

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) )  
 )

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NRC STAFF'S ANSWER TO PETITION TO INTERVENE AND  
REQUEST FOR HEARING BY FRIENDS OF THE EARTH ON THE  
RESTART OF THE SAN ONOFRE REACTORS

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July 13, 2012

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INTRODUCTION

The staff of the Nuclear Regulatory Commission (Staff) files its answer<sup>1</sup> in opposition to the Friends of the Earth's (FOE's) Petition to Intervene and Request for Hearing (Petition)<sup>2</sup> concerning the replacement of steam generators at San Onofre Nuclear Generating Station (SONGS), Units 2 and 3. FOE requests "a hearing in the NRC proceeding to amend the operating license" at SONGS.<sup>3</sup> But because there is no proceeding under section 189a of the

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<sup>1</sup> Although there is no proceeding in which Friends of the Earth (FOE) could have served a request for a hearing and a petition to intervene, the Staff is filing this answer within 25 days of the date that FOE's request was docketed by the Office of Secretary (i.e., June 18, 2012). If there were a proceeding, the Staff's answer would be timely under 10 C.F.R. § 2.309(h)(1).

<sup>2</sup> On June 18, 2012, FOE submitted the following documents to the Office of the Secretary: "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" (Stay Application); "Petition to Intervene and Request for Hearing by Friends of the Earth" (Petition); "Declaration Of Arnold Gundersen 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 Gundersen (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 Agencywide Documents Access and Management System (ADAMS) Accession No. ML12171A409.

<sup>3</sup> Petition at 2.

Atomic Energy Act of 1954 (AEA)<sup>4</sup> for the granting, suspending, revoking, or amending of any license, the statute provides no right for FOE to request a hearing. For the same reason, FOE's Petition does not satisfy the standards for submitting a request for hearing under 10 C.F.R. § 2.309, which presume the existence of an AEA section 189a proceeding in which to establish standing and raise contentions. FOE is mistaken in claiming that the NRC's March 27, 2012, Confirmatory Action Letter (CAL),<sup>5</sup> which confirmed the information in the licensee's March 23, 2012, "Steam Generator Return-to-Service Action Plan" (SCE's Return to Service Plan)<sup>6</sup> is a license amendment proceeding.<sup>7</sup> Moreover, FOE improperly rejects filing a 10 C.F.R. § 2.206 petition,<sup>8</sup> the means for challenging Southern California Edison Company's (SCE's or Licensee's) evaluation under 10 C.F.R. § 50.59 for installation of the replacement steam generators.<sup>9</sup> Nor does FOE's Petition constitute an acceptable challenge to SCE's license

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<sup>4</sup> Atomic Energy Act of 1954, as amended, 42 U.S.C. §§ 2011-2297h, § 2239 (2010).

<sup>5</sup> 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*, (Mar. 27, 2012) (ADAMS Accession No. ML12087A323) (CAL). 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. *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).

<sup>6</sup> 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) (SCE's Return to Service Plan).

<sup>7</sup> Petition at 23.

<sup>8</sup> *Id.* at 13, n. 11.

<sup>9</sup> 10 C.F.R. § 50.59(c)(1) specifies the conditions under which a licensee may make changes in the facility as described in the final safety analysis report (as updated) (UFSAR), make changes in the procedures as described in the UFSAR, and conduct tests or experiments not described in the UFSAR without obtaining a license amendment pursuant to 10 C.F.R. § 50.90. See *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 101 n.7 (1994) (holding that a "member of the public may challenge an action taken under 10 C.F.R. § 50.59 only by means of a petition under 10 C.F.R. § 2.206.").

amendment request (LAR) application of June 27, 2008.<sup>10</sup> Because there is no proceeding in which FOE may seek to initiate a hearing, the Commission should deny FOE's Petition.

### BACKGROUND

FOE's Petition raises challenges to a licensing action taken more than three years ago, as well as the NRC's response to recent operational issues at SONGS Unit 3. Below is a brief summary of these actions and events, including a description of FOE's opportunity to request a hearing more than three years ago.

#### I Licensing and Hearing Opportunity for RSG

On June 27, 2008, pursuant to 10 C.F.R. § 50.90, SCE submitted an LAR supporting installation of the RSGs to amend operating licenses NPF-10 and NPF-15 for SONGS, Units 2 and 3, respectively. The RSG LAR application stated:

SONGS Units 2 and 3 currently have Combustion Engineering designed and manufactured SGs (referred to as the existing, or original SGs) installed in both units. New Mitsubishi Heavy Industries (MHI) designed and manufactured RSGs will be installed during the Unit 2 Fuel Cycle 16 refueling outage (2C16), currently scheduled to begin in October 2009, and the Unit 3 Fuel Cycle 16 refueling outage (3C16), currently scheduled to begin in October 2010. *Since the existing SGs and RSGs are similar, the SG replacement is being evaluated under 10 CFR 50.59.* [<sup>11</sup>]

The LAR sought to revise Technical Specifications (TSs) 3.4.17, "Steam Generator (SG) Tube Integrity," 5.5.2.11, "Steam Generator (SG) Program," 5.5.2.15, "Containment Leakage Rate Testing Program," and 5.7.2.c, "Special Reports."<sup>12</sup> The LAR proposed revised SG inspection and repair criteria and revised peak containment post-accident pressure resulting from

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<sup>10</sup> The amendments considered Technical Specifications (TS) changes supporting the installation of replacement steam generators (RSGs). The "Letter from James T. Reilly, Vice President, SCE to US NRC Document Control Desk, Subject: "Docket Nos. 50-361 and 50-362, Amendment Application Numbers 252 and 238, Proposed Change Number NPF-10/15-583, Replacement Steam Generators, San Onofre Nuclear Generating Station, Units 2 and 3." (June 27, 2008) (RSG LAR). As part of its request, SCE included a description of the amendment and its analysis about the issue of no significant hazards consideration. See Enclosure and Attachments A to I to June 27, 2008 Letter. The documents are in a single file at ADAMS Accession No. ML081830421.

