

4/9/81

1 DAVID R. PIGOTT
2 SAMUEL B. CASEY
3 JOHN A. MENDEZ
4 CHICKERING & GREGORY
5 Three Embarcadero Center
6 Twenty-Third Floor
7 San Francisco, California 94111
8 Telephone: (415) 393-9000

6 CHARLES R. KOCHER
7 JAMES A. BEOLETT
8 SOUTHERN CALIFORNIA EDISON COMPANY
9 P. O. Box 800
10 2244 Walnut Grove Avenue
11 Rosemead, California 91770
12 Telephone: (213) 572-1900

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

12 UNITED STATES OF AMERICA
13
14 NUCLEAR REGULATORY COMMISSION
15
16 BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

17 In the Matter of)
18)
19) Docket Nos. 50-361 OL
20) 50-362 OL
21 SOUTHERN CALIFORNIA EDISON)
22 COMPANY, et al.,)
23 (San Onofre Nuclear Generating)
24 Station, Units 2 and 3).)
25) MEMORANDUM OF POINTS AND
26) AUTHORITIES OF SOUTHERN
27) CALIFORNIA EDISON COMPANY
28) AND SAN DIEGO GAS & ELECTRIC
COMPANY IN SUPPORT OF MOTION
FOR PROTECTIVE ORDER
IN RESPONSE TO FOE et al.'s
MOTION TO COMPEL FURTHER
ANSWERS TO INTERROGATORIES.

25 INTRODUCTION

26 On January 19, 1981, Intervenor Friends of the Earth,
27 et al. (hereafter "FOE") served by mail its "Sixth Set of Inter-
28 rogatories to Southern California Edison" (hereafter "FOE Sixth

18104220129

1 Set"). On March 10, 1981, Southern California Edison Company and
2 San Diego Gas & Electric Company (hereafter "Applicants") timely
3 served by mail their "Response and Objections of Southern
4 California Edison Company to Intervenor FOE et al.'s Sixth Set
5 of Interrogatories" (hereafter the "Response"). On March 25,
6 1981, FOE served by mail a motion (hereafter "FOE Motion") to
7 compel further answers from Southern California Edison Company
8 (hereinafter "SCE") to FOE Sixth Set Interrogatories Nos. 1-30,
9 35, 43, 45, 64-69, 71, 73, 77, 78, 81, 82, 85-87, 93, 98-100,
10 103, 104, 109, 111, 117, 122, and 123 (hereafter the "Disputed
11 Interrogatories").

12 For the reasons fully set forth below, Applicants
13 submit that the answers and objections to the Disputed
14 Interrogatories contained the Response are sufficiently complete
15 and supported by law to warrant entry of the requested protective
16 order pursuant to 10 C.F.R. §§ 2.740(c) and (f)(2) eliminating
17 any obligation Applicants may otherwise have to provide further
18 answers to the Disputed Interrogatories.

19 I.

20 MULTIPLE DISASTER PLANNING IS NOT A PROPER SUBJECT
21 OF DISCOVERY IN THIS PROCEEDING (Disputed
22 Interrogatories Nos. 1 through 22, 77(b), 122 and 123).

23 Multiple disaster planning^{1/} is not required by Nuclear

24 ^{1/} The term "multiple disaster" or any analogous term is not
25 used in NRC regulations. For purposes of this discussion,
26 the term "multiple disaster" refers to the relatively im-
27 probable concurrence of a natural phenomenon with potentially
28 serious consequences on the operation of a nuclear power
plant or the response capabilities of offsite assistance
agencies (e.g. floods, tornadoes, hurricanes, tidal waves, or
earthquakes) and an on-going radiological emergency at a
nuclear power plant.

1 Regulatory Commission regulations. Nonetheless, FOE has filed
2 twenty-five interrogatories (Disputed Interrogatories Nos. 1
3 through 22, 77(b), 122 and 123) inquiring into planning for a
4 "major earthquake"^{2/} concurrent with a radiological emergency
5 related to the operation of San Onofre Nuclear Generating
6 Station, Units 2 and 3 (hereafter "SONGS 2 and 3"). Applicants
7 have declined to answer these interrogatories on the ground that
8 they have no legal obligation under applicable NRC regulations^{3/}
9 to consider the potential impacts of any catastrophic natural
10 phenomenon, including a major earthquake, on radiological
11 emergency response capability for SONGS 2 and 3. Accordingly,
12 Applicants now seek a protective order under 10 C.F.R. §§
13 2.740(c) and (f)(2) on the ground that it would be burdensome and
14 oppressive to require Applicants to provide information that
15 cannot be relevant to any contention that is or may properly be
16 admitted in this proceeding.

17 / / /

18 / / /

21 ^{2/} The term "major earthquake", as defined by FOE in the FOE
22 Sixth Set, refers to an earthquake which exceeds the "Safe
23 Shutdown Earthquake" assigned for SONGS 2 and 3 in NUREG-
24 0712, Safety Evaluation Report, Office of Nuclear Reactor
25 Regulation, Nuclear Regulatory Commission, Related to the
26 Operation of San Onofre Nuclear Reactor Regulation, Nuclear
27 Regulatory Commission, Related to the Operation of San Onofre
28 Nuclear Generating Station, Units 2 and 3, February 6,
1981. See 10 C.F.R., Part 100, Appendix A.III.(c). The
Applicants oppose the use of any "earthquake" which exceeds
the "Safe Shutdown Earthquake" established for SONGS 2 and 3
for any regulatory purpose related to this proceeding.

^{3/} Applicable NRC regulations on emergency planning are set
forth in 10 C.F.R. §§ 50.33(g), 50.47, 50.54(q)(r)(s)(t) and
(u), and Part 50, Appendix E.

1
2 A. STATEMENT OF CASE.

3 By Order dated January 27, 1978, the Board admitted the
4 following emergency planning contentions for discovery purposes:

5 FOE Contention:

6 "The Applicants have not complied with 10
7 C.F.R. Part 50, Appendix E regarding emergency
8 plans since because of the jurisdictional diversity
9 of the several state and local agencies involved
10 and their inadequate fundings and staffing, approp-
11 riate and coordinated emergency plans cannot be
12 developed. An operating license should not be
13 granted for SONGS 2 & 3 because the various emer-
14 gency response plans are so complex, overlapping,
15 and difficult to implement that in the event of a
16 nuclear accident the safety of persons in the
17 surrounding areas will be imperiled."

18 GUARD Contentions:

19 "The applicants have not complied with 10
20 C.F.R. Part 50, Appendix E regarding emergency
21 plans since, because of inadequate funding the
22 staffing of the several state and local agencies
23 involved, appropriate and coordinated emergency
24 plans cannot be developed."

25 "As a consequence of increases in freeway use
26 in recent years and the influx of transient and
27 resident individuals into the exclusion area and
28 low population zone, there is no longer assurance
that effective arrangements can be made to control
traffic or that there is a reasonable probability
protective measures could be taken on behalf of
individuals in these areas including, if necessary,
evacuation, particularly considering the unique
geographic constraints in these areas; thus,
applicants do not comply with 10 C.F.R. § 100.3(a)
or (b)."

It can be readily seen that none of these contentions address the
need to consider the potential impact of a major earthquake on
radiological emergency response capability for SONGS 2 and 3.

On February 19, 1981, FOE served the FOE Sixth Set
consisting of 123 interrogatories. Twenty-five of these interro-
gatories (Interrogatory Nos. 1-22, 77(b), 122 and 123) requested

1 information pertaining to the impact of a "major earthquake" on
2 the ability of Applicants and offsite assistance agencies to
3 respond to a radiological emergency at SONGS 2 and 3.

4 On March 10, 1981, Applicants objected to these inter-
5 rogatories and declined to answer on the ground that Applicants
6 have no legal obligation under applicable NRC regulations to
7 fashion plans to consider or mitigate the consequences of a major
8 earthquake on the capability of Applicants and offsite assistance
9 agencies to respond to a radiological emergency at SONGS 2 and 3.

10 Applicants now seek a protective order on the ground
11 that it would be burdensome and oppressive to provide the re-
12 quested information because such information cannot lead to
13 production of evidence that could be relevant to any of the
14 current contentions, or any contention that may properly be
15 admitted to this proceeding.

16 B. STATEMENT OF FACTS.

17 In order to fully understand Applicants' position, it
18 is necessary to review the development of applicable NRC regula-
19 tions and guidance, as well as the apparent genesis of Inter-
20 venors' misplaced presumption that multiple disaster planning is
21 a proper subject of discovery in this proceeding.

22 1. NRC Regulations and Guidance.

23 A chronicle of the development of the applicable NRC
24 regulations and guidance reveals that multiple disaster emergency
25 planning has never been proposed or considered by the Nuclear
26 Regulatory Commission, and is not now being required or requested
27 by the NRC Staff.

28 / / /

1 At all relevant times, the Commission has required each
2 applicant for an operating license to include in its Final Safety
3 Analysis Report plans for coping with emergencies. 10 C.F.R.
4 § 50.34(b)(6)(v). The items to be included in these plans are
5 specified in 10 C.F.R., Part 50, Appendix E. At no time, has
6 this appendix ever required development of information necessary
7 to respond to a multiple disaster.

