

Official Transcript of Proceedings
NUCLEAR REGULATORY COMMISSION

Title: Southern California Edison Co.

Docket Number: 50-361-CAL and 50-362-CAL

ASLBP Number: 13-924-01-CAL-BD01

Location: Rockville, Maryland

Date: Friday, March 22, 2013

Work Order No.: NRC-4062

Pages 1-156

NEAL R. GROSS AND CO., INC.
Court Reporters and Transcribers
1323 Rhode Island Avenue, N.W.
Washington, D.C. 20005
(202) 234-4433

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

UNITED STATES OF AMERICA

U.S. NUCLEAR REGULATORY COMMISSION

+ + + + +

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

+ + + + +

ORAL ARGUMENT

In the Matter of: : Docket Nos. 50-361-CAL
SOUTHERN CALIFORNIA : 50-362-CAL
EDISON CO. : ASLBP No. 13-924-01-CAL-BD01
(San Onofre Nuclear :
Generating Station, :
Units 2 and 3) :
_____ :

Friday,
March 22, 2013
Rockville, Maryland

BEFORE:

E. ROY HAWKENS, Chairman
ANTHONY J. BARATTA, Administrative Judge
GARY S. ARNOLD, Administrative Judge

1 APPEARANCES:

2 On Behalf of the Petitioner Friends of the

3 Earth:

4 RICHARD E. AYRES, ESQ.

5 JESSICA L. OLSON, ESQ.

6 KRISTIN HINES GLADD, ESQ.

7 of: Ayres Law Group

8 1707 L Street, N.W.

9 Suite 850

10 Washington, D.C. 20036

11 (202) 452-9222

12 ayresr@ayreslawgroup.com

13 olsonj@ayreslawgroup.com

14 gladdk@ayreslawgroup.com

15

16 On Behalf of Southern California Edison Company:

17 STEPHEN J. BURDICK, ESQ.

18 STEVEN P. FRANTZ, ESQ.

19 of: Morgan, Lewis & Bockius LLP

20 1111 Pennsylvania Avenue, N.W.

21 Washington, D.C. 20004

22 (202) 739-5059 (Burdick)

23 (202) 739-5460 (Frantz)

24 sburdick@morganlewis.com

25 sfrantz@morganlewis.com

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

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

On Behalf of the U.S. Nuclear Regulatory

Commission:

DAVID E. ROTH, ESQ.

MAXWELL SMITH, ESQ.

CATHERINE KANATAS, ESQ.

U.S. Nuclear Regulatory Commission

Office of General Counsel

Mail Stop - O-15 D21

Washington, D.C. 20555

(301) 415-2749 (Roth)

(301) 415-1246 (Smith)

(301) 415-2321 (Kanas)

david.roth@nrc.gov

maxwell.smith@nrc.gov

catherine.kanatas@nrc.gov

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

T A B L E O F C O N T E N T S

	Page
Opening Instructions - Judge Hawkens	5
Introduction of Parties	8
Preliminary Matter - Mr. Frantz	9
Petitioner Opening Statement	13
Petitioner Argument	15
SCE Opening Statement	50
SCE Argument	54
Staff Opening Statement	103
Staff Argument	108
Petitioner Rebuttal	153

P R O C E E D I N G S

10:00 a.m.

1
2
3 JUDGE HAWKENS: On the record. Good
4 morning. My name is Roy Hawkens. I'm joined on this
5 Licensing Board on my right by Dr. Anthony Baratta and
6 on my left Dr. Gary Arnold.

7 This morning we're here to hear oral
8 argument in the Southern California Edison
9 Confirmatory Action Letter case. This case had its
10 origin in June 2012 when Petitioner, Friends of the
11 Earth, filed a hearing request with the Commission in
12 relation to the restart of Units 2 and 3 at the San
13 Onofre Nuclear Generating Station in Southern
14 California.

15 As relevant here, Petitioner argued that
16 the Confirmatory Action Letter issued to SCE including
17 the process for resolving the issues raised in the
18 letter constitutes a de facto license amendment
19 processing within the hearing provision of Section
20 189(a) of the Atomic Energy Act. And therefore an
21 adjudicatory hearing is required.

22 The Commission referred this portion of
23 Petitioner's hearing request to the Atomic Safety and
24 Licensing Board Panel for resolution. The Commission
25 directed a Board to consider (1) whether the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Confirmatory Action Letter constitutes a de facto
2 license amendment that would be subject to a hearing
3 opportunity under Section 189(a) of the Atomic Energy
4 Act; and, if so, (2) whether the petition meets the
5 standing and contention admissibility requirements of
6 Commission regulations.

7 This Board has received extensive briefing
8 from the parties on these two issues. We've also
9 received amicus briefs from the Natural Resources
10 Defense Council and from the Nuclear Energy Institute.
11 And I'd like to take this opportunity to commend the
12 parties for the quality of briefing they have provided
13 this Licensing Board on the issues.

14 This morning we'll hear oral argument on
15 the two issues referred by the Commission. We'll
16 first hear from counsel for Petitioner and then
17 counsel for SCE and then counsel for the NRC Staff.

18 The principal purpose of the argument is
19 to enable this Board to fully understand each party's
20 position. And once the Board concludes and
21 understands the party's position, it will hear from
22 the next party with the understanding that we may
23 subsequently return to a party with a follow-up
24 question.

25 In order setting this argument, we

1 instructed counsel should be prepared to answer
2 questions on any matter raised in the briefs. But in
3 particular they should expect questions on three broad
4 areas of concern that we identified that in that
5 order. And I'll identify those issues later on in the
6 proceeding.

7 Each party may, if wishes, make an opening
8 statement of no more than five minutes at the outset
9 of its presentation. And at the end of the
10 presentations, we'll give Petitioner an opportunity
11 for rebuttal of no more than five minutes.

12 It's our goal to finish by lunch, but if
13 we don't we'll recess for lunch break, resume in the
14 afternoon and continue until we finish.

15 Initially when we scheduled argument, this
16 Board raised the possibility of going into a closed
17 session to discuss information that's been designated
18 as proprietary. Yesterday, however, we informed the
19 parties in an email that our current intention is not
20 ask questions that will require a discussion of
21 proprietary information. So the Licensing Board does
22 not anticipate going into a closed session. However,
23 if a party believes that the discussion of proprietary
24 information is essential, please bring it to our
25 attention and we'll determine at that time whether to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 go into closed session or whether we'll direct the
2 submission of supplemental briefs on the matter.

3 Assuming we do not go into closed session,
4 this proceeding is being webcasted live for the
5 benefit of interested individuals who could not be
6 here today. And the webcast is also being recorded
7 and will be available for reviewing for 90 days at the
8 link we announced in our recent March 12th order.

9 Today's argument is also being
10 transcribed. And the transcript will be available to
11 the public on the NRC website.

12 Before proceeding with oral argument, I
13 would like to express gratitude on behalf of the
14 Licensing Board to several individuals who have worked
15 hard to support logistically the argument, the Board's
16 law clerk, Onika Williams, Board administrative
17 support staff, Karen Valloch and Twana Ellis and
18 finally the Board's IT support staff, Andy Welkie.

19 At this point, I would ask lead counsel
20 for each party to stand, introduce yourself and those
21 individuals who are with you today starting with
22 Petitioner and then SCE and then the NRC staff.

23 MR. AYRES: Thank you, Your Honor. My
24 name is Richard Ayres. I represent Friends of the
25 Earth in this matter. With me are my two colleagues,

1 Jessica Olson to my left and Kristin Gladd to my far
2 left. I will handle the first argument and they will
3 handle the second and third arguments respectively.

4 JUDGE HAWKENS: Thank you.

5 MR. FRANTZ: My name is Steven Frantz.
6 I'm with the law firm of Morgan Lewis. We represent
7 Southern California Edison. I'll refer to them as
8 Edison throughout the morning.

9 To my right is my associate Stephen
10 Burdick. Mr. Burdick will be handling the oral
11 argument, if there is any, on the 2.309 issues
12 Timeliness, Standing and Contention Admissibility. To
13 my left is Mike Short. Mr. Short is a former Vice
14 President of Engineering for Edison and he's currently
15 a consultant working on their steam generator recovery
16 project.

17 JUDGE HAWKENS: Thank you.

18 MR. ROTH: Good morning, Your Honors.
19 David Roth with the NRC staff. To my right is Maxwell
20 Smith, also the NRC staff counsel. My left is
21 Catherine Kanatas. With respect to how we divide up
22 the arguments, we anticipate that question one will
23 probably fall to me and questions two and three should
24 fall to Mr. Smith.

25 JUDGE HAWKENS: All right. Thank you.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Let us proceed please.

2 MR. FRANTZ: Judge Hawkens, with the
3 indulgence of the Board, if I could make a brief
4 perhaps one minute notification of a recent
5 development.

6 JUDGE HAWKENS: Please do, Mr. Frantz.

7 MR. FRANTZ: Thank you. In a response to
8 a Request for Additional Information 32, Edison
9 submitted an operational assessment at 100 percent
10 power which satisfies Technical Specification
11 5.5.2.11. We are awaiting feedback from the NRC staff
12 on that operational assessment.

13 However, the timing of the staff's review
14 is critical to Edison and the co-owners. We seek
15 recert approval in May to be able to operate for the
16 summer peak load to best serve our customers and rate
17 payers.

18 However, we also recognize that the staff
19 may not be able to complete its review of the
20 operational assessment within that time frame. And as
21 a result Edison is considering filing a voluntary
22 license amendment request with a no significance
23 hazards consideration as the most expeditious method
24 to resolve the issue raised by RAI 32. The decision
25 --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 JUDGE HAWKENS: Mr. Frantz, could I
2 interrupt for just one second? My IT expert requests
3 individuals when they are sitting at the table make
4 sure they speak directly into the mikes to make sure
5 it can be heard over the webstream.

6 MR. FRANTZ: Thank you.

7 JUDGE HAWKENS: And likewise when you're
8 at the podium.

9 MR. FRANTZ: The decision on whether to
10 file may occur as early as next week, but it may be
11 actually longer. We will promptly inform the Board
12 and the participants of Edison's decision once it's
13 made. Thank you.

14 JUDGE HAWKENS: Thank you, Mr. Frantz.

15 MR. AYRES: Your Honor, may I comment?

16 JUDGE HAWKENS: You may.

17 MR. AYRES: Frankly, this is somewhat
18 shocking development.

19 JUDGE HAWKENS: To all here assembled.

20 MR. AYRES: Nine months after this case
21 began and after the expenditure of a lot of resources
22 on our part, my client's part, your part, the United
23 States Government, Edison is admitting that they need
24 a license amendment, a remarkable last minute --

25 JUDGE HAWKENS: May I interrupt a second?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 I want to make sure I understand Mr. Frantz's
2 statement. I don't think you're -- Did you say you
3 admit you need a license amendment or did you say you
4 were giving substantial consideration to voluntarily
5 seeking one?

6 MR. FRANTZ: We do not admit we need one.
7 We believe an operational assessment at 100 percent
8 power obviates any potential need for one. However,
9 we are considering a voluntary license amendment
10 request as a means of expediting the NRC staff review
11 process.

12 JUDGE HAWKENS: All right. Thank you. I
13 just want to make sure I understood what you said.
14 Mr. Ayres, please continue.

15 MR. AYRES: To follow up on that, what we
16 have, of course, is nothing in the record at this
17 point. There is no license amendment offered nor any
18 kind of motion or other action with respect to this
19 proceeding. So as to today's proceeding it seems this
20 is not an event if that is filed and when whatever
21 papers are filed in this proceeding that Edison
22 chooses to file then we'll have to all look at what
23 meaning that might have for this proceeding.

24 I am curious and I would ask or perhaps
25 you could ask the staff to what extent they've known

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 about this and where they stand on it.

2 JUDGE HAWKENS: I will -- I'm not going to
3 press the staff in their workings until some motion is
4 formally submitted. At that point, they can certainly
5 opine on their position and advise us of anything else
6 that's relevant to the proceeding. I will simply ask
7 if the staff has any response it wishes to make to us
8 similar to the response made by Petitioner.

9 MR. ROTH: David Roth for the staff. No
10 response at this time, sir.

11 JUDGE HAWKENS: All right. Thank you.

12 Anything else before we start?

13 MR. FRANTZ: I would echo Mr. Ayres'
14 comments. I don't believe the announcement this
15 morning should have any effect on the oral argument
16 this morning. (1) We believe that we have voluntary
17 LAR if we do submit it. And (2) we have not made any
18 decision yet.

19 What we did not want to happen is have
20 this oral argument today without any discussion of
21 this possibility and then have the Board find out next
22 week or the following week that we were making that
23 consideration. We thought that would be not
24 appropriate to go forward with this oral argument
25 without making that notification.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 JUDGE HAWKENS: All right. Thank you, Mr.
2 Frantz.

3 The first question, we have three general
4 questions as I mentioned in my introductory remarks.
5 The first area of concern is as follows: Taking into
6 account the language of the Commission's decision in
7 CLI-12-20, the fact that the CAL is an evolving
8 process and relevant precedence whether this Board
9 should limit its review to the four corners of the
10 March 27, 2012 letter to resolve the de facto license
11 amendment issue referred by the Commission.

12 If we could have the representative from
13 Petitioner come to the podium and address that issue,
14 we'd be grateful. And, first, I want as I indicated
15 at the outset to the extent that if a party wishes to
16 give a five minute introductory remarks, you're
17 welcome to. Would you like to do that, Mr. Ayres?

18 MR. AYRES: I would yes.

19 Your Honors, Judge Hawkens, Judge Baratta,
20 Judge Arnold, good morning and may it please the
21 Board. We are here this morning about a case which is
22 about whether the public including this Atomic Safety
23 and Licensing Board will have a role in determining
24 whether San Onofre Unit 2 will be returned to service
25 in its current damaged condition.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Petitioner seeks a period for public
2 comment and opportunity for public hearing that is
3 provided in the Atomic Energy Act and in 10 CFR 50.91
4 and 2.309 for license amendments an opportunity for a
5 public hearing of the significant safety issues
6 involved in restarting this reactor.

7 If public review procedures are required
8 because under the law, this proceeding is a license
9 amendment for two reasons. First, Edison has failed
10 to demonstrate that it can meet the technical
11 specifications of its license which required Edison to
12 show it can operate safely at 100 percent power. The
13 plant can therefore not be operated until either the
14 license is amended or such a demonstration is made.

15 Second, Edison's proposal to restart
16 without repairing or replacing the damaged steam
17 generators is a change, test or experiment under the
18 terms of 10 CFR 50.59 and requires a license amendment
19 accordingly.

20 The staff and the Licensee argue
21 erroneously that this decision is strictly an
22 enforcement matter between them. They would exclude
23 the public and this Board from the decision of whether
24 to allow San Onofre a run with damaged steam
25 generators.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 This case is an important test of Chair
2 McFarlane's policy of transparency in regulating
3 nuclear power. Over the years, the staff and the
4 licensees have reduced the reach of licensing and
5 increased the role of enforcement with the result that
6 the public involvement is less and less. You have an
7 opportunity here to restore that balance.

8 Now let me turn to our first argument.
9 Edison cannot change the terms of its license without
10 a license amendment. Our position is very
11 straightforward despite all the pages of briefing in
12 this case.

13 Under the current license, Edison must
14 demonstrate that the steam generator tubes will
15 maintain integrity at full power. Edison cannot make
16 such a demonstration or has not made one. So it must
17 change the technical specifications. But technical
18 specifications cannot be changed without a change in
19 the license. It cannot be done by an enforcement
20 action between the staff and the licensee.

21 Thus, San Onofre cannot legally resume
22 operation unless the Licensee applies for and receives
23 a license amendment pursuant to a public adjudicatory
24 hearing as provided by Section 189(a)(1)(a) of the
25 Atomic Energy Act.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 To date Edison has not demonstrated that
2 the steam generators at Unit 2 will maintain their
3 integrity at full power. When asked by the Board
4 whether Unit 2 could be safely operated at 99 percent
5 of power, the counsel for Edison demurred as you
6 recall. Instead Edison proposes to employ
7 compensatory measures such as operating at 70 percent
8 power for a limited term.

9 Just a week ago, Edison offered an OA
10 purporting to show that the damaged steam generators
11 could be operated safely. In the short time we've had
12 to examine that, only a week, we see a lot of flaws.
13 But if the Board wants to consider this out of time
14 submission, yet another out of time submission, by
15 Edison, we will ask for time for our experts to do a
16 full review and for us to respond on the record.

17 The law is settled as to whether a change
18 in the technical specifications requires a license
19 amendment. See, for example, in the matter of
20 Cleveland Electric Illuminating Company, Perry, both
21 Edison and the staff have actually conceived this
22 point earlier in this discussion, Edison in its brief
23 at page 38 and the staff in its brief at page seven.

24 Edison cannot now redefine what full power
25 means in the license, having agreed that you have to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 change it if you change full power. They can't now
2 redefine full power. Full power is defined in the
3 tech spec in the operating license as 3438 megawatts-
4 thermal. The staff agrees that you can't change that
5 definition by simply stating that you're going to.

6 Gregory Warnick, the Chief Resident
7 Inspector at San Onofre, for example, recently said,
8 "The tech spec says that they need to demonstrate tube
9 integrity through all ranges of operation" which would
10 be up to 100 percent which is how the license is
11 written. They need to comply with the words of that
12 specification.

13 And Edison has admitted that the proposal
14 to run at 70 percent power modifies its license. On
15 page four of its March 11th answer opposing our motion
16 to bar the use of subsequent Board notifications,
17 Edison states, "SCE has formally committed to operate
18 SONGS Unit 2 at 70 percent of rated thermal power."
19 That commitment modifies the licensing basis for Unite
20 2.

21 Edison has also agreed that the tech specs
22 are part of its licensing basis. See, for example,
23 Edison's brief at 46 which explicitly discusses Tech
24 Spec 5.5.2.11, the one at issue here as part of the
25 licensing basis for SONGS. Because the tech specs are

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 part of the licensing basis, modifying the tech specs
2 modifies the license.

3 JUDGE HAWKENS: Can I interrupt for just
4 one second? It seems like you've moved from your
5 introductory comments into substantive arguments and
6 I just want to --

7 MR. AYRES: I invite questions or comments
8 from the Board.

9 JUDGE HAWKENS: Yes, you're focusing on
10 the third area of concern identified in the order. Is
11 that it? I think you had indicated that you --

12 MR. AYRES: I am focused on the question
13 of whether this proceeding, the CAL and response
14 proceeding, is a licensing amendment. My colleagues
15 will focus on the standing and the third issue that
16 you laid out earlier. I don't think it exactly
17 coincides with the three that you mentioned earlier.

18 JUDGE HAWKENS: All right.

19 MR. AYRES: Which I think are all confined
20 to the first of the questions that I just laid out
21 whether this in fact is a licensing amendment. Does
22 that help?

23 JUDGE HAWKENS: Are you going to be
24 discussing the scope of the issue presented to us?
25 It's referred to us by the Commission. I would like

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 to focus on that first.

2 MR. AYRES: Yes.

3 JUDGE HAWKENS: All right. Frame the
4 issue as you believe. The Commission has framed it.
5 Tell me exactly how you interpret the issue as
6 referred by the Commission.

7 MR. AYRES: The Commission has said that
8 you should look to the -- The Commission has stated
9 that Friends of the Earth contends that the
10 Confirmatory Action Letter including the process for
11 resolving the issues in the letter is what they're
12 asking you to look at.

13 Our view is that if you were to take the
14 position advanced by the staff and Edison that you are
15 confined to merely looking at the four corners of the
16 CAL. This would be a tautological and absurd inquiry.
17 A CAL is a CAL.

18 But what the question is here, I think the
19 question that the Commission has referred you, is this
20 process which began with the CAL and has gone with
21 responses to the CAL. A plan for restart is that
22 process. Does that process rise to the level of a
23 license amendment?

24 MR. AYRES: How do we know the process has
25 risen to the level of a license amendment until the

1 process is complete?

2 MR. AYRES: I think we're far enough along
3 in it now to know that it's a license amendment
4 process. This is not as simple as simply responding
5 to a CAL. I think of other cases where a CAL has been
6 issued because a valve was stuck open. An inspector
7 discovered it and issued a CAL. And the Licensee went
8 ahead and repaired it.

