UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

JOINT INTERVENORS' REQUEST FOR
WAIVER OF THE IMMEDIATE EFFECTIVENESS RULE

Pursuant to 10 C.F.R. §2.758 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 petition the Commission for waiver of 10 C.F.R. §2.764 ("immediate effectiveness rule") in its consideration of the Atomic Safety and Licensing Board's ("licensing board") July 17, 1981 Partial Initial Decision approving Pacific Gas & Electric Company's ("PG&E") application for a license to load fuel and conduct lower power tests at the Diablo Canyon Nuclear Power Plant ("Diablo Canyon"). 10 C.F.R. §2.764 provides for the licensing decision authorizing fuel load and low power testing to become immediately effective following a ten (10) day period for Commission review of the decision.[1/] Waiver of the immediate effectiveness rule

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1/ The ten (10) day Commission review period does not begin until the Atomic Safety and Licensing Appeal Board ("Appeal Board") issues a decision approving Diablo Canyon's security plan. In the Matter of Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Commission Order (July 22, 1981). The Appeal Board decision is due within the month. This motion is submitted now to provide the Commission additional time to consider the (footnote continued)

is justified because its application in the special circumstances of this proceeding would not serve the purpose for which it was intended. Full Commission review of the Diablo Canyon record should precede issuance of the low power test license, rather than the abbreviated ten-day review contemplated by the immediate effectiveness rule.

I. PURPOSE OF THE RULE

The purpose of the immediate effectiveness rule is to expedite the licensing process by reducing the time between completion of plant construction and a final Commission decision authorizing plant operation.[2/] The rule is based on a balancing of two competing factors: (1) the benefit of direct Commission consideration of nuclear power reactor operating licenses and (2) the costs associated with postponing operation of completed plants.[3/] Its provisions are explicitly qualified by the Commission's statement of intent that the amendment "does not compromise the Commission's commitment to the protection of public health and safety or to a fair hearing process."[4/]

The purpose of the rule, therefore, is to expedite licensing of completed facilities where, to do so, would be consistent with

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(footnote continued) issues raised should the Appeal Board's decision approve the security plan, thereby triggering the ten (10) day review period.

2/ Final Rule, Immediate Effectiveness (Commission Review Procedures for Power Reactor Operating Licenses), Preamble, at 2-3 (May 22, 1981).

3/ Id. at 4.

4/ Id.

the Commission's primary responsibility under the Atomic Energy Act of 1954 ("AEA"), 42 U.S.C. §§2011 et seq., to ensure that the issuance of an operating license will not be "inimical to the common defense and security or to the health and safety of the public." 42 U.S.C. §2033(d); 10 C.F.R. §50.57(a). Implicit is the Commission's belief that in the normal licensing proceeding, under normal circumstances, expedited licensing with only limited Commission review of the sort provided in 10 C.F.R. §2.764(f)(2) can be accomplished without undermining the mandate of the AEA.[5/] However, adherence to an expedited licensing procedure would foil the Commission's intent in adopting the immediate effectiveness rule where, as here, to do so would compromise the goal of "safety first".[6/]

4/ Id.

5/ Unlike other proceedings in which low power licenses have been approved, this is not a case where such licensing is unopposed (In the Matter of Maine Yankee Atomic Power Co., 5 AEC 2 (1972); In the Matter of Consumers Power Co. (Palisades Plant), 4 AEC 563 (1971)); or if opposed, where the reactor has already gone critical on a prior occasion pursuant to a stipulation of the parties (In the Matter of Consolidated Edison Co. of New York, Inc., 6 AEC 587 (1973)), where testing would not require that the reactor go critical (In the Matter of Virginia Electric and Power Co., 6 NRC 808 (1977)), or where an identical unit on the same site has already been operating for some time, the Licensing Board has made a finding of serious power shortage in the area, and full power licensing hearings are almost complete (In the Matter of Wisconsin Electric Power Co. and Wisconsin Michigan Power Co., 4 AEC 959 (1972)); see also 4 AEC 951 (1972); see also 4 AEC 899 (1972) and 4 AEC 932 (1972).

6/ In Power Reactor Development Company, the Supreme Court confirmed that in enacting the AEA Congress "had the problem of safety uppermost in mind ...." Power Reactor Development Company v. International Union of Electrical, Radio and Machine Workers, AFL-CIO, 367 U.S. 396, 414 (1961). Citing that decision the Commission has stated that its regulations are intended to reflect the philosophy that "public safety is the first, last and a permanent consideration in decisions to license nuclear power plants. In the Matter of Consumers Power Co. (Midland Nuclear Power Plant, Units 1 and 2), ALAB-315, NRCI-76-2, 103-04.