<sup>11</sup> RSG LAR at Enclosure, Page 5 of 40 (emphasis added).

<sup>12</sup> *Id.* at Letter 1-2.

installation of the replacement SGs.<sup>13</sup> Significantly, SCE clearly set forth in the LAR that "[s]ince the existing SGs and RSGs are similar, the SG replacement is being evaluated under 10 CFR 50.59."<sup>14</sup>

On September 23, 2008, the NRC published a notice in the *Federal Register* describing the proposed changes, seeking comments on a proposed "No Significant Hazards Consideration Determination,"<sup>15</sup> and announcing that within 60 days after the date of publication of the notice, persons may file a request for a hearing with respect to issuance of the amendment to the operating licenses.<sup>16</sup> The notice stated that "any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request via electronic submission through the NRC E-Filing system for a hearing and a petition for leave to intervene."<sup>17</sup> No requests for hearing were submitted in response to the *Federal Register* notice, and no comments were received regarding the determination of the no significant hazards consideration.<sup>18</sup>

On June 25, 2009, the NRC issued License Amendment No. 220 to NPF-10 (Unit 2), and License Amendment No. 213 to NPF-15 (Unit 3), which included changes to TS 3.4.17

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<sup>13</sup> *Id.* at 2.

<sup>14</sup> *Id.* at Enclosure, Page 5 of 40. *See infra* n. 9 (discussing 10 C.F.R. § 50.59 process).

<sup>15</sup> An amendment involves no significant hazards consideration, if operation of the facility in accordance with the proposed amendment would not: (1) Involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) Create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) Involve a significant reduction in a margin of safety. 10 C.F.R. § 50.92. At the time a licensee requests an amendment, it must provide to the Commission its analysis about the issue of no significant hazards consideration using the standards in § 50.92. 10 C.F.R. § 50.91.

<sup>16</sup> Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing, 73 Fed. Reg 54,862, 54,867-54,868 (Sept. 23, 2008).

<sup>17</sup> *Id.*

<sup>18</sup> Biweekly Notice; Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations, 74 Fed. Reg. 34,044, 34,052 (July 14, 2009). Supplemental letters from SCE dated August 13, 2008, and February 5, 2009, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the *Federal Register*. *Id.*

"Steam Generator (SG) Tube Integrity" and the associated Limiting Conditions for Operation (LCO)<sup>19</sup> 3.4.17 for each unit to support the steam generator replacement.<sup>20</sup> On July 14, 2009, the NRC announced the issuance of the license amendments in the *Federal Register*.<sup>21</sup>

II. Installation, Operation, and Performance of RSGs.

On September 27, 2009, the licensee shut down Unit 2 for a scheduled refueling outage and steam generator replacement.<sup>22</sup> The licensee completed the Unit 2 refueling and steam generator replacement outage on April 11, 2010, and the plant returned to full power on May 17, 2010.<sup>23</sup> On October 10, 2010, the licensee shut down Unit 3 for a scheduled refueling outage and steam generator replacement.<sup>24</sup> The licensee completed the Unit 3 refueling and steam generator replacement outage on February 18, 2011, and the plant returned to full power on March 3, 2011.<sup>25</sup> Thus, by March 3, 2011, both Unit 2 and Unit 3 were operating with new steam generators.

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<sup>19</sup> An LCO is described in 10 C.F.R. § 50.36(c)(2)(i) as the lowest functional capability or performance levels of equipment required for safe operation of the facility. Pursuant to 10 C.F.R. § 50.36(c)(2)(i), when an LCO of a nuclear reactor is not met, the licensee shall shut down the reactor or follow any remedial action permitted by the technical specifications until the condition can be met.

<sup>20</sup> Letter from James R. Hall, Senior Project Manager, US NRC to Ross T. Ridenoure, Senior Vice President and Chief Nuclear Officer, Southern California Edison Company, Subject: *San Onofre Nuclear Generating Station, Units 2 And 3 Issuance Of Amendments Re: Technical Specification Changes In Support Of Steam Generator Replacement (Tac Nos. MD9160 And MD9161)* (June 25, 2009), and enclosures (1) Amendment No. 220 to NPF-10, (2) Amendment No. 213 to NPF-15, and (3) Safety Evaluation. These documents are in a single file at ADAMS Accession No. ML091670298.

<sup>21</sup> 74 Fed. Reg. at 34,052.

<sup>22</sup> NRC's San Onofre Nuclear Generating Station – Unit 2 Steam Generator Replacement Project Inspection Report 05000361/2009007, Enclosure at 5 (Mar. 4, 2010) (ADAMS Accession No. ML100630838).

<sup>23</sup> NRC's San Onofre Nuclear Generating Station – Unit 2 Steam Generator Replacement Project Inspection Report 05000361/2010008, Enclosure at 3 (June 30, 2010) (ADAMS Accession No. ML101810506).

<sup>24</sup> NRC's San Onofre Nuclear Generating Station – NRC Integrated Inspection Report 05000361/2010005 and 05000362/2010005, Enclosure at 7 (Feb. 10, 2011) (ADAMS Accession No. ML110420223).

<sup>25</sup> NRC's San Onofre Nuclear Generating Station – Unit 3 Steam Generator Replacement Project Inspection Report No. 05000362/2010009 Enclosure at 3 (May 10, 2011) (ADAMS Accession No. ML111300448).