9 This is not a case like that. This is a
10 much more serious case.

11 JUDGE BARATTA: Why do you say it's not a
12 case like that? Could you be more specific?

13 MR. AYRES: I'll try. In this case, Your
14 Honor, you know this area technically far better than
15 I ever will. But my understanding is that what we've
16 had here is a break in the containment in the part of
17 the reactor which contains radioactive material. And
18 we have evidence of a great deal of wear or damage to
19 a lot of other tubes. And we also have a number of
20 analyses that have been done which show that the rate
21 of wear is remarkably higher than it should be.

22 So the issue here in this case is whether
23 this reactor is safe to run given that it appears to
24 be wearing away the protective barrier between the
25 radioactive and non radioactive parts of the reactor.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 To me, that seems like a very serious concern, much
2 more so than some of the things which we've seen dealt
3 with by CALs. The reactor has been stuck down for a
4 year which suggests that the Licensee regards it as
5 very serious, too.

6 JUDGE HAWKENS: My understanding is
7 essentially two ways for license amendment. The
8 Commission can direct one, order one, or the Licensee
9 can request one. Here we don't have yet the
10 Commission directing one. We don't have the Licensee
11 requesting one.

12 But is it your argument then that they are
13 effectively asking for one? And therefore this is a
14 de facto license amendment proceeding.

15 MR. AYRES: They have not asked for one,
16 but they must because the characteristics of this
17 proceeding are such that a license amendment is
18 required under the law.

19 JUDGE HAWKENS: And it's your view they
20 made a mistake in their 50.59 analysis which would in
21 your view require them to request a license amendment.

22 MR. AYRES: In our view, that's right. If
23 they had done a 50.59 analysis on this properly, they
24 would have concluded that they required a license
25 amendment.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 JUDGE HAWKENS: And how do we distinguish
2 that challenge to their 50.59 analysis from other
3 cases where the Commission has stated that challenges
4 to 50.59 analysis should be brought by a 2.206 claim.

5 MR. AYRES: I think I read 50.59 as
6 creating two duties, Your Honor. On the one hand, it
7 creates a duty for the licensee to do an analysis. On
8 the other, it creates a set of criteria for when that
9 analysis trips a license amendment.

10 In the first instance, in most cases, what
11 happens is the licensee does the 50.59 analysis and
12 then says nothing or says something needs to be done.
13 But we see nothing in 50.59 which prevents you from
14 applying the standards of 50.59 to this question.

15 You have been asked by the Commission to
16 tell them whether or not this is a license amendment.
17 And you need to find some basis for doing that. 50.59
18 provides in its criteria a good list of essentially
19 common sense criteria. And essentially what it says
20 is if you make a change that affects the risks
21 involved in a number of very specific ways, then there
22 has to be a license amendment. And the public has to
23 have an opportunity to review those risks and
24 understand whether it claims them unacceptable or not.

25 So, yes, we think 50.59 is a good guidance

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 for the Board to use. There are two grounds on which
2 the Board should make this decision. The first is the
3 one I began to talk about. That is if you need to
4 take a change in the license -- I'm sorry. If you
5 need to make a change in the tech specs, then the
6 license has to be changed. The second ground is if
7 you apply the standards of 50.59 you see that in this
8 case a license amendment is required.

9 JUDGE HAWKENS: Do you distinguish --
10 Edison seems to rely heavily on the Seabrook and Perry
11 cases as support for its position that this CAL is not
12 a de facto license amendment. Would you distinguish
13 those cases for us please?

14 MR. AYRES: Seabrook seems an entirely
15 different case to me, a classic enforcement case. A
16 dump valve failed in an open position causing the
17 pressurizer water level to drop. The staff at the
18 reactor did not respond as they were expected to. And
19 NRC personnel actually had to follow up and notify
20 them to shut down the reactor in order to deal with
21 this problem.

22 The issue here is a classic enforcement
23 issue. There is nothing involving the license. The
24 question is whether the license was being complied
25 with. The Commission staff says, "Wait a minute. You

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 haven't complied with it." And so there's an
2 enforcement issue.

3 In this case, in the San Onofre case,
4 there is a license change that's involved. This is
5 not as simple as just enforcing the current license
6 because Edison, at least in this record, has never
7 claimed that it can do that. To me those are entirely
8 different cases. And one is an enforcement case. The
9 other is not.

10 The Perry case is likewise I think a
11 classic enforcement case. Again, no question of
12 change in the license itself. It's simply a question
13 of enforcing the license to make sure the licensee
14 actually abides by it.

15 To me those two cases show appropriate
16 applications of the CAL enforcement process. This one
17 has become inappropriate.

18 JUDGE HAWKENS: Can you cite any case law
19 to me, Mr. Ayres, which supports your position that
20 this Board can find a de facto license amendment
21 before the staff has taken final action?

22 MR. AYRES: Your Honor, I think the staff
23 has misconstrued I think Perry in that respect.

24 JUDGE HAWKENS: Can you answer yes or no
25 and then follow up with an explanation?

1 MR. AYRES: Could you repeat the question?
2 I'm sorry.

3 JUDGE HAWKENS: Can you cite any case law
4 to support a conclusion that this Board could find a
5 de facto license amendment before the staff has taken
6 final action authorizing an amendment?

7 MR. AYRES: I think my answer is no. But
8 the staff is incorrect in citing case law which they
9 say supports their position. In that case, let me
10 find my notes here. Here it is. In that case,
11 petitioner argued -- It was a petition case from a
12 citizen -- that any change that required prior NRC
13 staff approval including non license changes, figured
14 hearing rights. It's almost the reverse of this
15 situation. The Commission rejected that view as they
16 should have.

17 But the case provides no support for the
18 idea that the staff must approve an action before it
19 can be considered a de facto license amendment. It's
20 about another situation altogether.

21 JUDGE HAWKENS: Isn't it problematic
22 though to challenge a process where the NRC staff is
23 reviewing a request and to come in and say, "This is
24 a license amendment proceeding" without giving the
25 staff the opportunity to do its job and make a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 conclusion that in fact the license amendment is
2 required? It's conceivable, is it not, that if you're
3 correct -- In fact, one would presume that if you're
4 correct, the staff upon its review would determine
5 that a license amendment is required.

6 So why isn't it a better use of resources,
7 a better use of the job of the staff and its
8 expertise, to allow it to continue with its review and
9 make that determination? If it's incorrect, then the
10 opportunity exists for a petitioner to come and
11 challenge it at that point.

12 MR. AYRES: I think there's one reason
13 that overwhelms all others in that instance the
14 Commission has asked you to make this decision.

15 JUDGE HAWKENS: And it's your view they do
16 not want us to wait until final action has been taken
17 by the NRC staff.

18 MR. AYRES: Well, nothing is said to that
19 effect in their referral. And given how far we've
20 come in this process, the most efficient way forward
21 is for you to go ahead and make the decision.

22 JUDGE HAWKENS: And since there doesn't
23 seem to be any indication on the horizon for when an
24 analysis will be done for Unit 3. That makes sense
25 also unless we were to bifurcate it.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. AYRES: Right. I think your charge is
2 to as I read it advise the Commission or to rule for
3 the Commission what kind of animal this is.
4 Whereupon, the next step assuming that you rule that
5 it is a licensing proceeding is that a board would be
6 convened -- Well, there are several steps, but
7 assuming a hearing occurs, a board would be convened
8 to have that licensing hearing.

9 I assume that once you've advised the
10 Commission of your decision, if you advise the
11 Commission that this is a licensing proceeding, the
12 Commission will then instruct no doubt you, Judge
13 Hawkens, as the Chief Judge to impanel an ASLB.
14 Probably the most efficient one would be this one
15 right here since all of you are now familiar with a
16 lot of the facts of this case.

17 JUDGE HAWKENS: Let me ask you. This
18 merges a little bit with your contention and what
19 happens to your contention if we were to rule in your
20 favor. As I read your contention, it's essentially
21 arguing that this is effectively a license amendment
22 proceeding. If we were to rule in your favor -- First
23 of all, if we were to rule it was not a de facto
24 license amendment proceeding, that would dispose of
25 your contention and dispose of this proceedings.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 If, on the other hand, we were to agree
2 this were a de facto license amendment proceeding as
3 I see it that grants you the relief you're requesting
4 and likewise renders your contention moot, giving you
5 the opportunity like every other member of the public
6 to bring a new contention once the staff issues its
7 notice of opportunity for hearing.

8 MR. AYRES: That's certainly one path that
9 could be followed. It might be more efficient simply
10 to allow us to amend our contention and essentially
11 continue this proceeding as a licensing amendment
12 proceeding. Certainly we would have to amend our
13 contention because as you say you would have ruled
14 favorably on the one that we have.

15 JUDGE BARATTA: I'd like to refer I think
16 it's to your initial brief that you filed back in
17 January, January 11th. Specifically, I'd like to ask
18 you a couple of questions on page 26 where you make a
19 statement.

20 MR. AYRES: Sorry.

21 JUDGE BARATTA: That's fine. Took me a
22 while to skip through mine. I had the advantage of
23 being able to do that while you were talking.

24 MR. AYRES: Could you give me the page
25 site again?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 JUDGE BARATTA: Page 26, yes. And this
2 question really goes back to one I asked you a moment
3 ago about trying to distinguish between say the valve
4 case or any other CAL cases. You make a statement
5 here that SCE is asking to be allowed to operate at 70
6 percent power because Unit 2 is considered to no
7 longer be capable of operating within safety limits of
8 FSAR at higher power levels.

9 Now what I'm asking here is in the case
10 you cited where you had a stuck valve for example or
11 they failed to follow procedures. In the end, what
12 happened? What was the outcome of the CAL process in
13 your opinion?

14 MR. AYRES: I'm trying to remember. In
15 the procedures case I believe there was additional
16 training. It was handled as a need to improve the
17 performance of the staff.

18 JUDGE BARATTA: To restore their ability
19 to operate within their licensing basis, is that it?

20 MR. AYRES: Yes. There was no change in
21 the license in any way. It was simply these are the
22 rules under which the license requires you to operate.
23 You didn't. Now you must.

24 JUDGE BARATTA: Now in this case what it
25 seems they're saying is that it cannot be restored to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 the licensing basis. Is that what you're claiming?

2 MR. AYRES: That is our decision. Yes,
3 Your Honor. If you look at the briefs in this case
4 and the material submitted, Edison has not claimed
5 that they can meet the 100 percent tube integrity
6 requirement of their license. Now they now claim they
7 have a OA which none of us have really had time to
8 look at which shows that. We frankly doubt it, but we
9 think we all need to look at it.

10 Up to now, you recall you have more than
11 once asked them whether their 70 percent proposal
12 means they can operate anywhere up to 99 percent. And
13 they have not been able to respond to that. They did
14 not provide an answer to the RAI 32 which essentially
15 was asking the same question.

16 And they didn't respond to you positively.
17 I forgot whether it was Judge Baratta or Judge Arnold
18 who asked whether they could operate at 99 percent.
19 But they did not respond to that on the phone call
20 either.

21 So we on this record argue that Edison has
22 not shown that it could meet that licensing
23 requirement, that tech spec, in its license. And
24 therefore it can't restart unless that's either
25 changed or they can show that they can meet it.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 JUDGE BARATTA: All right. Thank you.

2 JUDGE HAWKENS: Did you say you would be
3 addressing the second area of concern as well, Mr.
4 Ayres?

5 MR. AYRES: I'm not sure now which is the
6 second area.

7 JUDGE HAWKENS: Let me read the second
8 area of concern. Assuming that the scope of the de
9 facto license amendment issue requires the Board to
10 look beyond the March 27 letter and to consider
11 whether SCE's Edison start-up plan if authorized would
12 constitute a de facto license amendment, do the
13 standards in Section 50.59 provide relevant guidance?

14 MR. AYRES: Yes. And I think I addressed
15 that.

16 JUDGE HAWKENS: I think that has probably
17 been answered. And you believe they would provide
18 relevant guidance.

19 MR. AYRES: Yes.

20 JUDGE HAWKENS: I don't think we need to
21 go further on that matter of concern with you anyway.

22 MR. AYRES: Okay. I think that's right.

23 JUDGE ARNOLD: Well, actually I would like

24 --

25 JUDGE HAWKENS: Well, correct. Sorry.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 JUDGE ARNOLD: I would like to ask about
2 that because specifically 50.59(c)(2) has eight
3 criteria.

4 MR. AYRES: Yes.

5 JUDGE ARNOLD: And I'm curious because
6 what I want to know is how do you know whether or not
7 a specific criterion is met. For instance, many of
8 the criteria, let's just take the first one, more than
9 a minimal increase in the frequency of occurrence of
10 an accident previously evaluated.

11 Now is it that the Licensee has to
12 definitively show that the increase in a probability
13 of an accident is less than minimal? Or is it enough
14 for them to look at the changes and say there appears
15 to be no way it could affect any accident? Basically,
16 what's the burden on that?

17 MR. AYRES: Since 50.59 is normally
18 applied in a situation where the licensee is to do a
19 study and reach its own conclusions. I don't think
20 you actually have any standards for how that's to be
21 met. And indeed in the companion 2.206 proceeding,
22 we've argued that Edison has more than shaved the
23 corner on what it should have done in evaluating those
24 factors.

25 In this situation, I think your evaluation

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 has to be based on the record as it stands here.
2 We've addressed those issues at some length in our
3 brief and I don't have the page numbers right here.
4 But we've gone through them one by one arguing why the
5 risks are increased.

6 JUDGE ARNOLD: That was it. In your
7 brief, most of your argument consisted of they made
8 this physical change within the steam generator and
9 that has to affect the probability of tube rupture or
10 a different type of accident or whatever.

11 And there's no showing that it definitely
12 will -- let's see -- "more than a minimal increase in
13 the frequency of occurrence." That to me says some
14 increase in the probability of occurrence is
15 permissible. And I haven't seen anything in your
16 brief to show that this is beyond that threshold. How
17 would you address that?

18 MR. AYRES: Minimal is, of course, an
19 evaluative word, not a quantitative one. But I think
20 in the expert affidavits that we attached to our
21 briefs you'll find a much more elaborate discussion of
22 the ways in which and the amounts of which risks are
23 increased by what Edison is proposing to do. So I
24 think I would refer you to those affidavits as the
25 source of the factual material on which you should

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 reach your judgment on that.

2 JUDGE ARNOLD: In the statement of
3 considerations for the 1999 change to 50.59, the
4 Commission addressed this. And they said in a safety
5 analysis you're looking at orders of magnitudes. And
6 they use, for example, an event that is expected to
7 never occur, an event that is expected to occur maybe
8 once over the life of a reactor or an event that is
9 expected to occur several times. And they said but a
10 minimal increase would keep it in the same general
11 category. Whereas, more than minimal would be really
12 an order of magnitude change.

13 MR. AYRES: I think the materials that
14 have been submitted here together with both briefs
15 actually allow you to make that kind of judgment.
16 This is a unit which was designed, a steam generator
17 which was designed, to operate for 40 years. And the
18 last one didn't quite make it that far, but it did
19 last a long time.

20 We have analyses of the phenomenon that
21 are going on inside this generator now in the record
22 produced mostly for Edison which suggests that the
23 thresholds of safety for steam generator breaks will
24 be reached in far shorter time, more in the order of
25 one year or one and a half years. There is an order

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 of magnitude, two orders of magnitude actually I
2 guess. Forgive me if I don't have my orders of
3 magnitude right. But it's at least one. And we think
4 that represents a very significant increase in risk
5 under this 50.59 standard.

6 JUDGE ARNOLD: Now there is criterion
7 eight which is a differing kind of animal. And let me
8 read that to you. "Results are a departure from a
9 method of evaluation described in the FSAR used in
10 establishing the design basis or in the safety
11 analysis." What constitutes a departure from an
12 established method? Certainly, not changing some
13 parameter values within an analysis. But how do you
14 have to go before it's a departure from the analysis
15 method?

16 MR. AYRES: I'm not certain of this, but
17 I think you're asking me a hypothetical question. I
18 don't think that we pointed at that.

19 JUDGE ARNOLD: Okay. Let me ask you this.
20 If you have a general design criteria and if in the
21 FSAR there's an analysis that demonstrates that your
22 plant meets that general design criteria and you later
23 find out that there's another mechanism for failure
24 that wasn't considered in the original analysis and
25 you have to supplement it with another completely

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 different analysis method A to meet general design
2 criteria and you now find you have to use A exactly as
3 it was plus supplemented with analysis, is that a
4 departure from the method that is originally in the
5 FSAR?

6 MR. AYRES: Yes, I think so.

7 JUDGE ARNOLD: Okay. Thank you.

8 JUDGE HAWKENS: We are ready to move to
9 the third area of concern. Do you want me to refresh
10 your memory on that?

11 MR. AYRES: Please.

12 JUDGE HAWKENS: I'll refresh my own memory
13 as well. "Assuming the standards in Section 50.59
14 provide relevant guidance for this Board in resolving
15 the referred issue, whether the information in
16 Edison's October 3rd Unit 2 start-up letter including
17 its enclosures satisfies any of the Section 50.59
18 criteria that mandate a license amendment. Also
19 please be prepared to address questions regarding
20 provisions in the FSAR, tech specs and responses to
21 RAIs that may be relevant to the referred issue."
22 That's the third area of concern. Is that something
23 that you would be addressing, Mr. Ayres, or one of
24 your colleagues?

25 MS. GLADD: No, that's you.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. AYRES: I guess I am.

2 (Laughter.)

3 Couldn't get out of it. So the question
4 has to do with what was submitted in October in
5 response to the CAL. Is that the idea?

6 JUDGE HAWKENS: This will go more to the
7 actual merits of your views on the proper application
8 of the 50.59 analysis.

9 JUDGE BARATTA: I think you had more
10 questions in that area if I recall than I do. Do you
11 want to start off on that.

12 JUDGE HAWKENS: Or do you want to start
13 with the tech spec?

14 JUDGE BARATTA: Okay. I'd actually like
15 to start with the -- Yes, that's part of that area of
16 concern which deals with the technical specifications
17 and their responses on the RAIs that may be relevant
18 to the de facto license amendment issue if we could.
19 I'd like to refer you to your reply brief. Yes,
20 February 13th. There was a figure that appeared in
21 the Large affidavit which actually has been superceded
22 and was in connection with Paragraph 5.8.18 I believe.

23 And there's a new figure similar to that
24 which appeared in SCE's fifth notice concerning RAI
25 response. I'd like to actually use that figure, the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 newer figure.

2 MR. AYRES: Which figure is that on? The
3 Large --

4 JUDGE BARATTA: Well, I don't have the
5 page numbers unfortunately. I'm going by paragraph
6 number, 5.8.18.

7 MR. ROTH: Pardon me, Your Honor. This is
8 David Roth for the staff. I believe that's page 31 of
9 62.

10 JUDGE BARATTA: Thank you.

11 MR. FRANTZ: If I could bring to the
12 attention of the Board, I believe that figure is
13 proprietary.

14 JUDGE BARATTA: That's why we're referring
15 to the newer figure which does not appear to be such.
16 But the discussion pertains to that.

17 JUDGE HAWKENS: Except we don't want them
18 to use the --

19 JUDGE BARATTA: The newer one, yes. But
20 what I'd like to do is actually -- That figure has
21 been redone or something similar to it.

22 JUDGE HAWKENS: Right. We want to refer
23 to the figure in the response to the RAI, not to the
24 figure in the Large affidavit.

25 JUDGE BARATTA: But the discussion

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 pertains to both the old and new figures. I think we
2 have the ability to project that figure.

3 MR. AYRES: That would be very helpful.

4 JUDGE BARATTA: That's page 37 of 41.

5 Yes. Okay. That's the figure that I really want to
6 discuss, but it is -- In the discussion, at least,
7 that's in the Large affidavit, it's pointed out that
8 operation at 100 percent power which I believe is the
9 pink line of the boxes. I've got to look at this.
10 This would result in probability of a burst, a tube
11 rupture, of about five percent at about 11 months.

12 Now if I look at the tech specs going to
13 tube integrity, it basically says, "Okay. Now be able
14 to have a tube burst under a variety of conditions."
15 Does that tech spec in any way in your mind say it's
16 okay after ten months to have a tube burst or have a
17 higher probability of a tube burst? Or is that
18 something that supposed to apply for the entire life
19 of the plant?

20 MR. AYRES: I don't think it says it's
21 okay to have tube burst after 11 months. This is the
22 table which I really was referring to earlier about
23 the increase in risk involved in the proposed restart
24 plan. But if I understand what you're asking is
25 whether there's a hard and fast line here that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 anything underneath is an acceptable risk and anything
2 above is not. Or am I misunderstanding?