8 As originally promulgated in 1970, the appendix re-
9 quired Applicants to provide "sufficient information to assure
10 the compatibility of proposed emergency plans with facility
11 design features, site layout, and site location with respect to
12 such considerations as access routes, surrounding population
13 distributions, and land use." Former 10 C.F.R., Part 50, Ap-
14 pendix E.II. At the same time, the Commission developed a
15 document entitled "Guide to the Preparation of Emergency Plans
16 for Production and Utilization Facilities" to help applicants
17 "establish adequate plans required pursuant to §50.34 and this
18 appendix for coping with emergencies." Former 10 C.F.R., Part
19 50, Appendix E. note 1. Nothing in this guide suggested that
20 Applicants needed to engage in multiple disaster planning.

21 In March, 1977, the Commission published for use and
22 public comment revised guidance to provide "more complete guid-
23 ance in developing the emergency plans required in the final
24 safety analysis report." Regulatory Guide 1.101 (Rev. 1),
25 "Emergency Planning For Nuclear Power Plants, March, 1977", at
26 p.1. The guide purported to describe "a method acceptable to the
27 NRC Staff for complying with the Commission's regulations with
28 regard to the content of emergency plans for nuclear power

1 plants, primarily in the FSAR Stage." Id. This guidance did
2 suggest that a nuclear power plant operator should place plant
3 personnel on alert and possibly notify offsite emergency support
4 organizations in the event of "severe natural phenomena in the
5 plant environment such as a flood, earthquake, tsunami, hurricane
6 or tornado." Id. p. 4. However, nothing in this regulatory
7 guide stated or implied that applicants needed to engage in
8 multiple disaster planning. 4/

9 At the same time, the Commission published additional
10 guidance "to provide a common reference and guidance source for
11 state and local governments in the preparation of radiological
12 emergency response plans in support of fixed nuclear facilities",
13 as well as for "federal agency personnel engaged in the review of
14 such State and local government plans." NUREG-75/111, Guide and
15 Checklist for Development and Evaluation of State and Local
16 Government Radiological Emergency Response Plans in Support of
17 Fixed Nuclear Facilities, March, 1977, at p. 2. Nothing in this
18 guidance suggested that State or local governments needed to
19 engage in multiple disaster planning.

20 In August, 1978, the NRC Staff concurred in the State
21 and local radiological emergency response plans for the area
22 surrounding San Onofre Nuclear Generating Station. By letter
23 dated October 26, 1976, the NRC Staff had already notified the
24 Applicants that the on-site emergency plan for SONGS, Unit 1,
25

26
27 4/ The guidance did suggest consideration of "inclement
28 weather". However, the Applicants believe that the term
"inclement weather" cannot be properly construed to include a
major earthquake.

1 complied with applicable NRC regulations and guidance. None of
2 these plans, which were concurred in and otherwise approved by
3 the NRC Staff, contained multiple disaster planning.

4 On August 16, 1978, the Commission proposed for public
5 comment an amendment to Appendix E, in response to an Appeal
6 Board decision prohibiting licensing consideration of evacuation
7 plans for protection of persons outside the low population
8 zone. 43 Fed. Reg. 37473 et seq; see New England Power Company,
9 et al., ALAB-390, 5 NRC 733 (1977). In its prefatory remarks to
10 the proposed amendment, the Commission specified the "physical
11 characteristics in the vicinity of the site" which are relevant
12 to "the evaluation of protective actions which may be taken in
13 the event of an accidental release of radioactive material."
14 43 Fed. Reg. 37474. The characteristics specified by the Commis-
15 sion were the "numbers and proximity to the site boundary of
16 resident and transient persons and the relative speed which
17 warnings can be communicated to them, the availability and
18 character of evacuation routes and means of transportation, the
19 availability of locations of structures suitable for sheltering
20 people, and the presence of institutions (such as hospitals,
21 missing homes, and schools) which may require special emergency
22 planning arrangements". Id. Significantly, no consideration of
23 the potential impact of catastrophic natural phenomena on these
24 characteristics was stated or implied, much less required as a
25 matter of policy, by the Commission.

26 In December, 1978, the Commission published for comment
27 additional guidance entitled NUREG-0396, "Planning Basis for the
28 Development of State and Local Government Radiological Emergency

1 Response Plans in Support of Light Water Nuclear Power Plants."

2 The purpose of the guidance was to "provide a basis for Federal,
3 State and local government emergency preparedness organizations
4 to determine the appropriate degree of emergency response plan-
5 ning efforts in the environs of nuclear power plants." Id., at
6 p. 1. On October 29, 1979, the Commission adopted this addi-
7 tional guidance as NRC policy. 44 Fed. Reg. 61123. Effective
8 November 3, 1980, the emergency planning zones recommended by
9 this guidance became an NRC regulation. 10 C.F.R. §§ 50.33(g),
10 50.47(c)(2), Part 50, Appendix E, n.2; 45 Fed. Reg. 55402 (August
11 19, 1980). This guidance purported "not to change the require-
12 ments for emergency planning.", but did purport to set a "bound
13 on the emergency planning problem" Id., at 14. Accordingly, it
14 was stated therein that local conditions such as demography,
15 topography and land use characteristics, access routes, juris-
16 dictional boundaries, and arrangements with the nuclear facility
17 operator for notification and response assistance should be
18 considered. However, nowhere is it stated or implied in this
19 guidance that multiple disaster planning was required or recom-
20 mended.

21 On July 17, 1979, the Commission published an "Advance
22 Notice of Proposed Rulemaking on the Adequacy and Acceptance of
23 Emergency Planning Around Nuclear Facilities." 44 Fed. Reg.
24 41483. In the Notice, the Commission requested written public
25 comment on a number of issues, including objectives for effective
26 plans, acceptance criteria for State/local emergency plans, NRC
27 concurrence in State and local plans as a requirement for is-
28 suanace of an operating license or continued operation of a

1 nuclear facility, and coordination between the licensee plan and
2 State and local plans. However, the issue of whether multiple
3 disaster planning should be required of nuclear power plant
4 operators or offsite assistance agencies was not expressly or
5 implicitly raised by the Commission in this Notice, nor to
6 Applicants' knowledge were any comments received suggesting such
7 consideration.

8 On September 14, 1979, the Commission published for
9 interim use and comment guidance on the four classes of Emergency
10 Action Levels to be established in lieu of emergency action
11 levels established in prior NRC guidance. NUREG-0610, "Draft
12 Emergency Action Level Guidelines for Nuclear Power Plants,
13 September 1979." In November, 1980, the Commission published
14 final guidance on this subject as Appendix 1 to NUREG-0654/FEMA-
15 REP-1, Criteria for Preparation and Evaluation of Radiological
16 Emergency Response Plans and Preparedness in Support of Nuclear
17 Power Plants (Rev.1), hereafter "NUREG-0654". This guidance,
18 among other things, requires notice of declaration of progres-
19 sively serious emergency classifications be given to State or
20 local authorities depending on the severity of natural phenomenon
21 being projected or being experienced beyond usual levels.
22 Significantly, nothing in the guidance states or implies an
23 obligation to engage in multiple disaster planning beyond the
24 requirement of notifying offsite assistance authorities that
25 natural phenomena are projected or are being experienced at the
26 site beyond usual levels.

27 On September 19, 1979, the Commission proposed for
28 comment a rule requiring all nuclear power plant licensees, as a

1 licensing condition, to submit emergency plans for NRC review and
2 approval and maintain the emergency plans up to date. Nothing in
3 this proposed rule stated or implied that multiple disaster
4 planning was being proposed as a licensing condition. 44 Fed.
5 Reg. 54308.

6 On December 7, 1979, President Carter, accepting a
7 recommendation in the Kemeny Commission Report on the accident at
8 Three Mile Island, directed the Federal Emergency Management
9 Agency, ("FEMA"), rather than the NRC, "to head up all off-site
10 emergency activities, and complete a thorough review of emergency
11 plans in all states with operating reactors by, June, [1980]."
12 Atomic Energy Clearing House, Vol. 25, No. 50, at p.70. The
13 President's directive in no way stated or implied that FEMA
14 should direct or review multiple disaster planning for nuclear
15 power plants.

16 FEMA in furtherance of the President's directive
17 subsequently took the following actions: (1) entered into a
18 Memorandum of Understanding between FEMA and the NRC, 45 Fed.
19 Reg. 5847 (January 14, 1980), as revised effective October 22,
20 1980, 45 Fed. Reg. 82713 (December 16, 1980); (2) published for
21 interim use and comment a proposed rule to establish policy and
22 procedures for review and approval by FEMA of state and local
23 emergency plans and preparedness for coping with the offsite
24 effects of radiological emergencies which may occur at nuclear
25 power facilities, 45 Fed. Reg. 42341 (June 24, 1980); (3) pub-
26 lished its "Report to the President, State Radiological Emergency
27 Planning and Preparedness in Support of Commercial Nuclear Power
28 Plants, June, 1980"; (4) published for interim use and public

1 comment the "National Radiological Emergency Preparedness/
2 Response Plan for Commercial Nuclear Power Plant Accidents", 45
3 Fed. Reg. 84910 (December 23, 1980); and (5) issued informal
4 guidance on joint exercise procedures and critiques, January 27,
5 1981. Each of the foregoing documents indicate that FEMA review,
6 findings and determinations will be based exclusively upon
7 NUREG-0654. None of these documents state or imply that FEMA
8 intends or is required to review or make findings and determina-
9 tions on the status of multiple disaster planning for nuclear
10 power plants.

