**UNITED STATES OF AMERICA**
**NUCLEAR REGULATORY COMMISSION**

**BEFORE THE COMMISSION**

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| In the Matter of | ) | |
| | ) | Docket Nos. 50-361 & 50-362 |
| SOUTHERN CALIFORNIA EDISON COMPANY | ) | |
| | ) | |
| (San Onofre Nuclear Generating Station, Units 2 and 3) | ) | June 3, 2013 |

**SOUTHERN CALIFORNIA EDISON COMPANY'S ANSWER OPPOSING MOTION TO NOTICE A *DE FACTO* LICENSE AMENDMENT PROCEEDING, CONVENE A BOARD, CONSOLIDATE LICENSE AMENDMENT PROCEEDINGS, AND PROHIBIT NO SIGNIFICANT HAZARDS CONSIDERATION DETERMINATIONS**

## I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), Southern California Edison Company ("SCE") files this Answer opposing the Motion filed by Friends of the Earth ("FOE") and the Natural Resources Defense Council ("NRDC") on May 23, 2013 related to San Onofre Nuclear Generating Station ("SONGS").[1] The Motion requests that the Commission take four actions. First, in response to the recent Atomic Safety and Licensing Board ("Board") decision in LBP-13-07 ruling on issues the Commission referred to the Board in CLI-12-20,[2] the Motion requests that the Commission provide notice in the *Federal Register* of a *de facto* license amendment proceeding. Second, the Motion requests that the Commission convene a licensing board to preside over that *de facto* license amendment proceeding. Third, the Motion requests that the Commission consolidate that *de facto* license amendment proceeding with a separate proceeding involving SCE's license

[1] Motion by Friends of the Earth and the Natural Resources Defense Council Requesting the Nuclear Regulatory Commission to Convene an Atomic Safety and Licensing Board and Consolidate the License Amendment Proceedings for the San Onofre Nuclear Generating Station (May 23, 2013) ("Motion").

[2] *See Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 & 3), LBP-13-07, 77 NRC __, slip op. at 1-2 (May 13, 2013) ("LBP-13-07"); *see also Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 & 3), CLI-12-20, 76 NRC __, slip op. at 5 (Nov. 8, 2012) ("CLI-12-20").

amendment request ("LAR") filed on April 5, 2013. Fourth, the Motion requests that the Commission prohibit the NRC Staff from making a no significant hazards consideration ("NSHC") determination in the April LAR or consolidated proceeding.

As discussed below, FOE and NRDC's requests have "no legitimate place" before the Commission because FOE and NRDC have not submitted a request for hearing and petition to intervene with respect to the April LAR and SCE has not submitted a new "*de facto* LAR" in response to LBP-13-07.[3] Furthermore, the Motion is replete with numerous other procedural deficiencies, such that FOE and NRDC are essentially requesting that the Commission ignore its own regulations. For example, it would be inappropriate for the NRC to issue a notice of a *de facto* LAR. Rather, such notice is only appropriate should SCE submit such a LAR under 10 C.F.R. § 50.90. In addition, the Commission should not convene a licensing board absent an extant request for hearing and petition to intervene. Consolidation is also inappropriate, given that there are no proceedings to consolidate. Finally, the Commission should not entertain FOE and NRDC's NSHC arguments because NRC regulations prohibit such challenges.[4]

## II. BACKGROUND

In CLI-12-20, the Commission directed that the Board determine: (1) whether the March 27, 2012 Confirmatory Action Letter ("CAL") "issued to SCE constitutes a *de facto* license amendment" subject to a hearing opportunity; and (2) if so, whether FOE's June 18, 2012 Petition to Intervene related to that CAL satisfies the standing and contention admissibility

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[3] *See Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Indep. Spent Fuel Storage Installation), CLI-02-23, 56 NRC 230, 235 n.6 (2002); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-28, 54 NRC 393, 398 (2001).

