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

18 In the Matter of)
19)
20 SOUTHERN CALIFORNIA)
21 EDISON COMPANY, ET AL.,)
22)
23 (San Onofre Nuclear)
24 Generating Station,)
25 Units 2 and 3))
26

Docket Nos. 50-361 OL
50-362 OL

24 MEMORANDUM IN OPPOSITION TO ISSUE RAISED
25 SUA SPONTE BY ORDER OF AUGUST 7, 1981
26

I.

INTRODUCTION

By its "Order (Modifying an Issue Concerning Earthquake and Emergency Planning)" dated August 7, 1981 the Board determined that the following issue should be raised, sua sponte, in this proceeding:

Assume a major earthquake in the SONGS area. This assumed earthquake causes extensive structural damage to the facility, to communications, to highways designated as evacuation routes, and is accompanied by radiological releases requiring evacuation in the plume exposure pathway of the EPZ. In these circumstances what steps could be taken by the applicants and responding jurisdictions to carry out evacuation in a timely manner and/or protect those in the EPZ pending evacuation? What federal resources, including military resources, could be brought in to assist in this situation, and how would federal assistance be accomplished?

Applicants respectfully submit that the Board has improperly exceeded NRC regulations and its sua sponte powers under 10 C.F.R. §2.760a. The issue is totally lacking in factual basis and exceeds all relevant NRC regulations.

As posed, the issue necessarily requires consideration of emergency planning procedures at San Onofre under either or both of the following conditions:

- 1) An earthquake in excess of the Safe Shutdown Earthquake ("SSE") which is assumed to cause a major radiological release and evacuation in the plume exposure pathway in the Emergency Planning Zone ("EPZ"); and/or

1 (2) An earthquake in excess of the SSE which is
2 assumed to occur coincident with a
3 non-earthquake related radiological release
4 requiring evacuation in the plume exposure
5 pathway of the EPZ.

6 Applicants consider both assumed scenarios to
7 exceed NRC regulations. Site suitability regulations call
8 for establishing a SSE which is defined as the maximum
9 earthquake for that site (10 C.F.R. §100, App. A). That
10 earthquake was initially defined at the Construction Permit
11 stage of this proceeding and, to a limited extent, is being
12 re-examined at the Operating License stage. As will be
13 discussed more fully, there is no factual basis or regulatory
14 reason for discussion of postulated earthquakes in excess of
15 the SSE. For this reason, the proposed issue exceeds NRC
16 regulations.

17 Similarly, assumption that an earthquake in excess
18 of the SSE will occur coincident with a radiological release
19 has no factual basis or basis in the regulations and is
20 beyond this Board's authority to consider.

21 Applicants also note that the impact of the Board's
22 Order is not limited to the instant docket. If a Board may
23 exceed regulatory requirements with respect to earthquakes at
24 San Onofre, what should be the standard of inquiry with
25 respect to earthquakes at other facilities? If it is
26 necessary to evaluate emergency planning as in practice by an

1 earthquake in excess of the SSE at San Onofre, on what basis
2 are similar considerations ignored at other plants? The
3 natural disaster need not be limited to earthquakes. In
4 areas where the relevant potential natural disaster may be a
5 hurricane, tornado or flood, is it now necessary to evaluate
6 the emergency preparedness at such sites coincident with a
7 natural disaster exceeding design levels for such events?

8 Where, as here, the Board seeks to postulate
9 incredible events without factual basis, just to see what
10 will happen, it is acting in excess of existing regulations
11 and abuses its sua sponte powers. The issue proposed by the
12 Board should be withdrawn.

13
14 II.

15 SUMMARY OF COMMISSION AND BOARD CONSIDERATION
16 OF MAJOR EARTHQUAKES AND MULTIPLE DISASTERS

17 The following history of Commission and Board
18 actions demonstrates that "major earthquakes" 1/ (in excess
19 of the SSE) and multiple disasters need not be considered in
20 establishing emergency plans.

21 As originally promulgated in 1970, 10 C.F.R.
22 Part 50, Appendix E required Applicants to provide
23 "sufficient information to assure the compatibility of

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25 1/ The term "major earthquake" as used herein refers to an
26 earthquake which exceeds the "Safe Shutdown Earthquake"
assigned for SONGS 2 and 3. See 10 C.F.R., Part 100,
Appendix A.III.(c).

1 proposed emergency plans with facility design features, site
2 layout, and site location with respect to such considerations
3 as access routes, surrounding population distributions, and
4 land use." Former 10 C.F.R., Part 50, Appendix E.11. At the
5 same time, the Commission developed a document entitled
6 "Guide to the Preparation of Emergency Plans for Production
7 and Utilization Facilities" to help applicants "establish
8 adequate plans required pursuant to § 50.34 and this appendix
9 for coping with emergencies." Former 10 C.F.R., Part 50,
10 Appendix E, note 1. Nothing in this guide suggested that
11 Applicants needed to engage in multiple disaster planning or
12 planning for a major earthquake.

13 In March, 1977, the Commission published for use
14 and public comment revised guidance to provide "more complete
15 guidance in developing the emergency plans required in the
16 final safety analysis report." Regulatory Guide 1.101
17 (Rev. 1), "Emergency Planning For Nuclear Power Plants,
18 March, 1977", at p. 1. The guide described "a method
19 acceptable to the NRC Staff for complying with the
20 Commission's regulations with regard to the content of
21 emergency plans for nuclear power plants, primarily in the
22 FSAR Stage." Id. This guidance did suggest that a nuclear
23 power plant operator should place plant personnel on alert
24 and possibly notify offsite emergency support organizations
25 in the event of "severe natural phenomena in the plant
26 environment such as a flood, earthquake, tsunami, hurricane

1 or tornado." Id. p. 4. However, nothing in this regulatory
2 guide stated or implied that applicants needed to engage in
3 multiple disaster planning. The guidance did suggest
4 consideration of "inclement weather". However, the
5 Applicants believe it ludicrous that the term "inclement
6 weather" be construed to include a major earthquake, an event
7 with a much lower probability.

