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November 14, 1978

The Honorable Joseph M. Hendrie
Chairman
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555



Re: Appearance of ACRS Consultants
in Licensing Proceedings

Dear Dr. Hendrie:

On October 31, 1978, I wrote on behalf of the Joint-Intervenors in the Diablo Canyon operating license proceeding to express our view on the general policy question of subpoenaing ACRS consultants to require their attendance and testimony at evidentiary hearings before licensing boards. One additional point should be made.

As I pointed out in my earlier correspondence, the NRC Rules of Practice currently provide that licensing board subpoenas may issue to NRC personnel only upon a showing of "exceptional circumstances." This standard has been interpreted to apply only where a person has direct personal knowledge of a material fact not known to other witnesses. ^{1/} Facts, however, are only one component of an expert's opinion which reflects assumptions, judgement, experience, etc. In fact, since experts are often working with the same data base, this narrow reading would preclude the issuance of a subpoena in many instances where an ACRS consultant had an opinion on an important issue substantially different from experts for the Staff and the Applicant.

Should the Commission adopt the "exceptional circumstances" standard for subpoenaing ACRS consultants, it should make clear that it is not limited to apply only where a person has direct personal knowledge of a material fact not known to other witnesses. For example, as the

^{1/} Letter from Dr. M. Bender, Chairman, ACRS, to Howard K. Shapir, Esq., Executive Legal Director, NRC, dated December 12, 1977, at 2.

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Staff points out:

The mere fact that, as stated in the ACRS position, the consultants do not have "direct personal knowledge of a material fact not known to other witnesses made available by the Commission Staff," should not necessarily be a controlling factor. Of possibly greater significance, in our view, depending on the circumstances, is the opinion of the expert consultant, particularly where that opinion may be in an area where the necessary expertise is limited, or where there are substantial differences in the expert opinions which are otherwise available. 2/

We hope that these views are helpful in your deliberation.

Yours very truly,

David S. Fleischaker

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John R. Phillips, Esq.
Steven Kristovich, Esq.
CENTER FOR LAW IN
THE PUBLIC INTEREST

Attorneys For
JOINT-INTERVENORS

2/ STAFF COMMENTS ON THE GENERIC MATTER OF CROSS-EXAMINATION OF ACRS CONSULTANTS IN NRC LICENSING PROCEEDINGS, dated October 31, 1978, at 6.

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cc: Richard Kennedy, Commissioner
NRC

Victor Gilinsky, Commissioner
NRC

Peter Bradford, Commissioner
NRC

John Ahearne, Commissioner
NRC

James Kelly, Acting General Counsel
NRC

Harold Denton, Director of Reactor Safeguards
NRC

Stuart A. Treby, Assistant Chief Hearing Counsel for
NRC Staff

Advisory Committee on Reactor Safeguards

All Parties of Record in the Diablo Canyon
Operating License Proceeding

DSF/ms