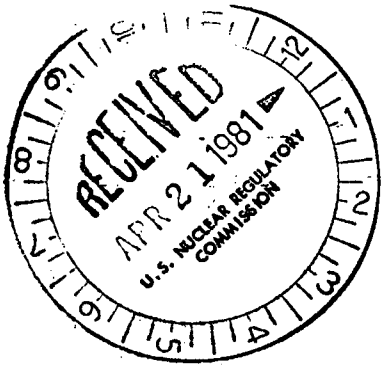

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
James L. Kelley, Chairman
Elizabeth B. Johnson
Cadet H. Hand

SERVED APR 20 1981

In the Matter of:

SOUTHERN CALIFORNIA EDISON COMPANY, ET AL.

(San Onofre Nuclear Generating Station, Units 2 and 3)

Docket Nos 50-361-OL
50-362-OL

April 17, 1981

MEMORANDUM AND ORDER
(Ruling on Motion for Protective Order)

On April 8, 1981, the Board issued a Memorandum and Order ruling on motions by the Intervenor FOE to compel further answers from the Applicants to numerous interrogatories. Our rulings were based upon the FOE motion papers and the Applicants' objections set forth along with its partial responses to the interrogatories. The governing Rule of Practice, 10 CFR 2.740(f), does not appear to contemplate a reply pleading to a motion to compel; the rule does not refer to replies and, more importantly, the person objecting has already had one opportunity to state his reasons. Nevertheless, it can be argued that an objecting party is entitled to state his reasons twice because he is responding to a "motion" to compel, and the separate rule governing motions generally, 10 CFR 2.730, authorizes answers thereto. In acknowledgment of this possible reading of the rules, we

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recently said that we "would entertain a pleading in opposition to a motion to compel, if timely filed."[1/]

On April 13, 1981, five days after our rulings on the disputed interrogatories, we received in the mail from the Applicants a lengthy motion for a protective order. The motion elaborates upon Applicants' previously expressed objections to the disputed interrogatories and adds several new objections. When issuing our rulings of April 8, the Board simply did not have in mind, as perhaps we should have, the possibility that we might receive a second set of objections from the applicants. Had we known they were forthcoming, we would have awaited their receipt and considered them before ruling.

Apart from the permissible (but not required) reading of the rules we have just sketched, and even assuming it may be a frequent practice, we see very little merit in giving an objecting party two bites at the apple in this context. To do so can seriously exacerbate delay problems in NRC proceedings. A party has 10 days to answer a motion, but five days are added when the motion is served by mail (10 CFR 2.710), and service of the answer is complete upon mailing. 10 CFR 2.712 (d)(3). This means that almost three weeks of delay can be added to the process of resolving a dispute over interrogatories when the objecting party pleads twice. And in cases like this one involving multiple rounds of interrogatories and frequent objections, allowance of this one extra pleading could add substantially to unnecessary delay. Whatever merit there may be in

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1/ Memorandum and Order of March 31, 1981, p. 8.

that approach when a case can be allowed to proceed in a leisurely fashion, it is certainly outweighed by the resultant delay where, as here, construction is almost complete and efforts are being made to conclude discovery so that the case can go to hearing.

To alleviate this delay problem, objecting parties are directed from now on to notify the Board Chairman's office by telephone if they intend to file an answer to a motion to compel. If no such message is timely received, the Board will proceed to rule on motions to compel as soon as practicable following their receipt. Beyond that, the Board is considering other measures it might adopt to expedite the remaining discovery in this proceeding, including the elimination of answers to motions to compel. Such measures will be discussed at the upcoming prehearing conference.

In the present circumstances, however, the Board has considered the Applicants' motion for protective order and reconsidered each of the pertinent rulings in our April 8 Order. For the reasons that follow, the Board declines to change its April 8 rulings, except in the few minor respects noted below.

Earthquakes and Emergency Planning. The Order of April 8 expressed the Board's tentative conclusion that the effects of earthquakes should be factored into emergency plans under 10 CFR 50.47 and Appendix E. We accordingly directed the Applicants to answer FOE's interrogatories about earthquake effects.