8 At the same time, the Commission published
9 additional guidance "to provide a common reference and
10 guidance source for state and local governments in the
11 preparation of radiological emergency response plans in
12 support of fixed nuclear facilities", as well as for "federal
13 agency personnel engaged in the review of such State and
14 local government plans." NUREG-75/111, Guide and Checklist
15 for Development and Evaluation of State and Local Government
16 Radiological Emergency Response Plans in Support of Fixed
17 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
21 State and local radiological emergency response plans for the
22 area surrounding SONGS. By letter dated October 26, 1976,
23 the NRC Staff had already notified the Applicants that the
24 onsite emergency plan for SONGS, Unit 1, complied with
25 applicable NRC regulations and guidance. None of these

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1 plans, which were concurred in and otherwise approved by the
2 NRC Staff, contained multiple disaster planning.

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

1 In December, 1978, the Commission published for
2 comment additional guidance entitled NUREG-0396, "Planning
3 Basis for the Development of State and Local Government
4 Radiological Emergency Response Plans in Support of Light
5 Water Nuclear Power Plants." The purpose of the guidance was
6 to "provide a basis for Federal, State and local government
7 emergency preparedness organizations to determine the
8 appropriate degree of emergency response planning efforts in
9 the environs of nuclear power plants." Id., at p. 1. On
10 October 29, 1979, the Commission adopted this additional
11 guidance as NRC policy. 44 Fed. Reg. 61123. Effective
12 November 3, 1980, the emergency planning zones recommended
13 by this guidance became an NRC regulation. 10 C.F.R.
14 §§ 50.33(g), 50.47(c)(2), Part 50, Appendix E, n.2; 45 Fed.
15 Reg. 55402 (August 19, 1980). This guidance purported "not
16 to change the requirements for emergency planning," but did
17 purport to set a "bound on the emergency planning problem."
18 Id., at 14. Accordingly, it was stated therein that local
19 conditions such as demography, topography and land use
20 characteristics, access routes, jurisdictional boundaries,
21 and arrangements with the nuclear facility operator for
22 notification and response assistance should be considered.
23 However, nowhere is it stated or implied in this guidance
24 that multiple disaster planning was required or recommended.

25 On July 17, 1979, the Commission published an
26 "Advance Notice of Proposed Rulemaking on the Adequacy and

1 Acceptance of Emergency Planning Around Nuclear Facilities."
2 44 Fed. Reg. 41483. In the Notice, the Commission requested
3 written public comment on a number of issues, including
4 objectives for effective plans, acceptance criteria for
5 State/local emergency plans, NRC concurrence in State and
6 local plans as a requirement for issuance of an operating
7 license or continued operation of a nuclear facility, and
8 coordination between the licensee plan and State and local
9 plans. However, the issue of whether multiple disaster
10 planning should be required of nuclear power plant operators
11 or offsite assistance agencies was not expressly or
12 implicitly raised by the Commission in this Notice, nor to
13 Applicants' knowledge were any comments received suggesting
14 such consideration.

15 On September 14, 1979, the Commission published for
16 interim use and comment guidance on the four classes of
17 Emergency Action Levels to be established in lieu of
18 emergency action levels established in prior NRC guidance.
19 NUREG-0610, "Draft Emergency Action Level Guidelines for
20 Nuclear Power Plants, September 1979." In November, 1980,
21 the Commission published final guidance on this subject as
22 Appendix 1 to NUREG-0654/FEMA-REP-1, Criteria for Preparation
23 and Evaluation of Radiological Emergency Response Plans and
24 Preparedness in Support of Nuclear Power Plants (Rev. 1),
25 hereafter 'NUREG-0654'. This guidance, among other things,
26 requires notice of declaration of progressively serious

1 emergency classifications be given to State or local
2 authorities depending on the severity of natural phenomenon
3 being projected or being experienced beyond usual levels.
4 Significantly, nothing in the guidance states or implies an
5 obligation to engage in multiple disaster planning beyond the
6 requirement of notifying offsite assistance authorities that
7 natural phenomena are projected or are being experienced at
8 the site beyond usual levels.

9 On September 19, 1979, the Commission proposed for
10 comment a rule requiring all nuclear power plant licensees,
11 as a licensing condition, to submit emergency plans for NRC
12 review and approval and maintain the emergency plans up to
13 date. Nothing in this proposed rule stated or implied that
14 multiple disaster planning was being proposed as a licensing
15 condition. 44 Fed. Reg. 54308.

16 On December 7, 1979, President Carter, accepting a
17 recommendation in the Kemeny Commission Report on the
18 accident at Three Mile Island, directed the Federal Emergency
19 Management Agency, ("FEMA"), rather than the NRC, "to head up
20 all offsite emergency activities, and complete a thorough
21 review of emergency plans in all states with operating
22 reactors by, June, [1980]." Atomic Energy Clearing House,
23 Vol. 25, No. 50, at p. 70. The President's directive in no
24 way stated or implied that FEMA should direct or review
25 multiple disaster planning for nuclear power plants.

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1 FEMA in furtherance of the President's directive
2 subsequently took the following actions: (1) entered into a
3 Memorandum of Understanding between FEMA and the NRC, 45 Fed.
4 Reg. 5847 (January 14, 1980), as revised effective
5 October 22, 1980, 45 Fed. Reg. 82713 (December 16, 1980);
6 (2) published for interim use and comment a proposed rule to
7 establish policy and procedures for review and approval by
8 FEMA of state and local emergency plans and preparedness for
9 coping with the offsite effects of radiological emergencies
10 which may occur at nuclear power facilities, 45 Fed. Reg.
11 42341 (June 24, 1980); (3) published its "Report to the
12 President, State Radiological Emergency Planning and
13 Preparedness in Support of Commercial Nuclear Power Plants,
14 June, 1980"; (4) published for interim use and public comment
15 the "National Radiological Emergency Preparedness/Response
16 Plan for Commercial Nuclear Power Plant Accidents", 45 Fed.
17 Reg. 84910 (December 23, 1980); and (5) issued informal
18 guidance on joint exercise procedures and critiques,
19 January 27, 1981. Each of the foregoing documents indicate
20 that FEMA review, findings and determinations will be based
21 exclusively upon NUREG-0654. None of these documents state
22 or imply that FEMA intends or is required to review or make
23 findings and determinations on the status of multiple
24 disaster planning for nuclear power plants.