11 On December 19, 1979, the Commission published for
12 comment its proposed rule to amend its regulations to provide an
13 interim upgrade of NRC emergency planning regulations. During
14 January, 1980, the Commission conducted four regional workshops
15 with State and local officials, utility representatives, and the
16 public to discuss the feasibility of various portions of the
17 proposed amendments, their impact, and the procedures proposed
18 for complying with their provisions. The NRC used the informa-
19 tion from these workshops, along with the more than 290 comment
20 letters received on the general topic of emergency planning to
21 develop the final rule. The public input received during the
22 period July 17, 1979 through publication of the final rule is
23 contained in NUREG-0628 (January, 1980), NUREG/CP-0011 (April,
24 1980), and NUREG-0684 (September, 1980).

25 The Commission was briefed by the NRC Staff on policy
26 issues pertaining to the proposed final rule on March 26 and June
27 18, 1980, and was briefed on the consistency of the proposed
28 final rule with the NRC Authorization Act for fiscal 1980, Public

1 L. No. 96-295, on July 23, 1980. Additionally, on June 25, 1980,
2 the Commission was briefed by three panels of public commentators
3 on the proposed rule, representing industry, State and local
4 government, and public interest groups, respectively. Finally on
5 July 3, 1980, the Commission was briefed by the NRC Staff in
6 response to these panels, including several modifications to the
7 proposed final rules. Transcripts of each of the foregoing
8 briefings were made by the Commission. The final rule was
9 published August 19, 1980, effective November 3, 1980. 45 Fed.
10 Reg. 55402.

11 The Applicants, through counsel or industry representa-
12 tives, have commented on the proposed rule, attended the work-
13 shops, attended the foregoing briefings, reviewed the transcripts
14 of those briefings, and reviewed the proposed rule and the final
15 rule, along with the prefatory comments to the rule, as proposed
16 and as adopted. Nowhere in any of these proceedings or documents
17 is a reference made by the Commission or the NRC Staff expressly
18 or implicitly directing or recommending multiple disaster plan-
19 ning for nuclear power plants. Moreover, no rationale is pro-
20 vided in these proceedings or documents as to why such planning
21 is needed or desirable.

22 In January, 1980, the Commission and FEMA, jointly
23 published for interim use and public comment, NUREG-0654/FEMA-
24 REP-1 "Criteria for Preparation and Evaluation of Radiological
25 Emergency Response Plans and Preparedness in Support of Nuclear
26 Power Plants" (hereafter "Draft NUREG-0654"). The current NRC
27 emergency planning regulations contain the planning standards
28 initially set forth in Draft NUREG-0654. Compare 10 C.F.R.

1 § 50.47(b) with NUREG-0654, Part II. These regulations also note
2 the specific criteria for meeting these planning standards
3 contained in NUREG-0654, but do not incorporate these criteria by
4 reference into the regulation. See 10 C.F.R. § 50.47(b) n. 1;
5 Part 50, Appendix E, n.1. A final version of NUREG-0654 was
6 published in November, 1980.

7
8 The stated purposes of NUREG-0654, as revised, is to
9 provide "a common reference and guidance source" for the develop-
10 ment and review of Federal, State, local, and licensee radio-
11 logical emergency response plans and preparedness in support of
12 nuclear power plants. NUREG-0654 (Rev.1), at p.1. NUREG-0654,
13 as proposed and as revised, contains no standard or criteria
14 directing multiple disaster planning. This is not surprising
15 since it is stated therein that the guidance contained therein
16 "has been drawn in large part" from the prior guidance documents
17 described above which, as previously explained, did not require
18 multiple disaster planning. NUREG-0654 (Rev. 1), at p.4.

19 The only guidance contained in NUREG-0654, as proposed
20 or revised, pertaining to the impact of natural phenonemon is
21 that offsite assistance agencies may be notified that such
22 phenomena are projected or are being experienced in the plant
23 vicinity above usual levels (NUREG-0654 (Rev.1), Appendix 1, pp.
24 1-5, 1-10, 1-13, 1-19); that the public notification system
25 "should be able to function notwithstanding environmental condi-
26 tions, such as floods and power outages" (NUREG-0654 (Rev.1),
27 Appendix 3, p. 3-6); and that evacuation time estimates within
28 the plume exposure pathway emergency planning zone should take
into consideration adverse weather conditions which "could

1 include flooding, snow, ice, fog, or rain." NUREG-0654 (Rev.1),
2 Appendix 4, p.4-6. This guidance, taken together, suggests that
3 multiple disaster planning involving the concurrence of a radio-
4 logical emergency and a major earthquake is not required. At
5 most, only the effects of inclement weather on evacuation plan-
6 ning are mentioned.

7
8 On June 16, 1980, Congress enacted the NRC Authoriza-
9 tion Bill for 1980, P.L. 96-295. Section 109(b)(1)(A) of the
10 bill directs NRC, "by rule", to promulgate standards for offsite
11 radiological emergency plans. 94 Stat. 784. As explained in the
12 Joint Explanatory Statement of the Committee or Conference, the
13 law does not "specify minimum requirements for the new rules
14 promulgated under this provision but rather leaves the specific
15 requirements to NRC discretion." U.S. Cong. & Admin. News, 96th
16 Cong. 2d Sess. (Vol. 6A, Advance Sheets), p. 4097. Conversely,
17 nothing in the law, or the legislative history of that law,
18 states or implies that multiple disaster planning was required or
19 even considered desirable by Congress. Moreover, as described
20 above, the Commission has not "by rule" required multiple dis-
21 aster planning for a radiological emergency complicated by
22 catastrophic natural phenomena, like a major earthquake.

23 2. Genesis of Multiple Disaster Planning Issue.

24 As explained above, the issue of multiple disaster
25 planning cannot have its genesis in applicable NRC regulations,
26 or Commission-approved guidance related to implementation of
27 those regulations, or any legislative history surrounding those
28 regulations. Accordingly, the question remains as to the pos-

1 sible genesis of Intervenor FOE, et al.'s misplaced presumption
2 that multiple disaster planning is a proper subject of discovery
3 in this proceeding. The answer appears to derive from the
4 eruption of Mt. St. Helen's and correspondence between President
5 Carter and Governor Brown.

6 On September 29, 1980, approximately a month and a half
7 after the NRC's current emergency planning regulations had been
8 promulgated, FEMA issued a formal news release announcing that it
9 would "lead a team of federal agencies as they work in coopera-
10 tion with state government and local agencies to accelerate
11 efforts toward improving the state of readiness to cope with
12 potential major earthquakes in California." FEMA News Release,
13 No. 80-49, at p.1; emphasis added. The announcement was
14 apparently prompted by the dramatic impression the destructive
15 impacts of the volcanic eruption of Mt. St. Helens had made on
16 President Carter. The announcement was also motivated by
17 President Carter's meeting with Governor Brown on July 4, 1980,
18 and President Carter's letter to Governor Brown, dated September
19 19, 1980, revealing the President's decision to direct an assess-
20 ment of the consequences and state of preparedness for a major
21 earthquake in California. Id. The pertinent correspondence
22 between President Carter and Governor Brown is attached to the
23 FEMA Press Release, along with a FEMA "Backgrounder" on the on-
24 going program by FEMA to review the potential consequences and
25 the state of preparedness for a catastrophic earthquake in
26 California.

27 Significantly, nowhere in the President's directive to
28 FEMA, the correspondence between the President and the Governor,

1 or FEMA's press release and "Backgrounder" is there any indica-
2 tion that FEMA's efforts in this regard were to be linked with
3 FEMA's independent responsibility to review state and local
4 radiological emergency plans. See Memorandum of Understanding
5 between FEMA and NRC, 45 Fed. Reg. 82713 (December 16, 1980).
6

7 On November 3, 1980, the NRC Staff issued a memorandum
8 to FEMA, noting that "volcanic eruptions and catastrophic
9 earthquakes have emerged as two issues of high public inter-
10 est." The NRC Staff referenced the FEMA News Release of Sep-
11 tember 29, 1980, and requested FEMA to include in its evaluation
12 of offsite emergency plans, "a qualitative evaluation of compli-
13 cating factors which might be caused by earthquakes for
14 California nuclear power reactor sites." The memorandum further
15 informed FEMA that the NRC Staff was "requesting the affected
16 licensees to revise their emergency plans to explicitly address
17 the possible problems associated with an earthquake."

18 By letter dated November 7, 1980, the NRC Staff in-
19 formed Applicants that the SONGS 2 and 3 Emergency Plan met "the
20 present requirements of 10 C.F.R., Part 50, Appendix E, and the
21 regulatory positions of Regulatory Guide 1.101 and NUREG-0610"
22 (now NUREG-0654, Appendix 1). The NRC Staff further informed
23 Applicants that "additional information and commitments" were
24 required before the NRC Staff could conclude "the planning
25 standards set forth in the revised 10 C.F.R. 50.47" were met.
26 Accordingly, the NRC Staff requested the Applicants to revise the
27 SONGS 2 and 3 emergency plan to address the "432-series ques-
28 tions" enclosed in the letter.