3 JUDGE BARATTA: No, what I'm trying to get
4 at is can the tech specs be satisfied for a certain
5 amount of time for a period and not satisfied for
6 another period of time without it being a license
7 amendment.

8 MR. AYRES: Understand. No, in our view,
9 you can't do that. You can't satisfy the tech specs
10 for a period of time. The license is for 40 years or
11 30 years, whichever it is. And the tech spec applies
12 throughout that period. So to say that we can satisfy
13 it for a year and a half is not the same thing as
14 compliance with it.

15 JUDGE BARATTA: Okay. Are you at all
16 familiar with a -- There's a case. It's a Palo Verde
17 case 43 NRC 344. And this was a 2.206 actually, not
18 an ASOP proceeding. I was wondering if you were at
19 all familiar with that case.

20 MR. AYRES: I had read it, but not for
21 quite some time.

22 JUDGE BARATTA: All right. In that case,
23 I won't put you on the spot.

24 MR. AYRES: Feel free to ask and at worst
25 we can respond afterwards.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 JUDGE BARATTA: What I'm referring to is
2 it seems to me that this situation is very similar
3 here where in order to operate these generators
4 without a problem developing apparently they had to
5 operate at 86 percent power to get a certain hot leg
6 temperature. And apparently that's what was causing
7 the issue.

8 And then in order to operate at 100
9 percent power they had to get a tech spec change to do
10 that. And I guess what I'm looking at here is that
11 although we're not doing -- Is this not leading down
12 that same path?

13 MR. AYRES: I think it is.

14 JUDGE BARATTA: And it's such here the
15 power will be limited as opposed to hot leg
16 temperature.

17 MR. AYRES: But it's alike in that the
18 Licensee is saying we can't meet the requirements that
19 are currently in our license. We have to have
20 additional requirements. And, having said that, those
21 are changes in the tech specs. And to add this 70
22 percent limit is to add another condition to the tech
23 specs which in turn requires a license amendment in
24 our view.

25 JUDGE ARNOLD: I'm going to get back on

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 50.59 for a moment. On pages 19 to 23 of your brief,
2 you address the Criteria 50.59(c)(2) that you consider
3 the current change, test or experiment to satisfy.
4 These were Criteria 1, 2, 3, 5, 6 and 7. You left out
5 Criteria 4 and 8. Correct?

6 MR. AYRES: Yes. As I mentioned earlier.

7 JUDGE ARNOLD: In Appendix B of the Edison
8 brief, Edison addresses these criteria countering your
9 arguments with their own. And that's a table in
10 there. And in there, they counter your arguments on
11 Criteria 4 and 8 even though you hadn't exactly called
12 them out in your argument. They called through the
13 entire brief and found statements that would indicate
14 that you also considered four and eight might satisfy
15 you. You're familiar with that.

16 MR. AYRES: I'm familiar with that, yes.

17 JUDGE ARNOLD: Okay. My question concerns
18 specifically Criterion 8 again which is results in
19 department from a method of evaluation described in
20 the FSAR used in establishing the design basis or in
21 the safety analysis.

22 Now on page 13 on your brief, you cite
23 50.59(a)(6) which is a definitions region. And in
24 that part of what you cite from there is inconsistent
25 with the analysis or descriptions in the Final Safety

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Analysis Report. It is exactly the same words that
2 are in Criterion 8. Do you agree?

3 MR. AYRES: Yes.

4 JUDGE ARNOLD: Okay. Also in the Large
5 report on page 5, he states "The methods of deducting
6 merely by improving inference from the probe
7 inspection results" blah, blah, blah, "are
8 inconsistent with the analysis and descriptions in the
9 FSAR." So it appears that the Large affidavit also
10 believes that Criterion 8 might be satisfied. Does
11 that seem logical?

12 MR. AYRES: Might not be satisfied?

13 JUDGE ARNOLD: Might be satisfied.

14 MR. AYRES: Might be satisfied triggering,
15 yes.

16 JUDGE ARNOLD: Yes.

17 MR. AYRES: Yes, it does.

18 JUDGE ARNOLD: Okay. From these bits and
19 pieces we find in your brief and in the Edison brief,
20 could we -- should we construe from these that in fact
21 you do think that Criterion 8 is satisfied even though
22 your brief didn't specifically call them out?

23 MR. AYRES: I think you could come to that
24 conclusion, yes.

25 JUDGE ARNOLD: Thank you.

1 JUDGE HAWKENS: Is that your position
2 before us today that Subsection 8 was in fact
3 satisfied?

4 MR. AYRES: Yes.

5 JUDGE HAWKENS: It appears that Edison
6 viewed it that way because they joined the issue in
7 there.

8 MR. AYRES: Right. And, of course, as you
9 know under 50.59 satisfaction of any one of the eight
10 is sufficient to require a license amendment.

11 JUDGE HAWKENS: We just wanted to make
12 sure you were not explicitly waiving any reliance on
13 eight.

14 MR. AYRES: No, we're not.

15 JUDGE ARNOLD: I just have two other
16 questions concerning your brief. In your brief, you
17 repeatedly referred to current tube damage in the Unit
18 2 steam generators as being unacceptable for
19 operation. You state that on page one, page seven and
20 page 12 and possibly elsewhere.

21 But in the Southern California Edison
22 brief, it notes that the SONGS technical
23 specifications do not require a tube to be removed
24 from service until its wall thickness is reduced by 35
25 percent. And it also states that the technical

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 specifications allow steam generators to be operated
2 with up to about eight percent of the tubes plugged.

3 MR. AYRES: Yes.

4 JUDGE ARNOLD: So when you say that they
5 have tube damage that is unacceptable for operation,
6 do you have evidence that the wall thickness has been
7 reduced by 35 percent in more than eight percent of
8 the tubes?

9 MR. AYRES: No, Your Honor. We don't. I
10 don't think that's the basis for that statement. The
11 basis for the statement is the extensive evidences of
12 wear in both Units 2 and 3 which indicate a much more
13 rapid erosion of those tubes than should be expected.

14 So the question has to be seen I think in
15 a slightly different way. We're not saying that that
16 particular eight percent requirement is violated.
17 We're saying if you look at these reactors the steam
18 generators are so damaged after such a short time that
19 as the table showed us serious consequences are not
20 very far away.

21 JUDGE ARNOLD: Okay. So you're
22 extrapolating from the current damage to say somewhere
23 in the near future.

24 MR. AYRES: Yes.

25 JUDGE ARNOLD: Okay.

1 MR. AYRES: And the Licensee I don't think
2 contests that point. I think by coming in and saying
3 we want to run this for five months and from other
4 things they've said they are admitting that they see
5 this as a serious problem. They have studies which
6 suggest that the tube ruptures may not be very far
7 away at all. And so they're unwilling to rely on the
8 tubes in the way they should be able to under the
9 license.

10 JUDGE ARNOLD: In your brief on pages 3,
11 4, 5, 7, 10 and 28, you claim that Edison has failed
12 to determine the root cause of steam generator tube
13 failure.

14 MR. AYRES: Yes.

15 JUDGE ARNOLD: Can you tell me? What is
16 your definition of the term "root cause"?

17 MR. AYRES: That's a very interesting
18 question, Judge Arnold. I find it interesting because
19 I'm not sure that I've seen anything from the Nuclear
20 Regulatory Commission that defines it.

21 But I believe what's intended, what's
22 meant by it, is not just looking at what is the
23 mechanical cause of what occurred. Here are all these
24 damaged tubes. Oh, where there was a lot of vortex.
25 There was a lot of shattering and rattling going on in

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 there. That's the cause. Well, yes. That's the
2 proximate cause as we lawyers would call it.

3 But the root cause goes back to how did
4 that happen. And I take it the term root cause to
5 mean the cause in terms of how the thing was designed
6 and built that made what has occurred inevitable. And
7 that's what I think has failed to be given here either
8 by the Licensee or by the staff.

9 JUDGE ARNOLD: That in fact is what I see
10 as root cause, the definition of root cause. But can
11 you cite any rule or law that requires that the root
12 cause be determined? I mean, do they have to figure
13 out why the design problem occurred or do they just
14 have to fix the design problem of the steam generator?

15 MR. AYRES: Isn't the question whether you
16 can fix it if you don't determine what the root cause
17 is? In this case, for example, if the root cause is
18 the design itself, and we walk through in several
19 affidavits exactly what we mean by that, the removal
20 of the stay cylinder, replacement with additional
21 tubes, different kinds of structure to hold the tubes,
22 those changes may make this kind of damage inevitable.
23 So there may be nothing you can do short of putting in
24 new steam generators that will resolve the root cause
25 here.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 And I think that's the reason why getting
2 to the root cause is so important because it tells you
3 whether Band-Aids will work or whether you need to go
4 back and start over.

5 JUDGE ARNOLD: But can you cite any
6 requirements that the root cause as you define it
7 needs to be determined and corrected?

8 MR. AYRES: I believe it's in the NRC
9 regulations, but I can't cite them to you right now.

10 JUDGE ARNOLD: Because I did find that 10
11 CFR 50, Appendix B has some criteria in it. Criterion
12 16 I think it is says "Find the cause and fix it."
13 But it doesn't go beyond the cause of the problem to
14 the root cause. And I couldn't find any reference to
15 root cause anywhere in 10 CFR 50.

16 MR. AYRES: There is certainly a lot of
17 discussion of root cause in the analyses done by the
18 staff and offered by the Licensee. Our concern with
19 them is they don't seem to really address the root
20 cause.

21 JUDGE ARNOLD: Okay. Thank you. I'm
22 done.

23 JUDGE HAWKENS: Do you have any final
24 concluding comment, Mr. Ayres?

25 MR. AYRES: I don't think so, Your Honor.

1 I wanted to ask you though whether you want us to
2 address the other two questions now. Or do you want
3 to have argument on this first, the issue of whether
4 this is a license amendment first, and reserve
5 whatever inquiry on standing and the other issue?

6 JUDGE HAWKENS: We've actually asked the
7 questions we had on all three areas of concern at this
8 point.

9 MR. AYRES: Okay.

10 JUDGE HAWKENS: I'll give you a few
11 minutes if there is any followup that you want to
12 make.

13 MR. AYRES: Yes, we'd appreciate the
14 opportunity to respond after the other arguments.

15 JUDGE HAWKENS: You will have time for
16 rebuttal after arguments made by the other parties.
17 You have nothing else to add.

18 MR. AYRES: Otherwise, I'm done.

19 JUDGE HAWKENS: All right. Thank you.

20 MR. AYRES: Thank you.

21 (Off the record discussion.)

22 JUDGE HAWKENS: Mr. Frantz, would you like
23 to take the opportunity for a five minute,
24 uninterrupted presentation before we go into the areas
25 of concern?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. FRANTZ: Yes, I would, Judge Hawkens.

2 JUDGE HAWKENS: All right.

3 MR. FRANTZ: Good morning.

4 JUDGE HAWKENS: Good morning.

5 MR. FRANTZ: I would like to thank the
6 Board for this opportunity to explain our position on
7 the issues referred by the Commission in its decision
8 of November 8.

9 The Commission was very specific in its
10 directions to the Board. The Board is directed to
11 consider whether the CAL constitutes a de facto
12 license amendment. The Commission did not direct the
13 Board to consider whether restart actions require a
14 license amendment pursuant to 10 CFR Section 50.59.

15 The Commission was clearly aware of our
16 restart actions and clearly aware of Section 50.59.
17 It referenced both in other places in its decisions.
18 But we think the absence of any discussion in the
19 referral to the Board is very significant. It
20 indicates to us that the Board was not directed to
21 consider either those restart actions or Section
22 50.59.

23 We also take a position that consideration
24 of or providing hearing rights on the CAL itself would
25 be inconsistent with the NRC's regulatory system. All

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 of the participants agree that the CAL itself is an
2 enforcement action as discussed in the Seabrook
3 decision which is referenced by the Commission.

4 Members of the public are not entitled to
5 a hearing on a CAL. Furthermore, under long-standing
6 precedent including the Bellotti decision by the Court
7 of Appeals, members of the public are not entitled to
8 a hearing on other kinds of enforcement actions such
9 as confirmatory orders.

10 A CAL is actually a lesser enforcement
11 action than a confirmatory order. It would turn the
12 entire regulatory system on its head to give more
13 hearing rights on a CAL than the NRC affords on
14 confirmatory order.

15 We strongly urge the Board to apply the
16 normal process applicable to CALs. Under the normal
17 process, the licensee makes commitments. The NRC
18 staff confirms those commitments as part of the CAL.
19 The NRC does its inspections to verify that we've met
20 our commitments and then closes the CAL. None of
21 these activities implicate the hearing rights under
22 Section 189 of the Atomic Energy Act.

23 If a licensee needs to request a license
24 amendment, it does so under Section 50.59. If the
25 staff finds that we should have requested one and we

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 don't, they can take enforcement action and can
2 require us to submit a license amendment.

3 If a member of the public believes that
4 neither we nor the staff have fulfilled our
5 obligations under Section 50.59, it can file a 2.206
6 petition. However, again there are no hearing rights.
7 And we actually file the application for a license
8 amendment.

9 Friends of the Earth is essentially
10 requesting that this Board disregard the longstanding
11 case law as reflected in Seabrook and Bellotti.
12 Friends of the Earth essentially wants this Board to
13 engage in a wide ranging inquiry into the safety of
14 restart and the acceptability of our restart actions.
15 However, again under Section 189 of the Act and the
16 NRC's regulatory system, such issues are delegated to
17 the staff and are not appropriate for a hearing.

18 Contrary to FOE's arguments, the public is
19 not being denied an opportunity to participate in this
20 process. The staff has already held six public
21 meetings where members of the public can come in and
22 submit comments or raise questions. And the staff has
23 announced it's having more public meetings.

24 Additionally, they can always submit a
25 2.206 petition and in fact FOE has already engaged in

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 a 2.206 process. Thus, nobody is being cut out of the
2 public process.

3 Finally, as a practical matter, if the
4 Board were to accept FOE's position, it would set a
5 horrible precedent for the rest of the nuclear
6 industry. CALs are a very common regulatory tool,
7 especially situations in which a plant is shut down
8 due to equipment problems.

9 The CAL process would not be viable if a
10 member of the public could request a hearing on
11 restart actions. A hearing on restart actions would
12 result in long delays in restart. The cost would be
13 substantial not only to the utility that would need to
14 provide replacement power but also potential
15 disruption of the grid during high peak load seasons.

16 If the Board were to grant a hearing on
17 the CAL, it would essentially negate the CAL as a
18 useful regulatory tool. No licensee is going to want
19 to agree voluntarily to a CAL if they know it can be
20 dragged through the hearing process.

21 Thank you very much and willing to take
22 any questions that you may have.

23 JUDGE HAWKENS: Let's start with the first
24 area of concern, namely the scope of the issue
25 presented. Speaking for myself, if I accepted your

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 argument that our review should be limited to the four
2 corners of that short letter --

3 MR. FRANTZ: Yes.

4 JUDGE HAWKENS: -- which was drafted by
5 the NRC staff I'm sure with great care, I'd come to a
6 very quick conclusion that that standing alone, read
7 in isolation, doesn't come close to being a de facto
8 license amendment.

9 MR. FRANTZ: I would hope so, yes.

10 JUDGE HAWKENS: It seems like the
11 Commission could have likewise come to that conclusion
12 and would have. It wouldn't have wasted resources of
13 this Board, of the NRC staff, a petitioner and of you
14 if the question was that simple and the resolution was
15 that simple. Your response to that.

16 MR. FRANTZ: Yes. That's not unusual for
17 the Commission to refer these kinds of hearing
18 requests to a Board. For example, there have been
19 many cases where members of the public have requested
20 hearings on confirmatory orders. Those are routinely
21 delegated to the Licensing Board even though under
22 longstanding case law members of the public are not
23 entitled to hearing rights on a confirmatory order
24 that imposes more restrictions on a licensee.

25 We want the Board simply to follow the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 same process it would follow for a confirmatory order.
2 Again, it's I think a fairly simple process. It's
3 happened in many, many cases in the past. And you
4 should follow that process here.

5 JUDGE HAWKENS: In this day of dwindling
6 resources, Mr. Frantz, it seems odd to me that the
7 Commission would refer an issue with a clear,
8 foreordained answer. That's just again -- I
9 understand your position on it. But it seems to me
10 other issues that are referred to the Board there's
11 usually some complexity involved. And, of course, an
12 appellate tribunal always if there's some type of
13 complexity involved would like a lower tribunal to
14 look at it more closely first.

15 MR. FRANTZ: In this case, of course, the
16 CAL does have seven numbered paragraphs that indicate
17 actions that Edison's planning to take and in some
18 cases has already taken by the way. It also has a
19 requirement for us to seek restart approval from the
20 staff.

21 We believe it's appropriate for the board
22 to look at each of those seven paragraphs and the
23 restart approval and determine whether or not those
24 require a license amendment. That's not necessarily
25 a pro forma exercise. We believe that it does require

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 the Board to go and evaluate those seven conditions
2 and the restart approval.

3 JUDGE HAWKENS: Not only are you asking
4 the Board to limit its review to that single letter
5 which triggered this lengthy process, this complex
6 process, but you're asking the Board to limit its
7 review of the Commission decision to its statement of
8 two issues rather than the entire text. And the
9 Commission as you are familiar stated that the
10 Petitioner argued before it that the Confirmatory
11 Action Letter issued to SCE, to Edison, including the
12 process resolving the issues raised in the letter
13 constitutes a de facto license amendment proceeding.

14 And it was that portion of the
15 Petitioner's hearing request it referred to us. And
16 it subsequently framed the issues. But it seems to me
17 that the Board could be making a mistake by not
18 looking at the entire text of the Commission's
19 decision in determining the scope of the issue
20 referred.

21 MR. FRANTZ: Yes, I have no problem with
22 the Board looking at the entire context. And I think
23 part of that context also includes the footnote where
24 the Board is referred to the decisions in both Perry
25 and Seabrook. That provides the relevant guidance I

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 think for the Board.

2 And in both Perry and Seabrook the Board
3 confined itself to the actual action taken by the NRC
4 staff. It did not look at the actions by the
5 licensee.

6 JUDGE HAWKENS: Of course, the NRC staff
7 hasn't taken any final action yet.

8 MR. FRANTZ: The only final action it has
9 left other than the administrative actions of tracking
10 and closing the CAL is to issue the restart approval.

11 JUDGE HAWKENS: Surely, that's not the
12 only. That perhaps could be final action with regard
13 to the CAL.

14 MR. FRANTZ: Yes.

15 JUDGE HAWKENS: But it could incident to
16 its review of the CAL and incident to its closeout.
17 Until it makes a final determination on whether a
18 license amendment is required, we don't know what it's
19 going to do in that regard.

20 MR. FRANTZ: Hypothetically, for example,
21 let's assume the staff comes to the conclusion that we
22 need a license amendment. In that case, we'll file a
23 license amendment or take other actions to obviate the
24 basis for the staff's determination. If that happens,
25 then Friends of the Earth will have a chance to submit

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 a petition to intervene.

2 JUDGE HAWKENS: But you've not asked this
3 Board to stay its hand on resolving the issue referred
4 by the Commission. In fact, I think you encouraged us
5 to take prompt action.

6 MR. FRANTZ: That's correct. And in that
7 regard if you come to the opposite conclusion that you
8 need to wait for the staff, then this Board can't make
9 a decision on Unit 2 until they give our restart
10 approval and we're up and operating. Can't make a
11 decision on the entire case until we do the same thing
12 for Unit 3. And that's not eminent at all.

13 Theoretically, then you'd have a
14 proceeding ongoing for years while the staff awaits
15 our action on Unit 3 and while they review that and
16 approve it. I don't think there is any intention for
17 the Board to, first of all, bifurcate this proceeding
18 between Units 2 and 3 or to wait indefinitely for
19 actions by Edison or the staff's review. We believe
20 that the Board should rule on the CAL itself like they
21 did in Seabrook. In Seabrook the Board did not wait
22 until the staff completed its review. The Board ruled
23 based upon the four corners of the CAL itself.

24 JUDGE HAWKENS: Do you have any precedent
25 that would bar this Board from going beyond the four

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 corners of the CAL and looking at the record that's
2 been compiled to date incident to that process?

3 MR. FRANTZ: No, I don't think there's
4 anything that would bar it. But the precedent in
5 Seabrook certainly indicates that the Board is
6 certainly capable of ruling now based upon the four
7 corners of the CAL without looking at our restart
8 actions and without waiting for the staff
9 determination on restart. So that's a precedent the
10 indicates you can go our way. It's certainly not a
11 requirement or a bar.