25 On December 19, 1979, the Commission published for
26 comment its proposed rule to amend its regulations to provide

1 an interim upgrade of NRC emergency planning regulations.
2 During January, 1980, the Commission conducted four regional
3 workshops with State and local officials, utility
4 representatives, and the public to discuss the feasibility of
5 various portions of the proposed amendments, their impact,
6 and the procedures proposed for complying with their
7 provisions. The NRC used the information from these
8 workshops, along with numerous comment letters received on
9 the general topic of emergency planning to develop the final
10 rule. The public input received during the period July 17,
11 1979 through publication of the final rule is contained in
12 NUREG-0628 (January, 1980), NUREG/CP-0011 (April, 1980), and
13 NUREG-0684 (September, 1980).

14 The Commission was briefed by the NRC Staff on
15 policy issues pertaining to the proposed final rule on
16 March 26 and June 18, 1980, and was briefed on the
17 consistency of the proposed final rule with the NRC
18 Authorization Act for fiscal 1980, Public L. No. 96-295, on
19 July 23, 1980. Additionally, on June 25, 1980, the
20 Commission was briefed by three panels of public commentators
21 on the proposed rule, representing industry, State and local
22 government, and public interest groups, respectively.
23 Finally on July 3, 1980, the Commission was briefed by the
24 NRC Staff in response to these panels, including several
25 modifications to the proposed final rules. Transcripts of
26 each of the foregoing briefings were made by the Commission.

1 The final rule was published August 19, 1980, effective
2 November 3, 1980. 45 Fed. Reg. 55402.

3 The Applicants, through counsel or industry
4 representatives, have commented on the proposed rule,
5 attended the workshops, attended the foregoing briefings,
6 reviewed the transcripts of those briefings, and reviewed the
7 proposed rule and the final rule, along with the prefatory
8 comments to the rule, as proposed and as adopted. Nowhere in
9 any of these proceedings or documents is a reference made by
10 the Commission or the NRC Staff expressly or implicitly
11 directing or recommending multiple disaster planning for
12 nuclear power plants. Moreover, no rationale is provided in
13 these proceedings or documents as to why such planning is
14 needed or desirable.

15 In January, 1980, the Commission and FEMA, jointly
16 published for interim use and public comment, NUREG-0654/
17 FEMA-REP-1 "Criteria for Preparation and Evaluation of
18 Radiological Emergency Response Plans and Preparedness in
19 Support of Nuclear Power Plants" (hereafter "Draft
20 NUREG-0654"). The current NRC emergency planning regulations
21 contain the planning standards initially set forth in Draft
22 NUREG-0654. Compare 10 C.F.R. § 50.47(b) with NUREG-0654,
23 Part II. These regulations also note the specific criteria
24 for meeting these planning standards contained in NUREG-0654,
25 but do not incorporate these criteria by reference into the
26 regulation. See 10 C.F.R. § 50.47(b) n. 1; Part 50, Appendix

1 E, n.1. A final version of NUREG-0654 was published in
2 November, 1980.

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

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

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

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

24 On September 29, 1980, approximately a month and a
25 half after the NRC's current emergency planning regulations
26 had been promulgated, FEMA issued a formal news release

1 announcing that it would "lead a team of federal agencies as
2 they work in cooperation with state government and local
3 agencies to accelerate efforts toward improving the state of
4 readiness to cope with potential major earthquakes in
5 California." FEMA News Release, No. 80-49, at p. 1; emphasis
6 added. The announcement was apparently prompted by the
7 dramatic impression the destructive impacts of the volcanic
8 eruption of Mt. St. Helens had made on President Carter. The
9 announcement was also motivated by President Carter's meeting
10 with Governor Brown on July 4, 1980, and President Carter's
11 letter to Governor Brown, dated September 19, 1980, revealing
12 the President's decision to direct an assessment of the
13 consequences and state of preparedness for a major earthquake
14 in California. Id. The pertinent correspondence between
15 President Carter and Governor Brown is attached to the FEMA
16 Press Release, along with a FEMA "Backgrounder" on the
17 on-going program by FEMA to review the potential consequences
18 and the state of preparedness for a catastrophic earthquake
19 in California.

20 Significantly, nowhere in the President's directive
21 to FEMA, the correspondence between the President and the
22 Governor, or FEMA's press release and "Backgrounder" is there
23 any indication that FEMA's efforts in this regard were to be
24 linked with FEMA's independent responsibility to review state
25 and local radiological emergency plans. See Memorandum of

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1 Understanding between FEMA and NRC, 45 Fed. Reg. 82713
2 (December 16, 1980).

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

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

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

14 By letter dated December 17, 1980, the NRC Staff
15 did request Applicants to "evaluate the potential
16 complicating factors" which might be caused either by an
17 earthquake onsite which disrupts "normal power and auxillary
18 services", or by an "earthquake offsite which disrupts
19 communications networks and transportation routes" following
20 the "initiation of accidents." The impact of an earthquake
21 upon onsite radiological emergency preparedness was requested
22 to be considered prior to the issuance of a full power
23 license for Units 2 and 3. A copy of the NRC Staff's memo to
24 FEMA, dated November 3, 1980, was enclosed in the letter, but
25 no time frame was specified for completion of FEMA's review
26 of the adequacy of State and local capabilities with respect

1 to response during earthquakes. It appears that a copy of
2 this letter was served on counsel for Intervenor FOE. et al.
3 and GUARD, but not on this Board.

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

9 On February 6, 1981, the NRC Staff issued
10 NUREG-0712, "Safety Evaluation Report Related to the
11 Operation of San Onofre Nuclear Generating Station, Units 2
12 and 3 (hereafter the "SER"). Section 13.3.1 of the SER notes
13 the NRC Staff has "requested all licensees and applicants of
14 nuclear plants in California to provide analyses of the
15 effects of an earthquake on their emergency plans." Section
16 13.3.4 of the SER further notes that "FEMA has been requested
17 as part of their review of Federal, State, and local
18 emergency plans to review the planning efforts for the areas
19 around the site to assure that protective actions to be
20 recommended by the applicants after earthquakes could be
21 implemented and are adequate." There is no mention in the
22 SER of the need for multiple disaster planning. Nothing in
23 SER states or implies that the NRC Staff considers multiple
24 disaster planning a regulatory requirement, or a necessary
25 prerequisite to issuance of operating licenses for SONGS 2
26 and 3. Accordingly, Applicants have interpreted the SER to

1 only request operational procedures to safely shutdown and
2 start up SONGS 2 and 3 in the event of an earthquake not
3 exceeding in severity the SSE, as required by 10 C.F.R., Part
4 50, Appendix A.I.2, and Part 100, Appendix A.