On January 9, 2012, the licensee shut down Unit 2 for a scheduled refueling outage.<sup>26</sup> On January 31, 2012, in response to radiation alarms in the secondary plant systems, Unit 3 operators diagnosed a steam generator tube leak of about 82 gallons per day, and as directed by plant procedures, shut down Unit 3.<sup>27</sup> The licensee shut down Unit 3 while still within the operational leakage limits specified in the TS.<sup>28</sup> The licensee's subsequent tests identified that eight Unit 3 RSG tubes did not meet the target performance criteria for tube integrity.<sup>29</sup>

### III. Inspections, Return-to-Service Plan and CAL

Since the shutdown of both units, the licensee has been working to determine the cause of the Unit 3 RSG tube leak, and the NRC has been inspecting and monitoring the licensee's activities.<sup>30</sup> On March 23, 2012, the licensee sent the NRC its Return to Service Plan, committing to execute the plan prior to returning Units 2 and 3 to power operation.<sup>31</sup> On March 26, 2012, the NRC confirmed its understanding of the actions the licensee plans by phone, and on March 27, 2012, NRC memorialized this understanding in a CAL which confirmed the actions to be taken prior to restarting either unit.<sup>32</sup> Specifically, the CAL confirms that:

SONGS Unit 2 will not enter Mode 2, and SONGS Unit 3 will not enter Mode 4 (as defined in the technical specifications), until the NRC has completed its review of your actions listed below. The

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<sup>26</sup> NRC Integrated Inspection Report 05000361/2012002 and 05000362/2012002, Enclosure at 5 (May 8, 2012) (ADAMS Accession No. ML12129A562).

<sup>27</sup> *Id.* Enclosure at 34.

<sup>28</sup> San Onofre Nuclear Generating Station (SONGS) Unit 3, Docket 05000362, Licensee Event Report (LER) 2012-001-00 "Unit 3 Manual Reactor Trip due to Steam Generator Tube Leak," at 2 (March 29, 2012) (ADAMS Accession No. ML12090A153).

<sup>29</sup> *Id.* The licensee reported details of failures to meet tube integrity performance criteria to the NRC in LER 2012-002-00 "Unit 3 Steam Generator Tube Degradation Indicated by Failed In-Situ Pressure Testing" (May 14, 2012) (ADAMS Accession No. ML12136A065).

<sup>30</sup> For example, 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 NRC Inspection Report 05000361 and 05000362/2012007. *Id.* Enclosure at 35.

<sup>31</sup> Return to Service Plan.

<sup>32</sup> CAL.

permission to resume power operations will be formally communicated to you in written correspondence. [<sup>33</sup>]

In the CAL, the NRC Regional Administrator cautioned the licensee that the issuance of the CAL did not prevent the NRC from (1) issuing an order formalizing the same commitments and actions as outlined in the CAL, (2) issuing an order requiring other actions by SCE, or (3) taking enforcement action for violations of NRC requirements that may have prompted the issuance of the CAL.<sup>34</sup>

#### IV. FOE's Petition and Request for Hearing

On June 18, 2012, FOE submitted, via e-mail, an application for stay of a restart decision and a petition to intervene and request for hearing. On June 27, 2012, the Natural Resources Defense Council (NRDC) filed a response in support of FOE's stay request and Petition.<sup>35</sup> On June 28, 2012, the NRC Staff answered and opposed FOE's application to stay any restart decision.<sup>36</sup> The licensee also opposed FOE's application to stay.<sup>37</sup>

FOE's Petition erroneously asserts that there is a proceeding underway to amend the operating license for the plant based on the current problems with the SG tubing.<sup>38</sup> FOE argues

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<sup>33</sup> CAL at 2.

<sup>34</sup> *Id.* at 3. To date, the NRC has not issued any order or taken enforcement action addressing the same issues as the CAL (e.g. steam generator tube wear).

<sup>35</sup> "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. These documents are in a single file at ADAMS Accession No. ML121850554. To the extent it may be viewed as joining in FOE's petition for a hearing, NRDC's response suffers the same deficiencies as FOE's request.

<sup>36</sup> "NRC Staff's Answer To Friends off 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." (June 28, 2012) (ADAMS Accession No. ML12180A624).

<sup>37</sup> "Southern California Edison's Answer Opposing Friends of the Earth's Application to Stay Any Decision to Restart Units 2 or 3 at the San Onofre Nuclear Generating Station." (June 28, 2012) (ADAMS Accession No. ML12180A651).

<sup>38</sup> Petition at 2.

that SONGS cannot be allowed to restart without a license amendment and adjudicatory public hearing, pursuant to 10 C.F.R. § 2.309.<sup>39</sup> Specifically, FOE's Contention states:

Petitioner Contends That San Onofre Cannot Be Allowed To Restart Wi[t]hout A License Amendment And Attendant Adjudicatory Public Hearing As Required By 10 C.F.R. § 2.309, In Which Petitioner And Other Members Of The Public May Participate<sup>40</sup>

The essence of the contention is that in replacing the SGs, the licensee did not properly follow 10 C.F.R. § 50.59.<sup>41</sup> Thus, FOE contends that the changes required a formal licensing proceeding and a license amendment is required for restart.<sup>42</sup> FOE concludes that the Commission should either recognize that the CAL process is a license amendment proceeding requiring an adjudicatory hearing or, in the alternative, exercise its inherent supervisory authority to convene a hearing.<sup>43</sup> As discussed in detail below, the Commission should not grant a hearing based on FOE's Petition. Instead, FOE's Petition should be denied.

## ARGUMENT

### I. Legal Standards

#### A. Legal Standards for Hearings on Proceedings for the Granting, Suspending, Revoking, or Amending of Any License

Section 189a of the AEA provides an opportunity for hearing to interested persons in any proceeding for the "granting, suspending, revoking, or amending of any license."<sup>44</sup> Importantly,

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<sup>39</sup> *Id.* at 2. Specifically, FOE "asserts that under 10 C.F.R. § 50.59 the San Onofre replacement steam generators may not be operated without an amendment to the San Onofre operating license." *Id.*

<sup>40</sup> *Id.* at 16.

