of the heater groups to the present on-site emergency power supplies does not provide an equivalent or acceptable level of protection. Contention Eleven alleges

that the Applicant has failed to demonstrate that the addition of pressurizer heaters will not degrade the capacity, capability and reliability of onsite emergency supplies. Contention Twelve alleges the power operated relief valves, associated block valves and the instruments and controls for these valves must be classified as components important to safety and required to meet all safety-grade design criteria. Contention Twenty alleges that all systems and components which can either cause or aggravate an accident or can be called upon to mitigate an accident must be identified and classified as components important to safety and required to meet all safety-grade design criteria. In the October 2, 1980 Order, the Board noted that the only appropriate contentions would be those relating to the requirements of NUREG-0694 (which has been superceded by NUREG-0737) or those contentions already admitted in the OL proceeding. The above four contentions are not contentions presently admitted in the OL proceeding in Diablo Canyon. The above contentions lack specificity in that they fail to identify any requirements of NUREG-0694 or NUREG-0737 that are not being complied with, or how any requirement is not being complied with. For the contention to be admissible the Board should require it to clearly state 1) the nexus of the issue to the TMI accident; 2) the significance of the issue and 3) the difference between the intervenors position and the Commission's rational in considering the TMI-related requirements. This would conform with the suggestion of the Commission in its revised statement of policy. If the contentions fail to fall under the TMI issues reserved by the Board in its June 5, 1979 order, the contentions would be late and must comply with the requirements for filing late contentions.

Since these contentions do not appear to be within the scope of issues as identified in the October 2, 1980 order, the intervenors will also have to comply with the requirements of 10 C.F.R. § 2.714(a)(1) for late filing of contentions. Absent such specification, these contentions do not appear to be within the issues the Board held appropriate for contentions in its October 2, 1980 Order and they should not be accepted for litigation in this proceeding.

Contention Thirteen alleges that the absence of instrumentation to directly measure the water level in the fuel assemblies poses a threat to public health and safety. Contention Fourteen alleges that the corrective actions taken as a result of TMI have not fully addressed the inadequacy of protection against small LOCA's. The Staff believes Contentions Thirteen and Fourteen present appropriate areas for litigation in this proceeding; however, the intervenors should amend the contentions to specify which requirements of NUREG-0694 and NUREG-0737 are not being complied with.

Contention Fifteen states that "the accident at TMI-2 was substantially aggravated by the fact that the plant was operated with a safety valve inoperable, to wit: two auxiliary feedwater system valves were closed which should have been open. The principal reason why this condition existed was that TMI does not have an adequate system to inform the operator that a safety system has been deliberately disabled. To adequately protect the health and safety of the public, a system meeting the Regulatory Position of Reg. Guide 1.47 or providing the equivalent is required." The Staff does not disagree with the above statement, however the statement is not in the form of a contention. If the intervenor could restate the contention relating

it to some perceived issue relevant to Diablo Canyon fuel loading and low power testing, the "contention" might be admissible.

Contention Sixteen alleges that the safety systems at Diablo should be modified so that no operator action can prevent completion of a safety function once initiated. The contention alleges that Section 4.16 of IEEE 279, as incorporated by 10 C.F.R. § 50.55(a)(h), is the requirement being violated at Diablo Canyon. By its terms, 10 C.F.R. § 50.55(a)(h) only applies to plants with construction permits issued after January 1, 1971. The intervenors should be required, therefore, to specify whether they are arguing that Section 4.16 IEEE 279 does apply, or are arguing that it should apply even if it doesn't apply under present rules.

Contention Eighteen alleges that "Diablo Canyon should not be permitted to load fuel until all safety-related equipment has been demonstrated to be qualified to operate as required by GDC 4. The criteria for determining qualification should be those set forth in Regulatory Guide 1.89 or equivalent." The Staff does not disagree with the above statement, but it is not in the form of a contention. The "contention" does not specify how the Applicant has failed to meet a requirement. In addition, the Intervenor has not alleged a requirement of NUREG-0694 or NUREG-0737 which Applicant has failed to meet. This contention would not be appropriate for litigation without modification to provide futher specificity.

Contention Nineteen alleges inadequate protection against "Class 9" accidents at the Diablo Canyon site. The Licensing Board, in its October 2, 1980 Order, ruled that consideration of Class 9 issues would be deferred until the Appeal Board had ruled on the seismic issues at Diablo. The

Appeal Board has not ruled on the seismic issues as of this time. This contention should therefore be rejected as inappropriate for consideration in the low power testing proceeding. In addition, the contention lacks specificity as to what "inadequacies" are present which cause the public to be inadequately protected and it does not specify in what way 10 C.F.R. 51.20(a) and 51.20(d) are not complied with. The contention also is unrelated to NUREG-0694 and NUREG-0737. It, therefore, is not within the issues the Licensing Board reserved for contentions in its October 2, 1980 order and must comply with the requirements of 10 C.F.R. § 2.714(a)(1) for late filing of contentions.

Contention Twenty-one alleges "the public health and safety require that this record demonstrate conformance with or document deviations from the Commission's regulations and each Regulatory Guide presently applicable to the plant." This statement is not in the form of a contention. Intervenors should be required to identify any NRC requirement they believe is not being complied with, as well as the basis for their position. This would provide the information required under 2.714(b) which would allow the other parties to this proceeding to respond to the contention.

Contention Twenty-two alleges a failure of Applicant to demonstrate compliance with the Commission's regulations concerning fire protection. This contention is not presently admitted in the OL proceeding and is not related to NUREG-0694 or NUREG-0737. It, therefore, does not fall within the designation of appropriate issues for consideration in this proceeding as identified by the Board in its October 2, 1980 Order. It further fails to comply with the requirements of 10 C.F.R. 2.714(a)(1) for late filing of

contentions. The contention also fails to identify the basis for the allegation of inadequacy with reasonable specificity as required by 10 C.F.R. § 2.714(b). The Staff believes this contention is not appropriate for litigation in this proceeding as presently written.

Contention Twenty-three alleges that multiple failure sequences at TMI exceeded the single failure criterion utilized in the Diablo Canyon design basis accident assessment. The contention continues that certain studies should be required in order to assure Diable Canyon can be operated without endangering the health and safety of the public. This contention is not within the scope of the low power testing proceeding as defined by the Board's October 2, 1980 Order, since it is not an admitted contention in the OL proceeding, and Intervenors have failed to identify a requirement of NUREG-0694 or NUREG-0737 which is not being complied with. It further fails to comply with the requirements of 10 C.F.R. 2.714(a)(1) for late filing of contentions. The Staff believes this contention is not appropriate for litigation in this proceeding as presently written.

Contention Twenty-Four alleges appropriate qualification testing has not been done to verify the capabilities of reactor coolant system relief and safety valves to function during normal, transient, and accident conditions. The contention continues that, in the absence of such testing, certain GDC requirements will not be complied with. This contention is inappropriate in that it does not fall within the scope of issues appropriate for contentions as identified in the October 2, 1980 Order. It is not an admitted OL contention and does not identify requirements from NUREG-0694 and NUREG-0737 which are not being complied with. It also fails

to comply with the requirements of 10 C.F.R. 2.714(a)(1) for late filing of contentions. This contention would, therefore, not be appropriate for litigation in this low power testing proceeding.

Contention Twenty-Five alleges that all safety problems indentified by the accident at Three Mile Island must be corrected prior to fuel loading. This contention is not within the scope of the fuel loading and low power testing proceeding as defined by the Licensing Board's October 2, 1980 Order. It is not an admitted contention in the OL proceeding, and Intervenors have failed to identify any requirement of NUREG-0694 or NUREG-0737 which has not or is not being complied with. In addition, the contention is non-specific in that it fails to give the basis for requiring the correction of all safety problems prior to fuel loading. The contention also fails to comply with the requirements of 10 C.F.R. § 2.714(c)(1) for late filing. The Staff believes this contention is inappropriate for litigation in the present proceeding.

Contention twenty-seven alleges that the Diablo Canyon Record must show either that each applicable generic safety issue has been resolved for the particular reactor or the existence of measures employed at the plant to compensate for the lack of solution to the problem. This contention is not within the scope of the fuel loading and low power testing proceeding as defined by the Licensing Board's October 2, 1980 Order. It is not an admitted contention in the OL proceeding, and Intervenors have failed to identify any requirement of NUREG-0694 or NUREG-0737 which has not or is not being complied with. In addition, in an "Order Relative to Generic Safety Issues" of February 26, 1979 the Licensing Board declared generic all safety issues

resolved except ATWS (Anticipated Transients without Scram) or Generic Issue A9. The Staff believes Contention Twenty-seven is inappropriate for litigation in the present proceeding.

CONCLUSION

The Staff believes Contentions One and Two are acceptable as written.

The Staff believes Contentions Three, Nine, Twenty-Two thru Twenty-Four and Twenty-Seven are unacceptable for litigation in the low power testing proceeding, as they fall outside the scope of the issues to be considered in that proceeding.

The Staff believes Contentions Four thru Eight, Ten thru Fourteen, Seventeen, Twenty, Twenty-One, and Twenty-Six are unacceptable for litigation in the low power testing proceeding as they lack specificity.

The Staff believes Contentions Fifteen and Eighteen are unacceptable for litigation in the low power testing proceeding as they lack specificity and are not framed as a contention.

The Staff believes Contentions Nineteen and Twenty-Five are not acceptable for litigation in the low power testing proceeding as they both lack specificity and relate to issues falling outside the scope of the proceeding.

Respectfully submitted,

Bradley W. Jones

Bradley W. Jones
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 23rd day of December, 1980.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO INTERVENOR'S STATEMENT OF CONTENTIONS RELATIVE TO FUEL LOADING AND LOW POWER TESTING" 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 23th day of December, 1980:

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EXHIBIT 8

JOINT INTERVENORS' REPLY TO RESPONSES
OF PACIFIC GAS AND ELECTRIC COMPANY
AND NRC STAFF TO JOINT INTERVENORS'
STATEMENT OF CONTENTIONS

EXHIBIT 8

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

JOINT INTERVENORS' REPLY TO RESPONSES OF PACIFIC GAS AND ELECTRIC COMPANY AND NRC STAFF TO JOINT INTERVENORS' STATEMENT OF CONTENTIONS

Pursuant to 10 C.F.R. § 2.706, the SAN LUIS OBISPO MOTHERS FOR PEACE, SCENIC SHORELINE PRESERVATION CONFERENCE, INC., ECOLOGY ACTION CLUB, SANDRA SILVER, GORDON SILVER, ELIZABETH APFELBERG, and JOHN J. FORSTER ("Joint Intervenors") hereby reply to the responses of Pacific Gas and Electric Company ("PGandE") and the NRC Staff ("Staff") to Joint Intervenors' Statement of Contentions which they intend to litigate with respect to PGandE's motion for a license to load fuel and conduct low power testing at the Diablo Canyon Nuclear Power Plant ("Diablo Canyon"). Although Joint Intervenors have in the past deemed unnecessary the filing of a reply in connection with proposed contentions, they believe

that a brief reply as to several objections raised by both PGandE and the Staff is appropriate and necessary in this instance, primarily in view of the recent issuance by the Commission of its "Revised Statement of Policy," entitled "Further Commission Guidance for Reactor Operating Licenses," CLI-80-42, 45 Fed. Reg. _____ (Dec. 18, 1980). As appears from the discussion below, Joint Intervenors submit that this recent Commission policy statement bears profoundly both on the scope of the Licensing Board's jurisdiction in this proceeding and the validity of many of the objections raised by PGandE and the Staff in opposition to the proposed contentions.