II. SPECIAL CIRCUMSTANCES

A. The Diablo Canyon Licensing Proceeding Raises Legal And Policy Issues Of First Impression That Have Serious Safety Significance

No proceeding more clearly justifies waiver of the Commission's immediate effectiveness rule than does this one. It raises legal and policy questions of first impression under the Commission's seismic design regulations,[7/] under the various Commission policy statements and orders regarding litigation of TMI-related matters,[8/] under the various NUREGs outlining areas of safety concern and supplemental licensing requirements arising out of the accident,[9/] including the Commission's revised emergency planning regulations,[10/] and under the recently revised physical security regulations. The most significant of these are discussed below.

1. Seismic Safety And Physical Security

Currently pending before the Commission are various Petitions for Review of ALAB-644, the recent Appeal Board decision regarding seismic safety at Diablo Canyon. Similar petitions will undoubtedly be filed with the Commission should the Appeal Board eventually ap-

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7/ 10 C.F.R. §100, Appendix A.

8/ "Statement of Policy: Further Commission Guidance for Power Reactor Operating Licenses," CLI-80-____, Fed. Reg. 41738 (June 20, 1980); "Revised Statement of Policy: Further Commission Guidance for Power Reactor Operating Licenses," CLI-80-42, 45 Fed. Reg. 85236 (Dec. 18, 1980).

9/ NUREG-0660 ("TMI Action Plan"); NUREG-0694 ("TMI-Related Requirements for New Operating Licenses"); NUREG-0737 ("Clarification of TMI Action Plan Requirements").

10/ Final Rule, Emergency Response Planning, 45 Fed. Reg. 55402 (August 19, 1980).

prove the Diablo Canyon physical security plan. Both issues are uniquely important in this proceeding. Because the Appeal Board has yet to issue its security decision, we discuss only the seismic issue below.

Diablo Canyon was sited on the mistaken assumption that no active earthquake fault was near the plant when, in fact, a major earthquake fault waits offshore only 2 1/2 miles from the reactor site. When the United States Geological Survey determined that the newly discovered fault -- the Hosgri fault -- was capable of a Ms = 7.5 earthquake, the NRC Staff and PG&E developed a new set of seismic design criteria which purport to take into account the greater forces associated with the 7.5 Ms Hosgri earthquake. As it turns out, the new design criteria for the 7.5 Ms Hosgri earthquake are substantially the same as -- and in some instances less strenuous than -- the original criteria developed for a smaller design basis earthquake. This was accomplished, however, only by embracing assumptions and methodologies never before used in nuclear power plant design and contested by knowledgeable scientists, including the Commission's own expert consultants.[11/]

In view of the exceptional circumstances surrounding the seismic issues, Diablo Canyon should not be permitted to operate -- even at low power -- until the Commission has completed review of this issue. Operation at low power risks contamination of the facility's components and systems. (See Affidavit of Dale Bridenbaugh, attached). This unnecessary commitment of resources tends to foreclose the option of

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11/ See "Joint Intervenors' Petition for Review of ALAB-644," filed on July 6, 1981.

denying a full power license even though full review of the record may justify that action. In addition, it tips the scale away from further plant modification even though the Commission review may determine additional modifications to be necessary.[12/] Accordingly, the immediate effectiveness rule should be suspended pending Commission review of the seismic controversy.

2. Emergency Planning

At issue also in this proceeding is whether, in the aftermath of the TMI accident, the Commission will license a nuclear power plant for low power operations notwithstanding the conceded failure of the combined applicant, state, and local emergency response plans (1) to comply with even one of the Commission's sixteen emergency preparedness criteria[13/] and (2) to consider and allow for the effects of a major earthquake occurring simultaneously with a radiological emergency at the site.[14/] In its Partial Initial Decision,

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12/ The introduction of significant amounts of radioactive materials into the reactor for low power operation amounts to an irreversible, and irretrievable commitment of resources. While, in theory, the Commission could ignore this commitment in its future deliberations, in fact, it won't. In an analogous situation, the courts prohibited the NRC from issuing "interim licenses" to plutonium recycling facilities prior to completion of a generic environmental impact statement in order to protect the deliberative process and to preserve available options. Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission, 539 F.2d 824 (2d Cir. 1976). The logic of that case suggests that the Commission should not permit Diablo Canyon to operate at any level of power until it has issued a final decision on the safety issues discussed in this motion. See also, Calvert Cliffs Co-ordinating Committee, Inc. v. United States Atomic Energy Commission, 449 F.2d 109, 1115- 16 (D.C. Cir. 1971), cert. denied, 404 U.S. 942 (1972); Izaak Walton League of America v. Schlesinger, 337 F.Supp. 287 (D.D.C. 1971).

