

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
)
SOUTHERN CALIFORNIA EDISON COMPANY) Docket Nos. 50-361-CAL/50-362-CAL
)
(San Onofre Nuclear Generating Station)
Units 2 and 3))
)

NRC STAFF'S ANSWER TO FRIENDS OF THE EARTH'S APPLICATION TO STAY ANY
DECISION TO RESTART UNIT 2 OR 3 AT THE SAN ONOFRE NUCLEAR GENERATING
STATION PENDING CONCLUSION OF THE PROCEEDINGS REGARDING
CONSIDERATION OF THE SAFETY OF THE REPLACEMENT STEAM GENERATORS

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June 28, 2012

TABLE OF CONTENTS

	<u>PAGE</u>
INTRODUCTION	1
BACKGROUND	2
ARGUMENT	4
I. Legal Standards	4
A. Legal Standards for Timing of Intervention	4
B. Standards for an Application for Stay	4
C. Requirements for Electronic Filing in Adjudicatory Proceedings	5
II. FOE's Application for Stay Should Be Denied	6
A. There Is No Proceeding to Stay	6
B. FOE Does Not Meet the Four Elements Needed For a Stay	7
1. FOE Has Not Made an Overwhelming Showing of Success on the Merits	7
2. FOE Has Not Shown Irreparable Harm	8
3. FOE Fails to Show That a Stay Is Harmless to Other Parties	8
4. FOE Does Not Show That a Stay Is In the Public Interest	9
C. FOE Failed to Comply with the EIE Filing Requirements	9
CONCLUSION	10

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.342(d), the Staff of the Nuclear Regulatory Commission (Staff) files its answer to Friends of the Earth's (FOE) "Application to Stay Any Decision to Restart Units 2 or 3 at the San Onofre Nuclear Generating Station [SONGS] Pending Conclusion of the Proceedings Regarding Consideration of the Safety of the Replacement Steam Generators" (Application to Stay), submitted June 18, 2012.¹ FOE requests a stay pursuant to 10 C.F.R. 2.342 "of any authorization for restart of Units 2 or 3 at the San Onofre Nuclear Generating Station (San Onofre) pending the conclusion of a license amendment proceeding concurrently requested by FOE."² The Staff opposes FOE's request for stay because, *inter alia*, (1) there is

¹ "Application to Stay Any Decision to Restart Units 2 or 3 at the San Onofre Nuclear Generating Station Pending Conclusion of the Proceedings Regarding Consideration of the Safety of the Replacement Steam Generators," (June 18, 2012) at 1. Along with its Application to Stay, FOE also submitted a Cover Letter dated June 18, 2012; "Petition to Intervene and Request for Hearing by Friends of the Earth" (June 18, 2012) ("Petition"); "Declaration Of Arnold Gunderson Supporting The Petition To Intervene By Friends Of The Earth Regarding The Ongoing Failure Of The Steam Generators At The San Onofre Nuclear Generating Station" (May 31, 2012); Curriculum Vitae of Arnold Gunderson (May 2012); "Declaration of Marcelin E. Keever" (May 30, 2012); and "Declaration of Lyn Harris Hicks" (May 29, 2012). The documents are in a single file at ADAMS Accession No. ML12171A409.

² Application to Stay at 1.

no licensing action in which to intervene, (2) FOE does not otherwise meet the equitable standards for a stay, and (3) FOE did not comply with the NRC's filing requirements.³

BACKGROUND

On January 9, 2012, Southern California Edison Company (the licensee) shut down SONGS Unit 2 for a refueling outage.⁴ On January 31, 2012, in response to radiation alarms in the secondary plant systems, the Unit 3 operators diagnosed that a steam generator tube leak of about 82 gallons per day was occurring, and as directed by procedures, shut down Unit 3.⁵ Both units remain shut down today.

On March 23, 2012, the licensee sent a letter to the Nuclear Regulatory Commission (NRC) describing the "Steam Generator Return-to-Service Action Plan" and committing to execute the plan prior to returning Units 2 and 3 to power operation.⁶ On March 26, 2012 the NRC confirmed its understanding of the actions the licensee planned by phone, and on March 27, 2012, NRC memorialized this understanding in a Confirmatory Action Letter (CAL)⁷ which

³ The Staff reserves its right to subsequently answer FOE's hearing request separately consistent with the Commission's procedures.

⁴ NRC Integrated Inspection Report 05000361/2012002 and 05000362/2012002, Enclosure at 5 (May 8, 2012) (ADAMS Accession No. ML12129A562).