In its response, PGandE objects to Joint Intervenors' contentions 10, 11, 12, 13, 15, 16, 17, 19, 20, 21, 23, 24, and 25 on the ground that they "are neither required by existing Commission regulations nor are they requirements of the Commission under NUREG-0694." (PGandE Response, at 38.) In addition, in its stated objections to contentions 3, 6, 8, 9, 18, 19, 22, and 27, PGandE notes that none of these is contained in NUREG-0694 as a requirement for low power testing. Similarly, the Staff finds "unacceptable" contentions 3, 9, 19, 22, 23, 24, 25, and 27, in part because they "fall outside the scope of the issues to be considered in [the low power test] proceeding." (Staff Response, at 15.)

Any basis which these objections may have had at the time the contentions in question were filed has been substantially undermined by the Commission's recent revision

of its June 20, 1978 "Statement of Policy," entitled "Further Commission Guidance for Power Reactor Operating Licenses," 45 Fed. Reg. 41738. In that now partially discredited document, the Commission, by a vote of 3-2, deemed the licensing requirements contained in NUREG-0694 a "necessary and sufficient" response to the March 1979 accident at Three Mile Island and imposed the following limitation on the jurisdiction of the Atomic Safety and Licensing and Appeal Boards to entertain contentions:

> The TMI-related "Requirements For New Operating Licenses" adopted herein can, in terms of their relationship to existing Commission regulations, be put in two categories: (1) those that interpret, refine or quantify the general language of existing regulations, and (2) those that supplement the existing regulations by imposing requirements in addition to specific ones already contained therein. * * *
>
> Insofar as the second category -- supplementation of existing regulations -- is concerned, boards are to apply the new requirements unless they are challenged, but they may be litigated only to a limited extent. Specifically, the boards may entertain contentions asserting that the supplementation is unnecessary (in full or in part) and they may entertain contentions that one or more of the supplementary requirements are not being complied with; they may not entertain contentions asserting that additional supplementation is required. The board's authority to raise issues sua sponte shall be subject to the same limitations. * * *

Id. (Emphasis added.)

On December 18, 1980, however, the Commission issued a clarification of the June 20 statement in the form of a "Revised Statement of Policy," cited supra at 2. This most

recent policy revision removed the artificial limitation of licensing and appeal board jurisdiction and explicitly provided for the right of intervenors to litigate the sufficiency of NUREG-0737 (successor to NUREG-0694) requirements. Specifically, the Commission stated that "parties may challenge either the necessity for or sufficiency of [those requirements that supplement the existing regulations by imposing requirements in addition to specific ones already contained therein]." 45 Fed. Reg. at _____. Thus, the various NRC boards now have jurisdiction to consider contentions properly raising such issues.

To the extent objections are submitted asserting that proposed contentions are beyond the scope of NUREG-0694 or 0737, those objections must be rejected and the contentions admitted in this proceeding; at the least, Joint Intervenors must be given an opportunity to demonstrate the insufficiency of the Commission's TMI-related requirements to protect the health and safety of the public. That this was the intention of the Commission in issuing the December 18 statement is demonstrated by its recent disposition of Joint Intervenors' Request for Directed Certification of several questions regarding application of the June 20 policy statement. In an order filed on December 22, 1980, the Commission cited the Revised Statement of Policy in support of its conclusion that "the Licensing Board now has the authority to rule on the issues raised by Joint Intervenors." Absent other proper bases for objection, the contentions are within the jurisdiction of the Licensing

Board and should be admitted.

Further objections have been raised by the Staff and, in some instances, by PGandE directed essentially to the form of a number of proposed contentions. More precisely, they claim that many are unacceptable because "nonspecific," "overbroad," or "not framed as a contention." Joint Intervenors dispute these characterizations. Indeed, it is notable that contentions virtually identical to Joint Intervenors' contentions 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, and 24 have recently been admitted by the licensing board in the TMI-1 Restart Proceeding. See In the Matter of Metopolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), No. 50-289, First Special Prehearing Conference Order (Dec. 18, 1979). Moreover, contentions 14, 15, 18, 19, and 24 in particular were derived from TMI-1 contentions admitted therein and subsequently adopted as board issues when, due to a shortage of resources, the intervenor Union of Concerned Scientists was compelled reluctantly to withdraw them.

Joint Intervenors respectfully submit that their proposed contentions are equally appropriate for admission in this proceeding. Should the Licensing Board conclude, however, that some are insufficiently specific or have been improperly presented, Joint Intervenors request an opportunity to refine the objectionable contentions in accord with the Board's direction.

Finally, both PGandE and the Staff have taken the position in effect that Governor Brown, as representative

of an interested state, has no independent right to participate with respect to "subjects" or "contentions" not first raised by Joint Intervenors and admitted by the Board. Without conceding the validity of this novel and unprecedented proposition, it should be noted that in the final paragraph of their Statement of Contentions, Joint Intervenors explicitly reserved the right to "submit testimony and other evidence with respect to any contentions filed by Governor Brown" in this proceeding. In order to preserve the right so reserved and to assure the fullest possible examination of important safety issues, Joint Intervenors hereby adopt as their own contentions each of the "subjects" filed by Governor Brown in the low power test proceeding.

Dated: January 8, 1980

Respectfully submitted,

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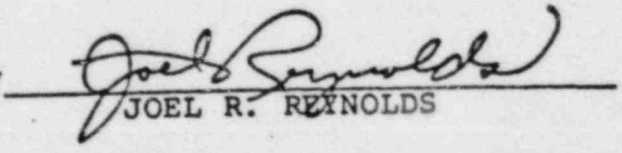
By 
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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of January, 1981, I have served copies of the foregoing JOINT INTERVENORS' REPLY TO RESPONSES OF PACIFIC GAS AND ELECTRIC COMPANY AND NRC STAFF TO JOINT INTERVENORS' STATEMENT OF CONTENTIONS, mailing them through the U.S. mails, first class, postage prepaid.

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EXHIBIT 9

RESPONSE OF PACIFIC GAS AND ELECTRIC COMPANY TO JOINT INTERVENORS' REPLY TO RESPONSES OF PACIFIC GAS AND ELECTRIC COMPANY AND NRC STAFF TO JOINT INTERVENORS' STATEMENT OF CONTENTIONS

EXHIBIT 9

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

RESPONSE OF PACIFIC GAS AND ELECTRIC COMPANY TO JOINT INTERVENORS' REPLY TO RESPONSES OF PACIFIC GAS AND ELECTRIC COMPANY AND NRC STAFF TO JOINT INTERVENORS' STATEMENT OF CONTENTIONS

INTRODUCTION

On December 18, 1980, Applicant Pacific Gas and Electric Company ("PGandE") filed its response ("PGandE Response") to Joint Intervenors' Statement of Contentions respecting PGandE's motion for a low power license. The NRC Staff ("Staff") filed its response ("Staff Response") to the Statement of Contentions on December 23, 1980. Thereafter, on January 8, 1981, Joint Intervenors filed a reply ("Joint Intervenors Reply") to PGandE's Response and the Staff's Response. Joint Intervenors' Reply, which is unauthorized by the Commission's Rules of Practice,[1/] apparently has a

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1/ Joint Intervenors state that their reply is made pursuant to 10 C.F.R. §2.706. That section provides that a party may file a reply to an answer within ten days after it is served. The "answer" referred to in section 2.706 is limited to an answer filed by a party to a notice of hearing pursuant to 10 C.F.R. §2.705. Section 2.706 has no application to a response to a statement of contentions.

twofold purpose. First, Joint Intervenors state that the Commission's "Further Commission Guidance for Power Reactor Operating Licenses -- Revised Statement of Policy," CLI-80-42, _____ NRC _____ (December 18, 1980) ("Revised Statement of Policy") "bears profoundly both on the scope of the Licensing Board's jurisdiction in this proceeding and the validity of many of the objections raised by PGandE and the Staff in opposition to the proposed contentions." (Joint Intervenors Reply, at 2.) Second, Joint Intervenors also adopted as their own contentions "each of the 'subjects' filed by Governor Brown in the low power test proceeding." (Id. at 6.)

For the reasons set forth herein, PGandE submits that the Revised Statement of Policy fully supports the position already taken by PGandE that Joint Intervenors should not be permitted to litigate any issues in connection with PGandE's low power motion because the hearing record is closed. (PGandE Response, at 1-7.) In addition, even if the Licensing Board does allow one or more of Joint Intervenors' contentions, Joint Intervenors may not be permitted to adopt the "subjects" filed by Governor Brown as their own contentions because the deadline for the filing of contentions was December 3, 1980. (Order Granting Additional Time for Contentions Relative to Fuel Loading and Low Power Testing, at 2 (October 24, 1980).)

REVISED STATEMENT OF POLICY

On June 20, 1980, the Commission issued a Statement of Policy entitled "Further Commission Guidance for Power Reactor Operating Licenses." (45 Federal Register 41738.) Issuance of the Statement of Policy followed the Commission's review of the Three Mile Island Unit 2 ("TMI-2") accident. With respect to the litigation of TMI-2 issues in operating license proceedings, the Commission stated that the TMI-related operating license requirements listed in NUREG-0694[2/] were necessary and sufficient for responding to the TMI-2 accident. The Commission stated that the TMI-related requirements could be placed in two categories: "(1) those that interpret, refine or quantify the general language of existing regulations and (2) those that supplement the existing regulations by imposing requirements in addition to specific ones already contained therein." (45 Federal Register at 41740.) Relative to the litigation of these requirements, the Commission stated:

> "Insofar as the first category -- refinement of existing regulations -- is concerned, the parties may challenge the new requirements as unnecessary on the one hand or insufficient on the other. . . .
>
> Insofar as the second category -- supplementing of existing regulations --

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2/ "TMI-Related Requirements for New Operating Licenses," NUREG-0694 (June 1980).

is concerned, boards are to apply the new requirements unless they are challenged but they may be litigated only to a limited extent. Specifically, the boards may entertain contentions asserting that the supplementation is unnecessary (in full or in part) and they may entertain contentions that one or more of the supplementary requirements are not being complied with; they may not entertain contentions asserting that additional supplementation is required." (Id.)