13/ 10 C.F.R. §50.57(b).

14/ In a recent decision, an NRC licensing board held that, for purposes of emergency planning, an applicant (footnote continued)

the licensing board adopted the applicant's unprecedented position that the Commission's emergency planning regulations -- enacted post-TMI and effective November 3, 1980 -- need not be considered in reviewing an application for a license to load fuel and conduct low power tests.[15/] The board based its conclusion on a document entitled "Emergency Preparedness," SECY-81-188 (April 22, 1981), a document which by its terms justifies no such conclusion. Indeed, that document -- which is not a regulation and has never been submitted for public notice and comment under the Administrative Procedure Act -- merely reaffirms the applicant's right under 10 C.F.R. §50.47(c) to demonstrate the insignificance of any noncompliance for the activity sought to be authorized. The document does not -- nor could it since it is not a regulation[16/] -- in any way alter either the effective date of the regulations or the obligations of the board to require a showing and make specific findings as to each regulatory standard not complied with. Ignoring the conceded deficiencies of existing applicant, state, and local plans under each of the sixteen

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(footnote continued)

> can at the very least be required to consider what they would do [in the event of an earthquake more severe than the SSE], and to make appropriate plans consistent with reasonable cost projections.

In the Matter of Southern California Edison Company (San Onofre Nuclear Generating Station, Units 2 and 3), Nos. 50-361-OL, 50-362-OL, Order (Passing on the Board's Motion on Issue Concerning Earthquakes and Emergency Planning), at 2-3 (July 29, 1981).

15/ Partial Initial Decision, at 22-24.

16/ See note 30 and accompanying text infra.

standards,[17] the board concluded that "a point by point examination of the planning standards of NUREG-0654, which would be necessary to obtain an exemption from full compliance with 50.47 under 50.47(c)(1), is no longer needed [prior to low power operation]."[18]

In addition, the licensing board impermissibly relied on generalized estimates of low probability of accidents or risk during low power operations in order to justify licensing in the absence of offsite emergency preparedness.[19] In so doing, it violated the basic principle of our regulatory process that even events with a low probability of occurrence must be anticipated and prepared for, a principle particularly applicable with respect to emergency planning.[20] The board's reliance on such estimates constitutes an attack on the Commission's regulations themselves in that its purpose is to permit operation of Diablo Canyon despite noncompliance with the regulations in question. Under the principle established in Vermont

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17/ See Joint Intervenors' Proposed Findings of Fact and Conclusions of Law, at 11-29.

18/ Partial Initial Decision, at 23.

19/ Id. at 24-35.

20/ Indeed, the Commission's emergency planning regulations are predicated upon the principle that "onsite conditions and actions, even if they do not cause significant off-site radiological consequences, will affect the way the various state and local entities react to protect the public from dangers, real or imagined, associated with [an] accident." Notice of Proposed Rulemaking, "Emergency Planning," Preamble, 44 Fed. Reg. 75167, 75169 (December 19, 1979)(emphasis added); "Report to Congress on Status of Emergency Response Planning for Nuclear Power Plants," NUREG-0755, at 1 (March 1981). Further, the Kemeny Commission concluded that "[o]ne must do everything possible to prevent accidents of this seriousness, but at the same time assume that such an accident may occur and be prepared for response to the resulting emergency." Report of the President's Commission on the Accident at Three Mile Island, at 17.

Yankee, such a rationale violates the Atomic Energy Act. In the Matter of Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-138, RAI-73-7, 520 528-29 (1973).[21/]

This is the first application of the Commission's revised emergency planning regulations in a contested licensing proceeding. The Joint Intervenors contend that the current state of emergency planning leaves the public with only the hope that an accident won't happen at low power, instead of the legally required protection of an adequate emergency plan. In view of the plainly significant safety issues raised, thorough Commission review should precede issuance of the low power license.