⁵ *Id.* Enclosure at 34. The NRC chartered an Augmented Inspection Team (AIT) to evaluate the steam generator tube integrity issues at Units 2 and 3, and the AIT's inspection results will be published in the future in NRC Inspection Report 05000361 and 05000362/2012007. *Id.* Enclosure at 35.

⁶ Letter from Peter T. Dietrich, Senior Vice President & Chief Nuclear Officer, Southern California Edison Company to Elmo E. Collins, Regional Administrator, Region IV, USNRC, subject: *Docket Nos. 50-361 and 50-362, Steam Generator Return-to-Service Action Plan, San Onofre Nuclear Generating Station* (March 23, 2012) (ADAMS Accession No. ML12086A182).

⁷ CALs are discussed in § 3.5 of the NRC's Enforcement Manual, Rev. 7 (Oct. 1, 2010) (ADAMS Accession No. ML102630150). The NRC uses CALs as a way to emphasize and to confirm a licensee's agreement to take certain actions in response to specific issues. *Id.* at 3-29. The NRC expects licensees to adhere to any obligations and commitments addressed in a CAL. *Id.* However, CALs do not establish legally-binding commitments with the exception of the reporting provisions contained in Section 182 of the Atomic Energy Act, as amended. *Id.* at 3-31. A CAL is not an order, and it does not restrict or otherwise change the ability of a licensee to engage in the activities authorized under their license (e.g. operate a reactor at full power). See *id.* at 3-31 - 3-32 (discussing noncompliance with CALs).

confirmed the actions to be taken prior to restarting either unit.⁸ In the CAL, the NRC Regional Administrator cautioned the licensee that the issuance of the CAL did not preclude the issuance of an order formalizing the same commitments and actions, and likewise that the issuance of the CAL did not preclude the NRC from taking enforcement actions.⁹ The CAL stated that "permission to resume power operations will be formally communicated to you in written correspondence."¹⁰ No order has been issued, and no license amendment request has recently been granted, which additionally restricts the ability of the licensee to restart beyond what was already present in the licenses.

On June 18, 2012, FOE requested, via e-mail, a stay of any authorization to restart SONGS Units 2 and 3 under the provisions of 10 C.F.R. § 2.342(e) until the Commission required a license amendment request concerning the replacement of steam generators at the plants, to which FOE would be able to participate in a hearing pursuant 10 C.F.R. § 2.309, and requested the stay last until the conclusion of that adjudicatory proceeding.¹¹ FOE also requested a temporary stay under 10 C.F.R. § 2.342(f)¹² until the Commission renders a decision on its stay request pursuant to 10 C.F.R. § 2.342(e).¹³ On June 27, 2012, the Natural

⁸ Letter from Elmo E. Collins, Regional Administrator, Region IV, USNRC, to Peter T. Dietrich, Senior Vice President and Chief Nuclear Officer, Southern California Edison Company, subject: *Confirmatory Action Letter – San Onofre Nuclear Generating Station, Units 2 and 3, Commitments to Address Steam Generator Tube Degradation*, (March 27, 2012) (ADAMS Accession No. ML12087A323).

⁹ *Id.* at 3. To date, the NRC has not issued any order addressing the same issues as the CAL (e.g. steam generator tube wear).

¹⁰ *Id.* at 2.

¹¹ Application to Stay at 1.

¹² 10 C.F.R. § 2.342(f) addresses "extraordinary cases" where a stay is needed to preserve the status quo without waiting for the filing of any answer. Because there is no impending startup of either unit at SONGS, the status quo is not being disturbed, and this request should be denied.

¹³ Application to Stay at 1.

Resources Defense Council (NRDC) filed a response in support of FOE's stay request and Petition.¹⁴

ARGUMENT

I. Legal Standards

A. Legal Standards for Timing of Intervention

The proper time for intervention is explained in the Commission's holding in *Millstone*, CLI-04-12, which addressed a petition to intervene and request for hearing which was submitted prior to NRC publishing a *Federal Register* notice docketing an application and providing the opportunity to request a hearing.¹⁵ The Commission held, "It is axiomatic that a person cannot intervene in a proceeding before the proceeding actually exists."¹⁶ Further, for reactor licensing actions, the issuance of a notice of hearing is a prerequisite to the initiation of a proceeding.¹⁷

B. Standards for an Application for Stay

Under 10 C.F.R § 2.342(a), any party to a proceeding may file an application for a stay of the effectiveness of a decision or action of a presiding officer pending the filing and resolution of a petition for review. In deciding whether to issue a stay, the Commission considers the following four equitable standards: (1) likelihood of success on the merits, (2) irreparable harm, (3) absence of harm to others, and (4) the public interest.¹⁸

¹⁴ "Natural Resources Defense Council's Response in Support of Friends of the Earth Petition to Intervene and NRDC's Notice of Intent to Participate (June 27, 2012). NRDC also filed several attachments supporting their Response.