5 Specifically, 10 C.F.R., Part 100, Appendix A,
6 requires that nuclear power plants be shut down following an
7 earthquake of severity greater than the operating basis
8 earthquake and not returned to operation until it has been
9 demonstrated to the NRC Staff's satisfaction that no
10 functional damage has occurred to those features necessary
11 for continued operation without undue risk to the health and
12 safety of the public. The December 17, 1980 NRC Staff letter
13 requires the identification of what evaluation of emergency
14 response capability must be performed, and the degree and
15 depth of those evaluations, following an earthquake prior to
16 return to continuous plant operation. The December 17, 1980
17 letter also requires the identification of required
18 determinations of emergency response capability following
19 earthquakes of severity less than the operating basis
20 earthquake.

21 By Memorandum and Order, dated April 17, 1981, the
22 Board agreed that the post-seismic emergency planning issues
23 were beyond the scope of intervenors' contentions. The Board
24 further found that planning for a major radiological
25 emergency complicated by an earthquake which disrupts key
26 elements of the emergency response "can be safely disregarded

1 for any regulatory purpose." (Memorandum and Order,
2 April 17, 1981, p. 5.) However, without reaching a
3 conclusion on the issue or articulating a factual basis for
4 the concern, the Board requested the views of the parties
5 regarding its legal authority, on its own motion, to require
6 the Applicants to demonstrate planning for a radiological
7 emergency caused by an earthquake at the site which exceeds
8 the SSE and causes "extensive damage to offsite
9 transportation, communication and the like." (Id. at
10 pp. 5-6.)

11 On April 29, 1981, during the third prehearing
12 conference, the NRC Staff confirmed on the record that both
13 the NRC Staff and the Federal Emergency Management Agency
14 were considering the impact of earthquakes in their review of
15 onsite and offsite emergency planning for SONGS 2 and 3.
16 (TR. 444). At the same time, Chairman Kelley agreed that
17 planning for an on-going radiological emergency complicated
18 by an earthquake, so-called "coincident event" planning, was
19 not required (TR. 450), but requested briefs on emergency
20 planning for an earthquake which exceeds the SSE ("simply
21 because [the question had] arisen and we've gotten responses
22 from some, but not all, of the parties." (TR. 451)

23 On or about May 13, 1981 Applicants received a
24 letter from the NRC Staff which clarified that an earthquake
25 exceeding the SSE need not be considered for emergency

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1 planning purposes. The letter in pertinent part stated
2 (emphasis added):

3 "[y]ou are requested to evaluate the
4 effects earthquakes would have on your
5 emergency response capability and include
6 these considerations in your emergency plan.
7 For purposes of this evaluation, as a
8 planning basis you may assume that the plant
9 site experiences earthquake effects no more
10 severe than the Safe Shutdown Earthquake."

11 A copy of this letter was made available to the parties
12 herein

13 On or about June 3, 1981, FEMA reported to NRC that
14 the involved offsite assistance agencies were prepared and
15 capable of responding to the "potential seismic problem."
16 The memorandum to Brian Grimes, NRC, from John E. Dickey,
17 FEMA, in pertinent part stated:

18 "While current plans reflect no direct
19 assessment of earthquake issues, all planning
20 considered the ramifications of such events and it
21 is considered that a general capability exists to
22 respond through basic emergency planning to what is
23 considered to be the most likely and frequent
24 levels of seismic activity. A catastrophic
25 earthquake notwithstanding (which would likely
26 nullify the significance of a nuclear emergency),
the offsite jurisdictions reflect a level of
preparedness through existent basic planning to
minimally respond to the potential seismic problem."

27 The memorandum containing this report has been served on the
28 parties herein.

29 On June 12, 1981, the NRC Staff filed its further
30 response to FOE et al.'s third set of interrogatories (the
31 "NRC Response"). The NRC Response explains the planning
32 rationale for not requiring consideration of earthquake

1 effects more severe than the SSE for emergency planning
2 purposes, as follows:

3 "Emergency plans need not be explicitly
4 written to respond to accidents created by
5 failure of plant systems designed for the SSE
6 as failures of such essential safety systems
7 have been made adequately low in likelihood
8 by explicit design against earthquakes at and
9 below the SSE level. In addition, the
10 characteristics of an accident which could
11 theoretically be created by an earthquake
12 larger than the SSE would be in the spectrum
13 of accidents considered in determining the
14 sizes of the emergency planning zones and the
15 other planning elements which form the
16 Commission's regulations in the area of
17 emergency planning. Consequently, in
18 planning for a moderate earthquake and
19 meeting the planning standards set forth in
20 the Commission's regulations, an emergency
21 response base capability would be in place
22 which could be expanded during an actual
23 emergency. Emergency planning for less than
24 worst-case events gives confidence that the
25 occurrence of any of a spectrum of events,
26 including very low likelihood events, would
give decisionmakers a planning base from
which specific actions could be chosen from
among available alternatives."

17 The NRC Response further explains the conservatism
18 of this rationale by pointing out that:

19 "Seismic Category I structures, systems, and
20 components at San Onofre 2 and 3 are designed
21 to remain functional during and after the
22 SSE, as required by 10 C.F.R. 100, Appendix
23 A.iii.(c). Further, these structures,
24 systems, and components have sufficient
25 margin that they are capable of withstanding
26 earthquakes that exceed the SSE."

24 Finally the NRC Response contains the response of
25 FEMA approving the adequacy of a planning basis which assumes
26 an earthquake not exceeding the SSE:

1 With respect to earthquake considerations for
2 the San Onofre Nuclear Generating Station,
3 Units 2 and 3 (SONGS 2 & 3), FEMA has
4 considered earthquake effects in making its
5 Interim Findings and Determination Relating
6 to the Status of State and Local Emergency
7 Preparedness for the San Onofre Nuclear
8 Generating Station (Units 2 and 3) dated
9 June 3, 1981. For purposes of the
10 evaluation, earthquake effects no more severe
11 than the Safe Shutdown Earthquake (SSE) were
12 assumed to occur independently of a reactor
13 accident. This planning basis is deemed
14 adequate given the substantial conservatism
15 applied by the Nuclear Regulatory Commission
16 (NRC) in establishing the SSE, and the
17 resulting low likelihood of its occurrence.
18 Even should such a low likelihood event
19 occur, a planning base would be available and
20 could be expended to meet actual conditions,
21 given a state of emergency preparedness in
22 conformance with the emergency preparedness
23 planning standards of 10 C.F.R. sub-section
24 50.47."

