6/5/81

DAVID R. PIGOTT
EDWARD B. ROGIN
SAMUEL B. CASEY
JOHN A. MENDEZ
Of ORRICK, HERRINGTON & SUTCLIFFE
A Professional Corporation
600 Montgomery Street
San Francisco, CA 94111
Telephone: (415) 392-1122

CHARLES B. KOCHER
JAMES A. BEOLETTO
SOUTHERN CALIFORNIA EDISON COMPANY
P. O. Box 800
2244 Walnut Grove Avenue
Rosemead, CA 91770
Telephone: (213) 572-1900

Attorneys for Applicants,
Southern California Edison Company
and San Diego Gas & Electric Company

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	Docket Nos. 50-261 OL 50-362 OL
SOUTHERN CALIFORNIA EDISON COMPANY, ET AL.	MEMORANDUM IN SUPPORT OF ADMISSIBILITY OF FINAL SAFETY ANALYSIS REPORT
(San Onofre Nuclear Generating Station, Units 2 and 3)	

INTRODUCTION

In this proceeding, Applicants will seek to introduce into evidence the Final Safety Analysis Report ("FSAR") filed in conjunction with its license application. The FSAR must be submitted with the license application. 10 C.F.R. § 50.34(b). It is clearly the intention of this

requirement that the FSAR be a part of the administrative record of license applications. A strict application of traditional evidentiary rules, whether administrative standards or the Federal Rules of Evidence, leads to the conclusion that the FSAR should be admitted into evidence in this proceeding.

ARGUMENT

A. The FSAR Is Part Of The License Application And As Such Must Be Admitted Into Evidence.

It is clear from the very requirements of the application for an operating license that the FSAR is an integral part of the licensing process and subsequent administrative proceedings. 10 C.F.R. § 50.30(d) (1958, as amended 1978) states:

> The holder of a construction permit for a production or utilization facility shall, at the time of submission of the final safety analysis report, file an application for an operating license or an amendment to an application for a license to construct and operate a production or utilization facility for the issuance of an operating license, as appropriate.

The submission of the FSAR is a part of the license application process. It is a required element of the application for a license to operate. At 10 C.F.R. § 50.34(b) (1968, as amended 1978):

> Each application for a license to operate a facility shall include a final safety analysis report. The final safety analysis report shall include information that describes the facility, presents the design

> bases and the limits on its operation, and presents a safety analysis of the structures, systems, and components and of the facility as a whole, and shall include the following:
> . . .

The United States Court of Appeals for the District of Columbia Circuit has recognized the FSAR as part of the application and noted that an earlier version of the regulations (10 C.F.R. 2.743(g) (1962)) required that in any proceeding involving an application, that application must be offered in evidence. The court went on to state:

> Even in the absence of such a provision, we do not see how reliability can be established prior to at least conditional admission in a proceeding in which reliability is the ultimate issue. Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1094 (D.C. Cir. 1974).

It would be contradictory to deny the admission of the FSAR into evidence given the requirement of its preparation and the amount of time and effort put into its evaluation and completion by the staff of the NRC.

B. The FSAR Is Relevant, Material, Reliable and Not Repetitious.

The standard for admissibility of evidence in ASLB proceedings is found at 10 C.F.R. § 2.743(c) (1962, as amended 1978):

> Only relevant, material, and reliable evidence which is not unduly repetitious will be admitted. Immaterial or irrelevant parts of an admissible document will be segregated and excluded so far as is practicable.

There can be no question that the FSAR is relevant, material and unduly repetitious. Its reliability, as noted by the D.C. Circuit, is a question very much at the heart of the proceeding. To prevent its admission into evidence would prevent the review which serves to shape the eventual decision while evaluating FSAR reliability. Technical objections to a failure to identify and qualify each participant and each step in the process of creating this comprehensive report frustrate the purposes of the regulatory requirement of FSAR submission and this very proceeding. In the opinion of the D.C. Circuit, an objection to admission of the FSAR for failure to lay a foundation of the professional qualifications of all who worked on the document was not only properly denied, but was, in fact, "specious." Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1094 (D.C. Cir. 1974). There is no merit to the objection that the FSAR does not meet the admissibility requirements of 10 C.F.R. § 2.743(c). Even more traditional evidentiary steps are met.