<sup>41</sup> *Id.* at 2.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> 42 U.S.C. § 2239(a)(1)(A). The section continues:

[T]he Commission may, in the absence of a request therefore by any person whose interest may be affected, issue . . . an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction

the Supreme Court and the Commission have held that “[this] hearing requirement was tailored to the scope of proceedings authorized under the licensing Subchapter.”<sup>45</sup> In other words, the only statutory “right” to an opportunity for a hearing under section 189a exists for those actions that are identified in section 189a as licensing proceedings.<sup>46</sup>

The Commission has provided examples of those actions subject to hearings, and those actions which are not:

Applicable case law includes several examples of NRC approvals that did not trigger section 189a hearing rights. *See, e.g., Massachusetts v. NRC*, 878 F.2d 1516 (1st Cir.1989) (NRC authorization of plant restart, which followed Staff’s review of forty-seven ordered modifications, was not a license amendment); *In re Three Mile Island Alert, Inc.*, 771 F.2d 720, 729–30 (3d Cir.1985) (decision lifting license suspension and authorizing restart under stipulated conditions was not a license amendment), *cert. denied*, 475 U.S. 1082 (1986); *SLO*,<sup>[47]</sup> 751 F.2d at 1314 (lifting a license suspension “does nothing to alter the original terms of a license” and is not a license amendment). Where the NRC approval does not permit the licensee to operate “in any greater capacity” than originally prescribed and all relevant safety regulations and license terms remain applicable, the NRC approval does not “amend” the license. *See Kelley v. Selin*, 42 F.3d 1501, 1515 (6th Cir.), *cert. denied*, 115 S.Ct. 2611 (1995); *Massachusetts v. NRC*, 878 F.2d at 1521–22. Only those actions falling “beyond the ambit of the prescriptive authority granted under the license” necessitate a license amendment. *CAN*, <sup>[48]</sup> 59 F.3d at 295. <sup>[49]</sup>

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permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

<sup>45</sup> *Florida Power & Light v. Lorion*, 470 U.S. 729, 739 (1985); *Yankee*, CLI-94-3, 39 NRC at 101.

<sup>46</sup> *Yankee*, CLI-94-3, 39 NRC at 101.

<sup>47</sup> *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1314 (D.C.Cir.1984) (lifting of a license suspension is not an amendment to the license), *reh’g en banc on other grounds*, 789 F.2d 26 (D.C.Cir.), *cert. denied*, 479 U.S. 923 (1986).

<sup>48</sup> *Citizens Awareness Network v. NRC*, 59 F.3d 284 (1st Cir. 1995).

<sup>49</sup> *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315, 327 (1996).

As demonstrated by these cases, authorization, approval, or written permission to restart is not among the items listed in Section 189 for which hearing rights attach, because such approvals are not amendments to a license.<sup>50</sup>

The Commission's regulations in Part 2 reflect requirements for hearing requests in section 189a proceedings, including license amendments. These regulations presume the existence of a section 189a proceeding.<sup>51</sup> Under 10 C.F.R. § 2.309(a), "[a]ny person whose interest may be affected *by a proceeding* and who desires to participate as a party must file a written request for hearing and a specification of the contentions which the person seeks to have litigated in the hearing."<sup>52</sup> The Commission (or presiding officer of the Atomic Safety and Licensing Board) will grant the request/petition if it determines that the requestor/petitioner has standing under § 2.309(d) of this section and has proposed at least one admissible contention that meets the requirements of § 2.309(f). The regulations at 10 C.F.R. § 2.309 also address the requirements for a petitioner to timely file a request for hearing,<sup>53</sup> requirements for the filing of late hearing requests,<sup>54</sup> the requirements for a petitioner to establish standing,<sup>55</sup> and the

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<sup>50</sup> See e.g., *SLO*, 751 F.2d at 1314 (holding restart approval is not an amendment to a license).

<sup>51</sup> See, e.g., 10 C.F.R. § 2.309.

<sup>52</sup> 10 C.F.R. § 2.309(a) (emphasis added).

<sup>53</sup> 10 C.F.R. § 2.309(b) specifies the timing for when a hearing request and/or petition and list of contentions must be filed. Generally, where a *Federal Register* Notice (Notice) of agency action is published, the time to file is specified within the Notice, and is at least sixty days from publication of the Notice. 10 C.F.R. § 2.309(b)(3).

<sup>54</sup> 10 C.F.R. § 2.309(c) addresses nontimely filings, and specifies that such nontimely requests and/or petitions and contentions will not be entertained absent a determination by the Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule upon the request that the request should be granted and the proffered contentions admitted based upon a balancing of the eight factors in 10 C.F.R. § 2.309(c)(1)(i)-(viii) to the extent they apply. Of all the eight factors, the first, good cause for failure to file on time, is given the most weight. *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 261 (2009). See also 10 C.F.R. § 2.309(f)(2).

<sup>55</sup> 10 C.F.R. § 2.309(d) addresses standing, and specifies that a request for hearing or petition to intervene must, among other things, state (1) the nature of the petitioners right under the Atomic Energy Act to be made a party to the proceeding; (2) the nature and extent of the petitioners' property, financial, or other interest in the proceeding; and (3) the possible effect of any order that may be entered in the proceeding on the petitioner's interest. 10 C.F.R. 2.309(d)(1)(ii)-(iv).

standards that must be satisfied for contentions to be admitted.<sup>56</sup> These rules establish rigorous standards for timely filings, demonstrating standing, and filing admissible contentions.<sup>57</sup> Significantly, all of these standards presume the existence of a proceeding under section 189a, which provides a statutory right to request a hearing.