/ / /

1 Analysis of these questions, which are contained in the
2 emergency plans served on the parties hereto on February 3, 1981,
3 reveals no request by the NRC to revise the SONGS 2 and 3 emer-
4 gency plan to in any way address possible radiological emergency
5 planning problems complicated by the concurrent occurrence of a
6 major earthquake. More significantly, the NRC Staff by this
7 letter approved the SONGS 2 and 3 Emergency Plan as complying
8 with revised 10 C.F.R., Part 50, Appendix E, and NUREG-0654,
9 Appendix 1, even though this plan does not contain any multiple
10 disaster planning beyond notifying offsite assistance agencies of
11 the occurrence of natural phenomenon in the plant area above
12 usual levels.

13 By letter dated December 17, 1980, the NRC Staff did
14 request Applicants to "evaluate the potential complicating
15 factors" which might be caused either by an earthquake onsite
16 which disrupts "normal power and auxillary services", or by an
17 "earthquake offsite which disrupts communications networks and
18 transportation routes" following the "initiation of accidents."
19 The impact of an earthquake upon onsite radiological emergency
20 preparedness is requested to be considered prior to the issuance
21 of a full power license for Units 2 and 3. A copy of the NRC
22 Staff's memo to FEMA, dated November 3, 1980, was enclosed in the
23 letter, but no time frame was specified for completion of FEMA's
24 review of the adequacy of State and local capabilities with
25 respect to response during earthquakes. It appears that a copy
26 of this letter was served on counsel for Intervenors FOE. et al.
27 and GUARD, but not on this Board.

28 / / /

1 In January, 1981, FEMA issued its preliminary report
2 entitled "An Assessment of the Consequences and Preparations for
3 Catastrophic California Earthquake: Findings and Actions
4 Taken". There is no mention in this report of the need for
5 multiple disaster planning.

6 On February 6, 1981, the NRC Staff issued NUREG-0712,
7 "Safety Evaluation Report Related to the Operation of San Onofre
8 Nuclear Generating Station, Units 2 and 3 (hereafter the
9 "SER"). Section 13.3.1 of the SER notes the NRC Staff has
10 "requested all licensees and applicants of nuclear plants in
11 California to provide analyses of the effects of an earthquake on
12 their emergency plans." Section 13.3.4 of the SER further notes
13 that "FEMA has been requested as part of their review of Federal,
14 State, and local emergency plans to review the planning efforts
15 for the areas around the site to assure that protective actions
16 to be recommended by the applicants after earthquakes could be
17 implemented and are adequate." There is no mention in the SER of
18 the need for multiple disaster planning. Nothing in SER states
19 or implies that the NRC Staff considers multiple disaster plan-
20 ning a regulatory requirement, or a necessary prerequisite to
21 issuance of operating licenses for SONGS 2 and 3. Accordingly,
22 Applicants have interpreted the SER to only request operational
23 procedures to safely shutdown and start up SONGS 2 and 3 in the
24 event of an earthquake not exceeding in severity the Safe Shut-
25 down Earthquake, as required by 10 C.F.R., Part 50, Appendix
26 A.I.2, and Part 100, Appendix A.

27 Specifically, 10 C.F.R., Part 100, Appendix A, requires
28 that nuclear power plants be shutdown following an earthquake of

1 severity greater than the operating basis earthquake and not
2 returned to operation until it has been demonstrated to the NRC
3 Staff's satisfaction that no functional damage has occurred to
4 those features necessary for continued operation without undue
5 risk to the health and safety of the public. The December 17,
6 1980 NRC Staff letter requires the identification of what evalua-
7 tion of emergency response capability must be performed, and the
8 degree and depth of those evaluations, following an earthquake
9 prior to return to continuous operation by the plant. The
10 December 17, 1980 letter also requires the identification of
11 required determinations of emergency response capability follow-
12 ing earthquakes of severity less than the operating basis earth-
13 quake.

14 C. ARGUMENT.

15 As fully detailed above, NRC regulations and related
16 guidance neither state, nor may be reasonably interpreted to
17 imply, a need for multiple disaster preparedness around nuclear
18 power plants, in particular the need to plan for a radiological
19 emergency complicated by a major earthquake. The only legal
20 ground for imposition of such a planning requirement is FOE's
21 peculiar interpretation of an NRC Staff request subsequent and
22 totally unrelated to the recent promulgation of NRC emergency
23 planning regulations. Applicants do not believe FOE's interpre-
24 tation is correct. Even assuming for purposes of argument only
25 that FOE's interpretation of the NRC Staff request is accepted,
26 the legal question presented is whether a contention may be
27 properly admitted and discovery permitted thereon based exclu-
28 sively on an outstanding request for information by the NRC Staff

1 which Applicants are under no legal obligation to provide. This
2 question need not even be reached by the Licensing Board if, upon
3 receiving the views of the NRC Staff, it is clarified that the
4 NRC Staff is only requesting operational procedures to safely
5 shutdown and startup SONGS 2 and 3 in the event of an earthquake
6 not exceeding in severity the Safe Shutdown Earthquake, and is
7 not requesting multiple disaster planning.

8 Applicants submit that it would be oppressive and
9 burdensome to require further answers to interrogatories whose
10 subject matter is beyond the emergency planning contentions as
11 currently defined. It is even more oppressive and burdensome
12 when it is recognized that the information requested by these
13 interrogatories goes far beyond that which the Applicants and
14 offsite assistance agencies are required to include in their
15 radiological emergency plans under current NRC regulations.

16 1. Discovery on Multiple Disaster Planning Does
17 Not Relate To Those Matters in Controversy
18 Which Have Been Identified by the Board.

19 10 C.F.R. § 2.740 (b)(1) in pertinent part states:

20 " In a proceeding on an application for . . . an
21 operating license for a production or utilization
22 facility, discovery shall relate only to those
23 matters in controversy which have been identified
24 by the commission or the presiding officer in the
25 prehearing order entered at the conclusion of that
26 prehearing conference." Accord 10 C.F.R., Part 2,
27 Appendix A.IV.

28 This provision has been construed only to permit
"discovery of information or documents relevant to the subject
matter involved in the proceeding", with the term "subject
matter" being limited exclusively to "the contentions admitted by
the presiding officer in the proceeding." Pennsylvania Power &

1 Light Co. et. al., supra, ALAB-613, 12 NRC at 322; Allied General
2 Nuclear Services, et. al., LBP-77-13, 5 NRC 489, 492 (February
3 24, 1977).

4 In this case, the emergency planning contentions
5 admitted for "discovery purposes" by Board Order dated January
6 27, 1978, in no way challenge the adequacy of radiological
7 emergency planning and preparedness on the ground that such
8 adequacy is precluded by the concurrent occurrence of a "major
9 earthquake." These contentions do generally challenge
10 Applicants' compliance with 10 C.F.R, Part 50, Appendix E, on a
11 number of grounds. However, as fully detailed in Part III above,
12 this appendix, as promulgated at the time these contentions were
13 stated or as currently revised, does not require multiple
14 disaster planning. The above-described NRC Staff letter to
15 Applicants, dated November 7, 1980, plainly recognizes this fact.
16

17 Accordingly, Applicants submit that a protective order
18 may properly bar discovery in the area of multiple disaster
19 planning because such discovery does not relate to any contention
20 currently at issue in this proceeding, nor will discovery of such
21 information reasonably lead to the discovery of admissible
22 evidence which is relevant to any such contention.

23 2. Any Contention Asserting the Need for Multiple
24 Disaster Planning May not be Properly Admitted
to this Proceeding

25 A Licensing Board may under certain circumstances
26 reject contentions on legal grounds on the pleadings. Project
27 Management Corporation LBP-76-14, 3 NRC 430, 432 (1976); citing
28 Potomac Electric Power Co., ALAB-218, 8 AEC 79, 85, 89 (1974).
Applicants submit that 10 C.F.R. § 2.758 bars the assertion of a

1 multiple disaster planning contention under the circumstances of
2 this case.

3 10 C.F.R. § 2.758(a) in pertinent part provides that:

4 "[A]ny rule or regulation of the Commission or any
5 provision thereof, issued in its program for the
6 licensing and regulation of production and utiliza-
7 tion facilities . . . shall not be subject to
8 attack by way of discovery, . . . or other means in
9 an adjudicatory proceeding involving initial licen-
10 sing . . ."

11 This rule is recognized to bar admission of contentions which, in
12 practical effect, challenge the sufficiency of Commission regula-
13 tions, or the basis upon which Commission regulations rest.

14 Pennsylvania Power and Light Co., supra, ALAB-613, 12 NRC, at 324
15 n. 11, Potomac Electric Power Co., ALAB-218, 8 AEC 79, 85-89
16 (1974); see Public Service Co. of Oklahoma, CL1-80-31, 12 NRC
17 264, 270 n. 7 (1980).