C. The FSAR Can Be Sufficiently Authenticated To Permit Its Admission Into Evidence.

The requirements for the authentication of the FSAR have been spelled out in Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-83, 5 AEC 54, 369 (1972), aff. sub nom, Union of Concerned Scientists v. AEC, 499 F.2d 1069 (D.C. Cir. 1974).

> The admissibility of the FSAR into the hearing record need be tested only by its identification as the document prepared pursuant to Commission Regulations and submitted to the Commission as a part of the application. So long as the FSAR meets such an identification test it is admissible.

The decision of the D.C. Circuit, cited above, affirms this method of authentication of the FSAR.

This approach is also consistent with the Federal Rules of Evidence, which are more strict in their requirements than those generally applicable to ASLB proceedings. Under Federal Rule of Evidence 901(a) the requirement of authentication of a document is "satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." In the illustrations in subsection (b) of that rule, there are two which would apply to authenticate the FSAR. Rule 901(b)(1) permits authentication by the testimony of a witness with knowledge that a matter is what it claims to be. Certainly a statement by one of the individuals responsible for supervising preparation of the FSAR would be sufficient testimony that the document was in fact the Final Safety Analysis Report submitted to the Commission with the license application. In addition, under Rule 901(b)(7), the FSAR could also be authenticated in the manner of a public record or report. Under illustration (7), a document can be authenticated by production of "[e]vidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a

public office, . . . is from the public office where items of this nature are kept." As noted above, the FSAR is required to be filed with the NRC along with the license application. Cases interpreting such authentication of "public records" include within the scope of this rule reports which are required by law or regulation to be filed, though prepared by private individuals. U.S. v. McNair, 341 F. Supp 919 (E.D. Pa. 1972), citing Sternberg Dredging Co. v. Moran Towing & Transp. Co., 196 F. 2d 1002 (2nd Cir. 1952).

Neither the administrative interpretation of authentication requirements for the FSAR nor the Federal Rules of Evidence require the testimony of each individual who participated in the creation of the FSAR over the several years of its drafting and revision.

C. The FSAR Is Admissible Despite Hearsay Objections.

An objection to admission of the FSAR on hearsay grounds would not prevent its use in NRC proceedings. Hearsay evidence is generally admissible. Duke Power Co. (Catawba Nuclear Station, Unit 1 and 2), ALAB - 355, 4 NRC 397, 411-12 (1976); citing Richardson v. Perales, 402 U.S. 389, 407-410 (1971). In light of the lengthy agency-supervised process which created the FSAR, a "reliability" or hearsay objection has very little merit.

Under the Federal Rules of Evidence, which are stricter than the rules applicable in administrative

proceedings, the FSAR is admissible. Rules 803(24) and 804(b)(5) provide a general exception to the hearsay rule under conditions of guarantees of trustworthiness, whether the declarant is available or not. The rules include specific conditions designed to ensure that the use of the evidence is fair and reliable. The FSAR meets these requirements. Trustworthiness is circumstantially guaranteed by the entire process of preparing the FSAR and its comprehensive and continuing review by the NRC staff. The facts contained within the FSAR are certainly material, in fact critical, to the NRC's evaluation of the license application. The FSAR is more probative on these issues, given the long history of its preparation, than other evidence. Admission of the FSAR serves the interests of justice by facilitating the intent of the regulations governing the license application and requiring the submission of the FSAR. As for the Rules requirement of notice, the proposed admission of the FSAR has been assumed by all parties from the very beginning of its preparation, and certainly sufficiently in advance of the hearing. As its preparation involved the work of many individuals over a long period of time, details on each declarant would be impossible to provide, but certainly there has been no attempt to hide the facts of preparation of this document. The FSAR is precisely the type of document which should be admitted

because of its very nature, despite technical hearsay objections.