The Applicants' motion is largely devoted to presentation of their position that they have:

> "...no legal obligation under applicable NRC regulations to fashion plans to consider or mitigate the consequences of a major earthquake on the capability of Applicants and offsite assistance agencies to respond to a radiological emergency at SONGS 2 and 3." Motion, p. 5

We stated in the April 8 Order and we repeat here, for emphasis, that our present rulings on legal issues "are for purposes of discovery only, and are without prejudice to their subsequent reconsideration." At the upcoming prehearing conference we intend to call for briefs from the parties on several legal questions, including this one, that need to be addressed and decided before the hearing. In these circumstances, therefore, we will not speak to each of the points advanced in the Applicants' lengthy legal argument. Suffice it to say that they have not yet changed the Board's tentative view that possible earthquake effects are at least relevant to emergency planning, and may require that additional precautions be taken. It may be helpful, however, to discuss briefly two considerations that are influencing the Board's present thinking on this difficult legal question.

First, throughout their argument, the Applicants cast the earthquake-emergency planning issue in terms of whether they must engage in "multiple disaster" planning. As they acknowledge, neither that phrase nor any analogous term is used in NRC regulations. Motion, p. 2, note 1. The Applicants' definition of a "multiple disaster", as we understand it, can be roughly paraphrased as the simultaneous occurrence of a major earthquake (or other rarely

occurring disaster[2]) and a radiological emergency at the reactor arising from other causes. They characterize a "multiple disaster," so defined, as "relatively improbable." Id. We would go much further. Without in any sense questioning the need for guarding against the event, and whatever the mathematical odds may be, one can say that the likelihood of a major radiological emergency with serious offsite effects at a particular nuclear power plant is "relatively improbable." Similarly, even in a seismically active area, one can say that the chances of a major earthquake's occurring in the forty-year life of a nuclear plant and disrupting key elements of its emergency plan is "relatively improbable." That both of these "relatively improbable" events would occur at or about the same time--the Applicants' "multiple disaster"--seems virtually inconceivable. Such a remote contingency can be safely disregarded for any regulatory purpose.[3]

The Board's present concerns about earthquake effects arise not from "multiple disaster" scenarios, but from the possibility that a major earthquake might cause a radiological emergency at the site

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[2] We confine this discussion to earthquakes for the sake of simplicity and because earthquakes appear to have the greatest potential for major damage to a reactor.

[3] Conceivably, there are other natural disasters whose rate of frequency may be such that to postulate their happening concurrently with a radiological emergency would not be so far-fetched.

and also extensive damage to offsite transportation, communications and the like. One might respond that such concerns suggest an inpermissible attack on the rules because they postulate an earthquake exceeding the "Safe Shutdown Earthquake" the facilities have been designed to (and, by hypothesis, will) withstand. In this connection, the Applicants express their opposition "to use of any 'earthquake' which exceeds the 'Safe Shutdown Earthquake' established for SONGS 2 and 3 for any regulatory purpose related to this proceeding." Motion, p. 3, note 2.

Which brings us to the second matter we wish the parties to consider. It is true as a general proposition that the Commission's rules are not subject to attack in adjudicatory proceedings. 10 CFR 2.758. Once an Applicant shows, for example, that its facility has been designed to withstand the applicable Safe Shutdown Earthquake, an effort to postulate a more severe earthquake for design purposes would be foreclosed as an impermissible attack on the rules. But it does not necessarily follow that the accident assumptions contained in or underlying one safety rule are also applicable to other safety rules. As the former Atomic Energy Commission stated in Vermont Yankee Nuclear Power Corp., 8 AEC 809, 812 (1971):

> "Thus, the accident postulated in the ECCS criteria need not necessarily be regarded as the accident to be postulated for containment design purposes. Rather, as shown in our discussion of defense-in-depth...the use of successively increasing conservatism in postulated accidents contributes an added measure of protection to the public health and safety."

Were the Vermont Yankee principle to be found applicable in the present case, the earthquake hazards found to exist for SONGS design

purposes might not necessarily be the maximum hazards to be postulated for emergency planning purposes. Whether that principle should apply here might depend on the various factors, such as the different purposes to be served by the two rules, and comparative costs involved in design changes and emergency plans.

In addition to their legal argument, the Applicants now contend that FOE's earthquake interrogatories are not within its emergency planning contention admitted for discovery purposes. The thrust of that contention is toward coordination of emergency plans; earthquakes are not mentioned.