The Commission also made clear that its Statement of Policy in no way modified its regulations respecting late-filed contentions or the reopening of hearing records.

"The Commission believes that where the time for filing contentions has expired in a given case, no new TMI-related contentions should be accepted absent a showing of good cause and balancing of the factors in 10 CFR 2.714(a)(1). The Commission expects strict adherence to its regulations in this regard.

Also, present standards governing the reopening of hearing records to consider new evidence on TMI-related issues should be strictly adhered to. Thus, for example, where initial decisions have been issued, the record should not be reopened to take evidence on some TMI-related issue unless the party seeking reopening shows that there is significant new evidence, not included in the record, that materially affects the decision." (Id.)

On December 18, 1980, the Commission amended the Statement of Policy and issued the Revised Statement of

Policy.[3] The Commission gave two reasons for amending the Statement of Policy. First, in October 1980, the Commission had approved NUREG-0737,[4] which superseded NUREG-0694. NUREG-0737 made numerous changes in NUREG-0694 and also added new requirements which were not part of NUREG 0694. In the Revised Statement of Policy the Commission stated that "the list of TMI-related requirements for new operating licenses found in NUREG-0737 can provide a basis for responding to the TMI-2 accident." (CLI-80-42, _____ NRC at _____.) Second, the Commission decided to revise its policy that licensing and appeal boards could not entertain contentions asserting that those TMI-related requirements which supplemented existing regulations were insufficient. In this regard, the Commission stated: "Insofar as the second category -- supplementation of existing regulations -- is concerned, the parties may challenge either the necessity for or sufficiency of such requirements." (Id.)

Although the Commission decided to permit parties to challenge the sufficiency of those NUREG-0737 requirements which supplement existing regulations, it left unchanged its

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[3] Because the Revised Statement of Policy first became available on the day PGandE filed its Response to the Statement of Contentions, no mention of the Revised Statement of Policy was made by PGandE. The Revised Statement of Policy was considered by the Staff in its Response.

[4] "Clarification of TMI Action Plan Requirements," NUREG-0737 (November 1980).

previously stated policy respecting (1) the litigation of new TMI-related contentions where the time for filing contentions had expired in a given case and (2) the reopening of hearing records to consider new evidence on TMI-related issues. (Id. at _____, see page 4, supra.)

EFFECT OF REVISED STATEMENT OF POLICY ON JOINT INTERVENORS' CONTENTIONS

In their Reply, Joint Intervenors refer to several contentions objected to by either or both PGandE and the Staff on the grounds that such contentions are beyond the scope of NUREG-0694 or NUREG-0737. (Joint Intervenors Reply, at 2.) As to such contentions, Joint Intervenors now say "those objections must be rejected and the contentions admitted in this proceeding." (Id. at 4.) Joint Intervenors add that "this was the intention of the Commission in issuing the December 18 [Revised Statement of Policy]." (Id.)

If PGandE's only objection to Joint Intervenors' contentions were that the contentions are not requirements of the Commission under NUREG-0737, then the Revised Statement of Policy would indeed suggest that such objection no longer provides a basis for rejection of the contentions. This would be so because the Revised Statement of Policy permits parties to challenge the sufficiency of those NUREG-0737 requirements which supplement existing regulations. However, such objection was not PGandE's sole objection. As PGandE pointed out in its Response, the fundamental infir-

mity of Joint Intervenors' Statement of Contentions is that it assumes "that Joint Intervenors are entitled to have any contentions litigated." (PGandE Response, at 1.) The Revised Statement of Policy emphasizes that (1) new TMI-related contentions must meet the requirements of 10 C.F.R. §2.714 and (2) present standards governing the reopening of hearing records to consider new evidence on TMI-related issues should be adhered to.[5/] (See pages 5 - 6, supra.) In spite of this emphasis, Joint Intervenors have failed, both in their Statement of Contentions and their Reply, to meet the requirements of 10 C.F.R. §2.714 as to new TMI-related con-

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5/ In its earlier Response, PGandE summarized the Diablo Canyon proceeding and showed that all hearings on the application for an operating license have been concluded. (PGandE Response, at 3-7.) Had PGandE not filed the motion for low power licenses, it is clear that if Joint Intervenors wished to have the Licensing Board reopen the record to take evidence on some TMI-related issue, Joint Intervenors first would have to show that "there is signficant new evidence, not included in the record, that materially affects the decision." (____ NRC at____, 45 Federal Register at 41740.) As also discussed in PGandE's Response, the motion for a low power license, which seeks lesser relief than the application for a full power license, "cannot give rise to a right in Joint Intervenors to future hearings and additional contentions." (PGandE Response, at 3.) It would indeed be anomalous if 10 C.F.R. §50.57(c) were intended to grant to an intervenor the right to litigate issues which were or could have been litigated in hearings already completed for an application for a full power license. PGandE submits that 10 C.F.R. §50.57(c) was never intended to have such effect, and, therefore, in order for any of Joint Intervenors' contentions to be accepted, they must meet all of the requirements of the Revised Statement of Policy, in addition to those of 10 C.F.R. §50.57(c) and the remainder of the Commission's regulations.

tentions,[6/] or to show that there is signficant new evidence, not included in the record, that materially affects the decision. Under the Revised Statement of Policy, the Licensing Board must reject Joint Intervenors' contentions in the presence of such defects.

MATTERS APPROPRIATE FOR CONSIDERATION IN RULING ON PGandE's MOTION FOR LOW POWER LICENSE

In its Order of October 2, 1980, the Licensing Board approved the Staff's identification of "the issues to be considered" in proceeding with consideration of PGandE's motion for a low power license. The issues identified as relevant by the Staff are those "already in issue in the full power application plus any contentions submitted concerning the low power test requirements set forth in NUREG-0694." (NRC Staff Response to Licensing Board's Order for Supplemental Positions on PGandE's Motion for Low Power Testing," at 6 (September 25, 1980). Matters other than NUREG-0694 which affect the low power license application were identified by the Staff as "the seismic issue, the security issue,

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6/ For purposes of Joint Intervenors' Statement of Contentions, any TMI-related contention which was not in issue in the proceedings for the full power operating license proceeding would be a "new" TMI-related contention under the Commission's Revised Statement of Policy, even though the Statement of Contentions was filed by December 3, 1980. This is so because 10 C.F.R. §50.57(c) cannot be deemed to expand upon the rights held by an intervenor in a full power operating license proceeding. In the case of the Diablo Canyon operating license proceeding, the time for filing contentions expired long ago.

the radon or Table S-3 issue, the emergency planning issue, the Class 9 issue, and quality assurance." (Id. at 10.)

PGandE is concerned that the Staff's identification of the issues may be misinterpreted. It needs to be understood that before any contentions respecting PGandE's low power license motion are accepted, they must meet the requirements of the Revised Statement of Policy and the Commission's regulations, including 10 C.F.R. §§2.714, 50.57(c). PGandE believes that the Staff is in agreement with this position. In the recent "NRC Staff Response to Licensing Board's Order for Status of Request to Defer Ruling," (January 12, 1981) ("Staff Status Response"), the Staff noted:

> "The Licensing Board has not yet had an opportunity to determine whether and to what extent the Joint Intervenors' contentions are litigable under existing regulations and Commission policy. In our view, the Commission's existing regulations, NUREG-0737, and the Revised Statement of Policy provide the Licensing Board with adequate guidance in these matters." (Staff Status Response, at 8 n. 7.)

With respect to the matters identified by the Staff as "other than NUREG-0694," PGandE has already addressed each of such matters in its earlier Response (PGandE Response, at 1-7, 15-21), and concluded that "the Licensing Board has before it sufficient information upon which to base its decision on the low power testing issues" (id. at 1). Any contentions respecting such matters which Joint Intervenors wish to have considered in the low power license proceeding must

be "relevant to the activity to be authorized." (10 C.F.R. §50.57(c).) In addition, because the hearing record has been closed respecting these matters, the Commission's present standards governing the reopening of hearing records apply to the Licensing Board's consideration of the contentions filed by Joint Intervenors. Because Joint Intervenors have failed to make the showing required by such standards, their contentions relating to such matters must be disallowed. (PGandE Response, at 8-12.)

With respect to the requirements of NUREG-0737 (formerly NUREG-0694), the Staff has indicated that the SER Supplement No. 10 represents "the Staff's position on the status of matters required by the Commission's Revised Policy Statement to be taken into consideration when considering fuel loading and low power test issues." (Staff Status Response, at 10-11.) Under the Revised Statement of Policy, where, as in the case of the Diablo Canyon proceeding, the hearing record is closed, "the record should not be reopened to take evidence on some TMI-related issue unless the party seeking reopening shows that there is significant new evidence, not included in the record, that materially affects the decision." (_____ NRC at _____, 45 Federal Register at 41740.) Because Joint Intervenors have failed to make the required showing, their TMI-related contentions must be summarily rejected.

CONCLUSION

The Revised Statement of Policy did not change the Commission's position set forth in its original Statement of Policy respecting (1) the litigation of new TMI-related contentions or (2) the reopening of hearing records to consider new evidence on TMI-related issues. Because Joint Intervenors have failed to meet the requirements of the Commission's statements of policy with respect to their contentions on TMI-related issues, each and every one of such contentions must be denied.

Respectfully submitted,

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Dated: January 23, 1981

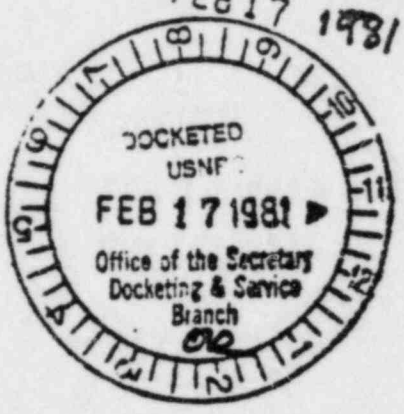
EXHIBIT 10

ASLB PREHEARING CONFERENCE ORDER

EXHIBIT 10 FROM OWS

LBP-81-5

SERVED FEB 17 1981



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Elizabeth S. Bowers, Chairman
Glenn O. Bright
Dr. Jerry R. Kline

In the Matter of:

PACIFIC GAS & ELECTRIC COMPANY

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

Docket Nos. 50-275-OL
50-323-OL

February 13, 1981

PREHEARING CONFERENCE ORDER

At the time of the Three Mile Island (TMI) accident, the record in this proceeding was complete. The occurrence of that accident prompted a motion (from the Joint Intervenors) on May 29, 1979, to reopen the record. The Staff urged that the Board defer ruling on that motion until the Staff could investigate the accident and report its conclusions as to the implications for the Diablo facility to the Board and the parties. In an Order of June 5, 1979, the Board granted the Staff request.