25 The foregoing facts demonstrate that Applicants and
26 the involved jurisdictions have in place emergency plans that
take into account the possible offsite effects of an
earthquake on offsite emergency response capability.
Additionally, these facts demonstrate that specific
consideration of an earthquake which exceeds the SSE in
severity is not necessary to assure a proper level of
earthquake emergency planning. Significantly, nothing in the
record presently before the Board provides a factual basis to
conclude that a serious safety question is presented by
failure to go beyond the planning basis established in NRC
regulations and to specifically consider an earthquake which
exceeds the SSE for emergency planning purposes.

1 III.
2 ARGUMENT

3 A. IF THE BOARD ASSUMES A RADIOLOGICAL RELEASE
4 CAUSED BY AN EARTHQUAKE IN EXCESS OF THE SSE,
5 IT IS CLEARLY EXCEEDING ITS AUTHORITY.

6 The SSE is the largest earthquake that need be
7 considered in evaluating reactor safety. In evaluating the
8 acceptability of a site for a nuclear power reactor, the
9 Commission takes into account the physical characteristics of
10 the site, including seismology, meteorology, geology and
11 hydrology. 10 C.F.R. Part 100. The evaluation of seismic
12 and geologic factors must conclude with "reasonable assurance
13 that a nuclear power plant can be constructed and operated at
14 the proposed site without any undue risk to the health and
15 safety of the public." 10 C.F.R. §100.10(c)(1). Such
16 conclusion is no less stringent than ". . . that the state of
17 onsite and offsite emergency preparedness provides reasonable
18 assurance that adequate protective measures can and will be
19 taken in the event of a radiological emergency." 10 C.F.R.
20 § 50.47(a)(1).

21 The SSE determined under Part 100 is the
22 appropriate basis for evaluation of reactor safety as a
23 result of earthquakes. Part 50, Appendix A, Criterion 2
24 specifies the design basis for protection against natural
25 phenomenon as follows:

26 Structures, systems, and components important
to safety shall be designed to withstand the
effects of natural phenomenon such as
earthquakes, tornados, hurricanes, floods,
tsunami, and seiches without loss of

1 capability to perform their safety functions.
2 The design bases for these structures, systems
3 and components shall reflect: (1) Appropriate
4 consideration of the most severe of the
5 natural phenomenon that have been historically
6 reported for the site and surrounding area,
7 with sufficient margin for the limited
8 accuracy, quantity and period of time in which
9 the historical data have been accumulated ..

10 The earthquake described is the SSE.

11 The seismic evaluation under Part 100 centers
12 around determination of the SSE, which is:

13 that earthquake which is based upon an
14 evaluation of the maximum earthquake potential
15 considering the regional and local geology and
16 seismology and specific characteristics of
17 local subsurface materials. It is that
18 earthquake which produces the maximum
19 vibratory ground motion for which certain
20 structures, systems, and components are
21 designed to remain functional. These
22 structures, systems, and components are those
23 necessary to assure:

24 (1) The integrity of the reactor coolant
25 pressure boundary,

26 (2) The capability to shut down the
reactor, and maintain it in a safe shutdown
condition, or

(3) The capability to prevent or
mitigate the consequences of accidents which
could result in potential off-site exposures
comparable to the guideline exposures of this
part."

10 C.F.R. Part 100, Appendix A, III(c). (Emphasis added.)

23 If the Board is assuming that a radiological
24 release is caused by an earthquake in excess of the SSE, it
25 is acting in excess of Commission regulations and in excess
26 of its authority. The regulations clearly provide that the

1 SSE is to be used as the design basis for reactor safety
2 considerations.

3 B. THE BOARD'S PROPOSED CONTENTION WOULD
4 REQUIRE APPLICANTS TO PLAN FOR A
5 MULTIPLE DISASTER. DESPITE A TOTAL
6 ABSENCE OF AUTHORITY FOR SUCH A
7 REQUIREMENT.

8 As discussed above, evaluation of the consequences
9 of an earthquake on reactor safety in excess of the SSE is
10 beyond the authority of the Board. A radiological release
11 resulting from an accident caused by an earthquake stronger
12 than the SSE accordingly cannot be considered.

13 Yet the Board has postulated a radiological release
14 occurring at the same time as an earthquake in excess of the
15 SSE. Since the Board is barred from assuming that the
16 release is caused by the earthquake, it is forced to assume
17 that the earthquake and the release would be coincident
18 events, an assumption that is itself unfounded under
19 applicable law.

20 Planning for such a multiple disaster is not
21 required by the Commission's regulations. Nonetheless, the
22 Board's contention would require analysis of a "major
23 earthquake" concurrent with a radiological emergency related
24 to the operation of SONGS 2 and 3. Such an analysis is not
25 required under applicable Commission regulations. 10 C.F.R.
26 §§ 50.33(g), 50.47, 50.54(q)(r)(s)(t) and (u), and Part 50,
Appendix E. Accordingly, the contention proposed by the

1 Board well exceeds the scope of the regulations and is beyond
2 its authority.

3 A chronicle of the development of the applicable
4 NRC regulations and guidance reveals that multiple disaster
5 emergency planning has never been proposed or considered by
6 the Nuclear Regulatory Commission, and is not now being
7 required or requested by the NRC Staff. At all relevant
8 times, the Commission has required each applicant for an
9 operating license to include in its Final Safety Analysis
10 Report plans for coping with emergencies. 10 C.F.R.
11 § 50.34(b)(6)(v). The items to be included in these plans
12 are specified in 10 C.F.R., Part 50, Appendix E. At no time
13 has the Commission ever required development of information
14 necessary to respond to a multiple disaster.