18 As more fully described in Part III above, nothing in
19 the applicable NRC regulations, or the legislative history of
20 those regulations, requires Applicants to engage in multiple
21 disaster planning or, specifically, to consider the impact of a
22 major earthquake on on-site and offsite radiological emergency
23 response capability. If the Commission had intended that such an
24 improbable contingency be assessed, it surely would have listed
25 this contingency in 10 C.F.R. Part 50, Appendix E, Part IV,
26 wherein the precise regulatory standards are referenced and an
27 analysis of the time required to evaluate the transient and
28 permanent populations within the plume response pathway EPZ is
C.F.R. § 2.758(a).

1 The most that can be derived from NRC guidance, con-
2 tained in NUREG-0654, on the impact of natural phenomena is that
3 only the effects of inclement weather on radiological emergency
4 planning and preparedness is to be considered by Applicants.

5 Applicants submit that it would be totally unreason-
6 able, arbitrary, and capricious to equate routinely experienced
7 inclement weather conditions such as a snowstorm in Buffalo with
8 a major earthquake in an area of California with little seismic
9 activity.

10 It is no response to this argument for Intervenors to
11 argue that the NRC Staff letter to Applicants, dated December 17,
12 1980, constitutes an additional regulatory requirement upon which
13 a contention may be based. No matter what information the NRC
14 Staff suggests should be included in Applicants' emergency plans,
15 prior Appeal Board decisions clearly hold that NRC Staff views,
16 requests, or "position papers", have no legal significance for
17 any regulatory purpose. See Northern Inc. P.S. Co., ALAB-224, 8
18 AEC 244 (1974); Southern California Edison Co. et al., ALAB-268,
19 1 NRC 383, 399 (1975); Duke Power Co., ALAB-355, 4 NRC 397, 416
20 (1976); See Porter County Chapter of Izaak Walton League v. AEC,
21 533 F.2d 1011, 1016 n.5 (7th Cir. 1976); Project Management
22 Corporation, LBP-76-14, 3 NRC 430, 432 n.4 (1976) and cases cited
23 therein.

24 Thus, simply because the NRC Staff has requested
25 Applicants to take some action, does not mean that the Applicants
26 are legally bound to comply with such a request as a precondition
27 to being granted an operating license nor is this Board obligated
28 to enforce such a request against Applicants, or admit conten-

1 tions based upon it. As the Appeal Board stated in Southern
2 California Edison, supra:

3 "[T]he staff is but one of the parties of this
4 licensing proceeding, and . . . the positions which
5 it may take are in no way binding upon us. The
6 Boards have independant responsibilities to ful-
fill, and the actions of the staff cannot compel a
board to adopt a particular position."

7 In sum, the NRC Staff has not exercised any regulatory
8 authority under which it may compel Applicants to evaluate the
9 potential complicating factors which might be caused by a major
10 earthquake coinciding with an radiological emergency at the plant
11 site.

12 3. Any Interpretation of NRC Regulations Requir-
13 ing Multiple Disaster Planning Violates the
Administrative Procedure Act.

14 In this case regulatory requirements pertaining to
15 multiple disaster planning have not changed at all. At no time
16 has such planning been required by NRC regulations. FOE may
17 nevertheless assert that even though such a requirement is not
18 explicitly found in the Commission's regulations, one still may
19 reasonably interpret those regulations to require multiple
20 disaster planning.

21 Section 553 of the Administrative Procedure Act
22 ("APA"), 5 U.S.C. § 553, requires agencies in promulgating rules
23 to allow interested and affected parties to submit comments to
24 proposed regulations which have been previously published in the
25 Federal Register.^{5/} "Elementary fairness" requires notice and

26
27 ^{5/} The notice and comment provisions of the APA are applicable
28 to the NRC. See Vermont Yankee Nuclear Power Corp. v.
Natural Resources Defense Council, 435 U.S. 519 (1978). See
also 10 C.F.R. § 2.800 et seq.

1 comment procedure to be followed before an agency interpretation
2 which substantially changes the scope of an affected party
3 obligations under current regulations may be enforced against the
4 regulated party. See e.g. Brokers Dealers Trade Association v.
5 SEC, 442 F.2d 132 (D.C. Cir. 1971) cert denied, 404 U.S. 828
6 (1971); United States ex rel Parco v. Morris, 426 F. Supp. 976
7 (E.D. Pa. 1977); 2 K. Davis Administrative Law Treatise, 30, 81
8 (2nd ed. 1979). This is especially true in this case where
9 Congress has specifically mandated that offsite emergency
10 planning requirments be imposed "by rule". 1980 NRC
11 Authorizations Bill, P.2. 96-295, 94 Stat. 784, June 30, 1980,
12 § 109(b)(1)(A) [hereafter the "1980 Authorizations Bill"].

13 Applicants submit that the NRC Staff request to eval-
14 uate the impact of a "major" earthquake on radiological emergency
15 response capability has a substantial impact on Applicants.
16 Accordingly, to the extent that the NRC Staff is permitted by
17 this Board to create a new emergency planning regulation solely
18 by way of its letter of December 17, 1980, rather than by follow-
19 ing the required notice and comment rulemaking procedures,
20 section 109(b)(1)(A) of the 1980 Authorizations Bill and section
21 553 of the APA would be violated.

22 Given the foregoing circumstances, it would be oppres-
23 sive and unduly burdensome to require Applicants to further
24 answer interrogatories regarding the impact of a "major earth-
25 quake" on emergency response capability. Accordingly, the Board
26 is requested on each of the foregoing grounds to find "good
27 cause" and grant Applicants' motion for a protective order on
28 Disputed Interrogatory Nos. 1 through 22, 77(b), 122, and 123.

1
2 II.

3 THE SUFFICIENCY OF NRC REGULATIONS ARE NOT
4 SUBJECT TO ATTACK BY WAY OF DISCOVERY IN THIS
5 PROCEEDING (Disputed Interrogatories Nos. 23
6 through 30, 72, 73, 92, 93, 103 and 104).
7

8 In two other respects, FOE's motion to compel consti-
9 tutes an impermissible attack on NRC regulations by way of
10 discovery barred by NRC regulations. 10 C.F.R. § 2.758(a);
11 Pennsylvania Power and Light Co., ALAB-613, supra, 12 NRC, at 324
12 n.11; Potomac Electric Power Co., supra, ALAB-218, 8 AEC, at 85-
13 89; see Public Service Co. of Oklahoma, CLI-80-31, supra, 12
14 NRC, at 270 n. 7. For this reason, SCE submits a protective
15 order should issue banning the need to provide further answers to
16 Disputed Interrogatories Nos. 23 through 30, 103, and 104.

17 A. NRC Regulations Establishing the Maximum Extent of
18 Emergency Planning Zones are Not Subject to Attack
19 by Way of Discovery in this Proceeding (Disputed
20 Interrogatories Nos. 23 through 30).
21

22 FOE argues that discovery on the above-referenced
23 Disputed Interrogatories challenging the size of the emergency
24 planning zones should be allowed because NRC regulations "call
25 for EPZ's to be determined by site specific studies
26 Applicant's failure to conduct a site-specific study in order to
27 determine the size of the EPZ's employed in their Emergency Plan
28 would be a violation of the Federal Requirements and would
jeopardize the public health and safety." FOE Motion, pp. 6-7.
FOE's argument is without support in NRC regulations or the
Commission's rationale for adopting these regulations.

10 C.F.R. § 50.47(c)(2) in pertinent part states:

"Generally, the plume exposure pathway EPZ for
nuclear power plants shall consist of an area about
10 miles (16 km) in radius and the ingestion pathway EPZ
shall consist of an area about 50 miles (80 km) in

1 radius. The exact size and configuration of the EPZs
2 surrounding a particular nuclear power reactor shall be
3 determined in relation to local emergency response needs
4 and capabilities as they are affected by such conditions
as demography, topography, land characteristics, access
routes, and jurisdictional boundaries"

5 The Commission has recognized that the regulatory basis
6 for adoption of this provision

7 "is the Commission's decision to have a conservative
8 emergency planning policy in addition to the conversa-
9 tism inherent in the defense-in-depth philosophy. This
10 policy was endorsed by the Commission in a policy
11 statement published on October 23, 1979 (44 FR 61123).
12 At that time the Commission stated that two Emergency
13 Planning Zones (EPZs) should be established around each
14 light-water nuclear power plant. The EPZ for airborne
15 exposure has a radius of about 10 miles; the EPZ for
contaminated food and water has a radius of about
50 miles. Predetermined protective action plans are
needed for the EPZs. The exact size and shape of each
EPZ will be decided by emergency planning officials
after they consider the specific conditions at each
site. These distances are considered large enough to
provide a response base that would support activity
outside the planning zone should this ever be needed."

16 45 Fed. Reg. 55406 (August 19, 1980); emphasis added.