12 JUDGE HAWKENS: All right. Let's assume
13 that your interpretation of referred issue is unduly
14 narrow and that in fact the Commission intended this
15 Board to look at the process which was as the issue
16 was framed or the argument was framed or either framed
17 the Petitioner's argument. They were raising a
18 challenge to the CAL process.

19 As I read your brief, it seemed that you
20 would agree that it would be appropriate for the Board
21 to be guided by Section 50.59 in determining whether
22 the de facto license amendment in fact occurred.

23 MR. FRANTZ: Let me answer this two ways.
24 First of all, process itself is somewhat an ambiguous
25 term. If you interpret the CAL process as I think the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 staff does and I think we do as the NRC staff actions,
2 then those NRC staff actions are governed by Perry.

3 If you want to look broader -- and we
4 don't believe it's appropriate -- and if you construe
5 the CAL process as including our restart actions, then
6 the restart actions are subject to 50.59. That's
7 correct.

8 JUDGE HAWKENS: All right. So the restart
9 actions, clearly they were subject to 50.59 for you.

10 MR. FRANTZ: That's correct.

11 JUDGE HAWKENS: When you did that analysis
12 as I understand it in your judgment they did not
13 trigger the need for seeking a license amendment. You
14 would agree that if the issue is broader and if we
15 were to look at the entire process, we should use that
16 as a guide as well for purposes of our analysis.

17 MR. FRANTZ: That's correct.

18 JUDGE HAWKENS: All right.

19 JUDGE BARATTA: I guess I don't read it
20 the way you do. I see words in the footnote for
21 example like "see generally" the cases that were cited
22 which to me implies that these are some that are
23 available for you to look at but not limiting us to
24 looking at that in that light. Would you care to
25 comment on that?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. FRANTZ: Yes. If you look at the
2 decision by the Commission on November 8th, a month
3 before that, we had submitted our CAL response with
4 our restart report and with our planned restart
5 actions. And the Commission is clearly aware of that
6 and referred to that in other parts of its decision.

7 If the Commission had wanted the Board to
8 look at that CAL response and the restart actions
9 under 50.59, we think the Commission would have said
10 so. It did not.

11 JUDGE BARATTA: But they did. That's the
12 whole point. They referred specifically to the
13 Friends of the Earth which includes those actions.

14 MR. FRANTZ: Actually, if you look at the
15 Friends of the Earth initial petition intervene, I
16 think there may have been two references to the CAL in
17 that entire petition. And it didn't say much more
18 than the CAL warrants a hearing.

19 I don't believe that they discussed at all
20 Section 50.59 in the context of the CAL. And they
21 certainly didn't mention our restart actions because
22 the petition was well before the restart actions.

23 JUDGE BARATTA: Evidently, the Commission
24 says the history of -- it says, "Friends of the Earth
25 contends that a confirmatory action letter issued to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 SCE including the process for resolving the issues
2 raised in the letter" including the process which
3 includes your restart, which includes your operational
4 assessment, etc. That's all part of the process. If
5 I look at the enforcement manual, that's what it says.

6 MR. FRANTZ: First of all, I think all the
7 Commission is doing there is repeating the language in
8 the petition. The actual direction is that the Board
9 does not refer to the CAL process. In any case --

10 JUDGE HAWKENS: Well, I disagree with
11 that, Mr. Frantz. They referred that portion of
12 Petitioners' hearing request to the Board. And when
13 they say they're referring that portion they are
14 reviewing to the language that Judge Baratta just
15 quoted.

16 MR. FRANTZ: In any case, as I said
17 before, if you look at the words "CAL process" we
18 believe that refers to actions by the NRC staff and
19 not our restart actions. And, for example, one of the
20 actions is going to be a restart approval.

21 Under the decision in Perry, restart
22 approval does not involve a license amendment. If you
23 interpret this as meaning the CAL process, you can
24 still find that the CAL process does not involve a
25 license amendment without looking at our restart

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 actions.

2 JUDGE BARATTA: But if, as directed by the
3 Commission, we look at restart actions, what happens
4 if we conclude that that does constitute a license
5 amendment?

6 JUDGE HAWKENS: I think there's one answer
7 to that question, but I may be wrong, Mr. Frantz.

8 MR. FRANTZ: If you find, if you have the
9 broader interpretation of the Commission's decision
10 and believe it includes the restart actions and if you
11 find that they involve a license amendment, then the
12 next step is to look at whether or not their petition
13 meets 2.309. And we don't believe it does. And
14 therefore their petition should be dismissed and this
15 proceeding should be concluded.

16 JUDGE BARATTA: Well, we really have two
17 questions. One is does the CAL process constitute a
18 de factor license amendment. And the other one is
19 whether or not Friends of the Earth have submitted a
20 contention in accordance with 2.309. So they're
21 distinct processes.

22 MR. FRANTZ: That's correct.

23 JUDGE BARATTA: If we find in the first
24 case -- That is distinct from the second case,
25 correct?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. FRANTZ: That's correct. And, for
2 example, if the Board rules in our favor on the first
3 issue, then the proceeding is done. And as Judge
4 Hawkens mentioned if they find adverse to us, then the
5 Board still needs to look at the second question. And
6 we believe the Board should dismiss the petition on
7 the second issue.

8 JUDGE HAWKENS: Is that effectively saying
9 what I believe I interpreted the staff's position
10 being is if by finding in Petitioner's favor on the
11 first issue, that would be effectively granting them
12 the relief they sought in their contention, therefore,
13 rendering the contention moot.

14 Therefore, they would become as any other
15 member of the public. When and if the staff issues a
16 notice of opportunity for hearing, they would be
17 eligible to then submit a new petition for hearing.

18 MR. FRANTZ: That's one way of looking at
19 it. If you view it that way, then I would suggest the
20 Board's or the Commission's decision almost becomes
21 nonsensical. Because if you agree with us and the
22 staff on the first issue, then the proceeding is
23 dismissed without considering the second issue.

24 But if you agree with the Petitioners on
25 the first issue, then it becomes moot and you never

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 address the second issue at all. We believe that even
2 apart from the first issue the Board should make
3 findings on standing and contention admissibility and
4 timeliness. And if it finds adverse to the
5 Petitioners, it can dismiss this entire proceeding
6 without reaching the first issue. Otherwise, the
7 Board's directions have no meaning.

8 JUDGE BARATTA: I guess the Commission has
9 asked us two questions. I've got to answer both
10 questions. And the second one is have they put in a
11 contention that's admissible. It has nothing to do
12 with the first one.

13 MR. FRANTZ: I agree.

14 JUDGE BARATTA: If we find the first one
15 is in your favor, then we can look at the second one
16 and just say "Hey, it's moot because there's no
17 proceeding." But if we find the opposite, then
18 whether or not they have submitted one that's
19 admissible or not, the proceeding at this point may
20 not occur because then the Commission has said they
21 would then notice it, etc., which at that point they
22 can come back and do whatever they want to do.

23 MR. FRANTZ: That's the dilemma that we're
24 faced with this language because as you've indicated,
25 Judge Baratta, if you always decide the first issue

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 first, then the second issue is meaningless. And we
2 would suggest that you can decide the second issue
3 first if you want to. And if you rule against the
4 Petitioners, the proceeding can be dismissed without
5 reaching the first issue.

6 JUDGE BARATTA: But we don't answer the
7 Commission then.

8 MR. FRANTZ: I think you do. The petition
9 was referred to the Board. And I think the Commission
10 wants a ruling on the petition. And you can rule on
11 the petition by dismissing it on grounds of standing
12 or timeliness or contention admissibility.

13 JUDGE BARATTA: I have another question,
14 too. You say that the staff has not taken any action.
15 If I look at the enforcement manual, it appears that
16 there are a series of actions that the staff takes,
17 one of which is when they responded to your letter in
18 accepting the CAL in essence for review. Isn't that
19 an action?

20 MR. FRANTZ: Yes. And we agree that the
21 Board should look at that in determining whether or
22 not that constitutes a de facto license amendment. We
23 believe it does not. In fact, the Petitioners have
24 not argued to contrary. Their arguments focus solely
25 on the restart actions and not on the CAL itself.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 JUDGE BARATTA: But again I go back to the
2 plain language of the Commission's direction to the
3 Board which includes the process for resolving the
4 issues which includes then the restart actions.

5 MR. FRANTZ: We interpret that it would
6 include the staff's tracking actions, the staff's
7 restart approval and the staff's closure of the CAL.
8 And that's part of the CAL process.

9 This whole issue by the way of a de facto
10 license amendment only applies to staff actions. It
11 doesn't really apply to a licensee's actions. A
12 licensee's actions are judged per 50.59 and if we're
13 required to submit amendment. And it's a formal
14 amendment. It's not a de facto amendment.

15 JUDGE HAWKENS: I would agree with you
16 that the run of the mill case -- in fact the case that
17 I'm familiar with -- the de facto, it's a challenge.
18 A de facto license amendment challenge where final
19 agency action, final authorization by the NRC staff,
20 has already occurred.

21 MR. FRANTZ: Right.

22 JUDGE HAWKENS: On the other hand, if you
23 look at this as being unique and different in a de
24 facto license amendment process challenge, it seems to
25 me there's nothing that would barr this Board from

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 taking a look at the startup request and the terms and
2 the conditions and determine even absent final action
3 by the staff to determine whether your request, if
4 granted without a license amendment, would in fact be
5 a de facto license amendment.

6 MR. FRANTZ: First of all, we aren't
7 making a request. We are submitting application.
8 What we have done is just describe the actions we're
9 taking. The staff is going to say yes or no based on
10 whatever determinations it makes. But the staff is
11 not necessarily --

12 JUDGE HAWKENS: I understand. It's not a
13 formal request. You're engaged in the CAL process.

14 MR. FRANTZ: Yes. And then finally going
15 to the third question, even if you assume that restart
16 actions are included in the scope and if you apply
17 Section 50.59 to those actions, those actions do not
18 require a license amendment per Section 50.59.

19 (Off the record discussion.)

20 JUDGE BARATTA: This really relates to the
21 third area. You didn't know Judge Hawkens can read
22 minds. I hope you realize that because I was just
23 about to move into that area.

24 To me, there's a bridge here between the
25 third area and the questions that are posed in the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 first and second questions which is that in a typical
2 CAL process or a CAL situation you return back to the
3 licensing basis. Is that correct? You fix the valve.

4 MR. FRANTZ: That's correct.

5 JUDGE BARATTA: You increase the training.

6 MR. FRANTZ: That's correct.

7 JUDGE BARATTA: Etcetera. Given what I
8 see in the material you provided and I'd like to
9 refer, for example, to there was a meeting on February
10 7th, a briefing on steam generator tube degradation.
11 Are you familiar with that?

12 MR. FRANTZ: Yes, I was there.

13 JUDGE BARATTA: Okay. And there are some
14 statement concerning the SONGS steam generator that
15 appear on pages 48 and 80. Are you familiar with
16 those?

17 MR. FRANTZ: I don't know the page
18 references offhand. I will add that that was a
19 meeting before the Commissioners on the general issue
20 of steam generator tubing integrity and degradation.
21 And it was not a meeting specific on San Onofre.

22 JUDGE BARATTA: Well, these were
23 statements by I believe MHI. And they said that "the
24 following two slides" -- that's page 48 at line 10 --
25 "show the improvement of the hydraulic conditions by

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 changing operating conditions. The graph shows the
2 quality. Power reduction show power reduction 70
3 percent, for example, would improve the steam quality
4 in SONGS steam generator by more than half. This
5 would bring the steam quality where it's in a range
6 and other steam generators fabricated by MHI."

7 And then "They are based on" -- on line 20
8 -- "the technical causes we can say in plane FEI,"
9 fluid elastic instabilities, "can be prevented by
10 reduced steam quality, reduced flow velocity and a
11 greater contact for AVBs" which I believe are the
12 anti-vibration bars.

13 MR. FRANTZ: That's correct.

14 JUDGE BARATTA: "...and the tubes." And
15 it goes on at page 80, line 13, "We have all sorts of
16 experience here at SONGS and as I said the three
17 factor flow and the quality, dryness, and also the
18 contact forces."

19 Am I drawing the wrong conclusion from
20 statements like this and from the figure that I asked
21 to be shown up before that in order to be able to
22 operate this generator and satisfy the tube integrity
23 you've got to change the power?

24 MR. FRANTZ: No. As we demonstrated in
25 our operational assessment at 100 percent power

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 submitted on March 14th, we can operate safely at 100
2 percent power. The graph showed that we do that for
3 at least 11 months. We're only at this point
4 proposing to operate for five months.

5 JUDGE ARNOLD: Can you operate it until
6 the mixed scheduled steam generator inspection as
7 defined in the steam generator program in the license?

8 MR. FRANTZ: That's correct. Right now
9 under Tech Spec 5.5.2.11, we're required to do an
10 assessment of how long we can operate and still meet
11 our steam generator tube integrity. We then need to
12 shut down under the program, do another inspection,
13 and then based upon those inspections do another
14 operational assessment for the next operating period.
15 And that continues on indefinitely.

16 The operational assessment only cover the
17 next operating period. And then a new operational
18 assessment is done for the next operating period.

19 JUDGE BARATTA: What is your normal cycle?

20 MR. FRANTZ: Approximately 18 months to
21 two years.

22 JUDGE BARATTA: Eleven months I think is
23 less than 18 months.

24 MR. FRANTZ: Yes, but we're only proposing
25 to operate for five months using this operational

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 assessment.

2 JUDGE BARATTA: But your analysis says
3 that you can't operate for a full cycle.

4 MR. FRANTZ: Yes. And we aren't proposing
5 to operate for a full cycle using that operational
6 assessment. We're proposing to operate for five
7 months using that operational assessment.

8 JUDGE BARATTA: But what I'm concerned
9 about is whether or not you can meet your tech specs.
10 And your tech specs say you should be able to operate
11 for a full cycle. And you're saying that you can't.

12 MR. FRANTZ: It does not say we have to
13 operate for a full cycle.

14 JUDGE HAWKENS: I thought that's what you
15 just said.

16 MR. FRANTZ: No, it says we have to be
17 able to operate for the next period, whatever that may
18 be. It may be five months. It may be for a full
19 reactor fuel cycle.

20 JUDGE ARNOLD: I'm looking right here at
21 your steam generator program 5.5.2.11(d)(1) says
22 "Inspect 100 percent of the tubes in each steam
23 generator during the first recycling outage following
24 steam generator replacement." That's right now.

25 MR. FRANTZ: Yes.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 JUDGE ARNOLD: The next one, "Inspect 100
2 percent tubes at sequential periods of 144, 108, 72
3 and thereafter 60 effective full power months." So I
4 would get from this that you have to go -- The next
5 scheduled inspection is 144 effective full power
6 months which seems to be much longer than one fuel
7 cycle.

8 MR. FRANTZ: Those are maximum periods.
9 We can always shorten those periods. In other words,
10 we can be more conservative, more restrictive, than
11 what the tech specs require us to be. Tech specs or
12 outer bounds.

13 JUDGE ARNOLD: You certainly can, but
14 you're telling me you can't do what the tech specs
15 allow you to do. Is that correct? To operate 144
16 months.

17 MR. FRANTZ: Those are I believe the
18 ISI/IST inspections, the ten year inspections. We
19 need to do operational assessments on a much more
20 frequent basis than that. We need to do it -- After
21 every time the inspections, we need to do an
22 operational assessment.

23 JUDGE ARNOLD: What does your license
24 allow you to operate before the next steam generator
25 tube inspection?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. FRANTZ: The license itself does not
2 have any restrictions. Instead it has programmatic
3 requirements. The programmatic requirements are to do
4 an operational assessment for justifying a period of
5 time for operation until the next inspection.

6 JUDGE ARNOLD: This came right out of your
7 license and I don't see how this is not your baseline
8 requirement to do it at 144 months.

9 MR. FRANTZ: And we will. We will do the
10 IST at 144 months. That's different than the
11 inspections we have to do after each operating period.

12 JUDGE ARNOLD: So what's in your license
13 is not sufficient to guarantee the integrity of your
14 steam generator tubes.

15 MR. FRANTZ: No, I believe it is. And
16 again we cannot operate without an operational
17 assessment showing that we can operate for the next
18 period until we shut down for a new tube inspection.
19 And that's not 144 months.

20 JUDGE ARNOLD: Okay. Is that specified
21 somewhere in your license that you do an operational
22 assessment and determine each subsequent period?

23 MR. FRANTZ: Yes. For example,
24 5.5.2.11(d), it says that we should have provisions
25 for steam generator or tube inspections and it refers

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 to the term "periodic" tube inspections. It does not
2 specify a precise period there. Typically, that
3 would, of course, be on a fueling cycle basis.

4 But we're being actually more
5 conservative. And we'll have five month period where
6 before we'll do our next steam generator tube
7 inspection.

8 And then if you go onto the next paragraph
9 the same section, it says that "the inspection scope,
10 inspection methods, inspection intervals, shall be
11 such to ensure that steam generator tube integrity is
12 maintained until the next steam generator tube
13 inspection."

14 That's the operational assessment that
15 we're referring to. The term is not actually used,
16 but that's the common industry terminology. And
17 that's what I'm referring to here. That's what we're
18 doing at the five month midcycle outage. We're doing
19 this periodic steam generator tube inspection. And
20 we'll then do our assessment to ensure for the next
21 operating period we're okay.

22 JUDGE ARNOLD: I'll start now on my
23 questions. My first real question for you is the same
24 question I asked for Petitioners having to do with
25 50.59 the eight criterion C2. To what extent do the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 criteria have to be demonstrated to either be met or
2 not met?

3 MR. FRANTZ: We're required to do an
4 evaluation to show that the criteria are met. And
5 that would also by the way include the preliminary
6 step called screening or actually most of the changes
7 are screened out because they don't adversely affect
8 the design function.

9 JUDGE ARNOLD: But, for instance, the
10 Criterion 1 that says not more than a minimal increase
11 of a frequency. Do you go through a PRA type analysis
12 to say this doesn't increase more than such and such?

13 MR. FRANTZ: No, that's not typical in the
14 industry. Instead typically what's done is a more
15 qualitative analysis. In general, it's fairly
16 apparent from the face of the change that the change
17 will not adversely affect probabilities of accidents.
18 So that's more of a qualitative analysis without going
19 through an kind of quantitative PRA.

20 JUDGE ARNOLD: Okay. That almost sounds
21 like what Petitioner said. They point to features in
22 the generators that are significantly different and
23 extrapolate from there and say that that could lead to
24 a new form of accident. You say that your evaluation
25 looking at that change led to no or not more than a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 minimal increase.

2 MR. FRANTZ: No. In fact, we exclude or
3 screen out these changes under this screening process
4 by showing that the changes -- our restart actions in
5 particular -- did not adversely affect the design
6 function as specified in our Updated Final Safety
7 Analysis Report. So we never get to those eight
8 criteria because we screen out the changes up front
9 because they don't have an adverse effect.

10 JUDGE ARNOLD: I'm actually asking these,
11 too. If we are using these as guidance, how absolute
12 are those criteria? Criterion 8 as I said earlier is
13 different. It's looking at have you used a different
14 analysis method. How much does an analysis method
15 have to change to be considered a departure from the
16 method?

17 MR. FRANTZ: First of all, as an
18 introductory question as part of the screening
19 process, we have to look at whether the methodology is
20 even specified in the FSAR. If the methodology is not
21 specified in the FSAR, then again you don't even have
22 to go through the 50.59 evaluation for that particular
23 change in methodology because it's not impacted under
24 the 50.59 process. So it's only changes in the FSAR
25 methodology that have to be looked at under the 50.59.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 And then there are basically two different
2 ways to look -- let's assuming you are changing
3 something in the FSAR -- at it. One is a completely
4 new method. And if it's a completely new method, then
5 you don't need a license amendment if the NRC staff
6 has previously approved that method for this type of
7 approach or issue.

8 If it's a change in an element of a
9 previous method, we are okay. You don't need a
10 license amendment as long as the results are
11 essentially the same as the results using the original
12 method. If you can't meet any of those two criteria,
13 then you need a license amendment.

14 JUDGE ARNOLD: Most of my questions don't
15 fall under the three headings. So I'm just going to
16 start going through them.