15 C. COMMISSION REGULATIONS DIRECTLY LIMIT THE
16 PLANNING BASIS FOR THE EMERGENCY PLAN TO THE
SSE.

17 As outlined above, the SSE is defined to be the
18 basis for evaluation of "structures, systems, and components"
19 which are necessary to assure the capability to "mitigate the
20 consequences of accidents." 10 C.F.R. Part 100, Appendix A,
21 III(c). The emergency plan is one such system for which the
22 SSE provides a planning basis. The Board's order would
23 narrowly construe this limitation to exclude the emergency
24 plan from the definition of a "system" necessary to assure
25 mitigation of the consequences of accidents. Such an
26 assumption lacks foundation in the regulations and is without

1 logic. To begin with, the regulations do not limit
2 application of the SSE to physical plant systems. The
3 limitation of the safety system planning basis to the SSE at
4 a minimum provides evidence of Commission intent that the SSE
5 is the ultimate earthquake to be postulated for all safety
6 purposes.

7 An interpretation of the definition of the SSE that
8 applies the SSE as the planning basis for the emergency plan
9 is consistent with the emergency planning regulations. The
10 standard for selection of the SSE is at least as stringent as
11 that specified in the emergency planning regulations for
12 evaluation of the emergency plan. The plan must provide
13 "reasonable assurance that adequate protective measures will
14 be taken" at San Onofre "in the event of a radiological
15 emergency." 10 C.F.R. §50.47(a)(1). (Emphasis added.) This
16 same level of assurance must be provided by selection of the
17 SSE, since the SSE must "provide reasonable assurance that a
18 nuclear power plant can be ... operated ... without undue
19 risk to the health and safety of the public." 10 C.F.R.
20 §100.10(c)(1). (Emphasis added.)

21 By requiring consideration of an earthquake in
22 excess of the SSE, the Board is postulating an incredible
23 event that need not be evaluated. The Board itself has
24 admitted that such an earthquake is "extremely unlikely",
25 Board Order of July 29, 1981, and, in fact, has no basis for
26 its occurrence. Consideration of an such incredible event is

1 not necessary to provide reasonable assurance that the
2 emergency plan will be effective. The postulated earthquake
3 that provides reasonable assurance for reactor safety
4 purposes, the SSE, also provides reasonable assurance in the
5 emergency planning context.

6 D. THE COMMISSION'S EMERGENCY PLANNING
7 REGULATIONS PROVIDE A DETAILED AND
8 COMPREHENSIVE DESCRIPTION OF WHAT MUST BE
CONSIDERED IN THE EMERGENCY PLAN.

9 The emergency planning regulations, 10 C.F.R.
10 §50.47, contain an exhaustive list of those elements that
11 must be considered in evaluating emergency plans. The
12 regulations were promulgated by the Commission after
13 extensive public comment and deliberation. No mention
14 whatsoever is made in the regulations of an earthquake in
15 excess of the SSE. If the Commission had intended that such
16 an unlikely event be considered, with corresponding costs and
17 delays, it would have so specified in the regulations. The
18 Commission instead carefully selected the language used to
19 measure the adequacy of an emergency plan, requiring
20 "reasonable assurance" -- precisely the standard also
21 delineated by the Commission for selecting the SSE.

22 The Board's proposed contention represents a bold
23 expansion of the emergency planning requirements so recently
24 set forth in detail by the Commission. Such an expansion
25 should only be undertaken by the Commission itself.

26 ///

1 The history of the emergency planning regulations
2 demonstrates the degree to which the Commission has
3 determined to oversee this area through regulation. On
4 December 19, 1979, the Commission proposed new regulations
5 relating to emergency planning. The proposed regulations
6 were intended to provide an "interim upgrade" of the existing
7 emergency planning requirements. The "mid-course correction"
8 represented by the emergency planning regulations clarifies
9 and expands areas that were perceived by the Commission to be
10 deficient as a result of past experiences. Notably, however,
11 nothing in the proposed regulations mentioned consideration
12 of the effect of earthquake on the emergency plan.

13 The final emergency planning regulations were based
14 upon extensive public comments, some of which suggested that
15 the Commission include consideration of earthquake in the
16 development of the emergency plans. See e.g., "Petition to
17 Intervene" by Edgecumb Citizens Committee Concerned About
18 Nuclear Power, Docket PR-50, NO. 12. One comment
19 specifically raised the issue of colloid events.

20 "Based on our review of this report, it is
21 urged that the NRC:

22 A. Require the use of a spectrum of
23 accidents (not the source term from a single
24 accident sequence) and concurrence external
emergency conditions (e.g., earthquake,
hurricane, floods) as the basis for
emergency response planning."

25 (Comments by San Luis Obispo Area Task Force on
26 Nuclear Power Issues, August 27, 1979). The final

1 regulations do not incorporate the suggested approach and it
2 must be presumed this suggestion was rejected. Notably, the
3 final regulations are totally lacking in any specific
4 requirements relating to earthquake preparedness.

5 The preamble to the final regulations states that:

6 "In order to discharge effectively its
7 statutory responsibilities, the Commission
8 must know that proper means and procedures
9 will be in place to assess the course of an
10 accident and its potential severity, that NRC
11 and other appropriate authorities and the
12 public will be notified promptly, and that
13 adequate protective actions in response to
14 actual or anticipated conditions can and will
15 be taken."

16 45 Fed. Reg. 55403 (August 19, 1980). (Emphasis added.) The
17 intent of the Commission is clear, that only anticipated
18 conditions need be considered in formulating the emergency
19 plan. Unanticipated conditions or incredible events,
20 including those created by an earthquake in excess of the
21 SSE, need not be evaluated.

22 The approach taken in the Commission's emergency
23 planning regulations is to establish specific criteria for
24 those emergency plans, which are assumed to provide a
25 response base to support activities to respond to emergencies
26 in excess of the emergency planning basis. For example, an
27 emergency planning zone ("EPZ") is established around each
28 plant, with a radius of approximately 10 miles for airborne
29 exposure, and 50 miles for ingestion exposure. Although it
30 is recognized that a response may be required beyond the

1 distances specified for the EPZs, the emergency plan need not
2 evaluate the need to respond beyond those distances, since
3 the plan itself provides a response base that would support
4 activity outside the planning zone should this ever be
5 needed. 45 Fed. Reg. 55406.