17 It can readily be seen from the foregoing authorities
18 that the use of the word "about" in reference to the prescribed
19 radial distances for the plume exposure and ingestion pathway
20 emergency planning zones, was intended to reserve to local
21 planning officials the flexibility to determine whether these
22 zones should be a little bigger or smaller depending on local
23 demography, topography, land characteristics, access routes, and
24 jurisdictional boundaries in close proximity to these zones.
25 Conversely, this provision was not intended to require
26 Applicants, (or in a contested proceeding, the Licensing Board)
27 to evaluate and determine whether the zones established by local
28 officials pursuant to this provision were adequate to protect the

1 public health and safety. The Commission has already determined
2 that the lack of radiological emergency planning beyond these
3 zones does not adversely impact the public health and safety
4 because these zones "are considered large enough to provide a
5 response base that would support activity outside the planning
6 zone should this ever be needed." 45 Fed. Reg. 55406; 44 Fed.
7 Reg. 61123 (October 23, 1979); see generally NUREG-0396, "Plann-
8 ing Basis for the Development of State and Local Government
9 Radiological Emergency Response Plans in Support of Light Water
10 Nuclear Power Plants," December 1978, at pp. 17, and Appendix I.

11 It is a well-established principle of law that the
12 rationale used by the Commission in establishing the maximum
13 geographic extent of emergency planning is not subject to attack
14 in NRC licensing proceedings, such challenges being more appro-
15 priately made in NRC rulemaking proceedings. New England Power
16 Company, et al, ALAB-390, 5 NRC 733 (1977).

17 SCE submits that the sole purpose of Disputed Interro-
18 gatories Nos. 23 through 30 is to attack by way of discovery the
19 sufficiency of the emergency planning zone concept established by
20 NRC regulations, and to use whatever information is thereby
21 discovered to request this Board to permit a challenge to this
22 concept in this proceeding. Such a challenge is prohibited by
23 NRC regulations. 10 C.F.R. § 2.758. Accordingly, a protective
24 order barring further discovery on these interrogatories is
25 requested by Applicants.

26 ///

27 ///

28 ///

1 B. The Sufficiency of NRC Regulations on the Public
2 Education and Information Program are Not Subject
3 to Attack by Way of Discovery in this Proceeding
 (Disputed Interrogatories Nos. 103 and 104).

4 FOE argues that a further answer to Disputed Interroga-
5 tories Nos. 103 and 104 is required because FOE has a right to
6 know whether or not Applicants have any plans to "test" the
7 coordination of public information and education programs
8 required by NRC regulations. FOE Motion, pp. 7-8. NRC regula-
9 tions in pertinent part require Applicants to establish "pro-
10 cedures for coordinated dissemination of information to the
11 public [10 C.F.R. § 50.47(b)(7)], and to "test the adequacy of
12 timing and content of implementing procedures and methods, . . .
13 emergency equipment and communication networks, . . . the public
14 notification system, . . . and as much of the licensee, State and
15 local emergency plans as is reasonably achievable without manda-
16 tory public participations" (10 C.F.R., Part 50,
17 Appendix E.IV.F). However, nothing in NRC regulations requires
18 Applicants to test the coordination of public information or
19 education programs.

20 Accordingly, SCE submits the sole purpose of Disputed
21 Interrogatories Nos 103 and 104 is to attack by way of discovery
22 the sufficiency of NRC regulations regarding public education and
23 information programs. Since such a challenge is prohibited by
24 NRC regulations (10 C.F.R. § 2.758), a protective order banning
25 further discovery on these interrogatories is requested by
26 Applicants.

27 ///

28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

III.

APPLICANTS HAVE NO OBLIGATION TO INQUIRE INTO WORK, STUDIES, OR INVESTIGATIONS WHICH MAY OR MAY NOT HAVE BEEN DONE BY THE OFFSITE AGENCIES FOR THE PURPOSE OF PROVIDING INFORMATION TO FOE (Disputed Interrogatories Nos. 27-30, 64-69, 77, 78, 81, 82, 85-87, 109-111).

Applicants have provided complete, nonevasive and truthful responses to the above-referenced Disputed Interrogatories. These interrogatories seek information concerning work, studies, or investigations which may or may not have been performed by the individual offsite assistance agencies. These agencies are neither agents of Applicants nor within the management or contractual control of Applicants. Applicants have no significant knowledge or belief as to the work, studies or investigations these agencies may have done or may be doing for the purpose of meeting their independent duties regarding radiological emergency planning and preparedness.

10 C.F.R. § 2.740b in pertinent part provides (emphasis added):

"Any party may serve upon any other party . . . written interrogatories to be answered in writing by the party, or if the party served is a public or private corporation . . . , by any officer or agent, who shall furnish such information as is available to the party."

It is established in NRC practice that "research and . . . data not readily known" to a party will not be deemed "available" within the meaning of that work in 10 C.F.R. § 2.740b. Boston Edison Company, LBP-75-30, 1 NRC 579, 584 (1975). Insofar as Applicants lack management or contractual control over the involved offsite assistance agencies, the work, studies or investigations conducted by these agencies, but not in Applicants possession, are not "readily known" to Applicants. It would be

1 unfair and oppressive by way of discovery to hold Applicants'
2 responsible under penalty of perjury for requesting and obtaining
3 information from a public entity, when there is no managment of
4 contractual guarantee of a full and adequate disclosure of such
5 information to Applicants. Moreover, there is no reason to
6 compel such discovery since the information requested by FOE is
7 more readily obtainable directly from the involved offsite
8 assistance agencies.

9
10 It is no response to this argument to assert, as does
11 FOE, that FOE has a right to know what studies Applicants intend
12 to rely on at hearing. FOE Motion, p.9. If FOE wanted an answer
13 to this question it should have asked it, rather than asking for
14 Applicants' knowledge of work, studies or investigations
15 conducted by offsite assistance agencies.

16 It is established that a party responding to a dis-
17 covery request is not required to engage in extensive independent
18 research. Boston Edison Company, supra, 1 NRC, at 584; Houston
19 Lighting and Power Company, LBP-80-11, 11 NRC 477, 478-79 (1980).

20 Applicants submit that it is improper for FOE to
21 request information which requires Applicants to do FOE's work
22 for it. Except as revealed in the Response, the information
23 requested is not in Applicants' possession and Applicants may not
24 be forced to provide such information by independent inquiry when
25 FOE can obtain the answers much more efficiently and expedi-
26 tiously from the offsite agencies themselves. In so far as
27 Applicants have answered these Disputed Interrogatories to the
28 best of their ability a protective order should be issued barring

///

1 further discovery on Disputed Interrogatories Nos. 27-30, 64-69,
2 77, 78, 81, 82, 85-87, and 109-111.

3
4 IV.

5 APPLICANTS MAY BE PROTECTED FROM PROVIDING INFORMATION
6 WHICH IS AS READILY AVAILABLE TO FOE, ESPECIALLY
7 WHERE DATA MUST BE COMPILED AND COLLATED
8 (Disputed Interrogatories Nos. 72, 73, 92 and 93).

9 The above-referenced interrogatories request informa-
10 tion pertaining to "any studies or investigations" on offsite
11 radiation dose projection (Disputed Interrogatories Nos. 72 and
12 73) and on emergency radiation dose limitations (Disputed Inter-
13 rogatories Nos. 92 and 93). These interrogatories do not ask
14 upon which studies or investigations in these areas Applicants
15 rely. They merely request a comprehensive bibliography.

16 Applicants submit that their objection to these Inter-
17 rogatories must be sustained on the grounds that it would be
18 burdensome and oppressive to require Applicants to catalogue the
19 information requested when such information is just as available
20 to FOE as it is to Applicants. These interrogatories are just
21 another example of an attempt by FOE to get Applicants to do
22 their work for them and it would be improper for the Board to
23 permit such a practice.

24 The NRC has recognized that "a party may be protected
25 against interrogatories where the answers would require an
26 excessive or oppressive amount of research or completion of data
27 and at a great expense" Boston Edison Company (Pilgrim Nuclear
28 Generating Station, Unit 2) 1 NRC 579, 584 (1975). Furthermore,
it has been stated that "it is not necessary for a party [to a
proceeding] to perform extended research or data gathering in
order to respond [to a set of interrogatories]" Houston Lighting

1 And Power Company, et al. (South Texas Project, Units 1 and 2) 11
2 NRC 477, 478 (1980).

3 Applicants have not made a comprehensive listing of the
4 studies and investigations referred to in the interrogatories nor
5 do they intend to do so at their own expense for the sole benefit
6 of FOE. Applicants recognize that where a heavy burden would be
7 imposed on a party that has been requested to answer detailed
8 interrogatories, segregate and analyze a great mass of material,
9 or compile and collate data and information, a Licensing Board
10 "as an alternative may require the interrogating party to dig out
11 and sift the information by examination of the other party's
12 files" pursuant to a proper request to produce documents (10
13 C.F.R. § 2.741)." Boston Edison Company, supra, 1 NRC at 583.
14 Even this approach is not warranted in this case since the
15 information requested by FOE is not in Applicants' files, but is
16 in the form of innumerable public documents available at any
17 major public or university library.

18 Interrogatories Nos. 72, 73, 92, and 93 request
19 Applicants to state whether "any studies or investigations have
20 been performed . . ." It does not request Applicants to state
21 whether they have performed any studies or investigations. Thus,
22 these interrogatories request Applicants to compile and provide
23 FOE with an extensive list of documents. Such a broad and
24 general request is clearly unreasonable, burdensome and oppre-
25 sive, and the Board may protect Applicants from it by issuing a
26 protective order barring further discovery on Disputed Interroga-
27 tories Nos. 72, 73, 92 and 93.

