

June 3, 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S ANSWER TO FOE & NRDC'S MOTION TO CONVENE A BOARD AND
CONSOLIDATE LICENSE AMENDMENT PROCEEDINGS

Pursuant to 10 C.F.R. § 2.323(c), the Staff of the Nuclear Regulatory Commission (Staff) hereby files its answer to Friends of the Earth (FOE) and the Natural Resources Defense Council's (NRDC) Motion Requesting the Nuclear Regulatory Commission to Convene an Atomic Safety and Licensing Board [ASLB] and Consolidate the License Amendment Proceedings for the San Onofre Nuclear Generating Station (SONGS) (Motion).¹ FOE and NRDC request that the Commission "issue an order convening an ASLB to preside over the *de facto* license amendment proceeding recognized by the Board [in LBP-13-07], and that the Commission take all necessary steps to implement [LBP-13-07]...."²

¹ Motion by Friends of the Earth and the Natural Resources Defense Council Requesting the Nuclear Regulatory Commission to Convene an Atomic Safety & Licensing Board & Consolidate the License Amendment Proceedings for the San Onofre Nuclear Generating Station (May 23, 2013) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML13143A517) (Motion). It should be noted that NRDC is not a party and did not participate as a petitioner (potential intervener) in requesting a hearing in the ASLB's CAL *de facto* license amendment proceeding. See NRDC's Amicus Response in Support of FOE (Jan. 18, 2013) (ADAMS Accession No. ML13018A445).

² Motion at 16. Among other things, FOE requests that the Commission: instruct the Staff formally to notice the *de facto* license amendment in the *Federal Register*, consolidate all of the license amendment proceedings for SONGS, and prohibit the Staff from making a no significant hazards consideration (NSHC) determination with regard to the license amendment requests that LBP-13-07 contemplates. *Id.* at 16-17.

The Staff opposes the Motion. The Motion requests relief that is premature and contrary to the Commission's regulations on the license amendment request (LAR) process in 10 C.F.R. § 50.90 through § 50.92 and the Commission's Adjudicatory Policy.³ Specifically, the Motion requests that the Commission consolidate the "separate license amendments required under the Board's May 13 Order." Motion at 2. But 10 C.F.R. § 50.90 specifies that a license amendment request is filed when "a holder of a license ... desires to amend." The license holder's "desired" amendment defines the scope of the license amendment proceeding, which is described in the *Federal Register* notice associated with the amendment request.⁴ Moreover, each submitted license amendment request is scoped and reviewed to technically stand on its own, with separate *Federal Register* notices and attendant opportunities for hearing. 10 C.F.R. §§ 2.101, 2.309, 50.91. This practice ensures that the hearing opportunity be "a meaningful one that focuses on genuine issues and real disputes regarding agency actions subject to adjudication."⁵ Accordingly, the actions of the licensee alone determine the scope of a license amendment.

Southern California Edison (SCE) has only submitted one license amendment request, and that request was noticed in the *Federal Register* on April 16, 2013.⁶ Even assuming *arguendo* that LBP-13-07 stands in holding that the CAL process in this instance amounts to a *de facto* license amendment proceeding, the CAL process is not yet complete here since it is

³ *Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 19 (1998) (noting Commission's objectives for the adjudicatory process, which are: to provide a fair hearing process, to avoid unnecessary delays in the NRC's review and hearing processes, and to produce an informed adjudicatory record that supports agency decision making on matters related to the NRC's responsibilities for protecting public health and safety, the common defense and security, and the environment). Consolidation of proceedings is within the Commission's discretionary authority. 10 C.F.R. § 2.317.

⁴ *See Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 565 (1980) (holding that agency's hearing notice defines the scope of the proceeding and its issues and limits the Board's jurisdiction).

⁵ *Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 19 (1998).

⁶ Application and Amendment to Facility Operating License Involving Proposed No Significant Hazards Consideration Determination; San Onofre Nuclear Generating Station, Unit 2, 78 Fed. Reg. 22,576 (Apr. 16, 2013).

not yet known how and when the licensee will complete all CAL actions. The Commission should not direct processing of a *de facto* license amendment that is based on a CAL process that is still ongoing. Further, the scope of the purported *de facto* license amendment may well be impacted by how SCE will respond to LBP-13-07. Under 10 C.F.R. § 50.90, it is the license holder—and the license holder alone—that requests an amendment “fully describing the [license] changes desired....” Until SCE describes “license changes” it requests in response to LBP-13-07, it is not possible to discern with sufficient specificity what proceeding(s) would exist. Thus, the request to convene a board and consolidate hypothetical LARs is premature and contrary to the Commission’s regulations governing the processing of license amendment requests.