The Board agrees that FOE's emergency planning contention does not encompass its earthquake questions. Neither, for that matter, do the GUARD contentions. However, the Board has the authority to inquire into a matter on its own motion when it concludes that a serious safety issue is presented. 10 CFR 2.760a. See also Consolidated Edison Co. of New York (Indian Point, Unit 3), 8 AEC 7, 9 (1974). The Board has not yet reached such a conclusion in this instance. We believe, however, that a serious question may be presented and that the answers to the FOE earthquake interrogatories will assist us in determining whether to pursue these concerns further.

There does not appear to be any question of undue burden on the Applicants in requiring answers to FOE's earthquake questions. From what has been said on the subject, we gather that a simple "no" will answer most of these questions. Accordingly, Applicants are directed to answer FOE interrogatories 1-22 and 77(b). Upon reconsideration, it appears that the NRC Staff is in a better position to respond to

interrogatory 122, and it is directed to do so.[4/] Promptly following receipt of the Staff's answer, the Applicants are to answer Interrogatory 123.

Size of Emergency Planning Zones--Interrogatories 23-30. The Board has considered the Applicants' further objections to these interrogatories and sees no reason to change its disposition of them in its April 8 Order. As in the case of the earthquake problem, our tentative views on the legal issues involved here will be reconsidered following receipt of views from all parties and before the hearing.

Coordination of Public Information Programs--Interrogatories 103 and 104. Again, we see no reason to alter our disposition of these interrogatories in our April 8 Order. It is generally true, as we have noted previously and as the Applicants point out here and elsewhere, that the sufficiency of NRC regulations may not be attacked in adjudicatory proceedings. But the party relying on that principle will prevail only if the Board agrees with the party's interpretation of the regulation. At this juncture, it appears that the Board and the Applicants are at variance on some questions of interpretation.

Information, Plans or Studies by Offsite Agencies--Interrogatories 27-30, 64-69, 77, 78, 81, 82, 85-87, 109-111. These interrogatories ask that the Applicants provide FOE with various kinds of information and documents from "offsite assistance

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4/ The Board finds that an answer from the Staff to this interrogatory is necessary to a proper decision and that it is not reasonably obtainable from any other source. 10 CFR 2.720(h)(2)(ii).

agencies", such as State, county and local agencies. Our Order of April 8 directed the Applicants to respond, with the exception of interrogatories 109-111, which we found to be outside the scope of admitted contentions.

Applicants resist these interrogatories principally on the grounds that these assistance agencies are not within their control, and that they have no significant knowledge about what these agencies may be doing to meet their "independent duties" in the emergency planning area. The extent of an Applicants' coordination responsibilities and whether they have been met are put in issue by the admitted contentions in this case and may be more fully explored at the hearing. While the Applicants obviously do not have "control" over the State of California and the political subdivisions near the facility, the Applicants will have some obligation to establish working relationships with interested outside agencies and to maintain a thorough knowledge of their interrelated emergency plans. With these considerations in mind, we adhere to the view that the information sought by these interrogatories, if it exists, should be available to and produced by the Applicants. The cases cited by the Applicants to the effect that parties responding to interrogatories are not required to engage in extensive research are inapposite.

Sweeping Requests for Information--Interrogatories 72, 73, 92 and 93. The Applicants have a valid complaint about the sweeping wording of these interrogatories. However, we have already accommodated this complaint in our April 8 Order, which we reaffirm in this respect.

Allegedly Privileged Material. As we said in our April 8 Order, which we reaffirm, it seems unlikely that material of the kind called for here would be privileged from disclosure. Nevertheless, the Applicant should submit to the Board for its review copies of any materials it seeks to withhold as privileged.

Other Matters and Summary. Our April 8 Order directed the Applicants to provide a fuller answer to interrogatory 24 of FOE's fifth set of interrogatories. Applicants have supplied a supplemental response, except to subpart (d), calling for the names of expected witnesses at the hearing. The names of expected witnesses should be provided.

The Applicants in their motion discuss certain procedural and other issues which, in light of our April 8 Order, we find it unnecessary to discuss.

By way of summary, the April 8 Order is hereby reaffirmed, except as specifically noted in this Order--i.e., we have shifted to the Staff the burden of answering interrogatory 122, and we have narrowed the Applicants' obligation in answering number 24 of FOE's fifth set of interrogatories. We have directed all parties to give oral notice to the Board if they propose to file an answer to a motion to compel.

The Applicants motion for a protective order is denied. However, the Applicants time to serve answers to the interrogatories in question is extended to May 1, 1981.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

James L. Kelley, Chairman

Dated at Bethesda, Maryland
this 17th day of April 1981.