28 ///

1
2 V.
3 INFORMATION WITHIN THE WORK-PRODUCT AND ATTORNEY-
4 CLIENT PRIVILEGES IS NOT SUBJECT TO DISCOVERY
5 IN NRC PROCEEDING (Disputed Interrogatories
6 Nos. 16, 19 and 20).
7

8 "Limitations [on discovery] come into existence when
9 the inquiry . . . encroaches upon the recognized domains of
10 privilege." Boston Edison Company, et al., supra, 1 NRC, at 583
11 quoting from Hickman v. Taylor, 329 US 495, 507-509 (1947).
12 Included among these recognized domains of privilege are communi-
13 cations within the attorney-client relationship and attorney's
14 work product.

15 Disputed Interrogatories Nos. 16, 19, and 20 are not
16 only objectionable on the grounds stated in Parts III and VII
17 herein, but are further objectionable to the extent that they
18 request information contained in correspondence prepared by
19 Applicants' counsel, between Applicants' counsel, and between
20 Applicants' counsel and its employees or consultants. Such
21 material would clearly include such privileged matter as the
22 mental impressions, conclusions, opinions, and legal theories of
23 Applicants' attorneys absolutely protected from discovery by 10
24 C.F.R. § 2.740(b)(2).

25 Applicants submit that this objection is not an attempt
26 to conceal relevant information or to avoid discovery. To the
27 extent that the information requested is of a legal nature,
28 Applicants are merely asserting their right to protect informa-
tion of a privileged nature and thereby limit discovery to
nonprivileged matters which are relevant to the subject matter
involved in this proceeding.

///
25

1
2 VI.

3 APPLICANTS' OBJECTION TO FOE'S INFORMAL REQUEST
4 FOR DOCUMENTS, WHICH STATES THAT PARTIES SEEKING
5 PRODUCTION OF DOCUMENTS MUST FOLLOW THE PROCEDURES SET FORTH
6 IN 10 C.F.R. 2.741, IS RESPONSIVE TO THE CALL OF THE QUESTION
7 (Disputed Interrogatories Nos. 2, 4, 6, 8, 10, 12, 14,
8 18, 22, 24, 26, 28, 30, 35, 45, 71, 73, 78, 93, 99, and 100).
9

10 Applicants' responses to the Disputed Interrogatories,
11 referenced above, have clearly been misconstrued and misinter-
12 preted by FOE. Applicants in response to these interrogatories
13 have provided such relevant, unprivileged information which is
14 responsive to these interrogatories and which has either been
15 submitted to the NRC by or on behalf of SCE and is available from
16 SCE files or from the personal knowledge of responsible SCE
17 personnel. There has been no attempt to be evasive.

18 Furthermore, Applicants' response to FOE interroga-
19 tories asking whether Applicants "will make such reports avail-
20 able to intervenors to inspect and copy without the necessity of
21 a formal motion to produce" clearly states that Applicants object
22 to any such request unless the procedures set forth in 10 C.F.R.
23 § 2.741 are followed. Such a response is required under 10
24 C.F.R. § 2.740b(b) which states, in pertinent part, that "[e]ach
25 interrogatory shall be answered separately and fully in writing
26 . . . unless objected to, in which event the reasons for objec-
27 tion shall be stated in lieu of an answer." (Emphasis added)
28

29 Thus, FOE's contention that Applicants' answer is non-
30 responsive to the call of the question is clearly without
31 merit. Applicants have chosen to respond to these interroga-
32 tories by objecting to the call of the question and stating the
33 basis for such an objection, in lieu of an answer. Applicants
34
35 ///

1 are in full compliance with the Commission's regulations and no
2 further answer can be compelled.

3 VII.

4 APPLICANTS HAVE PROVIDED ALL RELEVANT, NONPRIVILEGED
5 INFORMATION REQUESTED BY FOE THAT RELATES TO A
6 CONTENTION IN THIS PROCEEDING (Disputed Interrogatories
Nos. 1 through 30, 77(b), 25, 27, 29, 92,
93, 98, 99, 103, 104, 117, 122, 123).

7 FOE concludes its argument by alleging that Applicants'
8 "questionable and in some cases bad faith objections" have
9 necessitated its motion to compel. Given the weight of the
10 authority in support of Applicants' position recited above,
11 Applicants request this Board to utterly reject FOE's charac-
12 terization of the situation leading to its motion.

13 The fact is that each of Applicants' objections to the
14 Disputed Interrogatories are well founded in the law governing
15 these proceedings. Far from seeking to delay these proceedings
16 or frustrate FOE's legitimate discovery rights, Applicants'
17 objections are motivated by the simple recognition that all
18 parties to this proceeding are bound to adhere to the NRC's Rules
19 of Practice, as interpreted by the Commission and the courts,
20 notwithstanding the differing burdens these rules may practically
21 impose. Pennsylvania Power and Light Co., ALAB-613, supra, 12
22 NRC, at 336 n. 33; Offshore Power Systems, LBP-75-67, 2 NRC 813,
23 815 (1975).

24 In support of its argument accusing Applicants of
25 "questionable" and "bad faith" objections, FOE relies on the last
26 sentence of 10 C.F.R. § 2.740(b)(1), but ignores the rest of the
27 section which in pertinent part states:

28 "In a proceeding on an application for . . .
an operating license for a production or utilization

1 facility, discovery shall relate only to those matters
2 in controversy which have been identified by the commis-
3 sion or the presiding officer in that prehearing order
4 entered at the conclusion of that prehearing
5 conference." Accord 10 C.F.R., Part 2, Appendix A.IV.

6 This provision has been construed only to permit
7 "discovery of information or documents relevant to the subject
8 matter involved in the proceeding", with the term "subject
9 matter" being limited exclusively to "the contentions admitted by
10 the presiding officer in the proceeding." Pennsylvania Power &
11 Light Co. et al., supra, ALAB-613, 12 NRC at 322; Allied General
12 Nuclear Services, et al., LBP-77-13, 5 NRC 489, 492 (February 24,
13 1977).

14 In this case, the emergency planning contentions
15 admitted for "discovery purposes" by Board order, dated
16 January 27, 1978, in no way allege the need for multiple disaster
17 planning (Disputed Interrogatories Nos. 1-22, 77(b), 123 and
18 124); for larger emergency planning zones (Disputed Interroga-
19 tories Nos. 23-30); for reevaluation of radiation protection
20 standards established by NRC regulations (Disputed Interrogatory
21 No. 93); for evaluation of the turn-over rate of personnel
22 involved in the emergency response (Disputed Interrogatories Nos.
23 98 and 99); or for "tests" of the coordination and integration of
24 the Public Information and Education Program (Disputed Interroga-
25 tories Nos. 103, 104 and 117).

26 This is not surprising since admission of such conten-
27 tions should be barred as impermissible challenges to the suffi-
28 ciency of NRC regulations. 10 C.F.R. § 2.758. Nonetheless, the
point remains that 39 of the 59 Disputed Interrogatories do not
relate to a contention in this proceeding at all. FOE has had

1 more than ample opportunity to seek to amend its contentions
2 under 10 C.F.R. § 2.714(a)(3). It has not availed itself of the
3 opportunity to do so. FOE should not now be heard to complain of
4 "questionable" or "bad faith" objections to its interrogatories
5 insofar as these objections soundly rest on the rule limiting
6 discovery to contentions admitted in this proceeding, as well as
7 the other reasons briefed above.

8
9 VIII.
APPLICANTS' MOTION FOR PROTECTIVE
10 ORDER IS PROPER AT THIS TIME

11 10 CFR § 2.740(c) provides in pertinent part that:

12 "Upon motion by a party from whom discovery is
13 sought, and for good cause shown, the presiding
14 officer may make any order which justice requires
15 to protect a party or person from . . . oppression
16 or undue burden . . . including one or more of the
17 following: (1) That the discovery not be had; . . .
18 (4) that certain matters not be inquired into or
19 that the scope of discovery be limited to certain
20 matters; . . . "

21 The Appeal Board has recognized that objections to
22 interrogatories "may be accompanied by a motion for 'protective
23 order' to modify or eliminate the obligation to respond, but the
24 movant must establish 'good cause' for issuing such an order."
25 Pennsylvania Power & Light Co., et al, ALAB-613, supra, 12 NRC,
26 323.

27 Applicant submits there is "good cause" to issue a
28 protective order based on the sound reasons described above.
Perhaps in recognition of the validity of these reasons, FOE also
raises the procedural argument that because Applicants have not
previously applied for a protective order related to the Disputed
Interrogatories, this Board must compel Applicants to give
further answers to these interrogatories, notwithstanding the

1 validity of the objections to these interrogatories properly
2 raised by Applicants in the Response. FOE's argument finds no
3 support in the NRC's Rules of Practice regarding discovery or the
4 analogous Federal Rules of Civil Procedure upon which these rules
5 are based. Accordingly, Applicants' motion for a protective
6 order is proper at this time.

7
8 FOE relies exclusively upon 10 C.F.R. §2.740(f)(1)
9 which states (emphasis added):

10 "Failure to answer or respond shall not be excused on
11 the ground that this discovery sought is objectionable
12 unless the person or party failing to answer or respond
13 has applied for a protective order pursuant to paragraph
14 (c) of this section."