17 On page six of your brief, you state
18 "Southern California Edison requested and obtained a
19 license amendment in 2009 for certain issues related
20 to SONGS Units 2 and 3 steam generator replacement,
21 e.g., changes to certain SONGS technical
22 specifications related to steam generator tube
23 integrity." Would you happen to know what those
24 changes in general were?

25 MR. FRANTZ: Yes. One change dealt with

1 the peak containment pressure. The replacement steam
2 generators have a slightly higher value than the
3 original ones. As a result, if there was some kind of
4 a break, you would have more energy being released
5 into containment and therefore a higher containment
6 pressure. So we sought a license amendment to reflect
7 the changes related to the containment pressure.

8 The other one dealt with the through-wall
9 fitting. I believe, Judge Arnold, it was you who
10 mentioned that right now there's a criterion of 35
11 percent. It used to be higher. And so we went from
12 a I think 40 something down to 35 percent.

13 JUDGE ARNOLD: So these are definitely
14 changes that wouldn't have been made if you were going
15 to the same exact design steam generator.

16 MR. FRANTZ: I believe that's correct.

17 JUDGE ARNOLD: Now going back to the early
18 days when you were contemplating steam generator
19 replacement and designing new steam generators, you
20 obviously saw that there were some changes to your
21 license necessary for these new steam generators. How
22 did you go about parsing out what was going to go
23 license amendment route and what you would do without
24 a license amendment?

25 MR. FRANTZ: Yes. A very procedural path.

1 Again, the first step is to do a screening. And you
2 look at all the changes. And in the screening process
3 itself, these tech spec changes were identified. So
4 we knew we needed a license amendment for those tech
5 spec changes.

6 Most of the other changes, basically the
7 changes in configuration, were already screened out
8 because it was judged at the time that they had no
9 impact on the two design functions of the tubes,
10 namely to maintain directed coolant pressure boundary
11 and to transfer heat. So those configuration changes
12 were screened out.

13 There were also some changes in
14 methodology that were specified in the FSAR. We went
15 into a full evaluation for those changes in
16 methodology. And I mentioned before we determined
17 that they did not require a license amendment either
18 because they were previously approved by the staff for
19 their intended function or because they produced
20 essentially the same results as our original analysis
21 method.

22 JUDGE ARNOLD: I'm going to read you a
23 part of 50.59(c)(1) skipping the irrelevant part. "A
24 licensee may make changes in the facility as described
25 in the FSAR...without obtaining a license amendment

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 pursuant to 50.90 only if (1) a change to the
2 technical specifications incorporated in the license
3 is not required..."

4 Now back in 2007 you were sitting there
5 contemplating the replacement of steam generators.
6 And that replacement was going to require a change in
7 the technical specifications.

8 MR. FRANTZ: Yes.

9 JUDGE ARNOLD: So you decided we're going
10 to change the technical specifications in advance
11 before they need it so then the change in steam
12 generators wouldn't require a license amendment. Is
13 that correct?

14 MR. FRANTZ: No. It's all part of the
15 same process. You look at the entire replacement and
16 certain elements as I said you screen out. You can do
17 those without NRC approval. Other elements we need
18 the license amendment for and we sought those.

19 So we weren't seeking license amendment to
20 avoid a license amendment over here. We had already
21 made the determination over here that those changes
22 could be screened out. It was again a part of the
23 screening. We look at both questions at the same
24 time.

25 JUDGE ARNOLD: The next subject. In your

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 brief on page 9-10 you state before the problems in
2 Unit 3, "the tube to tube wear in Unit 2 was so minor
3 that it was not detected using normal eddy current
4 testing methods." If it had not been for the
5 experience in Unit 3, I get the impression that you
6 probably could have completed your refueling and gone
7 back up in power.

8 MR. FRANTZ: That's correct.

9 JUDGE ARNOLD: And I guess it's a good
10 thing Unit 3 happened in a strange, obscure sort of
11 way. Back in a recent brief to the staff with
12 Southern California Edison personnel, they explained
13 that "operation at rated power is currently or will be
14 outside the full range of normal operating
15 conditions." And are you familiar with that
16 discussion?

17 MR. FRANTZ: Your Honor, yes.

18 JUDGE ARNOLD: Could you explain that just
19 so that we get it on the record here?

20 MR. FRANTZ: I'll basically repeat the RAI
21 32 and the staff can speak for itself. But the RAI 32
22 basically refers to the language in the Tech Spec
23 5.5.2.11 that says we need to be able to meet our
24 performance criteria for power. And the staff then
25 asked for us to basically do 100 percent operational

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 assessment or otherwise show that we can operate at
2 full power.

3 In our response to that RAI, we took the
4 position that full power is not the same as rated
5 thermal power. Rated thermal power has a defined
6 meaning in the tech specs. And it's not used in
7 5.5.2.11.

8 But rather than fight this issue with the
9 staff, we gave them the 100 percent operational
10 assessment on March 14th so that even with Friends of
11 the Earth's interpretation we would meet that
12 technical specification in our license amendment once
13 the staff had raised a restart.

14 JUDGE ARNOLD: Okay. My understanding is
15 the words are "the full range of normal operating
16 conditions." Is it still your position that rated
17 power is not within the full range of normal operating
18 conditions?

19 MR. FRANTZ: Under our current licensing
20 basis, that's correct. We have made a formal
21 licensing commitment to limit power to 70 percent.
22 Therefore, we believe our licensing basis for the next
23 period which is the five month period is 70 percent.
24 And that's what full power is for that next period.
25 It may be different for some other period.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 JUDGE ARNOLD: Now it's the expression
2 "full range of normal operating conditions." That's
3 in a technical specification.

4 MR. FRANTZ: That's correct.

5 JUDGE ARNOLD: Is that a relatively new
6 technical specification or is it in --

7 MR. FRANTZ: Yes. That's basically
8 standard industry language. Basically almost all of
9 the PWRs have language essentially like that if not
10 identical to that. That's been around since I believe
11 the early 2000s.

12 JUDGE ARNOLD: Okay. Is there somewhere
13 a definition of full range of normal operating
14 conditions that makes it clear that if you have agreed
15 to reduce your range of operation that that is
16 excluded in the normal range?

17 MR. FRANTZ: I don't think it's quite that
18 clear. But I think if you look at some of the
19 industry guidance documents and some of the analysis
20 and reports that went into developing the standard
21 industry language, it indicates to us that a utility
22 is able to account for changes in its method of
23 operation when doing these operational assessments.
24 For example, if a licensee wanted to operate at a
25 lower temperature, you could account for that. If

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 they wanted to operate at lower pressure, you could
2 account for that in the operational assessments.

3 We also believe the same thing is true
4 with power levels. We believe we can also change
5 power levels and take into account those changes in
6 doing the operational assessments.

7 JUDGE ARNOLD: It seems to me to be a way
8 that you've made a tech spec be variable based upon
9 conditions that don't require a license amendment. Do
10 you know if that's been used by other utilities to
11 exclude something that would normally be considered
12 part of the normal range of operations?

13 MR. FRANTZ: I believe every utility has
14 to take into account changes in temperature and
15 pressure when doing operational assessments. Let me
16 confer with my expert just to make sure that's
17 correct.

18 (Off the record discussion.)

19 Just a slight, quick clarification.
20 Apparently, plants have done this, taken into account
21 changes in temperature and pressure. But the examples
22 we have are actually before the most recent version in
23 our tech spec language.

24 JUDGE BARATTA: In other words, there is
25 no precedent at this point.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. FRANTZ: That's as far as we know.

2 JUDGE BARATTA: Because looking at this
3 Palo Verde case, it seems directly analogous what
4 you're doing with the exception that instead of
5 changing the hot leg temperature you're changing the
6 power to achieve the same thing. And yet they felt
7 appropriate to submit a tech spec change at the time
8 that they reduced the power. That's what I find very
9 baffling here.

10 MR. FRANTZ: But I think it's interesting
11 at Palo Verde. They actually did restart at the lower
12 power level while that tech spec change was being
13 processed. So that again I think actually works in
14 our favor. We're allowed to operate in lower power
15 levels.

16 JUDGE BARATTA: Okay. Also had a no
17 significant hazards finding, too, when they submitted
18 the tech spec change.

19 MR. FRANTZ: Sure. And as I mentioned
20 this morning in my notification to the Board and
21 participants, if we go in for a license amendment,
22 we'll have a no significant hazards consideration also
23 for that.

24 JUDGE BARATTA: But we're in a different
25 ball game than we are now where you haven't submitted

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 a tech spec change and therefore there is no
2 adjudicatory process. Whereas, in that case, there
3 would be.

4 MR. FRANTZ: That's correct. And again we
5 don't believe just for operating at lower power levels
6 we need a tech spec change.

7 JUDGE BARATTA: I guess I still come back
8 to the situation that in all the CAL that I'm aware of
9 you're eventually able to get back to your operating
10 -- Excuse me -- consistent with your original design
11 basis. Based on what the gentleman from MHI said and
12 again we're referring back to that figure that's on
13 page 37 that I had shown earlier, you couldn't get
14 there from there. I just don't understand how you can
15 say that that you're within your design space because
16 now your design space is different.

17 MR. FRANTZ: First of all, the statements
18 by MHI were made in February. Of course, at that
19 point, we could not have our 100 percent operational
20 assessment that we submitted on March 14th. And as
21 that graph showed, we can operate safely for the next
22 operating period which is five months at 100 percent
23 power. We're using to operate at 70 percent power
24 even though the operational assessment shows that it
25 can operate at 100 percent power.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 JUDGE BARATTA: That statement is
2 completely consistent with all the information that's
3 been in the operational assessments, namely that the
4 velocities and quality that you have experienced at
5 100 percent power will cause fluid elastic
6 instabilities which will cause tube to tube wear.

7 MR. FRANTZ: We agree that they are
8 inconsistent. You're right in saying that our
9 previous operational assessments at 70 percent power
10 showed that, at least two of them showed that, we
11 would not have FEI.

12 The third one and this is the one done by
13 Intertek actually assumed that we would have FEI at 70
14 percent power.

15 JUDGE BARATTA: Right.

16 MR. FRANTZ: Our new updated operational
17 assessment by Intertek also assumes that we will have
18 FEI. And even making that assumption we show that we
19 can operate safely for 11 months without impacting
20 tube integrity.

21 JUDGE BARATTA: But what I'm seeing is a
22 change to your design basis which then to me requires
23 a license amendment.

24 MR. FRANTZ: We are not changing our
25 design basis. Our design basis still is that we need

1 to meet the, for example, the structural integrity
2 performance criteria which means that the tubes that
3 are in service have to, for example, be able to
4 withstand three times the normal operating pressure
5 differential. We meet that either under seven percent
6 or 100 percent.

7 Similarly, there's an accident induced
8 leakage performance criteria. We've shown we meet
9 that at 70 percent and 100 percent.

10 JUDGE BARATTA: For somewhere between five
11 to 12 months.

12 MR. FRANTZ: That's correct. And again
13 after that five month period we need to shut down, do
14 an inspection and do another operational assessment.

15 JUDGE BARATTA: But that's not consistent
16 with previous CAL actions which is where you were able
17 to operate to do something which would allow you to
18 operate the plant for the rest of its life barring
19 other problems.

20 MR. FRANTZ: As I indicated in Tech Spec
21 5.5.2.11(d)(1), if I recall the number correctly, what
22 we need to show is not that we can do an operational
23 assessment for the 40 year life of the steam
24 generators. We only need to do an operational
25 assessment for the upcoming operating period which in

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 our case is five months.

2 We don't need to show we meet the
3 integrity forever. In fact, if at some point we can't
4 meet the tube integrity criteria, we'll need to take
5 other action. And that may include shutting down the
6 plant and may entail taking corrective actions and may
7 entail replacement. But we can operate as long as we
8 have an operational assessment that shows we can
9 operate for the next period in question.

10 JUDGE BARATTA: I like in this situation
11 the first line that we saw, power instabilities at BWR
12 back in the early '90s, late '80s. Using your logic,
13 I didn't have to do anything. I didn't have to change
14 the power flow map or anything like that.

15 MR. FRANTZ: If we were to propose to
16 operate permanently at 70 percent power, we're not
17 proposing to do that yet. We may eventually decide to
18 do something like that. But if we were to propose of
19 a permanent operation, I think you're right. We would
20 probably need to seek a license amendment to change
21 our design basis.

22 But we're not proposing anything
23 permanent. What we're doing is we're evaluating
24 corrective action. We'll continue to do those
25 evaluations. At some point -- and we've committed to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 do this in cycle 17 -- we will determine what our long
2 term corrective actions are and, if necessary, make a
3 permanent change to our licensing basis.

4 JUDGE BARATTA: I'm glad you raised that
5 point because I found at Yankee Rowe the staff was a
6 little bit disingenuous in citing Yankee Rowe, but not
7 citing the fact that in fact it was found to be a de
8 facto license amendment. In that case, the staff
9 said, "Well, you're thinking about decommissioning.
10 Maybe you can go ahead and do that." And then, of
11 course, they did do decommissioning.

12 And the court said, "Well, that was a de
13 facto license." Aren't we in that analogous situation
14 here?

15 MR. FRANTZ: No. In that case, the
16 license did not allow and organizations did not allow
17 the dismantling without a new application and NRC
18 staff approval. That was the de facto license
19 amendment.

20 JUDGE BARATTA: What you're headed towards
21 it seems is we're going to do this assessment. We're
22 going to find 70 percent power. Things don't look
23 took bad. This is hypothetically. And maybe you go
24 to 75 percent power. And then maybe go to 80 percent
25 power. But 80 percent power all of a sudden you start

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 to see more indications. Therefore I've got to get a
2 license amendment.

3 MR. FRANTZ: But if we were to propose to
4 operate indefinitely at 80 percent, I think that's
5 correct.

6 JUDGE BARATTA: I don't know of too many
7 reactors that people don't propose to operate to the
8 end of their life unless they're uneconomical.

9 MR. FRANTZ: Yes, and that's a different
10 issue. But all I'm saying is if we decide we're going
11 to make a long term, basically a permanent, change to
12 our licensing basis we would need to evaluate that and
13 most likely seek a license amendment.

14 But for this temporary period and that's
15 all we're focused on now, the next five months
16 basically, for that period, that's a temporary period.
17 We're allowed to operate at lower power levels for
18 that period.

19 JUDGE ARNOLD: On page 29 of your brief,
20 you state "The CAL provision on restart does not grant
21 any greater operating authority to Southern California
22 Edison." And very similar sentences are found
23 throughout your brief.

24 MR. FRANTZ: Yes.

25 JUDGE ARNOLD: Do you consider operation

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 of your current steam generators to be authorized at
2 any power level by your current operating license?

3 MR. FRANTZ: Yes. We now have an 100
4 percent operational assessment. We have a 70 percent
5 operational assessment. We believe we can operate up
6 to 100 percent power right now based upon that
7 operational assessment. We've chosen to operate at 70
8 percent power.

9 JUDGE ARNOLD: Are you familiar with
10 General Design Criterion 14 that has to do with
11 integrity of the primary pressure boundary?

12 MR. FRANTZ: Yes.

13 JUDGE ARNOLD: Okay. So that is one of
14 the design criteria for Edison. And the steam
15 generator tubes are part of that pressure boundary,
16 correct?

17 MR. FRANTZ: That's correct.

18 JUDGE ARNOLD: In Attachment 18 of your
19 brief, you provided sections of the SONGS FSAR and
20 Section 5.4.2.3.1 which is titled "Steam Generator
21 Tubes," describes the analysis performed to assure
22 that steam generators maintain their integrity.

23 MR. FRANTZ: That's correct.

24 JUDGE ARNOLD: It discusses an analysis
25 that basically results in your saying that up to 35

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 percent tube wear integrity will be maintained. Along
2 with that, you have the steam generator program and
3 you have technical specs about the tubes. And
4 together they basically show the General Design
5 Criteria for the steam generator tubes is met.

6 MR. FRANTZ: That's correct.

7 JUDGE ARNOLD: Can you say the same about
8 those analyses without now including a vibration
9 analysis, a tube to tube wear analysis?

10 MR. FRANTZ: We do have a tube to tube
11 wear analysis. That's part of the 100 percent
12 operational assessment.

13 JUDGE ARNOLD: And is that included
14 somewhere in the FSAR?

15 MR. FRANTZ: No. The FSAR does not, I
16 don't believe, discuss specific locations. For
17 example, we have retainer bar wear. We had ADB wear.
18 We have tube support plate wear. I don't believe the
19 FSAR goes into that level of detail.

20 JUDGE ARNOLD: Here is where that 50.59
21 Criteria 8 comes in. You used to show satisfaction of
22 General Design Criteria 14 with your steady state
23 stress analysis and a tube inspection program. You
24 now have to supplement that with additional analysis
25 that looks in detail at tube to tube. How is that not

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 a change in the analysis method?

2 MR. FRANTZ: Yes. I don't think it goes
3 into that level of detail in the FSAR in describing
4 analysis. I don't believe there's an reference to any
5 particular kind of wear. It's just wearing in
6 general.

7 And we show that with tube to tube wear as
8 part of our operational assessments which are part of
9 our tech spec steam generator program. We do meet our
10 structural integrity performance criteria.

11 JUDGE ARNOLD: In your original steam
12 generator, did you have to do a vibration analysis on
13 specific tubes to show integrity?

14 MR. FRANTZ: I'll need to check.

15 (Off the record discussion.)

16 We don't know the answer to that question.

17 JUDGE ARNOLD: Let me put it like this.
18 In light of the fact that according to your brief in
19 plane vibrations caused by fluid elastic instabilities
20 has never occurred in a U tube steam generator in a
21 nuclear power plant. Is it likely that you did that
22 type of analysis for the original steam generators?

23 MR. FRANTZ: I would think we did not have
24 a specific tube to tube wear analysis. That's
25 correct.

1 And I might add, of course, that we do
2 have two operational assessments that show that at 70
3 percent power we will not have FEI. We actually have
4 one of the operational assessments performed by
5 Westinghouse that shows that FEI did not occur in Unit
6 2 even at 100 percent power. And indeed it was due to
7 close proximity of the tubes and the random vibration
8 rather than FEI.

9 JUDGE ARNOLD: My concern is you're
10 basically trying to demonstrate that a general design
11 criteria is met and you're using an analysis that has
12 never gone through the type of review or licensing
13 action. And that seems to me to be a definite change.

14 MR. FRANTZ: Yes, I think that there may
15 be some confusion here because we're talking about two
16 different analysis. We're talking about the analysis
17 in the FSAR which is the original design analysis.
18 I'm talking about the operational assessments which
19 are done periodically. And those are really different
20 assessments.

21 JUDGE ARNOLD: Essentially, you've found
22 that the original analysis in the FSAR is not adequate
23 to demonstrate that tube integrity is maintained. So
24 shouldn't this vibration now be incorporated in the
25 FSAR?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. FRANTZ: I guess I would not put it
2 that way. What we have -- I think the analysis is
3 fine. There's nothing wrong with the analysis. What
4 we had is a degraded or nonconforming condition in our
5 steam generators where they did not perform per the
6 procurement specifications.

7 That's again an action or condition we
8 need to correct under Criterion 16 of Appendix B. But
9 again it's a degraded condition. And that's different
10 from showing some defect in the original analysis.
11 The original analysis was fine if we had simply
12 received steam generators that met our specification.

13 JUDGE ARNOLD: I want to probe a little
14 bit more into the analysis that you're depending on
15 here. Now we've already established that Unit 2 is
16 the first or Unit 3 is the first instance of in plane
17 vibrations due to FEI or nuclear power plants with U
18 tube steam generators. Do you know if U tube steam
19 generators in any other application that have had in
20 plane fluid elastic instability?

21 MR. FRANTZ: I don't know of any offhand.
22 I do know that there have been some experiments that
23 have been performed that showed the theoretical
24 possibility for in plane FEI. I'm not aware of in
25 plane FEI in non nuclear facilities.

1 There have been cases of FEI by the way.
2 Those were cases of out plane FEI which is a little
3 bit different than what we're talking about here.

4 JUDGE ARNOLD: I'm also aware of tests,
5 experiments, that have been done looking at parallel
6 flow and cross flow. But the U bend of a U tube is
7 kind of unique and different from the type of geometry
8 that's easily tested in the laboratory.

9 So do you know if there a large somewhere
10 database of experimental data having to do with FEI in
11 U tubes?

12 MR. FRANTZ: I don't know of any such
13 database. Again, we do have that one set of
14 experiments. We've had other vendors such as
15 Westinghouse that tried to induce in plane FEI in the
16 laboratory and weren't able to do so. So again it's
17 not a situation which was expected to occur.