¹⁵ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-12, 59 NRC 237, 237-238 (2004)

¹⁶ *Id.* at 239.

¹⁷ *Id.* at 240.

¹⁸ See 10 C.F.R. § 2.342(e) (outlining standards for considering whether to stay presiding officer decisions). The Commission has stated that these standards are technically not applicable to a request for a stay of NRC Staff action, but considers these four standards as commonplace principles of equity universally followed when judicial or quasi-judicial bodies consider stays or other forms of temporary injunctive relief. See *Entergy Vermont Yankee Nuclear LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237 n.4 (2006).

The Commission recently addressed these standards in *Callaway*, CLI-11-05,¹⁹ and *Vogtle*, CLI-12-11.²⁰ In *Callaway*, the Commission responded to a series of petitions to suspend adjudicatory, licensing and rulemaking activities in light of the events at the Fukushima Dai-ichi Nuclear Power Station, following the March 11, 2011, earthquake and tsunami.²¹ There, the Commission emphasized that the stay provisions of 10 C.F.R. § 2.342 are “only available to parties to adjudicatory proceedings seeking stays of decisions or actions of a presiding officer pending the filing and resolution of a petition for review.”²² In *Vogtle*, the Commission spoke to the four equitable factors, and noted that:

Of these factors, irreparable injury is the most important. Specifically, “[a] party seeking a stay must show it faces imminent, irreparable harm that is both ‘certain and great.’” Without a showing of irreparable injury, Petitioners must make “an overwhelming showing” of likely success on the merits. (This has also been referred to as a demonstration of “virtual certainty.”)²³

Significantly, the Commission found that if a movant fails to make a strong showing of prevailing on the merits, and irreparable harm, then the Commission need not consider the other factors.²⁴

C. Requirements for Electronic Filing in Adjudicatory Proceedings

The regulations at 10 C.F.R. § 2.302 require that documents filed in Commission adjudicatory proceedings under 10 C.F.R. Part 2, Subpart C, must be electronically transmitted through the E-Filing system, unless the Commission or presiding officer grants an exemption

¹⁹ See *Union Electric Co. d/b/a Ameren Missouri* (Callaway Plant, Unit 2), CLI-11-05, 74 NRC __ (Sept. 9, 2011) (slip op.).

²⁰ *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-12-11, 75 NRC __ (Apr. 16, 2012) (slip op. at 7) (alterations in original) (footnotes omitted).

²¹ See *Callaway*, CLI-11-05, 74 NRC __ (slip op.).

²² *Callaway*, CLI-11-05, 74 NRC at __ (slip op. at 18-19 n. 63). See also *Shieldalloy Metallurgical Corp.* (License Amendment Request for Decommissioning of the Newfield, New Jersey Site), CLI-10-08, 71 NRC 142, 147 (2010) (“That section, by its terms, applies to stay of the decision or action of a presiding officer or licensing board,” meaning that the movant must be a “party to the proceeding, which in the context of 2.342, refers to an adjudicatory proceeding presided over by a presiding officer or board.”) Moreover, where the motion in question “involves a challenge to Commission action outside of the adjudicatory proceeding” where the petitioner is a party, “section 2.342 does not apply.” *Id.*

²³ *Vogtle*, CLI-12-11, 75 NRC at __ (slip op. at 7) (alterations in original) (footnotes omitted).

²⁴ *Id.*

permitting an alternative filing method.²⁵ A filer seeking an exemption from the filing requirements must submit the exemption request with its first filing in the proceeding, and show good cause as to why it cannot file electronically.²⁶ Filers “may not submit paper copies of their filings unless they seek a waiver.”²⁷ Nor may filers attach documents to an electronic message in lieu of E-Filing.²⁸ Neither of these methods will be accepted as properly submitted filings unless an exemption is granted.²⁹

II. FOE's Application for Stay Should Be Denied

A. There Is No Proceeding to Stay

FOE's request for stay under 10 C.F.R. § 2.342(a) should be denied because there is no adjudicatory proceeding, no presiding officer, and no parties to any proceeding. No notice of hearing or notice of proposed action has been issued and published in the *Federal Register*. Accordingly, no proceeding exists under 10 C.F.R. § 2.318(a). Because a proceeding has not commenced, there can be no stay of the proceeding, and the Application for Stay must be denied as premature.³⁰

Contrary to FOE's characterization of the CAL as including an "order" to keep SONGS Units 2 and 3 shut down,³¹ the NRC has not issued any orders, confirmatory or otherwise. In

²⁵ 10 C.F.R. § 2.302(a). Moreover, as the Commission recently reiterated, “[a]ll documents filed in NRC adjudicatory proceedings . . . must be filed in accordance with the NRC E-Filing rule.” *GE Hitachi Global Laser Enrichment, LLC* (GLE Commercial Facility), CLI-10-4, 71 NRC 56, 64 (2010).