E. The FSAR Satisfies Any Requirements For The Production Of The Original Document Or Best Evidence.

There can be no credible objection that a copy of the FSAR submitted to the Commission, whether a true "original" or not, is relevant, material, reliable and not repetitious. Even applying the requirement of an original as specified in Federal Rule of Evidence 1002, there would be no block to the use and admission of the FSAR. Although Rule 1002 requires the production of an original, Rule 1003 permits a duplicate to substitute for an original unless there is some genuine question raised as to authenticity or it would be unfair under the circumstances to permit the use of a duplicate. Neither of these circumstances would apply to prevent the admissibility of any duplicate of the FSAR as submitted to the Commission.

CONCLUSION

It is the clear intent of the regulatory requirements that the FSAR be submitted along with the license application. It should be admitted in these proceedings and be subject to review and analysis. The rules of evidence, whether those applicable in administrative proceedings or their strict Federal counterparts, support admission of the FSAR into evidence. The Final Safety

Analysis Report should be admitted into evidence and any objections to its admission should be overruled.

DATED: June 5, 1981

DAVID R. PIGOTT
EDWARD B. ROGIN
SAMUEL B. CASEY
JOHN A. MENDEZ
Of ORRICK, HERRINGTON & SUTCLIFFE
A Professional Corporation

CHARLES R. KOCHER
JAMES A. BEOLETTO
SOUTHERN CALIFORNIA EDISON COMPANY

By JOHN A. MENDEZ
JOHN A. MENDEZ
One of Counsel for Applicants
Southern California Edison Company and San Diego Gas & Electric Company

PROOF OF SERVICE BY MAIL

I declare that:

I am employed in the City and County of San Francisco, California.

I am over the age of eighteen years and not a part to the within entitled action; my business address is 600 Montgomery Street, 10th Floor, San Francisco, California 94111.

On June 5, 1981, I served the attached MEMORANDUM IN SUPPORT OF ADMISSIBILITY OF FINAL SAFETY ANALYSIS REPORT in said cause, by placing a true copy thereof enclosed in the United States mail at San Francisco, California addressed as follows:

James L. Kelley, Chairman
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Robert Dietch, Vice President
Southern California Edison Company
P. O. Box 800
2244 Walnut Grove Avenue
Rosemead, CA 91770

Dr. Cadet H. Hand, Jr.
Administrative Judge
c/o Bodega Marine Laboratory
University of California
P. O. Box 247
Bodega Bay, CA 94923

Alan R. Watts, Esq.
Rourke & Woodruff
California First Bank Building
10555 North Main Street
Santa Ana, CA 92701

Mrs. Elizabeth B. Johnson
Administrative Judge
Oak Ridge National Laboratory
P. O. Box X, Building 3500
Oak Ridge, Tennessee 37830

Lawrence J. Chandler, Esq.
Edward G. Ketchen, Esq.
Office of the Executive Legal Director
U.S. Nucelar Regulatory Commission
Washington, D. C. 20555

David W. Gilman
Robert G. Lacy
San Diego Gas & Electric Company
P. O. Box 1831
San Diego, CA 92112

Mr. Lloyd von Haden
2089 Foothill Drive
Vista, CA 92083

Mrs. Lyn Harris Hicks
G U A R D
3908 Calle Ariana
San Clemente, CA 92801

James F. Davis
State Geologist
Division of Mines and Geology
1416 Ninth Street, Room 1341
Sacramento, CA 95814

Richard J. Wharton, Esq.
University of San Diego
School of Law
Alcala Park
San Diego, CA 92110

Phyllis M. Gallagher, Esq.
1695 W. Crescent Avenue, Suite 222
Anaheim, CA 92801

Janice E. Kerr, Esq.
J. Calvin Simpson, Esq.
Lawrence Q. Garcia, Esq.
California Public Utilities Commission
5066 State Building
San Francisco, CA 94102

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

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Richard K. Hoefling, Esq.
U.S. Nuclear Regulatory Commission
Office of the Exeuctive Legal Director
Washington, D. C. 20555

Charles E. McClung, Jr., Esq.
23521 Paseo de Valencia
Suite 308
Laguna Hills, CA 92653

JOHN A. MENDEZ

JOHN A. MENDEZ
One of Counsel for Applicants
SOUTHERN CALIFORNIA EDISON COMPANY
and SAN DIEGO GAS & ELECTRIC CO.