With regard to requesting hearings on license amendments, the Commission has specifically addressed the timing requirements and means of challenging license amendments. For license amendment proceedings, the expiration time specified in the Notice of Opportunity for a Hearing, together with the NRC's action in issuing the noticed license amendment, closes out the availability of hearings under the Notice.<sup>58</sup> Any subsequent challenge to the license amendment must take the form of a petition under 10 C.F.R. § 2.206.<sup>59</sup>

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<sup>56</sup> The factors in 10 C.F.R. §§ 2.309(f)(1)(i)-(vii) address the requirements for contention admissibility, and provide that a contention must (i) provide a specific statement of the issue of law or fact to be raised or controverted; (ii) provide a brief explanation of the basis for the contention; (iii) demonstrate that the issue raised in the contention is within the scope of the proceeding; (iv) demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding; (v) provide a concise statement of the alleged facts or expert opinions with references to the specific sources and documents upon which the petitioner intends to rely; and (vi) provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact, including references to specific portions of the application that the petition disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief. Furthermore, 10 C.F.R. § 2.309(f)(2) requires that contentions are based on documents or other information available at the time the petition is to be filed.

<sup>57</sup> The burden for proving standing rests with the petitioner. *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 & 2), CLI-00-05, 51 NRC 90, 98 (2000). Moreover, the requirements governing the admissibility of contentions are "strict by design" (*Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001)) and have been strictly applied in NRC proceedings. *AmerGen Energy Company, LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 118-19 (2006).

<sup>58</sup> See *Texas Utilities Electric Company*, et al. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 67 (1992).

<sup>59</sup> *Id.*

B. Inherent Discretion of the Commission to Institute Hearings Where Not Required by Law

The Commission has the inherent discretion to institute a proceeding even where none is required by law.<sup>60</sup> But exercising this inherent discretion is only appropriate where substantial health and safety issues have been identified.<sup>61</sup>

C. Legal Standards for Public to Initiate a Proceeding to Modify a License

The Commission's regulations provide a remedy for individuals who believe that a licensee has failed to meet its licensing obligations. Specifically, 10 C.F.R. § 2.206 allows an individual to request appropriate remedial action, including a request for the Commission to require a license amendment.<sup>62</sup> 10 C.F.R. § 2.206(a) provides that "[a]ny person may file a request to institute a proceeding pursuant to § 2.202 to modify, suspend, or revoke a license, or for any other action as may be proper." Importantly, the Commission has held that individuals with concerns about licensee actions taken pursuant to 10 C.F.R. § 50.59, which allows a licensee to take an action without the need for any NRC approval, must challenge the action by means of a § 2.206 petition.<sup>63</sup>

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<sup>60</sup> *Yankee*, CLI-94-3, 39 NRC at 103 (citing 42 U.S.C. § 2201(c), which authorizes the Commission to make studies and investigations, obtain such information, and hold such meetings or hearings as the Commission may deem necessary or proper to assist it in exercising any authority provided in this chapter, or in the administration or enforcement of this chapter, or any regulations or orders issued thereunder.).

<sup>61</sup> *Id.*

<sup>62</sup> *See Amergen Energy Co., LLC* (License Renewal for Oyster Creek), CLI-07-08, 65 NRC 124, 133 (2007).

<sup>63</sup> *Yankee*, CLI-94-3, 39 NRC at 101 n.7). 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....").

D. Contentions Addressing the Performance of the Staff's Safety Reviews

The Staff's performance and official conduct is to be accorded a presumption of legitimacy.<sup>64</sup> "The NRC has not, and will not, litigate claims about the adequacy of the Staff's safety review in licensing adjudications."<sup>65</sup> Petitioners do not have the right to proffer contentions which claim errors in the Staff's safety review.<sup>66</sup>

II. Analysis of FOE's Petition under the Applicable Legal Standards

As discussed below, FOE's Petition should be denied because there is no proceeding and because FOE does not demonstrate that a discretionary hearing is warranted.

A. There Are No Actions Pending Concerning SONGS Unit 2 or 3 That Give Rise to Any Hearing Rights under Section 189 of the Atomic Energy Act

In this instance, there is no proceeding under Section 189a of the AEA in which FOE may request a hearing. A petitioner, such as FOE, may not file where there is no application and where the hearing process has not even commenced, it is not a sensible use of Commission resources to evaluate the Petitioners' legal and factual challenges to a non-licensing action.<sup>67</sup> As the Commission has held, the very purpose of NRC adjudicatory hearings is to consider claims of deficiencies in a license application.<sup>68</sup> In *Millstone*, CLI-04-12, the Commission addressed the proper time for filing a request for hearing. There, a potential intervenor submitted a petition to intervene and request for hearing prior to NRC publishing a

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<sup>64</sup> See *All Operating Boiling Water Reactor Licensees with Mark I and Mark II Containments* (Docket Nos. EA-12-050 and EA-12-051), LBP-12-14, 76 NRC \_\_, \_\_ (July 10, 2012) (slip op. at 9 n. 36) (quoting *United States Dep't of State v. Ray*, 502 U.S. 164, 179 (1991)).

<sup>65</sup> *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 476 (2008) (citing Final Rule: "Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004) (citing *Curators of the University of Missouri*, CLI-95-1, 41 NRC at 121-22, and prior agency rulings holding same)).

<sup>66</sup> *Id.*

<sup>67</sup> *U.S. Dep't of Energy* (High-Level Waste Repository), CLI-08-20, 68 NRC 272, 275 (2008) (dismissing without prejudice, several claims submitted before the Staff docketed an application and issued a Notice of Hearing).

<sup>68</sup> *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-08-15, 68 NRC 1 (2008) (denying a motion to suspend the hearing notice in the proceeding until the applicant responded to data requests and the Commission completed its design certification review).