²⁶ 10 C.F.R. § 2.302(f).

²⁷ *GLE*, CLI-10-4, 71 NRC at 65.

²⁸ Use of Electronic Submissions in Agency Hearings, 72 Fed. Reg. 49,139, 49,144 (Aug. 28, 2007).

²⁹ *Id.* See also *GLE*, CLI-10-4, 71 NRC at 64-65.

³⁰ See *Millstone*, CLI-04-12, 59 NRC at 237-239.

³¹ Application for Stay at 3.

some situations the NRC elects to issue an order after issuing a CAL, and in those cases, there is an opportunity for a hearing on the order under 10 C.F.R. § 2.202.³²

Here, there has been no order or license amendment proceeding. FOE could request an order under 10 C.F.R. § 2.206, which allows any person to file a request to institute a proceeding for an order, under 10 C.F.R. § 2.202, to modify, suspend, or revoke a license, or for any other action as may be proper. However, FOE explicitly rejects using 10 C.F.R. § 2.206 because FOE wishes to participate in a license amendment proceeding under 10 C.F.R. § 2.309, asserting that 10 C.F.R. § 2.206 does not allow the Staff to entertain requests for public participation in a proceeding.³³ But, FOE's request on an unsubmitted licensing request amounts to an effort to be accorded special procedural rights, and should be denied as baseless.

B. FOE Does Not Meet the Four Elements Needed For A Stay

1. FOE Has Not Made an Overwhelming Showing of Success On The Merits

FOE fails to make a demonstration of “virtual certainty” of success on the merits sufficient to support a stay of a restart pending a hearing on a not-yet-submitted license amendment request. FOE argues that it is likely to succeed on the merits because its Petition demonstrates that a license amendment is required prior to restart pursuant to 10 C.F.R. § 50.59.³⁴

³² See, e.g., *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-04-23, 60 NRC 154 (2004) (affirming the Board's decision to deny an intervention petition that challenged a confirmatory order which modified the operating license).

³³ Petition at 13 n. 11. Although FOE apparently does not believe its concerns could be satisfied by the ability to request an order for any action as may be proper, its fears are unwarranted. Indeed, the Commission has favorably commented on the 10 C.F.R. § 2.206 process. See *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 565 n. 63 (2005) (Skepticism regarding the likelihood of success of section 2.206 petitions “is entirely unwarranted and inappropriate... .” “Sixteen of this decade's twenty-six [§ 2.206 decisions] granted at least some of the requested relief....”)

³⁴ Application for Stay at 4.

However, instead of providing clear support for its argument, FOE and its expert state only that FOE needs more analysis.³⁵ In addition, even though FOE believes that an amendment proceeding must be initiated, FOE does not put forward the contents of a proposed license amendment request, let alone demonstrate success with respect to its position on the non-existent license amendment request. Thus, FOE fails to make a showing of success on the merits.

2. FOE Has Not Shown Irreparable Harm

FOE also fails to show any imminent, irreparable harm. First, FOE argues that it will be harmed by an increase in the risk of exposure if SONGS Units 2 and 3 are restarted without a complete understanding of the tube wear and corrective actions.³⁶ FOE's unproved speculation about an increase in risk does not equate to irreparable harm because it is settled that "[m]erely raising the specter of a nuclear accident" does not demonstrate irreparable harm.³⁷

FOE additionally argues that it will be irreparably harmed by being deprived of its hearing rights under the Atomic Energy Act, as amended, and the Commission's regulations.³⁸ But the Atomic Energy Act expressly allows for hearings after a licensing decision.³⁹ Thus FOE is not being irreparably harmed if a stay is not granted until the completion of hearings on a licensing amendment.

3. FOE Fails to Show that a Stay is Harmless to Other Parties.

Because there is no proceeding, there are no parties. FOE's request would change the established restart process and impact the licensee, and FOE does not quantify any potential harm to the licensee from a prolonged shutdown pending completion of a hearing. Instead,

³⁵ *Id.* 9-10

³⁶ *Id.* at 4.