On June 20, 1980, the Nuclear Regulatory Commission (NRC) issued a "Statement of Policy for Further Commission Guidance for Power Reactor Operating Licenses," 45 Fed. Reg. 41738. That statement adopted as both necessary and sufficient for responding to the TMI accident insofar as new operating licenses are concerned the requirements contained in NUREG-0694, "TMI-Related Requirements for New Operating Licenses."

The existence of this guidance from the Commission prompted the filing by Applicant of a motion seeking authority to load fuel and conduct low power testing (a so-called § 50.57(c) motion). The motion seeks an operating license authorizing (i) loading of fuel; (ii) proceeding to initial criticality; (iii) performing startup testing at zero power; and (iv) testing at power levels not in excess of 5% of rated power with respect to each unit.

The Applicant's motion prompted further proceedings which are the subject of this prehearing conference order. To some extent, the Joint Intervenors' motion to reopen is also necessarily involved in these proceedings and will be dealt with herein as appropriate.

Applicant's motion was filed on July 14, 1980. On August 4, 1980, Joint Intervenors responded, asserting that prior to the grant of any such license outstanding issues pertaining to seismic design, security planning, quality assurance, and emergency planning had to be resolved. Further, Joint Intervenors asserted the need for a hearing at which they would contest Applicant's conclusions with respect to fuel loading and low power testing.

Also on August 4, Governor Brown filed in opposition to Applicant's motion, asserting that the motion did not comply with the Rules of Practice.

On August 6, the Staff responded to the motion asserting, inter alia, that the motion application for 50.57(c) license appeared to be adequate and suggested that the Board should proceed. Attached to the Staff's response was Supplement 10 to the SER which served as its evaluation of the impact of TMI on the sought-for license.

After calling for further response from the parties, the Board issued an Order accepting the Applicant's motion as sufficiently complete to commence the proceeding and setting October 27, 1980, as the date for the filing of contentions. This date was subsequently adjusted to December 3, 1980 because of the parties involvement with Appeal Board matters. The Board also approved the Staff's identification of the issues remaining in the proceeding on which Board findings were still required and concurred in the Staff's judgment that a decision on Joint Intervenors' motion to reopen the record on so-called "Class 9" accidents should await the conclusion of proceedings on the seismic issue currently underway before an Appeal Board.

In compliance with the Board's Order, Joint Intervenors filed contentions and the Governor filed a list of "subjects" on which he wishes to participate. The Applicant and Staff have filed responses, and a two-day prehearing conference was held on January 28 and 29, 1981, in Bethesda, Maryland, in which the contentions and "subjects" were discussed.

Before dealing in detail with the positions of the parties with regard to the contentions and "subjects", at the prehearing conference a related matter was considered. On December 8, 1980, the Governor filed a motion to stay the proceeding pending preparation of an environmental impact statement (or alternatively an appraisal) dealing with fuel loading, testing, and low power operation. This motion was supported by Joint Intervenors on December 18 and opposed by Applicant and Staff on December 23, since the motion did not even address the criteria for a stay. The motion was argued at the prehearing conference and orally denied by the Board on

the basis that the Governor did not address the criteria in 10 CFR 2.788(e) which must be met in order for the motion to be granted. The Board also stated the motion would not prevail on the merits since an EIS was issued and a PID on environmental matters was issued. (Tr. 33-35) Subsequently, the Governor orally moved for reconsideration and requested the Board to direct the Staff to prepare an environmental impact appraisal in order to determine whether an environmental impact statement is necessary under 10 CFR 51.5(b)(3), 51.5(c)(1), 51.7 and 51.5(c)(1) prior to issuance of any fuel loading and low power testing license. The motion was denied and the Board stated the rationale would be detailed in its Order. While these motions seek somewhat different results, the Governor's rationale in support of them and the Applicant's and Staff's rationale in opposition are essentially identical. So are the Board's rulings. Therefore, both motions will be discussed together.

The Governor relies for support on the provisions of 10 CFR §§ 51.5(b) and (c). Subsection (b) of this section lists certain licensing actions which may or may not require an environmental impact statement. One of these is "[i]ssuance of a license to operate a power reactor...at less than full power...". (§51.5(b)(3).) Subsection (c) states that in the event that an environmental impact statement is not prepared, a negative declaration and environmental impact appraisal will be prepared, unless the Commission determines otherwise, with respect to the licensing action listed in subsection (b). The Governor seeks an order directing the Staff to prepare an environmental impact appraisal as a first step in determining whether an impact statement must be undertaken. The motion

to stay sought a halt in these proceedings pending the preparation of the statement or, alternatively, of the appraisal. The Governor cites several cases for the proposition that NEPA requires agencies to take a hard look at environmental matters.

Both Applicant and Staff raised procedural objections to the motion to stay the proceedings, the principal of which was the lack of any showing having been made under §2.788.

Further, both have pointed to the fact that an environmental impact statement and a supplement thereto have been prepared in regard to the full-term full-power operation. Hearings have been held on the environmental issues and a Partial Initial Decision issued. (LBP-78-19, 7 NRC 989 [1978].) The Applicant and Staff rely on Maine Yankee Atomic Power Company (Maine Yankee Atomic Power Station) ALAB-161, 6 AEC 1003 [1973]; aff'd sub nom., Citizens for Safe Power, Inc. v. NRC, 524 F.2d 1291 (D.C. Cir. 1975) for the proposition that, in this situation, there is no need to consider the environmental impact of something less than full-power, full-term operation. The Staff also cites Portland General Electric Co. (Trojan Nuclear Plant) LBP-78-40, 8 NRC 717, at 744 (1978); aff'd: ALAB-534, 9 NRC 287 (1979) for the same proposition. Additionally, the Staff points out that, absent some showing that the §50.57(c) license would entail some impacts which were not considered in the earlier environmental impact statement, supplement thereto, and hearings and decision thereon, there is no need to undertake a fresh environmental study. The latter, obviously, would only rehash earlier considerations.

For this proposition, the Staff cites Georgia Power Company (Vogtle Units 1 & 2), ALAB-291, 2 NRC 404 (1975); Detroit Edison Company (Enrico Fermi Unit 2), LBP-78-11, 7 NRC 381 at 393 (1978); and Northern States Power Company (Prairie Island Units 1 & 2), ALAB-455, 7 NRC 41 at 46 n. 4 (1978).

The Governor has assumed and the Applicant and Staff have not challenged the proposition that §51.5(b)(3) includes the license here sought. Section 51.5(b)(3) includes licenses to operate at less than full power, while Applicant seeks a license to, inter alia, test at less than 5% of rated power. The Board believes that a meaningful distinction may exist between testing and operation which would raise the question whether §51.5(b)(3) applies to this proceeding.

Be that as it may, following the assumption that §51.5(b)(3) is applicable, the Board notes that the Staff has correctly stated the law. The Governor's attempt to postulate a situation not covered in the earlier environmental proceedings (issuance of a §50.57(c) license, followed by denial of a full-term, full-power license) simply does not hold water. As pointed out in Maine Yankee, supra, any licensee faces the possibility of restriction or cancellation of his license as a result of regulatory developments. Clearly the environmental impacts of full-term, full-power operation are greater than the impacts of the limited testing here sought. To consider these limited impacts after the comprehensive review already undertaken would serve no useful purpose.

Consequently, it follows that both the Governor's motions must be denied; the motion to stay because the Governor cannot make the required showing that he is likely to prevail on the merits, etc.; and the oral motion to require preparation of an environmental impact appraisal because the Governor has not prevailed on the merits.

Next, it is necessary to address the positions taken by the parties with respect to the standards to be employed in determining which "contentions" and "subjects" are admissible. It would be an understatement to say that the discussion of this subject at the prehearing conference was characterized by some confusion. Nonetheless, the Board has carefully reviewed the transcript and has set down the positions of the parties as it understands them.

Joint Intervenors' position is most easily understood. The Joint Intervenors maintain that all contentions which were timely filed (by December 3) and which have a nexus to the application for the testing license are admissible. Contentions, of course, must meet the specificity requirements of 10 CFR §2.714 (Tr. 68, 82-84). Joint Intervenors base their position on their reading of the Commission's "Further Commission Guidance for Power Reactor Operating Licenses: Revised Statement of Policy" of December 18, 1980 (45 Fed. Reg. 85236, Dec. 24, 1980). Joint Intervenors believe that the fact that the revised policy statement removed the limitation in the policy statement as to litigation of the sufficiency of additional regulatory

requirements (those which constitute new requirements as opposed to those which constitute refinement of existing regulations) means that contentions may propose additional requirements beyond those addressed in NUREG-0737 (Tr. 340). Joint Intervenors take the position that their proposed contentions fall into two categories; they propose issues over and above those issues contained in NUREG-0737 and challenge the sufficiency of issues addressed in NUREG-0737.

Applicant's position, as stated in its response to contentions and subjects of December 18, is clear. Applicant believes that the revised policy statement, reiterating as it does the traditional standards for reopening records and admitting late contentions, does not provide any authority to deviate from those standards. Thus, absent a showing of good cause under the applicable standard, a showing which intervenors have not attempted to make, no contentions are admissible. At the prehearing conference Applicant took the position that the paragraph at the bottom of page 8 of the policy statement prohibits new contentions.[1/]

Staff's position as set forth in the transcript of the prehearing conference adopts a position not far from Applicant's. Staff agrees that good cause must be shown in order to reopen the record or admit a new

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1/ "The Commission believes that where the time for filing contentions has expired in a given case, no new TMI-related contentions should be accepted absent a showing of good cause and balancing of the factors in 10 CFR 2.714(a)(1). The Commission expects adherence to its regulations in this regard."

contention at this stage. Staff correctly points out that the policy statement is not a rule and that therefore preexisting rules must be followed. (Tr. 89) Staff parts company with Applicant, however, in that it views the policy statement and NUREG-0737 as constituting good cause to reopen the record on preexisting contentions impacted by NUREG-0737 as meeting the "nexus" requirement. (Tr. 89) Staff does not similarly view NUREG-0737 as constituting good cause for filing new contentions based on its requirements. Staff's reasons for this dichotomy are not entirely clear. (Tr. 91, 93-94)

Governor Brown's position is complicated by the fact that he is participating under 10 CFR §2.715(c) as opposed to §2.714, and by the timing of his entrance into the proceeding after the record was complete. The Governor's position is basically the same as the intervenors: he may participate on any subject which he timely filed (by December 3) and which relates to the testing license application. The Governor stipulates that his "subjects" must meet the specificity and bases requirements of 10 CFR §2.714. (Tr. 117-8) Applicant maintains that, pursuant to §2.715(c), the Governor may only participate on issues raised by the parties or by the Board and may not raise issues on his own. (Applicants response of December 18) The Governor, needless to say, takes sharp issue with this position. (Tr. 111-4) Staff's position with respect to the Governor appears to be the same as its position with respect to the Intervenors. That position, however, has a much more dramatic effect on the Governor because he did not

participate when the original record was compiled and hence cannot reopen the record on matters which concern him. (Tr. 118-9) Thus the Governor would be limited to participating on any intervenor contentions and Board questions admitted, unless, in the Staff's view, he can make a showing of good cause to admit a new contention at this time.