*Federal Register* notice docketing an application and providing the opportunity to request a hearing.<sup>69</sup> The Commission held, "It is axiomatic that a person cannot intervene in a proceeding before the proceeding actually exists."<sup>70</sup> Further, the Commission found, for reactor licensing actions, the issuance of a notice of hearing is a prerequisite to the initiation of a proceeding.<sup>71</sup> Because there is not any pending action or proceeding under section 189a for the granting, suspending, revoking, or amending of SCE's licenses for SONGS Unit 2 or Unit 3, there simply is no proceeding in which FOE may seek to initiate hearing rights.<sup>72</sup>

FOE recognizes that the Commission has not published any *Federal Register* Notice and claims that the 10 C.F.R. § 50.59 changes made by the licensee when replacing the SGs "triggered the Commission's obligation to convene a formal licensing amendment proceeding."<sup>73</sup> But Commission precedent provides that FOE's relief lies with a request to institute a proceeding under 10 C.F.R. § 2.206, not by filing a request for a § 2.309 hearing.<sup>74</sup>

FOE also requests that the Commission "recognize that the current [CAL] process is in fact a license amendment proceeding under 10 C.F.R. § 2.309 and 42 U.S.C. § 2239."<sup>75</sup> But the CAL does not constitute a license amendment proceeding. First, to the extent that the CAL and the steps outlined therein gather data and information, those activities do not modify a license. Second, with respect to the permission to restart which the CAL states is to be formally

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<sup>69</sup> *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-12, 59 NRC 237, 237-238 (2004).

<sup>70</sup> *Id.* at 239.

<sup>71</sup> *Id.* at 240.

<sup>72</sup> FOE also did not file a request for hearing when SCE submitted the RSG LAR, which sought changes to the TS to support installation of the RSGs. As outlined above, the *Federal Register* Notice for the RSG LAR was published more than three years before FOE's Petition. And the NRC issued the licensing action for the RSG on June 25, 2009, almost three years before FOE filed its Petition on June 18, 2012. Thus, the NRC already provided FOE an opportunity for hearing on the changes to the TSs for both units supporting replacement of the steam generators.

<sup>73</sup> Petition at 3.

<sup>74</sup> *Yankee*, CLI-94-3, 39 NRC at 101 n.7. FOE's Petition explicitly rejects using the 2.206 process to make its challenge. Petition at 13, n. 11.

<sup>75</sup> Petition at 2.

communicated in written correspondence,<sup>76</sup> the Commission and the courts have repeatedly held that restart authorizations which do not give additional authority are not amendments and thus are not subject to hearing rights.<sup>77</sup> Because the CAL does not grant to the licensee any more authority than already given by the existing licenses, the CAL is not a license amendment.<sup>78</sup>

The CAL confirms that the licensee will not restart until the NRC is satisfied with the steps taken under the licensee's "Steam Generator Return-to-Service Action Plan." However, the licensee's actions have not, and might not, result in a proceeding for the granting, suspending, revoking, or amending of any license.

FOE also asserts that the NRC issued an order to mandate the shutdown of SONGS Units 2 and 3.<sup>79</sup> But no NRC order mandated the shutdown. As discussed above, Unit 2 was already in a refueling outage when one of the RSG tubes at Unit 3's leaked. TS 3.4.17 for both Units 2 and 3 already requires that SG tube integrity shall be maintained and all SG tubes satisfying the tube repair criteria shall be plugged in accordance with the Steam Generator Program, else the reactor must be in Mode 3 (Hot Standby) within six hours, and be in Mode 5 (Cold Shutdown) within 36 hours.<sup>80</sup> In other words, neither Unit 2 nor Unit 3 can be in power operations (i.e. Mode 1) when any SG tube integrity is lost. No formal order, CAL, or additional license amendment is required to force a shutdown for a loss of SG tube integrity because the existing TS already mandates the shutdown. Further, as described in LCO 3.4.17.A, the licensee cannot resume operations and enter Mode 4 (Hot Shutdown) until the affected tube is

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<sup>76</sup> CAL at 2.

<sup>77</sup> See *Perry*, CLI-96-13, 44 NRC at 327 and cases cited therein.

<sup>78</sup> *Id.*

<sup>79</sup> Petition at 14.

<sup>80</sup> The TS for Unit 2 and Unit 3 are part of Amendment No. 220 to NPF-10, and Amendment No. 213 to NPF-15, respectively. (ADAMS Accession No. ML091670298).

plugged in accordance with the Steam Generator Program and the licensee has verified tube integrity will be maintained to the next planned refueling outage or SG tube inspection.<sup>81</sup>

Thus, the present dual-unit shutdowns in January were not the result of a proceeding for the granting, suspending, revoking, or amending of any license. Therefore, no hearing rights are available to FOE under section 189a.

B. FOE Does Not Demonstrate That the Commission Should Exercise Its Inherent Discretion to Institute a Proceeding

FOE has not shown that the Commission should exercise its inherent discretion to institute a proceeding.<sup>82</sup> Without addressing the standards, FOE barely asserts that the Commission should exercise its inherent supervisory authority and convene a proceeding.<sup>83</sup> But instituting such a hearing is only appropriate where substantial health and safety issues have been identified.<sup>84</sup> While the Petition raises broad concerns about the potential releases if multiple SG tubes fail,<sup>85</sup> the Petition fails to demonstrate what aspects of the SG tube problems would be left unaddressed under the CAL such that there would remain unusual unexamined significant safety issues which would warrant a grant of discretionary hearing.<sup>86</sup>

III FOE's Petition Does Not Meet the Requirements in 10 C.F.R. § 2.309

As discussed above, there is no proceeding under section 189a in which FOE may exercise hearing rights. FOE must instead seek relief for its claim of an inaccurate evaluation

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<sup>81</sup> *Id.*

<sup>82</sup> See *Yankee*, CLI-94-3, 39 NRC at 103.

<sup>83</sup> Petition at 2 n.2 & 15. The Petitioners cite *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 229 (1990) as authority to convene a proceeding, but that case is inapposite; Section 161(c) of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2201 (c)) provides the Commission with inherent discretion to institute a proceeding even where none is required by law. See *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 103 (1994).

<sup>84</sup> *Yankee*, CLI-94-3, 39 NRC at 103.