Similarly, if FOE’s request to consolidate is granted, the notice of hearing opportunity would be based on assumptions and inferences about how the CAL process might be completed and how SCE will respond to LBP-13-07. Such a notice would not produce an informed adjudicatory record, and would therefore be contrary to the Commission’s Adjudicatory Policy.⁷

The Staff also opposes the Motion to the extent it challenges the Staff’s proposed no significant hazards consideration determination on Southern California Edison’s April 5, 2013 license amendment request, as this is contrary to the Commission’s regulations.⁸ 10 C.F.R.

⁷ *Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 19 (1998). Consolidating the discrete activities associated with separate amendment requests can be contrary to the Commission’s goal of completing proceedings expeditiously. *Molycorp, Inc.* (Washington, Pennsylvania, Temporary Waste Storage & Site Decommissioning Plan), LBP-00-10, 51 NRC 163, 172 (2000) (citing CLI-98-12, 48 NRC at 24). Even if consolidated, the Commission may act upon applications at different times. *Edlow Int’l Co.* (Agent for the Government of India on Application to Export Special Nuclear Materials), CLI-78-4, 7 NRC 311, 312 (1978).

⁸ The Motion’s request that the Commission prohibit the Staff from making a NSHC determination with regard to the license amendment requests that LBP-13-07 contemplates is also premature and contrary to law. See 10 C.F.R. § 50.91(a)(2)(ii) (providing that for each amendment proposed to be issued, the *Federal Register* notice will contain the Staff’s proposed NSHC determination). See also Atomic Energy Act (AEA) of 1954, as amended, §189a.(2)(A), 42 U.S.C. § 2239 (1992) (giving Commission authority to issue an amendment notwithstanding the pendency of a request for a hearing if the Commission determines that such amendment involves NSHC).

§ 50.58(b)(6) states that no petition or other request for review will be entertained on the Staff's significant hazards consideration determination.⁹

Finally, the Commission's regulations specify that (1) a party, including the Staff, SCE or FOE, may file an appeal of LBP-13-07 with the Commission, within 25 days and (2) the Commission may opt to review LBP-13-07. 10 C.F.R. § 2.341. Until the time for appeal or Commission review expires, the Commission should not act on the Motion, since doing so would necessarily involve Commission determination of issues that inevitably would be raised in any appeal. The Commission's proper adjudicatory role in any appellate process arising from LBP-13-07 cannot be inviolate if it rules in advance on issues raised in the Motion that will necessarily be raised if an appeal is filed. Given the Board's unprecedented approach of considering an entire CAL "process" as a *de facto* license amendment proceeding, it is likely that one or more parties will appeal LBP-13-07. Deciding to grant this Motion, at this point in time, would necessarily require the Commission's prejudgment of issues that would be critical to any appeal of LBP-13-07 that may be filed with the Commission.

For all of the foregoing reasons, the Staff requests that the Motion be denied.

Respectfully submitted,

/Signed (electronically) by/

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⁹ FOE did not mention this claim during its May 23, 2013 consultation with Staff on this Motion, so the Staff did not have the opportunity to relay to FOE that this challenge was contrary to the regulations. FOE also did not indicate that its Motion would argue that the Staff violated the AEA, APA, NEPA, and the Commission's regulations or that NRDC was joining in the Motion. The Staff opposes these claims and the attempt to shift NRDC's participation from filing an "*amicus curiae*" brief to party status. 10 C.F.R. §§ 2.323(b), 2.315(d). Non-parties have no right to consolidation; consolidation of proceedings does not grant party status to non-parties. *Edlow Int'l*, CLI-77-16, 5 NRC at 1328-29 (1977).

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R § 2.305 (revised), I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER TO FOE AND NRDC'S MOTION TO CONVENE A BOARD AND CONSOLIDATE LICENSE AMENDMENT PROCEEDINGS" have been served upon the Electronic Information Exchange, the NRC's E-Filing System, in the above captioned proceeding, this 3rd day of June, 2013:

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 3rd day of June, 2013