While these are interesting arguments, we have found it unnecessary to confront them. As set forth below, we have viewed the Governor's "subjects" in the same light as contentions put forward by Joint Intervenors in those instances where an admitted contention did not exist.

With this background, it is appropriate to set forth the Board's rulings with respect to the above matters, followed by rulings on specific contentions. Because of the nature of the application here in question, this discussion must begin with 10 CFR §50.57(c).

Section 50.57(c) provides that, in any contested proceeding on an operating license application, the Applicant may request a "...license authorizing low power testing (operation of not more than 1 percent of full power for the purpose of testing the facility) and further operations short of full power operation." The presiding officer is to act on the motion "...with due regard for the rights of the parties..., including the right of any party to be heard to the extent that his contentions are relevant to the activity to be authorized." To the extent that the motion is contested, the presiding officer is to make findings of fact and conclusions of law. Findings and conclusions on matters not in contest are to be made by the Director of Nuclear Reactor Regulation.

Historically, §50.57(c) motions have usually been made prior to the closing of the record in operating license proceedings, but after the completion of the record on any contentions which are relevant to the sought-for testing license. This timing permitted the presiding officers to make the necessary findings and conclusions with respect to the testing license prior to the completion of the record on all contentions.

For purposes of the §50.57(c) motion, the contentions were those previously allowed in the proceeding. Contentions were considered "relevant" to the motion to the extent that they needed to be resolved prior to criticality. Thus, for example, a contention which asserted that the control rod drives were defective would have to be heard and decided prior to the grant of a testing license. To the extent that matters not raised by contentions were "relevant" to the motion, §50.57(c) contemplates that the Director of Nuclear Reactor Regulation would make the necessary findings. The filing of the motion was not deemed to provide an opportunity to file new contentions. Acceptance of new contentions remained governed by the provisions of §2.714.

Some recent developments must be taken into consideration against this background. An Appeal Board has laid down rules under which unresolved safety issues are to be considered (in the absence of controversy) in construction permit cases (Gulf States Utilities Co. [River Bend Station, Units 1 & 2] ALAB-444, 6 NRC 760 at 775 [1977]) and another Appeal Board has applied these rules, to a limited extent,

to operating license cases (Virginia Electric & Power Co. [North Anna Nuclear Power Station, Units 1 & 2] ALAB-491, 8 NRC 245, 248 [1978]). More importantly, the Commission has adopted measures it considers both necessary and sufficient to adequately protect the public health and safety for new operating licenses (NUREG-0737) along with a revised policy statement to govern consideration of these measures in licensing proceedings. Further, the Commission has recently adopted new rules governing emergency planning.

These developments must be considered in passing on the relevance of contentions to the motion for a testing license.

NUREG-0737 and the rule on emergency planning constitute new regulatory requirements. New regulatory requirements have always been viewed as establishing good cause for reopening a record or admitting new contentions. The Board does not agree with the Staff that there is a basis for treating NUREG-0737 as establishing good cause to reopen the record on old contentions while reaching an opposite conclusion with respect to the filing of new contentions. On the contrary, the whole purpose of the revised policy statement is to open the door to litigation of all NUREG-0737 requirements. If NUREG-0737 is not to constitute good cause for both reopening the record and filing new contentions, the revised policy statement becomes largely meaningless. The Board interprets the "nexus" requirement as nexus to Diablo Canyon facility not "nexus" to a contention previously admitted in this proceeding. Further, the appeal board's North Anna ruling means that

we cannot totally leave to the Staff for resolution those items which are not clearly contemplated by a relevant contention.

Applying the above to the instant proceeding, the Board will:

1. Make findings on all relevant preexisting contentions if no findings have been made previously.
2. Reopen the record on all relevant preexisting contentions to the extent necessary to properly take into account NUREG-0737 and the new rule on emergency planning.
3. Admit new relevant contentions with respect to the new rule on emergency planning and NUREG-0737. With respect to NUREG-0737, the Board will:
   a. deny any contention which is not directly related to NUREG-0737 requirements. Contrary to Joint Intervenors view, we believe the Commission's intent as set forth in the policy statement was not changed by the subsequent revision. Both the policy statement (p. 6) and the revised policy statement (p. 7) contain similar paragraphs which set forth three reasons why NUREG-0694 as clarified by NUREG-0737 should be the principal basis for consideration of the new requirements in adjudicatory hearings. These are: first, the effort expended by the Staff and Commission to deal with a large number of issues (the statement notes that this process cannot be duplicated in adjudicatory hearings); second, the lack of NRC resources to litigate

the Action Plan in individual proceedings; and third, the fact that many decisions involve policy issues better dealt with through less formal means than adjudication. Further, under the heading "Commission Decision" on page 6 of the revised policy statement, the following appears:

> Based upon its extensive review and consideration of the issues arising as a result of the Three Mile Island accident -- a review that is still continuing -- the Commission has concluded that the list of TMI-related requirements for new operating licenses found in NUREG-0737 can provide a basis for responding to the TMI-2 accident. The Commission has decided that current operating license applications should be measured by the NRC Staff against the regulations, as augmented by these requirements.9/ In general, the remaining items of the Action Plan should be addressed through the normal process for development and adoption of new requirements rather than through immediate imposition on pending applications.
>
> 9/ Consideration of applications for an operating license should include the entire list of requirements unless an Applicant specifically requests an operating license with limited authorization (e.g., fuel loading and low-power testing).

A similar statement appears at page 5 of the policy statement. In view of the above, the Board does not believe it reasonable to interpret the provision permitting the challenge of the sufficiency of new regulatory requirements as permitting the addition of requirements not contained in NUREG-0737.

b. admit contentions which are based on category one requirements (those which refine existing regulations). These contentions may challenge both the necessity and sufficiency of the refinement within the limits imposed by the regulation; and

c. admit contentions which are based on category two requirements (those which supplement existing regulations). Similarly, these contentions may challenge both the necessity and sufficiency of a requirement. In considering these contentions, the Board will pay particular attention to the nexus of the contention to the TMI accident, the significance of the issue raised by the contention, and the differences in the rationale underlying the contention and the NUREG-0737 requirement; and

4. Require the Staff to place on the record its conclusions regarding any issues which the Board, sua sponte, considers relevant and significant to the instant motion.

The Joint Intervenors requested the Board to certify the following question to the Commission:

> "What requirements, other than relevancy to low-power operation, sufficient specificity and an adequate statement of the basis for the contention must be met for a contention to be admitted for litigation in this period." (Tr. 331)

The Board has interpreted the Commission's Revised Policy Statement and applicable regulations more in support of Joint Intervenors position that the position of either Applicant or Staff. We have accepted NUREG-0737 as good cause for admitting new contentions if there is nexus to Diablo and if they are significant. While we do not accept Joint Intervenors position that the sufficiency of 0737 can be challenged on matters not included, our interpretation opens this proceeding to a wide range of Joint Intervenors contentions. In light of the provisions of the Revised Policy Statement discussed above, we have determined that a sufficient reason does not exist to certify this question to the Commission and we decline to certify.

The Board notes that neither the Governor nor the Joint Intervenors sought to establish good cause for admitting new contentions or reopening the record on old contentions aside from their reliance on NUREG-0737. Therefore, the contention and subjects are viewed only in the context of NUREG-0737.

A. Joint Intervenors Contentions

Contention 1. No final decision has been rendered by the Commission as to the Applicant's compliance at Diablo Canyon with 10 CFR Part 100 Appendix A regarding seismic safety. Because of the exceptional nature of the seismic danger associated with the Diablo Canyon facility such a definitive determination by the Commission must be issued prior to fuel loading.

Contention 2. No final decision has been rendered by the Commission as to the Applicant's Compliance at Diablo Canyon with 10 CFR Part 73, regarding physical protection of nuclear plants and materials. Such a definitive determination by the Commission must be issued prior to fuel loading.

These Contentions are legal arguments advanced by Joint Intervenors to the effect that there must be a final Commission decision with respect to seismic and security matters prior to fuel loading. Both of these matters are currently the subject of further proceedings before the Appeal Board.

At the prehearing conference, the parties agreed to discuss the possibility of a stipulation relating to these contentions and report their progress to the Board. (Tr. 168-170) No report was forthcoming.

Because these contentions do not present any factual issues, the Board will defer any further action on them until the Initial Decision. Therefore, the parties are requested to advise the Board of their respective positions on these contentions (or of any agreement they have been able to reach) in their proposed findings submitted following closing of the record, taking into account any Appeal Board decisions which may have been rendered in the interim.

Contention 3. The Applicant has failed to demonstrate compliance at Diablo Canyon with 10 CFR Part 50 Appendix B, regarding quality assurance.

Joint Intervenors did not take advantage of an opportunity to be heard on quality assurance matters in hearings raised by the Board on October 18-19, 1977. They have not demonstrated in their filings or oral argument a specific relationship between this contention and the additional requirements for fuel loading and low power testing arising from the accident at TMI as specified by the Commission in NUREG-0737. (Tr. 178) For these reasons and in accordance with the Commission Revised Statement of Policy of December 18, 1980 (at page 8) contention 3 is denied.

> Contention 4. Numerous studies arising out of the accident of TMI recognized the necessity of upgrading emergency response planning. Based upon these studies, the Commission has promulgated revised emergency planning regulations effective November 3, 1980. The Applicant has failed to demonstrate that the combined Applicant, state, and local emergency response plans for Diablo Canyon comply with those revised regulations ("Final Regulations on Emergency Planning," 45 Fed. Reg. 55402 (August 19, 1980)).
>
> Contention 5. The Applicant has failed to demonstrate that the combined Applicant, state and local emergency response plans for Diablo Canyon comply with the requirements of Sections III.A.1.1 and III.A.1.2 of NUREG-0694.