18 JUDGE ARNOLD: So the concern I have is
19 you've got an analysis showing it's not going to be a
20 problem and you don't have much of a database to
21 support the theory behind that analysis. How would
22 you address that?

23 MR. FRANTZ: We do know that FEI is a
24 credit basically of three different parameters. One
25 is fluid velocity. The second is void fraction. And

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 the third is ADB content. We have done analysis that
2 even if you have zero ADB content looking at fluid
3 velocity and void fraction we will not have FEI at 70
4 percent power.

5 JUDGE ARNOLD: So basically you rely on
6 the fact that you tuned your analysis to be so
7 conservative that it accounts for the fact you don't
8 have a lot of data for comparison.

9 MR. FRANTZ: That's correct. I don't want
10 to imply that's the only thing we've done. There's a
11 region. The conditions inside the steam generator
12 vary from location to location. They're not uniform
13 throughout. There is a region in our replacement
14 steam generators that had high void fractions and
15 velocities. And basically you get plugged tubes in
16 that region, even though some of them did not have
17 very extensive wear. We've done that as a preventive
18 measure. So even if you have seen we have FEI,
19 presuming it would occur in that same localized
20 region. And we've taken care of the tubes in that
21 region as part of our corrective action.

22 JUDGE ARNOLD: Thank you.

23 JUDGE HAWKENS: I have one final question
24 for you, Mr. Frantz. If you go back to contention
25 admissibility and standing issue, is it your view that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 we should review that issue first before reviewing the
2 de facto license amendment issue?

3 MR. FRANTZ: I think that's the only thing
4 that really makes sense. Otherwise, that issue is
5 just entirely moot.

6 JUDGE HAWKENS: Although that sequence
7 makes sense with the plain language used by the
8 Commission in saying "First look at the de facto
9 license amendment issue and if it is one, look at
10 standing and contention admissibility."

11 MR. FRANTZ: I think the Board has
12 flexibility and discretion as to what order it looks
13 at these two issues on. For example, it can look at
14 the first issue and decide there is no license
15 amendment involved. It doesn't even need to decide
16 the second issue.

17 We believe the reverse is also true. You
18 can decide there's no standing or contention
19 admissibility in reverse of the first issue. The
20 Board has discretion.

21 JUDGE HAWKENS: Understand. Then let me
22 ask you what is your position if we find in the
23 affirmative on the first issue? Namely it is de
24 facto license amendment. What would be the
25 consequence on the second issue? And what should the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 consequence of that be or?

2 MR. FRANTZ: It's hard to figure out right
3 now because if the Board rules against on the first
4 issue, then presumably we'll be enlisting a license
5 amendment. And there will be a new Board established,
6 if necessary, if there is a request for hearing.

7 JUDGE HAWKENS: Okay.

8 MR. FRANTZ: And that would be a different
9 proceeding than this one.

10 JUDGE HAWKENS: All right. Do you have
11 anything else for us at this point?

12 MR. FRANTZ: No, I do not.

13 JUDGE HAWKENS: Thank you very much.

14 MR. FRANTZ: Thank you.

15 JUDGE HAWKENS: We've been going now for
16 about two hours and 15 minutes. I'm confident that we
17 can get this wrapped up before lunch if the parties
18 don't object. But I would propose a 12 minute break.
19 Would that be adequate for the parties to get up and
20 stretch and ventilate a little bit?

21 MR. ROTH: David Roth for the staff. Yes,
22 Your Honors.

23 MR. FRANTZ: Yes. Thank you.

24 MR. AYRES: That's fine, Your Honor.

25 JUDGE HAWKENS: All right. Let's recess

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 and let's return at 12:35 p.m. We're in recess.

2 Thank you. Off the record.

3 (Whereupon, a short recess was taken.)

4 JUDGE HAWKENS: Back on the record. We're
5 now prepared from the staff. Who will be making the
6 presentation on behalf of the staff?

7 MR. ROTH: If it may please the Board,
8 Catherine Kanatas is going to be doing the opening,
9 sir.

10 JUDGE HAWKENS: All right. Am I
11 pronouncing it correctly? Ms. Kanatas.

12 MS. KANATAS: That's correct.

13 JUDGE HAWKENS: Thank you. Would you like
14 to make a five minute introductory remark before we
15 launch into our questions, Ms. Kanatas?

16 MS. KANATAS: I would, Your Honor.

17 JUDGE HAWKENS: All right.

18 MS. KANATAS: Good afternoon, Your Honors.
19 My name is Cathy Kanatas and I represent the NRC
20 staff. As Your Honors noted in CLI-12-20, the
21 Commission did restate Friends of the Earth's claim
22 that the CAL process constitutes a de facto license
23 amendment.

24 The Commission then specified that the
25 question that the Board should focus on is whether the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 staff's CAL constituted a de facto license amendment.
2 If the Board determines that the staff's CAL is a de
3 facto license amendment, then there will be a
4 proceeding instituted on the CAL regardless of
5 anything in the Edison's return to service plan and
6 regardless of whether a license amendment is needed to
7 restart either unit.

8 Whether Friends of the Earth would be a
9 party to that proceeding would depend on the Board's
10 determination of whether Friends of the Earth's June
11 petition to intervene met the Commission's contention
12 admissibility standards.

13 JUDGE HAWKENS: Or whether a subsequent--
14 I'm sorry to interrupt.

15 MS. KANATAS: That's okay.

16 JUDGE HAWKENS: Or whether a subsequent
17 petition submitted by them satisfied it.

18 MS. KANATAS: Correct. The Commission's
19 narrow focus on the staff's CAL is based on Commission
20 case law on de facto license amendments. That case
21 law, some of which the Commission refers in CLI-12-20
22 provides that only agency action can constitute a de
23 facto license amendment.

24 The staff's issuance of the CAL is the
25 only staff action that has been taken that is

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 reviewable by the Board. Therefore this Board like
2 the Seabrook board would only look at the CAL on its
3 face to make its determination. Here the Board must
4 determine whether the terms of the CAL granted Edison
5 any greater operating authority or otherwise alter the
6 original terms of the SONGS licenses.

7 Importantly, this de facto license
8 amendment standard comes from Commission and Federal
9 case law, not Section 50.59 of the Commission's
10 regulations. Section 50.59 provides a separate
11 standard for licensees to determine which changes to
12 their FSAR which is part of the plant licensing basis
13 require a license amendment.

14 The staff's brief in Karwoski affidavit
15 describe that each action in the CAL is allowed under
16 SONGS existing licenses. Therefore, the staff's CAL
17 is not a de facto license amendment.

18 Friends of the Earth actually appears to
19 agree with the staff on this point. On pages 2 and 3
20 of their June petition to intervene, Friends of the
21 Earth noted that the CAL only restates actions Edison
22 committed to take in a March 23rd submittal and did
23 not require Edison to submit a license amendment or
24 provide a 2.309 hearing opportunity.

25 This is the only discussion of the terms

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 of the CAL that Friends of the Earth provides.
2 Therefore Friends of the Earth does not indicate how
3 the terms of the CAL provided Edison additional
4 authority or otherwise amended the license. Instead
5 Friends of the Earth's brief focuses on Edison's
6 October 3rd return to service plan.

7 This focus is inappropriate. The plan was
8 prepared in response to the CAL, but it is not staff
9 action. The CAL itself specifies that the terms of
10 the plan are not effective until the staff has
11 completed its review and given written permission to
12 resume power operations. That's the CAL at Unit 2.

13 The staff has not completed its review of
14 Edison's proposed action or given written permission
15 to resume operation or taken any licensing action
16 associated with Unit 2. Therefore, the terms of
17 Edison's October 3rd return to service plan cannot
18 constitute a de facto license amendment.

19 First, the Friends of the Earth's claim
20 regarding Edison's return to service plan also raised
21 impermissible challenges. For example, challenges to
22 the 70 percent plan are impermissible in this
23 proceeding as they are challenges to 50.59 analyses.
24 FOE argues that Commission precedent on 50.59
25 challenges is dicta. That's at their reply brief at

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 16.

2 However, in both Yankee and SONGS, the
3 Commission held that challenges to 50.59 are only
4 properly raised in a 2.206 petition. Therefore, these
5 challenges as well as challenges to the 50.59
6 evaluations done to support the steam generator
7 replacements are improperly raised here.

8 Additionally, to the extent Friends of the
9 Earth's claims challenge the staff's conduct as it
10 performs its review, those claims are not properly
11 before the Board as they're outside the purview of a
12 licensing board. That's CLI-04-6, 59 NRC 62 at 74.

13 Finally, Friends of the Earth's challenges
14 that the 70 percent plan are not adequate or
15 appropriate are not relevant as the Board made clear
16 in its December 20th order at page four. Because
17 Friends of the Earth has not demonstrated that the
18 staff's March 27th CAL constitutes a de facto license
19 amendment, this Board should deny FOE's petition to
20 intervene. Thank you.

21 Dave Roth will be addressing your first
22 questions.

23 JUDGE HAWKENS: Thank you. To refresh the
24 audience's memory on what the first question or first
25 area of concern is it deals with the scope of the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 referred issue.

2 Mr. Roth.

3 MR. ROTH: David Roth for the staff. It's
4 the staff's view that the scope of the referred issue
5 is just within the four corners of the CAL. This
6 morning we've heard a lot of discussion about 50.59.
7 Ms. Kanatas just discussed the 50.59 and the
8 Commission referral order is highlighted as something
9 that's not before the Board.

10 In the Commission's order itself they also
11 deny the discretionary period. If we look at Section
12 D I believe of the Commission's order -- Pardon me,
13 Section C, they denied the discretionary hearing
14 request.

15 Now let's read that in context with the
16 Commission's citation to Yankee which is footnote 10
17 in which the Commission notes that except for the
18 Commission determines that a discretionary hearing is
19 warranted that 2.206 is the only way to challenge a
20 50.59.

21 I know the Board has been considering what
22 the scope of the issues are. A lot of questions about
23 50.59 analyses. The staff, of course, is doing an
24 independent review of the 50.59 analyses. But I think
25 reading of what Commission actually referred is those

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 things are not before the Board. It's just what the
2 CAL is.

3 JUDGE HAWKENS: I understand your
4 position. How do you square that position with the
5 language that Commission used when it said Petitioner
6 argued that the CAL including the process for
7 resolving the issues raised in the CAL constitutes a
8 de facto license amendment. And it was this portion
9 of their argument that was referred to this Licensing
10 Board.

11 You had suggested you're looking at the
12 process. The CAL itself is recognized as a process,
13 not simply limited to that letter. The letter
14 triggers the process. And my understanding is that
15 the Commission wanted us to review that process.

16 MR. ROTH: Certainly so, Your Honor. I
17 don't see a conflict at all. It's looking at the
18 process which in this case is inspection and
19 enforcement and it's not looking at the technical
20 details behind any inspections and enforcement. So
21 the process by which the staff is reviewing and the
22 Commission has tasked the Board with verifying this is
23 not a licensing action is different than that actual
24 technical merits behind whether their 50.59
25 evaluations were or were not performed correctly. I

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 don't see a conflict between those.

2 JUDGE HAWKENS: Let me pose this
3 hypothetical to you. Let's suppose in Edison's
4 October return to service plan they indicated that
5 they had plugged 50 percent of their tubes. And the
6 rest of the return to service plan remained the same.
7 Would you have this Board ignore that and just focus
8 on the four corners of the CAL letter and say the CAL
9 letter, of course, viewed in isolation is not a de
10 facto license amendment and that would be the end of
11 the matter?

12 MR. ROTH: The task that the Board has as
13 determined is the staff's CAL. The action, the CAL
14 existed long before the restart plan. The CAL may
15 continue to exist until Unit 3 has some action taken
16 on it. The CAL might become modified.

17 The actions that SCE is suggesting they
18 may wish to do, whether they're compliant or not
19 compliant, whether tech specs --

20 JUDGE HAWKENS: For a second, I understand
21 that. But it would be clear, would you agree, that
22 the CAL process would implicate a license? It would
23 effectively be a license amendment proceeding if that
24 was included in the return in service plan. It would
25 require a license amendment for them to restart.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. ROTH: The determination whether or
2 not it would be in compliance for their technical
3 specifications should they restart is again an
4 inspection and enforcement one. The determination as
5 to whether the staff by issuing a CAL that essentially
6 says "Show us what you're doing to meet your license"
7 that is the issue that's before.

8 If they say, "Here's what we're doing" and
9 in fact the staff disagreed, that's an inspection and
10 enforcement issue. If they say, "Here's what we're
11 doing" and as counsel for SCE said, "We're thinking
12 about a license amendment," then that again doesn't
13 change the nature of the CAL, doesn't change that it's
14 an inspection and enforcement tool. And the Licensing
15 action should they request one occurs separately.

16 JUDGE HAWKENS: So it's your position that
17 there cannot be a de facto license amendment until the
18 staff has ruled on that letter, on the CAL letter.

19 MR. ROTH: If I'm understanding your
20 question, it would be fact dependent. Now if the
21 staff somehow altered that authority at some point in
22 the future, then altering the authority in case law
23 can be a de facto license amendment.

24 But what we have before us right now is a
25 CAL that essentially says "Show us how in fact you are

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 meeting your requirements." And as Your Honors are
2 very aware, that is the intent of a CAL while in this
3 particular CAL. And Your Honors have repeatedly
4 discussed how CALs are normally resolved when the
5 licensee returns back to compliance with its license.

6 JUDGE HAWKENS: Can you cite any binding
7 precedent that would barr this Board from considering
8 the return to service plan to determine whether this
9 was a de facto license amendment proceeding?

10 MR. ROTH: This Commission told the Board
11 to consider the CAL. For its very unique situation,
12 I'm unaware binding, on point precedent that would say
13 the restart plan submitted --

14 JUDGE HAWKENS: Well, let's be clear.
15 They said as I understand their direction review the
16 CAL including the process for resolving the issues
17 raised in the CAL. To me that suggests this is not
18 solely -- The former de facto license amendment cases
19 dealt with de facto license amendment after the
20 amendment had been implemented. This seems to be a de
21 facto in the nature of a de facto license amendment
22 process case as I understand the Commission's referred
23 issue.

24 MR. ROTH: And even if one were to read it
25 very broadly that way, if we examine the process, the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 process is inspections and enforcement. There are at
2 least two inspection reports that are on the streets
3 covering the AIT, augmented inspection team. The
4 augmented inspection team report looked into the
5 issues associated with the steam generator program.
6 The augmented inspection team report and its
7 supplement directly discussed they're doing
8 inspections through the CAL or in accordance with the
9 CAL.

10 Again, even if you were to say the whole
11 process is the current inspection and enforcement
12 activities, there remain inspection and enforcement
13 activities. Nowhere is there something where the
14 staff is saying "Do you mean now right at this power
15 instead of that power? This tech spec has changed
16 from this to that." Those actions simply don't exist
17 and the CAL does not cause them to exist.

18 JUDGE HAWKENS: And so it is your position
19 again, getting back to my hypothetical, that if the
20 return to service plan submitted had in it a term that
21 clearly required a different tech spec or a change to
22 the license it would not be within this Board's
23 authority in resolving the referred issue to identify
24 that and say essentially, "This is a de facto license
25 amendment process based on the return to action plan."

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Now it may be that the staff ultimately
2 would direct a license amendment. But the salient
3 point is at that point there was a material before the
4 staff submitted by the Licensee that turned this CAL
5 process into a de facto license amendment process
6 until the agency acted upon it one way or the other.

7 MR. ROTH: I would disagree with that,
8 Your Honor. And that's your word. And here's further
9 explanation on that. If the Licensee were to propose
10 to do something counter to its technical
11 specifications and the staff were aware of the intent
12 to go against its technical specifications or other
13 portions of its license, that doesn't mean it suddenly
14 becomes a license amendment. That clearly remains an
15 enforcement issue.

16 If the plant tells us, especially if they
17 tell us in some letter "We're going to do this" and
18 the staff says, "My gosh, the tech specs say they
19 can't do that."

20 JUDGE HAWKENS: I understand. That's the
21 routine. The run of the mill case. This is not that
22 routine, run of the mill case. This is a case, a very
23 unique case, where the Commission took the issues
24 presented to it very seriously.

25 As I told Mr. Frantz, in my view if the

1 Commission just wanted the Board to limit its review
2 to the four corners of that letter, that's something
3 that the Commission could have done and would have
4 done rather than in my view expending unnecessary
5 resources. I think there was more that the Commission
6 wanted done. It required looking beyond the four
7 corners of that to look at the return to service plan
8 and to at some point make a determination on whether
9 the process itself rather than a very short letter
10 that triggered a lengthy and complex process
11 constituted a de facto license amendment.

12 MR. ROTH: I believe that Your Honors have
13 sufficient briefs and behalf of the staff and all the
14 parties thank you for the compliment on the briefs
15 earlier. But I believe Your Honors have sufficient
16 briefs that have described the process, described the
17 process at length, showing how it goes through the
18 enforcement history, the enforcement manual, how CALs
19 came into be, what SONGS is currently planning on
20 doing, what FOE's position is.

21 Although your question goes to just the
22 four corners of the CAL, that's the staff's action.
23 But Your Honors have before you far more.

24 If the Commission wanted you to wait until
25 the staff made a decision to say was that decision a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 CAL, the Commission could have done that. The
2 Commission had before it a request to stay. They
3 denied that request to stay.

4 The Commission thought at that point in
5 time there was sufficient information. These
6 additional RAIs for instance that were asked earlier
7 this week, those were not before the Commission at the
8 time.

9 If the Board elects not to make a decision
10 as to whether the CAL itself is a de facto license
11 amendment until the entire process is done, if
12 everything under the CAL, then looking at the CAL that
13 addresses Unit 3 as well. Counsel for SCE has
14 indicated they're not certain when they're going to do
15 something with Unit 3. So the Board would never be
16 able to make any rulings whatsoever if one took that
17 view.

18 JUDGE HAWKENS: If one took the view that
19 it was going to await final action by the NRC staff.

20 MR. ROTH: Exactly. Then the Commission
21 provided the Board an open end to review essentially
22 independently acting as though the Board were the
23 staff looking at the 50.59s rather than saying, "What
24 did the staff do?"

25 And the Commission said specifically,

1 "What was the CAL? Was the CAL a de facto license
2 amendment? And, if so, did FOE provide admissible
3 contention?"

4 JUDGE HAWKENS: At the end of the day a de
5 facto license amendment involves either a licensee
6 erring in its 50.59 analysis and/or the NRC staff
7 similarly committing error in not recognizing that it
8 requires a license amendment.

9 MR. ROTH: If I may interrupt, Your Honor.
10 I think I would disagree with the first part. The de
11 facto license amendment is not a licensee violating
12 its regulations. A licensee does not modify its
13 license by committing a violation.

14 JUDGE HAWKENS: I'm with you. And that's
15 not an essential part. I was saying it can be the
16 first step in what ultimately is a de facto license
17 amendment. If the licensee makes a 50.59, determines
18 it can take action without a license amendment and if
19 the NRC staff would ultimately approve that.

20 But let's put the 50.59 analysis and say
21 it's staff ultimately erring in not recognizing that
22 a license amendment was required. It seems to me
23 rather than waiting for that to happen one should
24 consistent with 189(a) of the Atomic Energy Act which
25 gives rise to a hearing opportunity. When a process

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 for amendment is occurring, you shouldn't wait until
2 the amendment already becomes effective when you've
3 denied the public the right under 189(a) to
4 participate or an opportunity to participate through
5 a public hearing. Rather, if you can discern error
6 either in a 50.59 analysis -- and let's say it is a
7 50.59 analysis error -- if you can say in our view
8 this does require a license amendment, that would be
9 the better course and give the opportunity for an
10 adjudicatory hearing before the amendment becomes de
11 facto becomes effective.

12 Let me try to make that a question. Don't
13 you think that it's more consistent with 189(a) to say
14 this process is a de facto license amendment process
15 de facto license amendment rather than waiting until
16 the end when there could be a de facto license
17 amendment in error already made? Shouldn't we be
18 looking at it that way and give the public the
19 opportunity to have their hearing rights during the
20 process if we recognize plainly that this implicates
21 50.59 licensing requirements?