6 The Commission made a deliberate determination not
7 to require consideration of extremely unlikely events in the
8 development of the emergency plan, and instead relied upon
9 the presence of the emergency response system to provide a
10 framework for responding on an ad hoc basis to unanticipated
11 emergency events.

12 The on-site and off-site emergency response plans
13 are required to satisfy a list of very specific requirements
14 under the final emergency planning regulations. These
15 requirements include definition of responsibilities, an
16 action plan, procedures, public notification, emergency
17 facilities and equipment, etc. Significantly, no mention is
18 made whatsoever of extraordinary events, including major
19 earthquake, in this comprehensive listing of emergency
20 planning requirements.

21
22 E. THE BOARD CAN ONLY RAISE AN ISSUE ON ITS OWN
23 MOTION WHERE IT DETERMINES THAT A SERIOUS
24 SAFETY QUESTION EXISTS.

25 Commission regulations provide that:

26 Matters not put into controversy by the
pa ties will be examined and decided by the
presiding officer only where he or she

1 determines that a serious safety,
2 environmental, or common defense and security
matter exists.

3 10 C.F.R. §2.760a. No such matter is presented by this
4 case. As discussed above, determination of the SSE in
5 development of the emergency plan provides the "reasonable
6 assurance" required by the Commission. No evidence has been
7 presented to contradict this fact, and the NRC Staff confirms
8 the adequacy of the consideration of earthquake in the
9 emergency plan. The threshold showing required by Section
10 2.760a has not been made and the Board may not raise the
11 issue without such a showing.

12 The Commission has recently evidenced concern over
13 expansive use of such sua sponte authority by directing a
14 screening review of such orders by the Office of General
15 Counsel to determine if Commission oversight is necessary.
16 Memorandum from Bethesda Licensing Operations,
17 "Commissioner's Meeting on Licensing Procedures on June 2,
18 1981," dated June 3, 1981.

19 Section 2.760a has been interpreted to mean that an
20 Atomic Safety and Licensing Board has the power to raise "sua
21 sponte" any "serious" safety issue. However, this power
22 should be used "sparingly" in operating license cases since
23 the Board is "neither required nor expected to pass upon all
24 the items which the staff must consider and resolve before it
25 approves the license." Consolidated Edison Company of New
26 York (Indian Point, Units 1, 2 & 3), ALAB-319, 3 NRC 188, 190

1 (1976); see also Consolidated Edison Co. of New York (Indian
2 Point, Unit 3), CLI-74-28, 8 AEC 7, 9 (1974). This rule is
3 complemented by the general principal that a Licensing Board
4 is not required to do independent research or conduct de novo
5 reviews of applications, but may rely on uncontested NRC
6 Staff and Applicant evidence. Consumer Power Co. (Midland
7 Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 334-35 (1973);
8 Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-83, 5
9 AEC 354, 357 N.16 (1972), affirmed Union of Concerned
10 Scientists v. AEC, 499 F.2d 1069 (D.C. Cir. 1974).

11 This does not mean "extraordinary circumstances"
12 are required to invoke the Board's sua sponte power.
13 However, it does mean that realistic health and safety
14 questions must be presented before the Board should exercise
15 its sua sponte power. 44 Fed. Reg. 67038, November 23, 1979,
16 (emphasis added).

17 Such realistic questions are not presented in this
18 case. The uncontroverted evidence submitted to the Board by
19 Applicants, the NRC Staff and FEMA is that adequate
20 consideration of the on-site and off-site effects of
21 earthquakes has been given by Applicants and the involved
22 offsite jurisdictions such that no "serious" or "important"
23 health and safety issue exists. The Board itself recognized
24 that the Intervenor have no standing to state contentions in
25 this regard. Memorandum and Order, April 17, 1981, p. 7;
26 TR. 446 (April 29, 1981). Given the total absence of facts

1 suggesting the existence of a serious or important health and
2 safety issue, there is no justification for the Board to
3 exercise its sua sponte power.

4 F. VERMONT YANKEE DOES NOT PERMIT THIS BOARD TO
5 EXCEED APPLICABLE NRC REGULATIONS IN
6 ESTABLISHING A PLANNING BASIS FOR SONGS 2 & 3.

7 The Vermont Yankee case, relied upon by the Board,
8 involved an effort by the NRC Staff to impose a 5%
9 metal-water reaction criteria for purposes of designing a
10 system to control hydrogen concentrations within the
11 containment (the "Hydrogen Control System"). Vermont Yankee
12 Nuclear Power Corporation (Vermont Yankee Nuclear Power
13 Station), CLI-74-40, 8 AEC 809 (1974). The NRC Staff was
14 opposed by Applicants based on the fact that a 1% metal-water
15 reaction criteria had been previously imposed by regulation
16 as the design basis for the emergency core cooling system
17 (the "ECCS System"). However, there were no NRC regulations
18 establishing metal-water reaction criteria for the design
19 basis of the Hydrogen Control System. (8 AEC, at p. 810.)
20 The Commission determined that regulations governing ECCS
21 System design did not preempt NRC Staff guidance on design of
22 the Hydrogen Control System, since the design parameters of
23 the Hydrogen Control System had not been established by
24 regulation. Reliance upon Vermont Yankee is misplaced in a
25 case such as this where the design or planning basis for
26 development of emergency plans is definitively and

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1 comprehensively established in NRC regulations as described
2 above. 10 C.F.R. Parts 50 and 100.

3 Vermont Yankee was motivated by a concern with
4 "defense in depth" and the Commission did state that
5 successively increasing conservatism could be imposed on
6 measures designed to mitigate accidents. It is also true
7 that emergency planning provides an additional layer of such
8 defense. However, the Board errs in taking the next critical
9 step -- assuming that the defense in depth concept provides a
10 carte blanche for imposition of requirements in excess of
11 clearly defined regulatory limits.