The Board has stated that it will admit new relevant contentions with respect to the new rule on emergency planning and NUREG-0737. Contention 4 specifically identifies requirements of the new rule on emergency planning which must be complied with (new Appendix E to Part 50). Contention 5 identifies requirements of NUREG-0694 (which was later issued and approved by the Commission as NUREG-0737 with changes and clarification) which must be complied with prior to the issuance of a license for fuel loading and low power testing. (NUREG-0737 Enclosure 2) The requirements are stated in NUREG-0737 Enclosure 2,

however, the text gives no additional clarification for Items.) These contentions are relevant and specific to matters which must be resolved prior to issuance of the requested license. Contentions 4 and 5 are, therefore, admitted insofar as they pertain to issues related to fuel loading and low power testing.

> Contention 6. The Applicant has failed to demonstrate that the containment at Diablo Canyon can withstand pressures resulting from the combustion of hydrogen likely to be generated by the reaction of zirconium cladding with water during a loss of coolant accident at the facility.

Joint Intervenors in oral argument pointed to requirement II.E.4.1 of NUREG-0737 which deals with dedicated hydrogen penetrations when called upon to show how contention 6 is related to new TMI requirements. They conceded, however, that this requirement does not specifically contain a requirement which "meets" contention 6. (Tr. 212) They argue instead that the NUREG-0737 requirement is insufficient. (Tr. 212) The Board interprets this as a demand for a new item not now contained in NUREG-0737. The Board has stated that we would reject such contentions as being inconsistent with the Commission's Revised Statement of Policy.

Contention 6 is therefore denied.

> Contention 7. The Applicant has failed to address adequately safety considerations designated as high priority and/or high risk in Table B.2 of NUREG-0660 TMI Action Plan.

The Commission in its Revised Statement of Policy has decided that current operating license applications should be measured by the NRC Staff against the regulations as augmented by these requirements contained

in NUREG-0737, not NUREG-0660. The Revised Statement of Policy states:

> "In general the remaining items of the Action Plan should be addressed through the normal process for development and adoption of new requirements rather than through immediate imposition on pending applications."

Items appearing in NUREG-0660 but not in NUREG-0737 are, therefore, not to be imposed on pending applications. Joint Intervenors assert, however, that under their right to challenge sufficiency of NUREG-0737 requirements 12 additional items taken from NUREG-0660 should be made a part of NUREG-0737. (Tr. 224) Little rationale for the adoption of the newly enumerated items was given in oral argument however.

Contention 7 is denied.

> Contention 8. The accident at TMI Unit 2 demonstrated that reliance on natural circulation to remove decay heat is inadequate. During the accident it was necessary to operate at least one reactor coolant pump to provide forced cooling of the fuel. However, the Applicant's testing program does not demonstrate a reliable method for forced cooling of the reactor in the event of a small loss-of-coolant accident ("LOCA") particularly with regard to two-phase flow and with voids such as occurred at TMI-2. This is a threat to health and safety and a violation of both General Design Criterion ("GDC") 34 and GDC 35 of 10 CFR Part 50 Appendix A.

In the prehearing conference Joint Intervenors asserted only a remote relationship between this contention and the augmented requirements for licensing contained in NUREG-0737. They asserted instead a right to go beyond the requirements of NUREG-0737 (Tr. 234) (i.e., to challenge their sufficiency under the Commission Revised Statement of Policy).

Therefore, this contention is denied.

Contention 9. Using existing equipment at Diablo Canyon, there are three principal ways of providing forced cooling of the reactor: (1) the reactor coolant pumps; (2) the residual heat removal system; and (3) the emergency core cooling system in a "bleed and feed" mode. None of these methods meets the NRC's regulations applicable to systems important to safety and is sufficiently reliable to protect public health and safety.

a. The reactor coolant pumps do not have an adequate on-site power supply (GDC 17), their controls do not meet IEEE 279 (10 CFR 50.55a(h)) and they are not adequately qualified (GDC 2 and 4).

b. The residual heat removal system is incapable of being utilized at the design pressure of the primary system.

c. The emergency core cooling system cannot be operated in the "bleed and feed" mode for the necessary period of time because of inadequate capacity and radiation shielding for the storage of the radioactive water bled from the primary coolant system.

In the prehearing conference Joint Intervenors asserted only a remote relationship between this contention and the augmented requirements for licensing contained in NUREG-0737. They assert instead a right to go beyond the requirements of NUREG-0737. (Tr. 234) (i.e., to challenge their sufficiency under the Commission's Revised Statement of Policy)

For these reasons this contention is denied.

Contention 10. The Staff recognizes that pressurizer heaters and associated controls are necessary to maintain natural circulation at hot stand-by conditions. Therefore, this equipment should be classified as "components important to safety" and required to meet all applicable safety-grade design criteria, including but not limited to diversity (GDC 22), seismic and environmental qualification (GDC 2 and 4), automatic initiation (GDC 20), separation and independence (GDC 3 and 22), quality assurance (GDC 1), adequate, reliable on-site power supplies (GDC 17) and the single failure criterion. The Applicant's proposal to connect two out of four of the heater groups to the present on-site emergency power supplies does not provide an equivalent or acceptable level of protection.

Joint Intervenors point to item II.E.3.1 in enclosure 2 of NUREG-0737 which addresses emergency power for pressurizer heaters as a new TMI-related requirement justifying admission of this contention (Tr. 242) Item II.E.3.1 does, however, not require that pressurizer heaters be classified as "components important to safety" a fact conceded by intervenors (Tr. 242) Intervenors challenge the sufficiency of this requirement (Tr. 242) (i.e., that they ought to be so classified). We do not believe that they have sufficiently tied this contention to the requirements of NUREG-0737 for it to be admitted, nor has it been demonstrated what a bearing this has on fuel loading and low power testing at Diablo Canyon.

The contention is denied.

> Contention 11. The Applicant has proposed simply to add the pressurizer heaters to the on-site emergency power supplies. It has not been demonstrated that this will not degrade the capacity, capability and reliability of these power supplies in violation of GDC 17. Such a demonstration is required to assure protection of public health and safety.

Joint Intervenors cited item II.E.3.1 of NUREG-0737 as a new Commission requirement for licensing arising from the accident at TMI. (Tr. 242) Item II.E.3.1 deals specifically with requirements of emergency power supplies to pressurizer heaters. Its requirements must be met 4 months prior to issuance of the SER according to enclosure 2 of NUREG-0737 (p. 2-6). This contention is, therefore, relevant to this proceeding and specifically related to a new requirement for licensing. It is, therefore, admitted.

Contention 12. 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.

This contention does not specifically identify an item in NUREG-0737 which has not been complied with nor has a showing been made that any item is insufficient. The contention is therefore denied.

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

> "To the extent feasible and practical protection system inputs shall be derived from signals which are direct measures of the desired variables."

Diablo Canyon has no capability to directly measure the water level in the fuel assemblies. The absence of such instrumentation delayed recognition of a low-water level condition in the reactor for a long period of time. Nothing proposed by the Staff would require a direct measure of water level or provide an equivalent level of protection. The absence of such instrumentation poses a threat to public health and safety.

This contention raises an issue which is clearly TMI-related, and is included in NUREG-0737 (II.F.2) as an action item. As presented, the contention lacks specificity, as there is no argument among the parties that a water level indication will be required. During discussion of the contention (Tr. 258-252) it was revealed that the Intervenor's concern was that installation of the indicator would not be required until 1/1/82, rather than before fuel loading and low power testing. With that understanding the Board accepts contention #13 as a litigable issue.

Contention 14. 10 CFR 50.46 requires analysis of ECCS performance "for a number of postulated loss-of-coolant accidents of different sizes, locations, and other properties sufficient to provide assurance that the entire spectrum of postulated loss-of-coolant accidents is covered." For the spectrum of LOCAs, specific parameters are not to be exceeded. At TMI, certain of these were exceeded. For example, the peak cladding temperature exceeded 2200° fahrenheit (50.45(b)(1)), and more than 1% of the cladding reacted with water or steam to produce hydrogen (50.46(b)(3)). The measures proposed by the Staff address primarily the very specific case of a struck-open power operated relief valve. However, any other small LOCA could lead to the same consequences. Additional analyses to show that there is adequate protection for the entire spectrum of small break locations for the Diablo Canyon design have not been performed. Therefore, there is no basis for finding compliance with 10 CFR 50.46 and GDC 35. None of the corrective actions to date have fully addressed the demonstrated inadequacy of protection against small LOCAs.

The contention appears to have a very tenuous relationship with NUREG-0737; specifically to I.C.1. I.C.1, however, appears to lead toward off-normal occurrence analysis with the view of developing procedures to be used in operator training, rather than ECCS performance, per se. In any event, 10 CFR 50.46 sets limits on clad temperature and oxidation, and does not lay down input parameters to be used in analysis. As phrased in the contention and further laid out in discussion (Tr. 262-268), the contention lacks the necessary basis and specificity to be accepted. The contention is therefore denied.

Contention 15. The accident at TMI-2 was substantially aggravated by the fact that the plant was operated with a safety system inoperable, to wit: two auxiliary feedwater system valves were closed which should have been open. The principal reason why this condition existed was that TMI does not have an adequate system to inform the operator that a safety system has been deliberately disabled. To adequately protect the health and safety of the public, a system meeting the Regulatory Position of Reg. Guide 1.47 or providing equivalent protection is required.

Review of the contention as presented and the pertinent discussion (Tr. 268-270) indicates that there exists a very fragile connection with the requirement of NUREG-0737 at best. In any event, a broad allegation that the requirements of NUREG-0737 are insufficient does not supply the requisite specificity to define an issue to be placed in litigation in this proceeding. The contention is denied.

> Contention 16. The design of the safety systems at TMI was such that the operator could prevent the completion of a safety function which was initiated automatically; to wit: the operator could (and did) shut off the emergency core cooling system prematurely. This violated §4.16 of IEEE 279 as incorporated in 10 CFR 50.55(a)(h) which states:
>
> > "The protection system shall be so designed that, once initiated, a protection system action shall go to completion."
>
> The Diablo Canyon design is similar to that at TMI and must be modified so that no operator action can prevent the completion of a safety function once initiated.

The Board could find no connection between this contention and the requirements of NUREG-0737. The contention is denied.

> Contention 17. The design of the hydrogen control system at TMI was based upon the assumption that the amount of fuel cladding that could react chemically to produce hydrogen would, under all circumstances, be limited to less than 5%. The accident demonstrated both that this assumption is not justified and that it is not conservative to assume anything less than the worst case. Therefore, the Diablo Canyon hydrogen control systems should be designed on the assumption that 100% of the cladding reacts to produce hydrogen.

This contention was considered in conjunction with contention 6. (Tr. 209-222). For the same reason set forth above the contention is denied.