³⁷ See *Vermont Yankee*, CLI-06-8, 63 NRC at 237-238 (quoting *Massachusetts Coalition of Citizens with Disabilities v. Civil Defense Agency*, 649 F.2d 71, 75 (1st Cir. 1981)).

³⁸ Application for Stay at 5.

³⁹ See *Vermont Yankee*, CLI-06-8, 63 NRC at 238.

FOE argues that a stay is necessary to protect public safety.⁴⁰ FOE presumes that "residential and commercial electricity consumers" are parties and admits they might be harmed by a stay.⁴¹ FOE argues that consumers will still have power but acknowledges the cost of providing such power is unknown.⁴² FOE's evidence on harm to others does not tip the balance in FOE's favor.

4. FOE Does Not Show That a Stay is in the Public Interest

FOE argues that a stay is in the public interest because 1) the public cannot be assured of safe operation until a hearing concludes, 2) the public has an interest in compliance with the regulations, and 3) it is in the public interest for the Commission to hear the testimony of Mr. Arnold Gundersen.⁴³ A stay is not warranted for any of these three conclusory reasons. The NRC's rules already require safe operations and compliance with regulations, and are unaffected by any stay.⁴⁴ Furthermore, the regulations and Atomic Energy Act expressly provide for hearing testimony to be received after issuance of a license amendment,⁴⁵ thus the testimony may still be presented even if no stay is granted, presuming that FOE properly becomes a party to a future licensing action.

C. FOE Failed to Comply with the EIE Filing Requirements

FOE's filings, including its Application to Stay, are subject to the requirements in 10 C.F.R. § 2.302. Accordingly, FOE must file any documents through the E-Filing System or submit a request for an exemption from the requirements, showing good cause for any failure to file electronically. Without requesting an exemption from the filing requirements, FOE served

⁴⁰ Application for Stay at 7.

⁴¹ See *id.* at 6-8

⁴² See *id.*

⁴³ *Id.* at 8-10.

⁴⁴ See, e.g., 10 C.F.R. § 50.57(a)(3), requiring, for issuance of an operating license or amendment thereto, reasonable assurance (i) that the activities authorized by the operating license can be conducted without endangering the health and safety of the public, and (ii) that such activities will be conducted in compliance with the NRC's regulations. The CAL also requires this showing. See CAL at 2-3 Actions 2 and 7.

⁴⁵ See *Vermont Yankee*, CLI-06-8, 63 NRC at 238.

the Application to Stay and the related documents via email and hand delivery, stating in their cover letter that they “requested, but were denied, an approval code to obtain the digital ID certificate necessary to file with the Commission’s E-File system.”⁴⁶ FOE provides no details demonstrating “good cause” for its failure to file using the E-Filing system. Because FOE’s Application to Stay does not meet the filing requirements set forth in 10 C.F.R. § 2.302 and because FOE did not file an exemption request with its filing demonstrating good cause for failure to file using the E-Filing system, the Application to Stay is in contravention of Commission regulations and cannot be accepted as grounds for a stay or initiating an adjudicatory proceeding outside of the E-Filing system.⁴⁷

CONCLUSION

Accordingly, the Staff opposes the Application to Stay because (1) there is no proceeding to stay, (2) FOE does not meet the four elements needed for a stay, and (3) FOE did not meet the NRC’s filing requirements. For all these reasons, the Application to Stay should be denied.

/Signed (electronically) by/

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⁴⁶ Petition To Intervene And Request For A Hearing And Application For Stay In The Matter Regarding The Proceeding To Address Major Safety Issues With The Replacement Steam Generators At San Onofre Units 2 And 3, “Letter Requesting Docket” (ADAMS Accession No. ML12171A409) (June 18, 2012).

⁴⁷ FOE did not submit its application via EIE docket. However, the Staff’s answer is being served via EIE service and via e-mail.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S ANSWER TO FRIENDS OF THE EARTH'S APPLICATION TO STAY ANY DECISION TO RESTART UNIT 2 OR 3 AT THE SAN ONOFRE NUCLEAR GENERATING STATION PENDING CONCLUSION OF THE PROCEEDINGS REGARDING CONSIDERATION OF THE SAFETY OF THE REPLACEMENT STEAM GENERATORS" in the above-captioned matter have been served on the following by Electronic Information Exchange and on the parties or counsel marked with an asterisk "*" by electronic mail this 28th day of June, 2012.

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Dated at Rockville, Maryland
this 28th day of June, 2012