12 Defense in depth is furthered by emergency
13 planning, particularly where the plans must assume the
14 occurrence of "worst case core melt sequences" tempered by
15 "probability considerations" in establishing that level of
16 planning necessary to provide a response capability adequate
17 to protect the public health and safety. See 45 Fed. Reg.
18 55406 (August 19, 1980); 44 Fed. Reg. 61123 (October 23,
19 1979); NUREG-0396/EPA 520-1-78-016, "Planning Basis for the
20 Development of State and Local Government Radiological
21 Emergency Response Plans in Support of Light Water Nuclear
22 Power Plants, December, 1978," pp. 4-6, 15 and Appendix I;
23 NUREG-0654/FEMA-REP-1 (REV. 1), "Criteria for Preparation and
24 Evaluation of Radiological Emergency Response Plans and
25 Preparedness in Support of Nuclear Power Plants, November
26 1980," pp. 5-13. It is with this planning basis that the

1 Commission has placed a limit on this Board. By going beyond
2 this limit, the Board is exceeding its regulatory authority.

3 This Board should also note that the Commission in
4 Vermont Yankee determined that the issue raised was of
5 sufficiently widespread importance that a rulemaking should
6 be initiated to address the question. Although the
7 Commission affirmed the Board's imposition of a 5%
8 assumption, it stayed application of that assumption pending
9 a rulemaking effort. This action was clearly in support of
10 the principle that significant expansions of law or policy
11 are reserved to the Commission.

12 An unlimited ability of the Board to adopt new
13 issues and broaden the scope of licensing proceedings would
14 open a regulatory Pandora's box. There must be some limit to
15 regulation and it is unclear where the Board would draw the
16 line. For example, should "major" earthquakes not be
17 considered at all plants? Should an extraordinary hurricane
18 now be considered at San Onofre? The administrative process
19 is bounded by regulation to avoid such endless litigation.

20 Applicants submit that the Board lacks the
21 necessary legal authority to impose any emergency planning
22 basis other than the emergency planning basis specified in 10
23 C.F.R. §50.33(g), n.1 and 10 C.F.R., Part 100,
24 Appendix A.III.(c). Imposition of a planning basis not
25 specified or inconsistent with these regulations violates the
26 Commission's regulation barring a challenge in the licensing

1 proceeding to the sufficiency of Commission regulations, or
2 the basis upon which Commission regulations rest. 10 C.F.R.
3 §2.758(a); Pennsylvania Power and Light Co. (Susquehanna
4 Nuclear Power Plant), ALAB-613, 12 NRC, 324, n.11 (1980);
5 Potomac Electric Power Co. (Douglas Point Nuclear Generator
6 Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85-89 (1974);
7 see Public Service Co. of Oklahoma (Black Fox Station,
8 Units 1 and 2), CLI-80-31, 12 NRC 264, 270, n.7 (1980). Even
9 if the Board is of the view that such a challenge should be
10 considered, it may only allow such a challenge upon "a prima
11 facie showing" of its factual legitimacy and express
12 direction to do so from the Commission. 10 C.F.R.
13 §§2.758(b), (c) and (d). No such showing or Commission
14 authorization is currently before the Board.

15 Based on the Commission's decision in Vermont
16 Yankee, as well as applicable NRC regulations, Applicants
17 submit the Board is constrained to exercise its power to
18 investigate matters not otherwise put in controversy only
19 where a serious safety question, not otherwise governed by
20 NRC regulations, has been shown by some evidence to exist.
21 There is no need to exercise such power in this case. Unlike
22 the situation in Vermont Yankee, such post-seismic emergency
23 planning is neither required nor authorized by the governing
24 NRC regulations. Nor has there been a threshold showing by
25 the federal agencies involved that implementation of the
26 emergency planning basis established in the governing NRC

1 regulations leaves a "serious" safety question regarding the
2 ability to respond to a seismic emergency, including an
3 earthquake exceeding the SSE in severity, at SONGS 2 and 3.

4 G. ANY INTERPRETATION OF NRC REGULATIONS
5 REQUIRING MULTIPLE DISASTER PLANNING, OR
6 PLANNING FOR AN EARTHQUAKE IN EXCESS OF THE
7 SSE, VIOLATES THE ADMINISTRATIVE PROCEDURE ACT.

8 At no time has multiple disaster planning or
9 planning for an earthquake in excess of the SSE been required
10 by NRC regulations. The Board erroneously takes the position
11 that even though such a requirement is not found in the
12 Commission's regulations, it still may imply a requirement of
13 multiple disaster planning or planning for a major earthquake.

14 Section 553 of the Administrative Procedure Act
15 ("APA"), 5 U.S.C. § 553, requires agencies in promulgating
16 rules to allow interested and affected parties to submit
17 comments to proposed regulations which have been previously
18 published in the Federal Register. The notice and comment
19 provisions of the APA are applicable to the NRC. See Vermont
20 Yankee Nuclear Power Corp. v. Natural Resources Defense
21 Council, 435 U.S. 519 (1978). See also 10 C.F.R. § 2.800 et
22 seq. "Elementary fairness" requires notice and comment
23 procedure be followed before an agency interpretation, which
24 substantially changes the scope of an affected party's
25 obligations under current regulations, may be enforced
26 against the regulated party. See e.g. Broker Dealers Trade
Association v. SEC, 441 F.2d 132 (D.C. Cir. 1971) cert.

denied, 404 U.S. 828 (1971); United States ex rel Parco v. Morris, 426 F. Supp. 976 (E.D. Pa. 1977); 2 K. Davis Administrative Law Treatise, 30, 81 (2nd ed. 1979). This is especially true in this case where Congress has specifically mandated that offsite emergency planning requirements be imposed "by rule". 1980 NRC Authorizations Bill, P.2. 96-295, 94 Stat. 784, June 30, 1980, § 109(f)(1)(A).

Applicants submit that the Board's request to evaluate the impact of a "major" earthquake on radiological emergency response capability has a substantial impact on Applicants. Accordingly, to the extent that this Board is permitted to create a new emergency planning regulation solely by way of its proposed Convention, rather than by following the required notice and comment rulemaking procedures, section 109(b)(1)(A) of the 1980 Authorizations Bill and section 553 of the APA would be violated.

IV.

CONCLUSION

There is neither legal authority nor factual basis to support an exercise by the Atomic Safety and Licensing Board of its sua sponte power under 10 C.F.R. §2.760a, which would require specific consideration of earthquake consequences, including an earthquake exceeding the SSE, for

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1 emergency planning purposes. Accordingly, the Board's
2 contention should not be raised sua sponte in this case.

3 Dated: August 17, 1981

4 Respectfully submitted,

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