Contention 18. The TMI-2 accident demonstrated that the severity of the environment in which equipment important to safety must operate was underestimated and that equipment previously deemed to be environmentally qualified failed. One example was the pressurizer level instruments. The environmental qualification of safety-related equipment at TMI is deficient in three respects: (1) the parameters of the relevant accident environment have not been identified; (2) the length of time the equipment must operate in the environment has been underestimated; and (3) the methods used to qualify the equipment are not adequate to give reasonable assurances that the equipment will remain operable. Diablo Canyon should not be permitted to load fuel until all safety-related equipment has been demonstrated to be qualified to operate as required by GDC 4. The criteria for determining qualification should be those set forth in Regulatory Guide 1.89 or equivalent.

NUREG-0737, at II.B.2, considers added requirements for shielding against and qualification tests for the radiation to be expected in a TMI-2 situation. To this extent the contention appears to be related to a NUREG-0737 requirement. However, the stated contention, as well as the discussion which took place at the Prehearing Conference (Tr. 272-74) is totally lacking in any specific issues which might be litigated in this proceeding. Even the three defects in environmental qualifications at TMI were not shown to connect in any recognizable way with Diablo Canyon, and even if so alleged, are too diffuse to constitute a litigable issue. The contention is denied.

Contention 19. Neither the Applicant nor the NRC Staff has presented an accurate assessment of the risks posed by operation of Diablo Canyon, contrary to the requirements of 10 CFR 51.20(a) and 51.20(c). The design of Diablo Canyon does not provide protection against so-called "Class 9" accidents. There is no basis for concluding that such accidents are not credible. Indeed, the Staff has conceded that the accident at TMI-2 falls within that classification. Therefore, there is not reasonable assurance that Diablo Canyon can be operated without endangering the health and safety of the public.

Without going to the merits of the contention, as presented, the Board will defer consideration of this issue until the Appeal Board has ruled on the Diablo Canyon seismic issue which is now before it.

Contention 20. The TMI-2 accident demonstrated that there are systems and components presently classified as non-safety-related which can have an adverse effect on the integrity of the core because they can directly or indirectly affect temperature, pressure, flow and/or reactivity. This issue is discussed at length in Section 3.2, "System Design Requirements," of NUREG-0578, the TMI-2 Lessons Learned Task Force Report (Short Term). The following quote from page 18 of the report describes the problem:

> There is another perspective on this question provided by the TMI-2 accident. At TMI-2, operational problems with the condensate purification system led to a loss of feedwater and initiated the sequence of events that eventually resulted in damage to the core. Several nonsafety systems were used at various times in the mitigation of the accident in ways not considered in the safety analysis; for example, long-term maintenance of core flow and cooling with the steam generators and the reactor coolant pumps. The present classification system does not adequately recognize either of these kinds of effects that nonsafety systems can have on the safety of the plant. Thus, requirements for nonsafety systems may be needed to reduce the frequency of occurrence of events that initiate or adversely affect transients and accidents, and other requirements may be needed to improve the current capability for use of nonsafety systems during transient or accident situations. In its work in this area, the Task Force will include a more realistic assessment of the interaction between operators and systems.

The Staff proposes to study the problem further. This is not a sufficient answer. All systems and components which can either cause or aggravate an accident or can be called upon to mitigate an accident must be identified and classified as components important to safety and required to meet all safety-grade design criteria.

There is not cognizable relationship between this contention and the requirements in NUREG-0737, as confirmed by Intervenor (Tr. 280). The contention is denied.

Contention 21. The accident at TMI-2 was caused or aggravated by factors which are the subject of Regulatory Guides not used in the design of TMI. For example, the absence of an automatic indication system as required by Regulatory Guide 1.47 contributed to operation of the plant with the auxiliary feedwater system completely disabled. The public health and safety require that this record demonstrate conformance with or document deviations from the Commission's regulations and each Regulatory Guide presently applicable to the plant.

The Intervenor has agreed that there is no NUREG-0737 requirement which is related to this contention (Tr. 284). Denied.

Contention 22. Withdrawn (Tr. 286)

Contention 23. The accident at TMI-2 was a multiple failure accident involving independent and dependent failures. The multiple failure sequences exceeded the single failure criterion utilized in the Diablo Canyon design basis accident assessment. Therefore, comprehensive studies of the interaction of nonsafety grade components, equipment, systems, and structures with safety systems and the effect of these interactions during normal operation, transients, and accidents need to be made by the Diablo Canyon Applicant in order to assure that the plant can be operated without endangering the health and safety of the public.2/

This contention was considered to be on the same subject as contention 20. For the same reasons the contention is denied.

Contention 24. Reactor coolant system relief and safety valves form part of the reactor coolant system pressure boundary. Appropriate qualification testing has not been done to verify the capabilities of these valves to function during normal, transient and accident conditions. In the absence of such testing and verification, compliance with GDC 1, 14, 15 and 30 cannot be found and public health and safety are endangered.

2/ On February 11, 1981, the Joint Intervenors submitted two (2) documents referenced in the prehearing conference. The Board had prior knowledge of these documents.

NUREG-0737, at II.D.1, sets out test schedules for relief valve, safety valve and block valve tests. The RV and SV tests must be completed before fuel load. However, the block valve tests completion schedule is for before fuel loading or 7/1/82, whichever is later. Intervenors believe that all these tests should be completed prior to fuel loading, and that the NUREG-0737 requirements are not sufficient in this manner. (Tr. 250-258) With this understanding by the Board, the contention is accepted.

Contention 25. Withdrawn (Tr. 286)

Contention 26. Withdrawn (Tr. 286)

Contention 27. Withdrawn (Tr. 286)

In the prehearing conference, at such times when the Applicant or Staff criticized a contention of the Joint Intervenors as inadequate, the Joint Intervenors would volunteer that they could improve the specificity of a contention after meeting with their technical consultants (e.g., Tr. 185 or 193). The Joint Intervenors had several months to develop their contentions. They are represented by knowledgeable, experienced counsel. The Board has ruled on the contentions as submitted and as clarified at the prehearing conference. The Joint Intervenors will not be granted additional time to revise and resubmit those contentions not admitted by the Board.

The Joint Intervenors in their filing of January 8, 1981 and in the prehearing conference (Tr. 116) want to adopt Governor Brown's subjects as their contentions. The only subjects admitted were bootstrapped to the Joint Intervenors contentions. There are no separately admitted subjects from Governor Brown. The question is academic.

B. Governor Brown's Subjects

Governor Brown's timely-filed petition to participate as the representative of an interested state under 10 CFR 2.715(c) set forth "subjects on which Governor Edmund G. Brown, Jr., intends to participate" in this proceeding. No contentions, per se, were presented. As a representative of an interested state participating under 10 CFR 2.715(c) Governor Brown is not required to submit contentions of his own, but is free to fully participate in the litigation of any contentions which are otherwise accepted by the Board. However, if the Governor wishes to raise specific issues not otherwise accepted by the Board he must comply with the requirements of 10 CFR 2.714(b) for acceptable contentions, just as any other party must. [See Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760 (1977).] The Governor agrees to this proposition (Tr. 117-18). To determine the admissability of Governor Brown's subjects as issues in this proceeding (as limited by the Board's Order of October 2, 1980) they will be considered individually as contentions and subjected to the same tests as have been applied to the contentions submitted by Joint Intervenors.

Subjects 1 and 2. Withdrawn (Tr. 169-71)

Subject 3. Whether the emergency plans of PG&E, the State, and the local jurisdiction are satisfactory for issuance of the requested licenses.

A. Whether further steps, including those set forth in the NRC's Final Rule on Emergency Planning, 45 Fed. Reg. 55402 (August 19, 1980), must be accomplished before the licenses may be issued.

This subject is closely related to Joint Intervenor's contentions 4 and 5, which the Board has accepted. Governor Brown may thus participate in litigation of this issue.

Subject 4. Whether PG&E, as alleged in its Motion, has complied with or will comply with the requirements of NUREG-0694 prior to loading fuel (Motion, p. 2), including the following matters specified in the Safety Evaluation Report ("SER"), Supplement 10, which the NRC Staff has examined but which, as of publication of Supplement 10, were not complete:

(a) Adequacy of the training, experience and procedures for shift technical advisors. (SER, Suppl. 10, p. I.A.-2)

(b) Results of cold license examinations for the 21 candidates who were to take examinations in August 1980, and results of examinations for other licensed personnel. (Id. I.A.-6)

(c) Adequacy of procedures for accident mitigation and recovery. (Id. I.B-3)

(d) Adequacy of the reorganization of PG&E's operating organization for both routine and emergency operations and adequacy of PG&E's agreements with other organizations and utilities to pool resources in the event of an emergency. (Id.)

(e) Adequacy of PG&E's guidelines and procedures for emergency core cooling and small break LOCAs.

(f) Adequacy of PG&E's startup test procedures. (Id. I.C.-7)

(g) Adequacy of PG&E's measures to deal with human factors-related deficiencies. (Id. IV. 1-2 and 3).

There is no issue presented here. All parties and the Board agree that these matters must be resolved before a license can issue. (Tr. 288-295) The Board and the parties should be kept informed on the status of Applicant's compliance. Denied.

Subject 5. Whether the seven tests proposed by PG&E in its Motion are a complete list of necessary tests.

A. Whether, in addition to the seven stated tests, there must be tests designed to demonstrate 2-phase natural circulation cooling capability that are representative of actual accident conditions.

This subject is not contained in the NUREG-0737 requirements, nor does it have the basis and specificity to qualify as a contention on its own. (Tr. 235-39). Denied.

Subject 6. Whether the activities sought by PG&E to be authorized under the licenses are "vital to demonstrate the effectiveness of the augmented reactor operation training program, improved management organization and operating procedures and controls, and certain changes in design and equipment implemented by PG&E to meet the NTOL Requirements." (Motion, p. 2)

This subject has no colorable relationship with this proceeding, because PG&E reasons for desiring to undertake the testing program at this time are irrelevant to Section 50.57(c) requirements. Further, the subject lacks any connection to NUREG-0737 and lacks sufficient basis and specificity to qualify as a contention on its own. (Tr. 295-307) Denied.

Subject 7. Whether the requested licenses and the activities authorized thereby "will provide meaningful technical information beyond that obtained in the normal startup test program." (Motion, p. 2)

This subject has no colorable relationship with this proceeding, because PG&E reasons for desiring to undertake the testing program at this time are irrelevant to Section 50.57(c) requirements. Further, the subject lacks any connection to NUREG-0737 and lacks sufficient basis and specificity to qualify as a contention on its own. (Tr. 295-307) Denied.