21/ In Vermont Yankee, the Appeal Board stated:

> [N]either the applicant nor the Staff should be permitted to challenge applicable regulations, either directly or indirectly. * * * Nor can they avoid compliance by arguing that, although an applicable regulation is not met, the public health and safety will still be protected. For, once a regulation is adopted, the standards it embodies represent the Commission's definition of what is required to protect the public health and safety.
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> [W]e reject at the outset two of the Staff's arguments in support of continued facility operations. The first is a factual one. .that there is a low probability of a loss-of-coolant accident in the time required for the reopened proceeding. That argument may be factually sound, but it constitutes an indirect challenge to the applicable criteria, in that it would permit licensing of a non-complying reactor. Consequently, we need not consider the factual question concerning the degree of probability of a LOCA in the next few months.

Id. at 528-29 (footnotes omitted)(emphasis added).

3. TMI-Related Contentions

This is also the first contested proceeding in which the Commission's policy guidance on litigation of TMI-related issues has been applied.[22/] The TMI accident challenged many of the assumptions upon which the licensing process had been based by exposing deficiencies in plant design and operating procedures that, before the accident, had been overlooked or judged as tolerable risks.[23/] Recognizing this, the Commission issued a series of TMI-related reports and policy statements culminating in additional licensing requirements published as NUREG-0737, "Clarification of TMI Action Plan Requirements," which were adopted by the Commission on December 18, 1980 in its Revised Statement of Policy, "Further Commission Guidance for Power Reactor Operating Licenses" (45 Fed. Reg. 85236). Because none of these documents was submitted for notice and comment pursuant to the Administrative Procedure Act ("APA"), the Commission

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22/ See note 8 supra.

23/ The TMI accident has been recognized as the most serious in the history of the United States commercial nuclear reactor program. Report of the President's Commission on the Accident at Three Mile Island, "The Need for Change: The Legacy of TMI" (Kemeny Commission, at 1 (October 30, 1979)). In testimony before the House Subcommittee on Environment, Energy and Natural Resources, Committee on Government Operations, Commissioner Bradford explained the implications of the TMI-2 accident for the licensing process:

> 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.

In Re Statement of Policy: Further Commission Guidance for Power Reactor Operating Licenses, ___ NRC ___, Separate Views of Commissioner Bradford, n. 1 (Nov. 3, 1980).

explicitly provided that "parties may challenge either the necessity for or sufficiency of the [NUREG-0737] requirements."[24/]

In disregard of this Commission directive, the licensing board rejected the majority of Joint Intervenors' TMI-related contentions in the low power test proceeding because they were "not directly related to NUREG-0737 requirements."[25/] When the Commission ruled once again on April 1, 1981 that contentions need not be limited to specific NUREG-0737 requirements,[26/] Joint Intervenors sought reconsideration of the previous denial of contentions,[27/] which request (supported by affidavit) was summarily denied by the licensing board.[28/]

The board's rejection of Joint Intervenors' TMI-related contentions was erroneous as a matter of fact and law. First, many of the rejected contentions were, in fact, related to specific NUREG-0737 requirements.[29/] Second, by citing NUREG-0737 as an inflexible

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24/ Revised Statement of Policy, at 8.

25/ Prehearing Conference Order, at 13-15 (February 13, 1981). The Board stated:

> [T]he 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.

Id.

26/ In the Matter of Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ___ NRC ___ (April 1, 1981).

27/ Joint Intervenors' Response in Opposition to NRC Staff's and Pacific Gas and Electric Company's Motion for Reconsideration, at 8-20 (April 22, 1981).

28/ Memorandum and Order (Denying Motions for Reconsideration) (April 30, 1981).

29/ See discussion in and affidavit attached to Joint Intervenors' filing cited at note 27 supra.

limitation on Joint Intervenors' substantive right to litigate safety issues relevant to the operation of Diablo Canyon, the board conferred on NUREG-0737 the status of substantive regulations. However, neither NUREG-0737 nor the Revised Policy Statement were subject to public notice and comment. Accordingly, the licensing board's ruling violates the APA provisions that preclude use of the NUREG-0737 criteria as binding norms in adjudicatory proceedings absent an opportunity for public notice and comment.[30/]

In addition, by arbitrarily limiting the scope of contentions to the specific requirements of NUREG-0737, the board has in effect denied the right of interested persons to a hearing on all relevant contentions going beyond that limitation. Such a limitation constitutes a direct violation of §189(a) of the AEA, which guarantees to all interested parties the right to a hearing upon request prior to issuance of a license.[31/]

Given the obvious significance of the legal and policy questions surrounding the Commission's TMI-related policy guidance and the

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30/ See, e.g., Chamber of Commerce of the United States v. Occupational Safety and Health Administration, ___ F.2d ___, (OSHA ¶24,596 at 30,191 (D.C. Cir. July 10, 1980); 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).