<sup>85</sup> See e.g., Petition at 10.

<sup>86</sup> See *Yankee*, CLI-94-3, 39 NRC at 103.

under 10 C.F.R. § 50.59 by filing a petition pursuant to 10 C.F.R. § 2.206.<sup>87</sup> Nonetheless, analysis of FOE's Petition under the standards in 10 C.F.R. § 2.309 for submitting a request for hearing further confirms that their Petition should be denied.

A. FOE Fails to Show Standing

As discussed above, there is no proceeding currently underway. Therefore, FOE cannot be a "person whose interest may be affected by a proceeding" under 10 C.F.R. § 2.309(a) such as to demonstrate standing. Because standing is an essential element in determining whether there is any legitimate role for a court or an agency adjudicatory body in dealing with a particular grievance, the existence of a "proceeding" establishing a right to request a hearing is a prerequisite for demonstrating standing. For the same reason, FOE cannot satisfy the requirements of 10 C.F.R. § 2.309(d)(ii)-(iv), which also presume the existence of a proceeding under Section 189a of the AEA.

B. FOE's Petition Does Not Meet the 10 C.F.R. § 2.309(f) Requirements

In addition to not demonstrating standing, FOE's Petition also does not meet the contention admissibility requirements in § 2.309(f). FOE's contention asserts that a license amendment and a hearing must be held prior to restart.<sup>88</sup> As an initial matter, to the extent that FOE intends its Petition to apply to the licensing action which FOE now requests the Commission to require or to recognize,<sup>89</sup> its contention must be rejected because no notice of hearing on those matters has been issued.<sup>90</sup> Moreover, because there is no proceeding, FOE cannot meet the requirements of 10 C.F.R. § 2.309(f).

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<sup>87</sup> *Id.*

<sup>88</sup> Petition at 16.

<sup>89</sup> *Id.* at 3.

<sup>90</sup> See e.g., *High-Level Waste*, CLI-08-20, 68 NRC at 275 (The Commission dismissed, without prejudice, several claims submitted before the Staff docketed an application and issued a Notice of Hearing.).

For example, FOE cannot show that its contention is within the scope of the proceeding, as there is no proceeding here.<sup>91</sup> Likewise, FOE cannot provide a specific statement of the issue of law or fact to be raised or controverted because no proceeding exists in which to raise an issue. As previously discussed, the Commission holds that under circumstances such as those claimed by FOE, where a petitioner challenges a 10 C.F.R. § 50.59 evaluation, the correct course of action is to file a petition under 10 C.F.R. § 2.206, not a request for hearing under 10 C.F.R. § 2.309.<sup>92</sup> Similarly, FOE cannot meet the requirement of 10 C.F.R. § 2.309(f)(1)(vi) to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact because the licensee has submitted no information to dispute. The issue FOE raises is not material to any NRC finding under 10 C.F.R. § 2.309(f)(1)(v) because the NRC is not making any findings. Additionally, FOE does not plead or attempt to show that its Petition meets the new or amended contention requirements in 10 C.F.R. § 2.309(f)(2). Even had FOE made this argument, it would have failed, as there was no timely original filing made by FOE to amend.

C. FOE Cannot Challenge the Uncontested RSG LAR

FOE also does not meet the timely filing requirements of 10 C.F.R. § 2.309(b) because the heart of FOE's claim appears to be that the June 27, 2008, license amendment was incomplete.<sup>93</sup> But the time for FOE to bring forward this concern would have been within sixty days of the *Federal Register* notice published on September 23, 2008.<sup>94</sup> No individual or individuals submitted a hearing request. The Staff subsequently issued the requested amendments on July 14, 2009.<sup>95</sup> Thus a hearing on the adequacy of the June 27, 2008 request

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<sup>91</sup> See § 2.309(f)(1)(iii).

<sup>92</sup> *Yankee*, CLI-94-3, 39 NRC at 101 n.7.

<sup>93</sup> The LAR directly stated that the SG replacement is being evaluated under 10 CFR § 50.59. LAR at Enclosure, Page 5 of 40.

<sup>94</sup> 73 Fed. Reg at 54,867-54,868.

<sup>95</sup> 74 Fed. Reg. at 34,052.

is no longer available to FOE.<sup>96</sup> FOE's challenge to the previous action must take the form of a petition under 10 C.F.R. § 2.206.<sup>97</sup>

D. Balancing the Factors of § 2.309(c)(1) Does Not Support This Late Filing

FOE also claims that its Petition meets the nontimely filing standards in § 2.309(c)(1).<sup>98</sup> First, it is unclear what trigger point or clock FOE uses for the timing of its Petition. FOE made its request months after the reactor shutdowns in January of 2012, and months after the NRC issued its March 27, 2012 CAL. But neither of those actions is a proceeding, and neither resulted in a corresponding notice for hearing; thus, they are not proper measures for timeliness.

In any event, FOE's arguments do not meet the requirements of 10 C.F.R. § 2.309(c). Significantly, FOE does not discuss any reason for its lateness where it attempts to address the requirement in § 2.309(c)(1)(i) to explain "Good cause, if any, for the failure to file on time," which is the most important factor when determining to admit late-filed contentions.<sup>99</sup> Instead, FOE asserts that it has "good cause" because it represents many members living near SONGS, and its expert could provide important expert assistance to the NRC.<sup>100</sup> But FOE's assertion has nothing to do with timeliness. Thus, because FOE does not address "good cause" for failure to file on time, the factor weighs heavily against FOE. Moreover, if good cause is not shown, a petitioner must make a compelling showing on the remaining factors in 10 C.F.R. § 2.309(c).<sup>101</sup>

The remaining factors of 10 C.F.R. § 2.309(c)(1)(i)-(viii), do not tip the scales to allow such tardy intervention. For example, regarding the factor in 10 C.F.R. § 2.309(c)(1)(iv)

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<sup>96</sup> See *Comanche Peak*, CLI-92-12, 36 NRC at 67.