Subject 8. Whether the requested licenses and the activities authorized thereunder "will not pose an undue risk to the health and safety of the public" (Motion, p. 2), particularly since PG&E has not submitted safety analyses related to these activities and the NRC's risk assessment is unsupported by plant-specific analyses. (SER, Supp. 10, p. I.G.-5)

This subject lacks the requisite basis and specificity to qualify as a contention. (Tr. 295-307) Denied.

Subject 9. Whether the requested licenses will result in radiation levels within the plant that would preclude or impede implementation of any later changes ordered by the NRC. (Ref. Motion, p. 2)

A. Whether these levels would expose workers to unacceptable exposures beyond ALARA levels.

This subject lacks the necessary basis and specificity to be accepted as a contention. (Tr. 308-09). Denied.

Subject 10. Whether the requested licenses and the activities authorized thereunder "will provide significant supplemental operator training." (Motion, p. 2).

A. Whether there are other means, including training on simulators and at other facilities, to obtain such supplemental operator training.

This subject has no colorable relationship with this proceeding, because PG&E reasons for desiring to undertake the testing program at this time are irrelevant to Section 50.57(c) requirements. Further, the subject lacks any connection to NUREG-0737 and lacks sufficient basis and specificity to qualify as a contention on its own. (Tr. 295-307) Denied.

Subject 11. Whether early operation of Diablo Canyon Units 1 and 2 will contribute in any meaningful way toward the national objective of reducing dependence on imported oil and/or reduce in any meaningful way the risks or consequences to the public of inadequate generating resources and/or allow generation of power using less expensive fuels. (Ref. Motion, p. 3).

This subject has no colorable relationship with this proceeding, because PG&E reasons for desiring to undertake the testing program at this time are irrelevant to Section 50.57(c) requirements. Further, the subject lacks any connection to NUREG-0737 and lacks sufficient basis and specificity to qualify as a contention on its own. (Tr. 295-307) Denied.

Subject 12. Whether the small break loss of coolant accident analyses and tests, including computer code verification, required for Westinghouse PWRs are sufficiently complete and accurate to permit issuance of the requested licenses.

This subject lacks the necessary basis and specificity to qualify as a contention and does not relate to an admitted contention. (Tr. 263-268) Denied.

Subject 13. Whether the licenses should issue prior to installation of PG&E of a reliable and unambiguous method of measuring reactor vessel water level.

A. Whether PG&E's proposed system to measure water level in the reactor vessel is adequate for all conditions, including level swell, 2-phase flow, flow blockage and system dynamics. (SER, Supp. 10, p. II.F-9)

Although lacking the basis and specificity required for an allowable contention, the subject is essentially the same as Joint Intervenors contention 13, which the Board has accepted. Governor Brown may, therefore, participate in litigation of this issue in the form in which the Joint Intervenor's contention was accepted.

Subject 14. Whether the licenses should issue prior to completion of qualification tests and analyses on relief and safety valves.

Although this subject lacks the specificity and basis necessary to being accepted as a contention, it is essentially the same as Joint Intervenor's Contention 24, and Governor Brown may participate in this litigation.

Subject 15. Whether PG&E has established adequate procedures for dissemination of operating experience, obtained from operation of both Diablo Canyon and other nuclear plants, to PG&E personnel. (SER, Supp. 10, p. I.C.-7)

The subject lacks the necessary basis and specificity to qualify as a contention. (Tr. 309-12) Denied.

Subject 16. Whether additional TMI Action Plan items should be completed before the licenses are issued, including:

(a) NRC audit of emergency procedures (NUREG-0660, p. I.C.-7)

(b) Withdrawn (Tr. 313)

(c) Withdrawn (Tr. 313)

(d) Withdrawn (Tr. 313)

(e) Withdrawn (Tr. 313)

(f) Completion of upgraded training and qualification requirements. (Id. I.A.2-1)

(g) Completion of reevaluation of AFW reliability. (Id. II.E.1-1)

This subject, as stated, lacks the requisite basis and specificity to be accepted as a contention. Further, as discussed above, the Action Plan items are not appropriate for litigation unless contained in NUREG-0737. (Tr. 312-17) Denied.

Subject 17. Whether the NRC and PG&E have complied with all obligations under the National Environmental Policy Act, the regulations of the Council on Environmental Quality, and the NRC's regulations in Part 51.

A. Whether an environmental impact statement, or at the very minimum, an environmental impact appraisal must be prepared.

This subject has no relationship to any allowable issue in this proceeding and also lacks the basis and specificity necessary for it to be accepted as a contention. (Tr. 317-28. See, also, Board rulings on Governor Brown's Motion to Stay and Governor Brown's oral motion for ruling in Tr. 321-23 made previously in this Order). Denied.

At the prehearing conference, the parties stipulated to the following schedule (Tr. 367):

Assuming Board Order Issues	February 13, 1981
Close of Discovery	March 25, 1981
Motions for Summary Disposition	April 1, 1981
Prepared Direct Testimony Filed	May 8, 1981
Hearing Commences	May 19, 1981

The Board accepted the schedule. (Tr. 370)

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Elizabeth S. Bowers, Chairman
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland

this 13th day of February 1981.

EXHIBIT 11

OBJECTIONS OF PGandE TO ASLB ORDER
DATED FEBRUARY 13, 1981

EXHIBIT 11

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
PACIFIC GAS AND ELECTRIC COMPANY	)	Docket No. 50-275
	)	Docket No. 50-323
Diablo Canyon Units 1 and 2	)	(Low Power Motion)
	)	

OBJECTIONS OF PGandE TO ASLB ORDER DATED FEBRUARY 13, 1981

Pacific Gas and Electric Company (PGandE), pursuant to 10 CFR 2.752(c), files objections to those portions of the Prehearing Conference Order dated February 13, 1981 admitting Joint Intervenors' Contentions 4, 5, 11, 13, and 24.

In the first place the Board, although noting

> ". . . that neither the Governor nor the Joint Intervenors sought to establish good cause for admitting new contentions or reopening the record on old contentions aside from their reliance on NUREG-0737." (Order at 16)

nevertheless admitted the five above-numbered contentions. The Board apparently is of the opinion that mere mention in NUREG-0737 is sufficient to make an issue the subject of a valid contention for litigation in a public hearing (Order at 12). Clearly, this is an improper and incorrect interpretation of the Commission's Statement of Policy dated December 18, 1980 (45 F.R. 85236). This statement very clearly provides

> "The Commission believes that where the time for filing contentions has expired in a given case, no new TMI-related contentions should be accepted absent a showing of good cause and balancing of the factors in 10 CFR 2.714(a)(1). The Commission expects adherence to its regulations in this regard. Also, present standards governing the reopening of hearing records to consider new evidence on TMI-related issues should be adhered to. Thus, for example, where initial decisions have been issued, the record should not be reopened to take

> evidence on some TMI-related issue unless the party seeking reopening shows that there is significant new evidence, not included in the record, that materially affects the decision." (45 F.R. 85238)

Since the Joint Intervenors totally failed to make any such showing they are not entitled to have any of their contentions accepted, and those portions of the Board's order which purport to do this are wrong and should be amended.

An additional defect in the Board's order is the use of the wrong standard for reopening records. At page 12 the order speaks in terms of "good cause." However, this is the standard for accepting late-filed contentions. As quoted above, the Statement of Policy provides that in addition to good cause and a balancing of the factors in 10 CFR 2.714(a)(1)

> ". . . present standards governing the reopening of hearing records to consider new evidence on TMI-related issues should be adhered to. Thus, for example, where initial decisions have been issued, the record should not be reopened to take evidence on some TMI-related issue unless the party seeking reopening shows that there is significant new evidence, not included in the record, that materially affects the decision." (45 F.R. 85238) (Emphasis added)

Further, with respect to Contentions 4 and 5, it is well settled that emergency response plans are not proper subjects for litigation in connection with issuance of licenses to load fuel and conduct low power tests. Footnote 9 to the Statement of Policy provides in full as follows:

> "Consideration of applications for an operating license should include the entire list of requirements unless an applicant specifically requests an operating license with limited authorization (e.g., fuel loading and low-power testing)."

Prior to issuance of NUREG-0737 it was established under NUREG-0694 and the Commission's Statement of Policy dated June 16, 1980 (45 F.R. 41737) that updated emergency preparedness requirements were required before a full-power license as opposed to a license to load fuel and conduct low-power tests (NUREG-0694 p. 25). There is nothing in the revised Statement of Policy and NUREG-0737 to indicate that the Commission intended any change in this regard. Indeed the repetition as Footnote 9 of Footnote 8 in the Statement of Policy dated June 16, 1980 mandates a contrary conclusion. Accordingly, the Board acted improperly in granting Joint Intervenors' Contentions 4 and 5.

Finally, § 109(a)(2) of P.L. 96-295 (94 Stat. 784) provides that if an emergency preparedness plan which complies with the Commission's guidelines is not in effect the Commission is authorized to issue an operating license if it determines that

> ". . . there exists a State, local, or utility plan which provides reasonable assurance that public health and safety is not endangered by operation of the facility concerned."

The NRC Staff has determined that the existing state, local, and utility emergency plans provide sufficient assurance and protection of the public health and safety for purposes of a license to load fuel and conduct low-power tests (SER Supplement 10, page III B-2, NUREG-0675). This position is supported by the language in 10 CFR 50.47(c) which provides for issuance of an "operating license" even if the requirements of 10 CFR 50.47(b) have not been met so long as there is reasonable assurance the public health and safety is not endangered. Accordingly, the Board should not have accepted Contentions 4 and 5 for purposes

of PGandE's motion for a license to load fuel and conduct low-power tests.[1/]

If the Board choses not to revise its order in the light of the objections presented herein PGandE urges the Board to certify PGandE's objections to the Commission for a decision pursuant to 10 CFR 2.718(i). The Commission in the Statement of Policy encouraged certifications

> ". . . where Boards are in doubt as to the Commission's intentions in approving NUREG-0737." (45 F.R. 85238)

PGandE is preparing a separate request for certification for filing with the Commission.

Respectfully submitted,

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1/ 10 CFR 50.57(c) under which PGandE seeks issuance of a low-power testing authorization expressly limits contentions to those relevant to the activity to be authorized. Joint Intervenors' Contentions 4 and 5 are irrelevant to fuel load and low-power testing.

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By Philip A. Crane, Jr.
Philip A. Crane, Jr.

Dated: February 25, 1981

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
PACIFIC GAS AND ELECTRIC COMPANY	)	Docket No. 50-275
	)	Docket No. 50-323
Units 1 and 2	)	
	)	
Diablo Canyon Site	)	
	)	

CERTIFICATE OF SERVICE

The foregoing document(s) of Pacific Gas and Electric Company has (~~have~~) been served today on the following by deposit in the United States mail, properly stamped and addressed:

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