31/ See Brooks v. Atomic Energy Commission, 476 F.2d 924, 926 (D.C. Cir. 1973)(per curiam); Westinghouse Electric Corporation v. U.S. Nuclear Regulatory Commission, 598 F.2d 759, 772-72 (3d Cir. 1979).

licensing board's application of it in this proceeding, immediate review by the Commission of the board's ruling prior to low power operation is essential.

B. Joint Intervenors Will Be Denied Commission Review In The Absence Of A Waiver

If low power operations are allowed to commence, Joint Intervenors will in effect be deprived of any right to appeal because the proposed low power test program will be completed before appellate review can be obtained. Numerous courts have recognized harm of this sort -- the loss of a right to judicial review before the activity in dispute has been completed -- to require staying the order for which review is sought.[32/]

C. Suspending The Immediate Effectiveness Rule Will Not Unduly Prolong This Proceeding

Even if 10 C.F.R. §2.764 is waived, there appears to be adequate time to complete the proposed low power test program prior to the earliest possible date for full power licensing. As is described in the attached affidavit of nuclear consultant Richard Hubbard, the fuel loading, initial criticality, and low power testing, including the special low power tests, can be accomplished at Diablo Canyon within approximately 60 days, with an outside maximum elapsed time of approximately 90 days, after issuance of the low power operating license.[33/] Full power licensing of Diablo Canyon is not projected to occur, how-

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32/ See e.g., Isbrantsen Co. v. United States, 211 F.2d 51, 55 (D.C. Cir.), cert. denied, 347 U.S. 990, 74 S.Ct. 852 (1954); Dalmo Sales Co. v. Tysons Corner Regional Shopping Center, 308 F.Supp. 988 (D.D.C. 1970); Zenith Radio Corporation v. United States, 505 F.Supp. 216, 219 (U.S. Ct. Int. Trade 1980).

32/ Bridenbaugh Affidavit, at 6.

ever, until approximately January 1982.[34/] Thus, even subtracting the limited period of time necessary for thorough Commission review of the full record in this proceeding, there is more than ample time to complete low power testing without causing any delay in the full power licensing schedule.

III. CONCLUSION

The dual purpose of 10 C.F.R. §2.764 -- namely to reduce costly delays in licensing while providing some degree of Commission review -- will be better served in this case by waiver of the rule. Its application will not hasten the startup of full power operations by even a day, but would limit Commission review to less than ten days. On the other hand, waiver would allow full Commission review without the potential prejudice resulting from premature testing of the facility, and it would do so without any reduction in the duration of the test program or delay in full power operation, if indeed such activities are authorized by the Commission. Further, waiver of the rule would assure Joint Intervenors of their right to appellate review at a time when such review is meaningful -- before the low power test program has been instituted.

This is precisely the circumstance for which the Commission's waiver authority was intended. Several issues of overriding importance -- discussed only briefly herein -- are ripe for Commission review. A balanced, thorough, and impartial resolution of those issues can be assured only by waiver of the immediate effectiveness rule.

34/ NRC Monthly Report to Congress, dated July 29, 1981.

Accordingly, Joint Intervenors respectfully request the Commission to waive 10 C.F.R. §2.764 in its consideration of the licensing board's July 17, 1981 order authorizing the issuance of a license to load fuel and conduct low power tests at Diablo Canyon.

In the event that the Commission determines that this petition should be denied, Joint Intervenors request that it issue a stay of effectiveness of its decision under 10 C.F.R. §2.764(f)(2) for twenty days to provide a reasonable opportunity for any parties aggrieved by the Commission's decision to seek appropriate relief in the Court of Appeals for the District of Columbia Circuit. The Commission has previously provided such a period after issuance of a decision during which the parties could seek judicial review. See In the Matter of Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), Nos. STN 50-556, STN 50-557, Memorandum and Order on Certified Question: Release of Nuclear Reactor Study, ___ NRC, ___ CCH Nucl. Reg. Rept. ¶30,537 (December 8, 1980).

Dated: August 14, 1981

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of August, 1981, I have served copies of the foregoing JOINT INTERVENORS' REQUEST FOR WAIVER OF THE IMMEDIATE EFFECTIVENESS RULE, by sending them first class through the U.S. mail, postage prepaid, and hand delivered to those parties designated by an asterisk:

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