15 This section by its express terms does not apply to the instant
16 case. Applicants have not failed "to answer or respond". To the
17 contrary, Applicants fully complied with 10 C.F.R. § 2.740b(b) by
18 answering or stating the reasons for objecting to each of the
19 Disputed Interrogatories within the requisite period for respond-
20 ing to these interrogatories.^{6/}

21 FOE provides no authority in support of its argument.
22 This is not surprising. The plain language of 10 C.F.R.
23 §2.740(f)(1) and 2.740b(b) explains why FOE's strained interpre-

24
25 ^{6/} 10 C.F.R. §2.740b(b) in pertinent part states (emphasis
26 added):

27 "(b) Each interrogatory shall be answered separately and
28 fully in writing under oath or affirmation, unless it is
objected to, in which event the reasons for objection shall
be stated in lieu of an answer. . . . by the person making
them, and the objections by the attorney making them. The
party upon whom the interrogatories were served shall serve a
copy of the answers and objections upon all parties to the
proceeding within 14 days after service of the interroga-
tories or within such shorter or longer period as the
presiding officer may allow"

1 tation of these provisons has never been considered, much less
2 approved in NRC decisions. However, we are not without judicial
3 guidance. It is generally recognized by the NRC that its regula-
4 tions "are based upon and drawn generally from the Federal Rules
5 of Civil Procedure governing discovery Accordingly,
6 guidance may be had from the legal authorities and court
7 decisions construing the Federal Rules on discovery." Boston
8 Edison Company, LBP-75-30, 1 NRC 579, 581 (1975), See 10 C.F.R.,
9 Part 2, Appendix A.IV.

10 10 C.F.R. §2.740(b)(1), the section relied upon by FOE,
11 is analogous to Rule 37(d) of the Federal Rules of Civil Proce-
12 dure.^{7/} Rule 37(d) has been interpreted to mean there must be
13 total failure to respond to interrogatories to deny the respond-
14 ing party the right to apply for a protective order. Fox v.
15 Studebaker Worthington, Inc., 516 F.2d 989 (8th Cir. 1975); See
16 Notes of Advisory Committee on 1970 Amendments of Rules ["provi-
17 sion added to make clear that a party may not properly remain
18 completely silent - even when he regards . . . a set of interro-
19 gatories . . . as improper or objectionable If he
20 desires not to respond, he must apply for a protective order."
21 (Emphasis added.)]; 4A Moore's Federal Practice, ¶37.05 n. 34
22 (1980-81 Supplement).

23 ///
24

25 _____
26 7/ F.R.C.P., Rule 37(d) in pertinent part provides:

27 The failure to act described in this subdivision may not be
28 excused on the ground that the discovery sought is
 objectionable unless they party failing to act has applied
 for a protective order as provided by Rule 26(c).

1 Far from totally failing to respond to the Disputed
2 Interrogatories, Applicants answered each of these interrogatories
3 or fully detailed the bases for their objections to them as
4 required by 10 C.F.R. §2.740b(b).

5 Applicants are not required to move for a protective
6 order under 10 C.F.R. §2.740(c) to preserve the validity of its
7 objections to the Disputed Interrogatories timely filed in the
8 Response. Rather the burden is upon FOE to move under 10 C.F.R.
9 §2.740b(f) for an order compelling answers to the Disputed
10 Interrogatories duly objected to by Applicants. The preservation
11 of Applicants' right to seek and obtain a protective order in
12 opposition to a motion to compel is made clear by the provision
13 in 10 C.F.R. § 2.740(f)(2) extending the right to the Licensing
14 Board to "make such a protective order as [it] is authorized to
15 make on a motion made pursuant to [10 C.F.R. §2.740(c)]."

16 This provision is analogous to Rule 37(a)(2) of the
17 Federal Rules of Civil Procedure.^{8/} Rule 37(a)(2) is generally
18 interpreted to make a cross-motion for a protective order avail-
19 able, but unnecessary. 4A Moore's Federal Practice, ¶ 37.02[8],
20 at p. 37-46 (1981). As explained by Professor Moore [footnotes
21 omitted]:

22 "When the protection is sought in connection with
23 the answers to interrogatories, the applicable
24 rules provide for the filing of objections in lieu
25 of answers. Under the present practice, the
26 objecting party has not duty to notice a hearing,

26 ^{8/} F.R.C.P., Rule 37(a)(2) in pertinent part provides: "If the
27 court desires the motion [to compel] in whole or in part, it
28 may make such protective order as it would have been
empowered to make on a motion made pursuant to Rule 26(c)
[regarding protective orders]."

1 the initiative being shifted to the party seeking
2 discovery. Since this change in the practice was
3 designed to reduce the necessity for judicial
4 intervention, it seems reasonable to suppose that
5 the need for protective orders in connection with
6 disclosure should be considered at the hearing on
7 the discovering party's motion to compel answers
8 and the party from whom disclosure is sought need
9 not move under Rule 26(c)."

10 4 Moore's Federal Practice, ¶ 26.68, at p. 26-492 (1979).

11 In short, "to reduce the necessity for judicial inter-
12 vention", the motion to compel discovery, not the motion for a
13 protective order, is the usual mode for placing at issue objec-
14 tions to interrogatories.

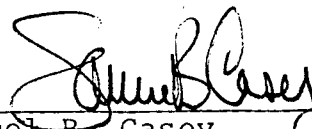
15 In sum, Applicants have properly objected. 10 C.F.R.
16 §2.740b(b). FOE has availed itself of the proper procedure to
17 question these objections 10 C.F.R. §2.740(f). The Board retains
18 its discretion upon Applicant's motion or its own motion to
19 protect Applicants from further discovery on the Disputed Inter-
20 rogatories for the reasons fully set forth above. 10 C.F.R.
21 §§ 2.740(c) and (f)(2).

22 DATED: April 9, 1981

23 DAVID R. PIGOTT
24 SAMUEL B. CASEY
25 JOHN A. MENDEZ
26 CHICKERING & GREGORY

27 CHARLES R. KOCHER
28 JAMES A. BEOLETT
SOUTHERN CALIFORNIA EDISON COMPANY

By


Samuel B. Casey
One of Counsel for Applicants
Southern California Edison Company
and San Diego Gas & Electric
Company

1 DAVID R. PIGOTT
2 SAMUEL B. CASEY
3 JOHN A. MENDEZ
4 CHICKERING & GREGORY
5 Three Embarcadero Center
6 Twenty-Third Floor
7 San Francisco, California 94111
8 Telephone: (415) 393-9000

6 CHARLES R. KOCHER
7 JAMES A. BEOLETTO
8 SOUTHERN CALIFORNIA EDISON COMPANY
9 P. O. Box 800
10 2244 Walnut Grove Avenue
11 Rosemead, California 91770
12 Telephone: (213) 572-1900

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

12 UNITED STATES OF AMERICA

13 NUCLEAR REGULATORY COMMISSION

14 BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

15 In the Matter of)	
)	Docket Nos. 50-361 OL
16 SOUTHERN CALIFORNIA EDISON)	50-362 OL
17 COMPANY, et al.,)	
)	
18 (San Onofre Nuclear Generating)	<u>PROTECTIVE ORDER</u>
Station, Units 2 and 3).)	
)	

19 On good cause being shown therefor;

20 IT IS HEREBY ORDERED pursuant to 10 C.F.R. §§ 2.740(c)
21 and (f)(2) that no further discovery may be had on Interrogatory
22 Nos. 1 through 30, 35, 43, 45, 64-69, 71, 73, 77, 78, 81, 82, 85
23 through 87, 93, 98 through 100, 103, 104, 109, 111, 117, 122 and
24 123 of "Intervenor, F.O.E. ET AL. Sixth Set of Interrogatories to
25 Southern California Edison."

26 DATED: _____, 1981

27 ATOMIC SAFETY AND LICENSING BOARD

28 By _____

CERTIFICATE OF SERVICE

I hereby certify pursuant to 10 C.F.R. § 2.712(e)(2) that on the 9th day of April, 1981, a copy of the "MOTION OF SOUTHERN CALIFORNIA EDISON COMPANY and SAN DIEGO GAS & ELECTRIC COMPANY FOR PROTECTIVE ORDER IN RESPONSE TO FOE, et al.'s MOTION TO COMPEL FURTHER ANSWERS TO INTERROGATORIES", as well as the accompanying memorandum of points and authorities and proposed protective order in support thereof, was served upon each of the following by depositing in the United States mail, first-class, postage prepaid, addressed as follows:

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

Dr. Cadet H. Hand, Jr.
Director, Bodega Marine Laboratory
University of California
P. O. Box 247
Bodega Bay, California 94923

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

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

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

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

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

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

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

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

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

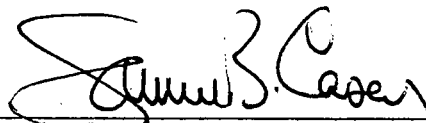
Richard J. Wharton, Esq.
University of San Diego
School of Law
Alcala Park
San Diego, California 92110

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

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

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

Docketing and Service Section
(Original and two copies)
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555



Samuel B. Casey
One of Counsel for Applicants
SOUTHERN CALIFORNIA EDISON COMPANY
and SAN DIEGO GAS & ELECTRIC COMPANY