22 MR. ROTH: The Commission has clearly
23 tasked the Board with assuring that the staff's CAL
24 was not a license amendment, de facto or otherwise.
25 And the situation that you're hypothesizing if you're

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 saying a 50.59 violation, an erroneous 50.59 would
2 provide hearing opportunity rights. That's simply not
3 how the Atomic Energy Act is set up. It's not --

4 JUDGE HAWKENS: Not normally. But here
5 when the Commission has referred an issue that directs
6 us to look at the CAL process then it's not a direct
7 attack by Petitioners on the 50.59. But it's part and
8 parcel of the referred issue, isn't it?

9 MR. ROTH: The referred issue is did CAL
10 give correct actions, show us how the problem in Unit
11 3 isn't going to affect Unit 2, don't change modes
12 into mode 2 on Unit 2 until you're sure that it's
13 fixed and we've validated through inspection and
14 enforcement that it's fixed.

15 JUDGE HAWKENS: That's your initial
16 directions. That's correct. Now we have a lot of
17 action since then. We have a return to service plan.
18 And if we look at that and make a determination that
19 this CAL process requires a license amendment, you're
20 saying this Board should ignore that.

21 MR. ROTH: If the Board believes that the
22 steps proposed by the Licensee are in violation, the
23 Board should certainly bring that to the staff's
24 attention. But the inspection and enforcement action
25 that you're hypothesizing that if the Board identifies

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 if they do X they're in violation with their tech
2 specs, that does not change the fact that the staff
3 has not said, "You're authorized to do X."

4 JUDGE HAWKENS: Understand that. So in
5 our analysis -- and this is purely hypothetical -- if
6 we were to find that their return to service plan did
7 require a license amendment, it's your view that under
8 the referred issue we should simply express that view,
9 but conclude it is not a de facto license amendment
10 process.

11 MR. ROTH: If the Board believes that the
12 50.59s done by the staff, or pardon me, reviewed by
13 the staff, performed by SCE, were incorrect, the
14 Commission in the SONGS referral memo itself has again
15 indicated that's not within the Board's review.

16 So if the Board believes that the Licensee
17 is in violation of a regulation because they
18 incorrectly performed a 50.59 violation, that is not
19 the question that's before the Board. The
20 Commission's footnote made clear that unless it's
21 provided in a discretionary hearing that the 50.59s
22 could be challenged by a 2.206. And the Board in the
23 same order said, "There's no discretionary hearing."

24 JUDGE HAWKENS: Again, if a member of the
25 public wants to challenge a 50.59, that's correct.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 They do it through 2.206.

2 MR. ROTH: That's correct.

3 JUDGE HAWKENS: The Commission has not
4 referred to us the opportunity for the Petitioners to
5 launch a direct attack on 50.59. But they've directed
6 us to consider whether I believe this is a de facto
7 license amendment process. And to do that, it doesn't
8 seem to me that we're barred from using 50.59 as
9 guidance in determining whether the return to service
10 plan requires a license amendment.

11 MR. ROTH: Here is where I think that
12 analogy does not work properly. The 50.59 activities
13 are the Licensee's activities. The return to service
14 plan is the Licensee's proposal. As Ms. Kanatas
15 emphasized in the opening, the staff's action other
16 than the inspection reports that have been issued,
17 there are some outstanding, unresolved items as well,
18 is the issuance of the CAL. The staff have not done
19 any other CAL.

20 If a licensee incorrectly performs a task,
21 be it a 50.59, a maintenance activity, an operations
22 activity, that simply does not create a de facto
23 license amendment. If the staff in an inspection
24 report review and document that the licensee did
25 something incorrectly, that does not make it a de

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 facto license amendment.

2 Here the CAL is saying give us information
3 for inspections. The staff have published two
4 inspection reports at least that discuss information
5 from the CAL. That does not create the information or
6 does not cause the information to become a de facto
7 license amendment.

8 JUDGE HAWKENS: The Commission is not
9 barred from referring to us an issue that requires us
10 to look at the process and determine whether that's a
11 de facto license amendment process, is it?

12 MR. ROTH: And the process that the staff
13 is using is outlined clearly in the enforcement
14 manual. It indicates that this is CAL with routine
15 enforcement activity. From the terms of looking at
16 the process, you're quite right. That's the process
17 the staff is using.

18 If we're looking at the process, that is
19 the process. If we think we have a concern here, we
20 called you on the phone. We told you, "Here are the
21 things we think that need to get done before you
22 restart."

23 The Licensee said, "Yes, we agree."

24 We sent back a letter that says, "We're
25 confirming these are the things you think you need to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 do before you restart."

2 A couple months later, the Licensee sends
3 in information saying, "Hey, here's what we've done.
4 We think this satisfies the concern."

5 Now unless the staff say, "Why, yes.
6 Here's a change to your license," that does not create
7 a licensing action. That instead is just inspection
8 and enforcement

9 JUDGE HAWKENS: So, Mr. Roth, is it your
10 view that we should limit our review to the four
11 corners of that letter, the CAL letter? And if we go
12 beyond that, we can't make a final ruling until the
13 NRC staff has taken final action on the CAL for Unit
14 2 and then Unit 3.

15 MR. ROTH: If one were to take the very
16 broad view that the Board is taking, I think that
17 would be the only logical conclusion.

18 JUDGE BARATTA: But it's the view that the
19 Commission has told us to take because it references
20 the CAL as well as the process.

21 MR. ROTH: And the reference to the CAL
22 process can be read as "Well, what is the staff doing?
23 Is the staff changing policy? Is the staff changing
24 some regulation or?"

25 JUDGE BARATTA: What the Applicant has

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 proposed as part of their CAL, it's something that
2 would change their design basis. It's the old
3 expression about if it walks like a duck and quacks
4 like a duck, then it is a duck.

5 Now if they come in and propose something
6 that is in essence a change to the design basis, then
7 isn't that a license amendment request and therefore
8 becomes a de facto license amendment process?

9 MR. ROTH: No, Your Honor. Under 50.90 if
10 they desire to actually make a license amendment, they
11 will make a license amendment request. As counsel for
12 SCE has indicated, SCE is --

13 JUDGE BARATTA: Well, that's something
14 other than a de facto license amendment.

15 MR. ROTH: The de facto license amendment
16 would have to originate with the NRC, not with the
17 utility. If the utility is deciding "We wish to do
18 something" and the same "Oh gosh, we think we can do
19 it" and the staff is silent, perhaps that's a
20 violation. Perhaps it's not. But unless the staff
21 has actually taken some action, then it's not a de
22 facto license amendment.

23 JUDGE BARATTA: But by accepting the CAL
24 for review, you took an action. You initiated a
25 process. That is an action.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. ROTH: The issuance of a CAL is an
2 action. The letters that are sent in by SCE are in
3 response to inspection activities, not in response to
4 --

5 JUDGE BARATTA: But you've taken an
6 action. Yes or no?

7 MR. ROTH: By receiving letters, no.
8 That's not taking an action.

9 JUDGE BARATTA: No, by initiating, by
10 responding to that request. You issued a CAL letter.
11 Did you or did you not?

12 MR. ROTH: Yes, we did.

13 JUDGE BARATTA: Is that not an action?

14 MR. ROTH: That is an action I would say.

15 JUDGE BARATTA: Thank you.

16 JUDGE ARNOLD: I have a question. The
17 actual phrase in the CLI is "The Confirmatory Action
18 Letter issued to SCE including the process for
19 resolving the issue raised in the letter." Is the
20 staff able to resolve the issue raised in the letter
21 without any participation from Southern California
22 Edison?

23 MR. ROTH: If I am understanding your
24 question, is the staff able to resolve its inquiry of
25 show us what happened on Unit 3 and why it won't

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 happen on Unit 2 without their participation, then no.

2 JUDGE ARNOLD: Okay. So the process would
3 involve some Edison participation. It seems to me
4 that Edison participation has also been referred to
5 the Board.

6 MR. ROTH: In the sense that the Board is
7 looking to see what is Edison doing, certainly so. In
8 terms of getting into nitty-gritty details about is a
9 particular 50.59 analysis good or bad, did Edison do
10 something technically correct or not, those are areas
11 that are outside the purview of the Board as referred
12 by the Commission. Those remain the inspection and
13 enforcement activities currently ongoing by the staff.

14 JUDGE HAWKENS: If we reviewed the return
15 to service plan as de facto license amendment request,
16 would that transform the CAL process into a de facto
17 license amendment process if you're considering a de
18 facto license amendment request?

19 MR. ROTH: No, that would not because it's
20 not a de facto license amendment request. It's them
21 trying to show how they're meeting their current
22 requirements. Counsel for SCE says as argued earlier
23 that SCE believes they are meeting their requirements.

24 The staff have a number of outstanding
25 RAIs. They staff are still looking into this area.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 But again, if utility correctly or incorrectly does
2 something does not cause whatever the utility did to
3 become subject to a hearing. That does not create an
4 amendment all by itself.

5 By contrast, if the staff were to change
6 a policy, change a rule improperly, then as courts
7 have held that becomes a de facto license amendment.
8 But that's not the case here.

9 JUDGE HAWKENS: I understand your argument
10 that it is consistent with past precedent. But I
11 would also observe that past precedent does not
12 mandate that we take so limited a view in this case in
13 my view, Mr. Roth.

14 MR. ROTH: I understand, Your Honor.

15 JUDGE BARATTA: Let me just -- I just want
16 to make one point clear. As I understand this
17 question of de facto license amendment, the courts
18 have said that they are fact dependent. Is that not
19 correct?

20 MR. ROTH: Correct.

21 JUDGE BARATTA: So the two cases that you
22 cited could have totally different facts which led the
23 courts to conclude they were not de facto license
24 amendments than from this case. Is that correct?

25 MR. ROTH: That is correct. They were

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 different factual situations.

2 JUDGE HAWKENS: Let's assume that this
3 Board were to conclude that we were looking at the
4 entire process including the return to service plan to
5 determine whether this constitutes a de facto license
6 amendment process. Edison indicated that if that were
7 the case then it would be permissible to be guided by
8 the 50.59 factors.

9 It wasn't clear to me from reading your
10 brief whether you thought we could use the 50.59
11 factors as guidance under those circumstances. What's
12 your position?

13 MR. ROTH: Well, Your Honors, our position
14 is actually going to be presented by Maxwell Smith who
15 is ready for questions two and three.

16 JUDGE HAWKENS: All right. One second,
17 Mr. Smith. I just want to make sure my colleagues
18 don't have any further questions for you.

19 JUDGE ARNOLD: Sure. Certainly. I
20 haven't started yet.

21 JUDGE HAWKENS: This is on the first.

22 JUDGE ARNOLD: Well, I don't really go
23 along with your concerns. Mine are pretty much
24 independent. So I can wait or I can go.

25 JUDGE HAWKENS: I just want to make sure

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 that while Mr. Roth is up here.

2 JUDGE ARNOLD: He's the person I would
3 want to ask.

4 JUDGE HAWKENS: All right.

5 MR. ROTH: Thank you, Your Honor.

6 JUDGE ARNOLD: On page 10 of your brief,
7 you state "Specifically, courts have found that
8 Commission actions that change a licensee's authority
9 under its license without formally amending the
10 license are effectively license amendments." And then
11 on the next page you say, "If the NRC approval does
12 not permit the licensee to operate in any greater
13 capacity than originally prescribed and all relevant
14 safety regulations and license terms remain
15 applicable, the NRC approval does not amend the
16 license."

17 Now there's two differences here. One is
18 a court decision. The other is a Commission decision.
19 The court decision says if it changes the license
20 authority; whereas, the Commission says if it
21 increases the operating authority.

22 Which is it? Is it a change in the
23 operating authority or an increase in the operating
24 authority? Or is a decrease in operating authority
25 also a license amendment?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. ROTH: An increase is a change.
2 Certainly, if the staff were to modify any portions of
3 the tech spec, maximum thermal power for instance,
4 that would be a change.

5 JUDGE ARNOLD: So if you decrease that,
6 it's a change. And that could be a license amendment.

7 MR. ROTH: Certainly.

8 JUDGE ARNOLD: Okay. 10 CFR 50.36
9 describes the various types of technical
10 specifications required to be part of the license.
11 Furthermore, it describes the purpose of each type of
12 technical specification.

13 For instance, for safety limits, the
14 section states "Safety limits for nuclear reactors are
15 limits upon important process variables that are found
16 to be necessary to reasonably protect the integrity of
17 certain of the physical barriers that guard against
18 the uncontrolled release of radioactivity."

19 Now if in the course of operation it is
20 found that some technical specification is such that
21 it does not achieve its intended purpose, for
22 instance, a protecting against release of radioactive
23 material, is there a requirement to modify the
24 technical specifications such that its intended
25 purpose is achieved?

1 MR. ROTH: The staff actually published
2 administrative letter in 98.12 I believe the number
3 is. It may be 98.10, but 98.12 is what jumps to mind
4 that essentially says if a utility becomes aware that
5 it has a nonconservative, technical specification,
6 they take administrative control of that specification
7 and they submit the appropriate licensing action
8 afterwards.

9 Now in terms of what if you are
10 hypothesizing a safety limit which are in Section 2 of
11 the tech specs but the safety limit is not being
12 protected by different technical specification. I
13 would say that would be fact dependent, but the
14 expectation would be that the utility would follow the
15 most conservative actions which may include shutting
16 down or removing the mode that would be causing the
17 problem.

18 JUDGE ARNOLD: Next question. At the end
19 of the CAL process, if SONGS is given permission to
20 operate with a promise that they will limit power to
21 70 percent, is that 70 percent power limit an
22 enforceable limit?

23 MR. ROTH: Your Honors, that would be a
24 very fact dependent situation. As you know, the
25 staff are currently reviewing SCE's restart proposal.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 And it would have to depend on what sort of promise
2 what it's referring to.

3 There is a rule of thumb the licensee
4 actions or the license themselves, if there is a
5 commitment they made to do something and the nature of
6 the commitment, the fact that the staff are still
7 looking into this, that's just too fact dependent and
8 speculative there. I'm sorry, Your Honor.

9 JUDGE ARNOLD: So the answer is maybe.

10 MR. ROTH: Yes. Your question is
11 essentially if they did this would this be a violation
12 and I'm not going to respond to that. There's ongoing
13 inspection activities.

14 JUDGE ARNOLD: Okay. My next question is
15 and I'll admit it's hypothetical and you may not be
16 able to give me an answer, but even speculation might
17 help. And I'm trying to really understand how much of
18 a problem is this with the steam generators.

19 Let's go back to 1981 and Southern
20 California Edison is waiting to get an operating
21 license for Unit 2. Now assume at this time that a
22 combustion engineer comes out with a notification that
23 the original steam generators had some sort of design
24 flaw such that they were prone to fluid elastic
25 instability that could lead to in plane tube vibration

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 and accelerator wear that could fail tubes in a time
2 less than one fuel cycle.

3 Under that hypothetical circumstance, is
4 it likely that the NRC would just go ahead and grant
5 the original operating license? Or would they want to
6 see some resolution to that problem first?

7 MR. ROTH: Well, Your Honor, your
8 hypothetical has a lot of facts in it. And the facts,
9 there may be information I'm unaware of relative to
10 those. However, if there's a construction defect
11 that's required to be reporting, certainly the staff
12 would address that construction defect. Certainly,
13 the staff would not ignore a report that says that
14 certain tubes are defective.

15 Moving it forward to the current situation
16 with the current technical specifications, that's the
17 issue that's present. Is the Licensee meeting or not
18 meeting its technical specifications? As you know,
19 the staff have a number of questions that are out.
20 Counsel for SCE has indicated their position on them.

21 But the staff's reviews are ongoing as to
22 whether the Licensee is currently meeting its license.
23 And the issue with the CAL is "Show us how you're
24 meeting your license." And again the CAL's request of
25 show us how you meet your license is not amending the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 license, not changing it, not saying ignore a problem
2 with fluid elastic instability that shows up,
3 according to SCE, above 85 percent power.

4 It's instead "Show us how you meet your
5 current full power operations." So while trying to
6 answer your hypothetical, I hope I'm being helpful.

7 JUDGE ARNOLD: My hypothetical was
8 designed to reflect what's currently going on with the
9 steam generators. The fact is that Edison repeatedly
10 depends upon the fact that they are within the limits
11 of their current license.

12 And I'm just trying to find out how much
13 comfort I should get from that. If they didn't have
14 that license, would they have gotten it if their steam
15 generators were suspected of having this problem?

16 MR. ROTH: Certainly, the staff would be
17 in issuing an original license following 10 CFR 50.57
18 and making the appropriate safety findings. With
19 respect to whether or not Edison's currently being in
20 its license, in the current mode, the staff would not
21 issue a particular public concern on this. The
22 question is if they restart -- I think that's your
23 hypothetical -- would they without any other changes
24 meet the license? The staff would open RAIs on that.

25 Now I will segue a little bit. Earlier

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 this morning, Your Honors were asking about
2 definitions of full power. If you look at Attachment
3 10 of the staff's brief which is NEI 97-06, you'll
4 actually find a series of definitions in Appendix B.
5 Those are all related to what's called TSTF-449 with
6 the steam generator program that all the utilities
7 have and all the PWRs have adopted.

8 JUDGE BARATTA: But I really have a
9 problem with you using that because I've been looking
10 at the FSAR while you're been talking just see how it
11 refers to things. And I'm sorry. It continually
12 refers to 100 percent power and things like that at
13 the 35 whatever. And it also talks about periods as
14 24 months or a cycle and such.

15 So I see a big disconnect between what I'm
16 hearing you say and what the FSAR says. And there's
17 no doubt the FSAR is part of the license, correct?

18 MR. ROTH: Correct. And, Your Honor,
19 there should be no disconnect. The intent of the
20 reference is not to indicate that the staff's opinion
21 is that SCE's view is correct.

22 JUDGE BARATTA: That's what you just said.

23 MR. ROTH: No. What I said, Your Honor,
24 was the definitions are provided there. SCE was
25 unaware of where the definitions are. The definitions

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 of full power which -- and I'm doing this from memory.
2 Perhaps co-counsel may be able to pull it up from my
3 computer. But my computer is locked. But the
4 definition of full power refers to the maximum steady
5 state power.

6 JUDGE BARATTA: And that's what's in the
7 FSAR.

8 MR. ROTH: Exactly.

9 JUDGE BARATTA: Okay.

10 MR. ROTH: But again the staff opened
11 questions to SCE and SCE has responded RAI 32. The
12 staff are still reviewing that. So I'm not going to
13 say the staff is agreeing or disagreeing with it.

14 But in terms of where there is a
15 definition, I can point you to 97.06. And it's
16 actually on the PDF that's attached to our filing.
17 It's page 254 of 619 for ease of pulling up. And that
18 does provide a definition.

19 JUDGE BARATTA: I'm done.

20 (Off the record discussion.)

21 JUDGE HAWKENS: What other topic are you
22 prepared to address, Mr. Roth?

23 MR. ROTH: I'm here for whatever. Mr.
24 Smith is well prepared to answer any of these 50.59 as
25 you know in the staff's view are beyond what the Board

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 should looking at. But nonetheless he's here.

2 JUDGE HAWKENS: All right. Why don't you
3 remain at the podium then for a few more minutes.

4 JUDGE ARNOLD: Are you sure that we don't
5 want to question somebody who is a little less slick
6 with the answers?

7 (Laughter.)

8 MR. ROTH: Am I supposed to say thank you?
9 I'm not certain.

10 JUDGE BARATTA: I was surprised when you
11 referenced Yankee Atomic that you didn't notice that
12 I didn't note that it was in fact ruled as a de facto
13 license amendment. I was wondering why that didn't
14 come up in your brief.

15 You referenced Yankee Atomic in your
16 brief. If you'd like I can find the cite to that.
17 Let's see. NRC Staff Brief January 30th, page 45 I
18 believe has a reference to the Yankee. It's reference
19 227, CLI 94-3.

20 But when I actually go and look at when it
21 was challenged, it turns out it was ruled as a de
22 facto license amendment. And that's 59 -- let's see.
23 Let me get that right. Sorry.

24 MR. ROTH: It's subsequently 59(f).

25 JUDGE BARATTA: And I was curious as to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 why you didn't mention that in your brief and why --
2 See. I'm looking for what distinguishes this case
3 from that case.

4 MR. ROTH: The distinguishing there is
5 that in Yankee Rowe the NRC had changed its policy.
6 The change in the policy which I believe was initiated
7 through rulemaking allowed a licensee to start to
8 remove major components without actually amending its
9 license. And the court had ruled that an act of
10 license amendment was required before this.