<sup>97</sup> *Id.*

<sup>98</sup> Petition at 9.

<sup>99</sup> *Pacific Gas & Electric Co. (Diablo Canyon ISFSI)*, CLI-08-08, 67 NRC 193 (2008).

<sup>100</sup> Petition at 9.

<sup>101</sup> *Diablo Canyon ISFSI*, CLI-08-08, 67 NRC 193.

concerning the possible effects of an order in the proceeding, FOE only vaguely states that an order could affect one of its member's interests<sup>102</sup> but inasmuch as there is no proceeding, there are no impending orders in the proceeding which could affect FOE's interests.

In addressing the factor in 10 C.F.R. § 2.309(c)(1)(v) considering the availability of other means whereby the requestor's/petitioner's interest will be protected, FOE inappropriately, and contrary to Commission decisions and regulation, rejects using 10 C.F.R. § 2.206.<sup>103</sup> Also in addressing the availability of other means whereby its interest will be protected, FOE claims that the CAL is insufficient.<sup>104</sup> Inasmuch as the CAL includes broad requirements for the licensee to "determine the causes of the tube-to-tube interactions that resulted in steam generator tube wear in Unit 3, and implement actions to prevent loss of integrity due to these causes in the Unit 2 steam generator tubes,"<sup>105</sup> it is not clear how these actions are not protective of FOE's interests. FOE speculates that the NRC Staff's relationship with the licensee is close, and that the Staff's review of the RSG LAR was insufficient.<sup>106</sup> Contrary to FOE's claim, the Staff's performance of its official duties is presumed to be legitimate,<sup>107</sup> and furthermore a challenge to the Staff's safety review is not admissible.<sup>108</sup> FOE's claim that the "NRC failed to do its job"<sup>109</sup> is inadmissible for the same reason.<sup>110</sup> Last, FOE asserts that the NRC's Augmented Inspection

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<sup>102</sup> Petition at 10.

<sup>103</sup> *Id.* at 13, n. 11.

<sup>104</sup> *Id.* at 11.

<sup>105</sup> CAL at 2 ¶ 1.

<sup>106</sup> Petition at 11 (asserting that Staff "mutely" accepted the licensee's assertions).

<sup>107</sup> *See All Operating Boiling Water Reactor Licensees with Mark I and Mark II Containments*, LBP-12-14, 76 NRC at \_\_\_ (slip op. at 9 n. 36) (quoting *United States Dep't of State v. Ray*, 502 U.S. 164, 179 (1991)).

<sup>108</sup> *Oyster Creek*, CLI-08-23, 68 NRC at 476 (2008) (citing Final Rule: "Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004) (citing *Curators of the University of Missouri*, CLI-95-1, 41 NRC at 121-22, and prior agency rulings holding same)).

<sup>109</sup> Petition at 12.

<sup>110</sup> *Oyster Creek*, CLI-08-23, 68 NRC at 476.

Team (AIT) is insufficient to protect FOE's interests because it concentrates on Unit 3,<sup>111</sup> but the AIT's inspection is just one part of the NRC's ongoing operational inspection efforts addressing the safety of both Unit 2 and Unit 3.

With respect to whether the Petition would broaden the issues or delay the proceeding under 10 C.F.R. § 2.309(c)(1)(vii), FOE bases its arguments on its incorrect claim that the NRC ordered the plants to remain shutdown.<sup>112</sup> FOE ignores that there presently is *no* proceeding, meaning FOE would clearly both broaden and delay the "proceeding" by instituting one where presently there is none.<sup>113</sup>

With respect to 10 C.F.R. § 2.309(c)(1)(viii)'s factor about developing a sound record, FOE has not provided any information to demonstrate that its expert has specialized knowledge regarding the RSG that would otherwise be unavailable to the licensee and to the NRC, plus there is no adjudicatory record to be developed because there is no proceeding.

In sum, the balancing of the late filing factors weigh against allowing late intervention, notwithstanding the fact that there is no proceeding.

#### CONCLUSION

FOE's Petition must be denied because there is no section 189a proceeding to amend the licenses of SONGS Unit 2 or Unit 3 in which to establish standing or submit contentions. Contrary to FOE's assertions, the March 27, 2012, CAL is not a license amendment. As the Commission has recently emphasized, FOE may not challenge the Staff's safety evaluations. Additionally, FOE's Petition fails to demonstrate that it warrants a discretionary hearing. Moreover, three years ago when FOE would have been afforded an opportunity to request a

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<sup>111</sup> Petition at 12-13 (stating the AIT is reviewing Unit 3 and not assessing whether the licensee incorrectly used a 10 C.F.R. §50.59 evaluation).

<sup>112</sup> *Id.* at 14.

<sup>113</sup> *State of New Jersey* (Department of Law and Public Safety), CLI-93-25, 38 NRC 289, 296 (1993).

hearing on the relevant license amendments application, FOE sat silent on this opportunity. Finally, inasmuch as FOE's concern claims that the licensee incorrectly used the 10 C.F.R. § 50.59 process, FOE must seek relief through a 10 C.F.R. § 2.206 petition, not a request for a § 2.309 hearing. For all of these reasons, FOE's Petition does not meet the Commission's requirements and must be denied.

Respectfully submitted,

**/Signed (electronically) by/**

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of )  
 )  
SOUTHERN CALIFORNIA EDISON CO. ) Docket Nos. 50-361-CAL/ 50-362-CAL  
 )  
(San Onofre Nuclear Generating Station) )  
 )  
 )  
 )

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S ANSWER TO PETITION TO INTERVENE AND REQUEST FOR HEARING BY FRIENDS OF THE EARTH ON THE RESTART OF THE SAN ONOFRE REACTORS" 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 13th day of July, 2012.

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