11 By contrast here, there is no change in
12 policy. The staff's CAL is following the long
13 established policy of confirmatory action letters and
14 they've been part of the enforcement manual since
15 before the NRC was the NRC.

16 JUDGE BARATTA: Yes. Getting back to what
17 CALs in the past have done, as far as I'm aware, it's
18 enabled you to go back to operate within your design
19 basis. And there is some question here as to whether
20 or not that's going to be the result here.

21 MR. ROTH: And the staff has a variety of
22 questions on that very topic and are inspecting to
23 ascertain whether or not SCE would be meeting its
24 license if they took the actions that they propose to
25 take. So we fully agree. That's what a CAL is for.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 A CAL is to assure that whatever the
2 issues are they are resolved. If the resolution
3 requires SCE to submit a license amendment, then
4 should they wish to operate within the bounds of the
5 license they would have to amend it. If the
6 resolution of the CAL, the staff is satisfied that
7 SCE's actions under the restart plan would in fact
8 meet their current license, then no license amendment
9 on that point would be necessary.

10 But as Your Honors are aware, the staff
11 have a variety of questions still and have made no
12 determination as to whether or not SCE's actions would
13 meet their license. But contrast in the inspection
14 reports the staff have noticed, not noticed in a
15 hearing sense, but the staff have observed and
16 documented several deficiencies.

17 And should the staff find more, they will
18 presumably document them in their inspection reports.
19 But none of that documentation, none of the inspection
20 findings, causes the CAL to become a licensing action
21 all by itself.

22 JUDGE BARATTA: I mentioned the Palo Verde
23 case. I got comments from SCE and Friends of the
24 Earth. Would you care to comment on the Palo Verde
25 case?

1 MR. ROTH: The Palo Verde case, I believe
2 that would be one prior to the TSTF 449 widespread, an
3 option for steam generators. I'm not overly familiar
4 with the case, Your Honor. But was that pre 2006?

5 JUDGE BARATTA: Yes.

6 MR. ROTH: Then it would be before the
7 current version of SCE's license relative to the steam
8 generator program. And so the analogies --

9 JUDGE BARATTA: I'm looking at it not from
10 that aspect, but from whether or not in that case
11 there was a change because of a problem with a steam
12 generator. And it was simultaneously a license
13 amendment, too, because there was a tech spec change
14 submitted. Would you care to -- All right. You're
15 not familiar with it. Never mind. Maybe you should
16 look at it.

17 MR. ROTH: I would say that as the staff's
18 brief noted when SCE did its original changes -- I
19 believe this is our Commission brief actually that
20 noted this -- we noted the changes in the tech specs
21 that SCE requested in the same licensing action
22 request that they said they're going to change their
23 steam generators using a 50.59. So they did have some
24 corresponding changes that I believe went to special
25 reports, went to overprotection or containment

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 pressure of final values.

2 But that's again in the brief the staff
3 filed before the Commission last summer. I could get
4 specific information for you.

5 But if the question is did SCE need some
6 licensing action with the steam generators, yes, the
7 staff --

8 JUDGE BARATTA: No, no. That's different.
9 I think you got it confused with another case. Okay.
10 This is a case where they had a steam generator and it
11 degraded. And they found they had to lower the hot
12 leg temperature. So it's different than changing out
13 the steam generator which is I think the other case
14 you were referring to.

15 MR. ROTH: Certainly. In that situation,
16 perhaps the Administrative Letter 98-10 or 98-12, the
17 one that says if you find a nonconservative tech spec
18 come in for an amendment. Here if they find they're
19 T hot is incorrect. It's not going to satisfy some
20 analyses. Then certainly they would be expected to
21 take administrative control, lower the power as needed
22 and then submit a licensing action.

23 So while I express no familiarity with the
24 facts of Palo Verde, the description you provide
25 sounds appropriate.

1 JUDGE BARATTA: Right. And that's
2 precisely what was done.

3 JUDGE HAWKENS: I have one more question
4 for you, Mr. Roth. Do you agree with Edison's view
5 that this Board has the discretion to resolve the
6 standing and contention admissibility issue first?
7 And if we rule either lack of standing or an
8 inadmissible contention we need not address the first
9 issue?

10 MR. ROTH: One would have to look very
11 carefully at the language of the CAL. The
12 Commission's referral said determine if the staff's
13 CAL was a licensing action and, if so, does FOE have
14 standing to otherwise meet the requirements? So I
15 think reading the Commission you really have to
16 determine one before two.

17 JUDGE HAWKENS: All right. Thank you.

18 MR. ROTH: And did you have any questions
19 on the 50.59 evaluations, questions 2 and 3?

20 JUDGE HAWKENS: I have one question.

21 MR. ROTH: I'll turn it over to Mr. Smith
22 then. Thank you, Your Honors.

23 JUDGE HAWKENS: Good afternoon, Mr. Smith.

24 MR. SMITH: Good afternoon, Your Honor.

25 JUDGE HAWKENS: I have one question for

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 you.

2 MR. SMITH: Okay.

3 JUDGE HAWKENS: Assuming that we construe
4 the referral order as directing us to look at the
5 entire process, not limited to the four corners of the
6 letter itself, is it appropriate to use Rule 50.59
7 standards for resolving whether it's a de facto
8 license amendment?

9 MR. SMITH: Thank you, Your Honor. It's
10 a good question and the staff position's which we
11 articulated in our brief is that 50.59 is not helpful
12 in resolving the question referred to you by the
13 Commission. Commission precedent on de facto license
14 amendment says that the relevant inquiry and I'll
15 quote from the Perry decision here is "is it an agency
16 action permitting a licensee to go beyond existing
17 license authority" and that would be license amendment
18 with meeting the Atomic Energy Act.

19 As we explained in our brief, the Standard
20 50.59 evaluate a different question. They look at
21 changes to the FSAR themselves for the license
22 amendment.

23 JUDGE HAWKENS: So your answer --

24 MR. SMITH: There is already a change
25 presupposed in the 50.59 analysis.

1 JUDGE HAWKENS: Let me ask a question.

2 MR. SMITH: Yes, sir.

3 JUDGE HAWKENS: Your answer is really
4 linked to the premise that our review is limited to
5 the four corners of the CAL or awaiting a final
6 determination by the staff.

7 MR. SMITH: No, Your Honor. It's not. If
8 you were to go beyond the four corners of the CAL and
9 to determine whether or not the activities described
10 in the October return to service plan constitute a de
11 facto license amendment, then we think that the
12 Standard 50.59 aren't helpful for three main reasons.

13 First, the 50.59's inquiry focus limit
14 change rises to the level of requiring a license
15 amendment under the 50.59(c)(2) criteria. So in
16 essence it already presupposes that there's a change
17 to the licensing basis, a change to the FSAR.

18 Second, 50.59 standards are towards the
19 licensees. The Commission precedent makes clear that
20 it's staff action that's ultimately the relevant
21 loadstone for determining if an agency action is in
22 fact a de facto license amendment.

23 And then third and finally in the CLI-12-
24 20 the Commission referred you to the Yankee case
25 which we cited in our brief and Mr. Roth discussed

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 briefly. And Yankee indicated that an inquiry into
2 the compliance of 50.59 is not appropriate --

3 JUDGE HAWKENS: That's also because there
4 was final agency action there as well, wasn't there?

5 MR. SMITH: Yes.

6 JUDGE BARATTA: In Yankee Rowe, I believe
7 there was an agency action, wasn't there? They
8 approved dismantling of some of the equipment. Was
9 that it?

10 MR. SMITH: Right. That's correct. I
11 believe there were three challenges brought to that
12 action, one of which was that activities leading to
13 that dismantling were inappropriately taken with
14 50.59. And in a footnote in that case, the Commission
15 made the observation. They reiterated in CLI-12-20
16 that -- and I quote. This is from 101 Note 7 of that
17 case -- "A member of the public may challenge an
18 action taken under 10 CFR 59.50 only by means of a
19 petition that under 10 CFR 2.206."

20 And I'd like to go a little farther on
21 Yankee for a minute if I could. In their reply brief,
22 Friends of the Earth has suggested that this footnote
23 is a dicta or the language is not entitled to any
24 further weight.

25 But if you read the actual decision, I

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 think it's integral to the final holding in the case.
2 And if you'll bear with me, on 101 to 102, the
3 Commission describes it and says that "dismantling of
4 the decommissioning activities currently be connected
5 by YAEC," and that's the Yankee Atomic Electric
6 Company, "and the component removal program are being
7 undertaken pursuant to 10 CFR 50.59 which allows the
8 licensee to make changes to those facility without
9 prior NRC approval. If these changes do not involve
10 an unreviewed safety question" -- that was the old
11 standard. It's been amended since then as you're
12 probably aware -- "or by the terms of the license."

13 And then after some time, they say, "the
14 activities that are the subject of the petition are
15 not activities that involve NRC actions -- the hearing
16 rights afforded by Section 189(a)."

17 So contrary to FOE's suggestion I think,
18 the observation you can only challenge 50.59
19 determination in a 2.206 proceeding is really integral
20 to the holding in Yankee. And if there are any
21 questions about a dicta or a throwaway line or an
22 actual rule the Commission intends to be effective and
23 have force on the Commission reliance on it, in CLI-
24 12-20 to refer Friends of the Earth's 50.59 claims to
25 the staff in the 2.206 proceeding I think demonstrates

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 that the Commission meant what it said in the Yankee
2 case

3 JUDGE HAWKENS: Does the staff refer or
4 rely or use this guidance to 50.59 standards when it,
5 for example, is looking at the return to service plan
6 to ensure that nothing does require a license
7 amendment?

8 MR. SMITH: The way 50.59 enters into the
9 staff's review and I think this illustrates why 50.59
10 is not a useful tool for the Board to use in this case
11 --

12 JUDGE HAWKENS: No, no. I asked does the
13 staff refer or rely or use the guidance, the standards
14 in 50.59, when, for example, it's reviewing the return
15 to service plan?

16 MR. SMITH: Yes. The staff will use 50.59
17 to review the Licensee's 50.59 evaluation. It doesn't
18 take an independent 50.59 evaluation. That's because
19 those standards are directed towards licensees.

20 JUDGE HAWKENS: I understand. So why would
21 it be inappropriate for this Board if it were looking
22 at this de facto license amendment process? Why would
23 it be inappropriate likewise to refer to that very
24 standards that the staff refers to in determining
25 whether it is a de facto license amendment?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. SMITH: Thank you, Your Honor. I
2 think you misunderstood my last response. I didn't
3 mean to say that the staff uses 50.59 to look and
4 determine if a license amendment is needed when it's
5 conducting its own independent analysis, what's in this
6 case, the October return to service plan.

7 Rather when the Licensee submitted the
8 return to service plan, they also performed 50.59
9 evaluations to support several of the actions in
10 there. There were several 50.59s that were done. And
11 in its inspection and oversight capacity, the staff
12 reviewed those 50.59 evaluations for adequacy. It did
13 not itself undertake a 50.59 evaluation to see if the
14 terms of the return to service plan needed a license
15 amendment.

16 JUDGE HAWKENS: But I'm sure that's what
17 has to be in the back of the NRC staff as it conducted
18 its review whether any of the terms in the return to
19 service plan do require a license amendment, isn't it?

20 MR. SMITH: I think it's an excellent
21 point, but the important thing I think -- I don't want
22 to speculate too much on what the internal process
23 that the staff is using to review the return to
24 service plan is. But I think, of course, as the staff
25 is reviewing that plan they are keenly aware of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 whether or not the terms that are proposed in it
2 conflicted in any licensing in terms of the licensing
3 basis as they currently exist which is to the extent
4 this raises concerns why you're seeing things like RAI
5 35 that asks the Licensee to demonstrate that proposal
6 is in conformance with the current licensing basis.

7 I don't think that the staff has sort of
8 the 50.59(c)(2) checklist in mind all the time and is
9 going through the eight criteria with every plan they
10 review. They look at those when they review the
11 licensee's application of those criteria. I think
12 this shows why this is really a criteria that's used
13 in a different context by a different entity for a
14 different purpose.

15 JUDGE BARATTA: I think you said something
16 earlier which I would like to confirm. You said that
17 the 50.59 process only comes into play when one has
18 determined that a change to the FSAR is going to be
19 made. Correct?

20 MR. SMITH: That's right. That's in our
21 brief in the area you cite, Your Honor.

22 JUDGE BARATTA: Right. Now, however, if
23 you are trying to -- If you're looking back at
24 something, isn't it helpful to use those factors of
25 (c) if a change should have been made?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. SMITH: Could you restate your
2 question, Your Honor?

3 JUDGE BARATTA: Looking backwards at -- So
4 somebody goes off and does something. Okay.

5 MR. SMITH: Sure.

6 JUDGE BARATTA: Now looking back at that
7 event, they didn't even look at the FSAR to see a
8 change needed to be made. They go off and do
9 something. And then someone comes along and says,
10 "Okay. Wait a minute. I want to see if that should
11 have been an FSAR change." Isn't it useful to look at
12 the considerations that are in 50.59 to determine if
13 maybe there should have been an FSAR change?

14 MR. SMITH: It's a good question, Your
15 Honor. And I think the answer lies in applying the
16 standard for de facto license amendment as it's
17 articulated by the courts and the Commission. And
18 they say, "Has there been a change in the licensing
19 basis authorized by the agency?" In this case your
20 question presupposes that there was in fact a change
21 to the FSAR. I think 50.59(c)(2) wouldn't be helpful
22 because you'd already had your question answered.

23 JUDGE BARATTA: Isn't it true that when
24 you talk about a change to the licensing basis or the
25 scope of the license, etc., that there are many ways

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 it can occur, one of which happens to be the FSAR and
2 also the tech specs which are an expression of the
3 FSAR? Right? Is that correct?

4 MR. SMITH: I would agree with that. Both
5 those are included in the licensing basis.

6 JUDGE BARATTA: Now I'm trying to
7 determine if an event should have been treated as a
8 tech spec change or a change to the FSAR. The
9 criteria that are in 50.59 are the eight items that,
10 yes, those could result in a change to the FSAR.
11 They're not the only ways and there may be other ways,
12 too. So why isn't it useful as guidance to look at
13 those factors, not to apply the 50.59 process, but to
14 look at those factors?

15 MR. SMITH: A very good question, Your
16 Honor. And I think when thinking about 50.59 it's
17 extremely helpful to review the NRC approved guidance
18 document that the industry has put out, NEI 96-07,
19 which has a very detailed description of how 50.59
20 process is supposed to function.

21 And before you get to the place where you
22 apply the eight criteria, you first look and see if
23 the proposed activity, be it a change, a test or an
24 experiment, is resulting in a change to the FSAR. And
25 if it doesn't result in a change to the FSAR, you

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 screen it out. So to the extent we're talking about
2 with de facto license amendment is there's been a
3 change to the licensing basis. You're already talking
4 about a change to the licensing basis and you've
5 identified a change to the FSAR. So your question is
6 answered I believe without the need to invoke the
7 (c) (2) criteria.

8 JUDGE BARATTA: Okay. Thank you.

9 (Off the record discussion.)

10 JUDGE HAWKENS: Mr. Smith and Mr. Roth and
11 Ms. Kanatas, we've exhausted our questions for you
12 unless you have any final information to share with
13 us.

14 MR. ROTH: One final item, Your Honor,
15 that you may find useful in answering Judge Baratta's
16 question. If you look at the AIT reports, the
17 supplemental report which is published November 9th
18 which is a public report available at NRC's website,
19 among the items that it reviews are the 50.59
20 evaluations. And obviously the inspectors used 50.59
21 criteria when reviewing the 50.59s that are performed.

22 In particular, if you look on page 22, the
23 closure of unresolved item 7 which is called
24 "Evaluation of Departure of Method of Evaluation for
25 the 50.59 Process," it's very clearly something the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 staff uses in its reviews. Thank you, Your Honors.

2 JUDGE HAWKENS: Thank you. Thank you, Mr.
3 Smith.

4 MR. SMITH: Thank you.

5 JUDGE HAWKENS: Mr. Ayres, we said at the
6 outset we would give the opportunity for rebuttal not
7 to exceed five minutes. Would you like to avail
8 yourself of that opportunity?

9 MR. AYRES: I would, Your Honor, with full
10 understanding that I stand between you and lunch. So
11 I will try to make this quick and hopefully be able to
12 do that in five minutes.

13 The staff and Edison argue repeatedly as
14 they have here this morning that the scope of this
15 proceeding is limited to the four corners of the CAL.
16 The Board I think is correct in its conclusion or
17 apparent conclusion that the scope is broader than
18 that.

19 The key part here is the NRC's
20 characterization of this proceeding is not
21 determinative. For that, we cite Commonwealth of
22 Massachusetts v. NRC, 1st Circuit Case, 878 F 2d 1516.
23 That's simply reiterates a Supreme Court case, CVS v.
24 U.S. from the year 1942.

25 Second point, I want to be clear that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 we're not asking for hearings on all CALs. Edison's
2 presentation seems to suggest that. To the contrary,
3 we regard this as a unique case. The CAL is a useful
4 enforcement tool, should be used without hearings in
5 many instances.

6 But in this case what's happened is just
7 not the CAL. It's a process which whatever it's been
8 called is a licensing process. Public meetings and
9 hearings don't stand in for the kind of hearings that
10 are available under NRC regulations.

11 With regard to the question of whether you
12 can change the order of your consideration and
13 consider questions 2 and 3 after question 1 or before
14 question 1, you get different results that way. If
15 you consider questions 2 and 3, standing and
16 admissibility, you do not reach the question referred
17 to you by the Commission.

18 And, of course, in terms of the result, no
19 hearing is provided. No license amendment is
20 required. So these are not interchangeable. I think
21 the Commission said, "Tell us whether this is a
22 licensing proceeding. Then tell us whether these
23 parties are appropriate parties in it." And that's
24 the right order to do it in.

25 With regard to the license provision

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 5.5.2.11 on tube integrity, the license requires that
2 they demonstrate tube integrity. There's a
3 demonstration required. And the OA that's been
4 offered may or may not provide such a demonstration.
5 We've already seen a number of critiques from our
6 experts of what has been provided there.

7 More to the point with respect to those
8 issues as we brought to your attention earlier when
9 the Applicant began to send you notifications, the
10 Applicant seems to want to litigate this case after
11 the close of the briefing. You were very clear about
12 briefing schedules. We followed them with a few
13 changes which were approved by you.

14 Edison chose not to answer the obvious
15 question in their brief. Now they want to try to
16 answer it by supplying you documents after the fact.
17 I just want to remind you that we have a motion
18 pending to exclude those documents and we would ask
19 the Board consider that motion carefully.

20 Last, Edison seems to be proposing
21 something here that at least I've never heard of and
22 I suspect none of you have either. I would call it
23 the infinitely malleable license provision. They're
24 telling us now that 70 percent can be the limit this
25 time. And then 75 or 85.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 If you allow this kind of a rewriting of
2 the clear language in a license, then what is the
3 license? The purpose of the license under the Atomic
4 Energy Act is to make sure that plant can be operated
5 safely. And for that reason, it has specific
6 requirements, specific demonstrations that have to be
7 made, specific rules that have to be followed.

8 To allow the Licensee to come in here and
9 say, "Well, actually on this one, we can have a
10 malleable rule. You won't even know about it. We'll
11 change it every time there is fuel cycle. Staff will
12 know about," this is degrading what the license is all
13 about. And I urge you to reject that point of view.

14 Your Honors, thank you very much. We
15 appreciate the opportunity to appear before you. And
16 we look forward to your decision.

17 JUDGE HAWKENS: Thank you, Mr. Ayers. And
18 I would like to thank all counsels that were here
19 assembled. This went longer than I think the
20 Licensing Board had expected. But it's been very
21 useful to us. We appreciate your endurance and your
22 vitality and your assistance during this argument in
23 the cases submitted. Thank you. Off the record.

24 (Whereupon, at 1:44 p.m., the above
25 entitled matter was concluded.)

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

CERTIFICATE

This is to certify that the attached proceedings
before the United States Nuclear Regulatory
Commission

Proceeding: Southern California Edison Co.

Docket Number: 50-361-CAL and 50-362-CAL

ASLBP Number: 13-924-01-CAL-BD01

Location: Rockville, MD

were held as herein appears, and that this is the
original transcript thereof for the file of the
United States Nuclear Regulatory Commission taken
and thereafter reduced to typewriting under my
direction and that said transcript is a true and
accurate record of the proceedings.

Neal R. Gross

Official Reporter
Neal R. Gross & Co., Inc.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701