[4] 10 C.F.R. § 50.58(b)(6) ("No petition or other request for review of or hearing on the staff's significant hazards consideration determination will be entertained by the Commission. The staff's determination is final, subject only to the Commission's discretion, on its own initiative, to review the determination.").

requirements in 10 C.F.R. § 2.309.[5] In LBP-13-07, the Board found the CAL, "viewed in isolation, is not a *de facto* license amendment."[6] The Board went further, however, and concluded that the CAL "process" is a *de facto* license amendment proceeding.[7] In doing so, the Board interpreted CLI-12-20 broadly and concluded that the Commission also intended for the Board to consider whether the CAL "process"—including SCE's Return to Service Report for SONGS Unit 2—constitutes a *de facto* license amendment proceeding.[8]

According to the Board, the CAL process constitutes a *de facto* license amendment proceeding for three reasons:

1. The restart of Unit 2 would grant SCE authority to operate without the ability to comply with Technical Specification 5.5.2.11, because SCE is proposing to operate at 70% power;

2. The restart of Unit 2 would allow SCE to operate beyond the scope of its existing license because fluid elastic instability ("FEI") is not discussed in the SONGS Updated Final Safety Analysis Report ("UFSAR"); and

3. SCE's Unit 2 Return to Service Plan includes a test or experiment that meets the criteria in 10 C.F.R. § 50.59 for a license amendment, because the UFSAR does not address FEI.[9]

The Board found that SCE's April LAR addresses Reason 1.[10] To address Reasons 2 and 3, the Board stated that SCE must augment its UFSAR with a vibration analysis to assure that the steam generator tubes do not fail prematurely due to tube-to-tube wear ("TTW") and thus satisfy

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5 CLI-12-20 at 5.

6 LBP-13-07 at 16 n.33.

7 *Id.* at 1-2.

8 *Id.* at 11-16.

9 *Id.* at 24-37.

10 *Id.* at 30 n.48.

their design basis.[11] The Board did not decide whether FOE's Petition to Intervene satisfied Section 2.309 because the Board already granted FOE "all the relief that its contention seeks."[12]

After the Board issued LBP-13-07, FOE and NRDC filed the instant Motion. For the reasons discussed in the following section, the Motion should be rejected.

## III. ARGUMENT

### A. The Motion Should Be Denied Because FOE and NRDC Have No Right to File a Motion.

The Commission should deny the Motion because FOE and NRDC are not participants in the April LAR proceeding and SCE has not submitted a "*de facto* LAR" in response to LBP-13-07 that would begin a new proceeding. An organization does not have the requisite status to seek action in a proceeding unless it has gained formal "party" status or filed a timely request for hearing or petition to intervene.[13] FOE and NRDC have not submitted a request for hearing or petition to intervene related to the April LAR and there is no *de facto* LAR proceeding in which to intervene. Thus, FOE and NRDC's request for action has "no legitimate place" before the Commission,[14] and the Motion should be denied for that reason alone.

### B. The Request to Issue a Notice of Proposed Action and Opportunity for Hearing Should Be Denied Because There Is No New LAR Addressing LBP-13-07.

FOE and NRDC request that the Commission notice in the *Federal Register* a *de facto* license amendment proceeding involving the issues identified by the Board in LBP-13-07.[15] In LBP-13-07, the Board found a *de facto* license amendment proceeding for three reasons. As

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11 *Id.* at 33 n.52, 35 n.55.

12 *See id.* at 11, 37-38.

13 *See Diablo Canyon*, CLI-02-23, 56 NRC at 235 n.6; *Savannah River*, CLI-01-28, 54 NRC at 398.

14 *See Diablo Canyon*, CLI-02-23, 56 NRC at 235 n.6; *Savannah River*, CLI-01-28, 54 NRC at 398.

15 Motion at 3.

discussed below, the NRC has previously noticed a proceeding for SCE's April LAR addressing Reason 1 and there is no new LAR before the Commission that addresses Reasons 2 and 3.

In Reason 1, the Board concluded that SCE's plan to operate SONGS Unit 2 at 70% power is a *de facto* license amendment because it would deviate from the technical specification requirements.[16] The Board, however, also found that SCE's April LAR addresses Reason 1.[17] Because the NRC already noticed the April LAR in the *Federal Register*, there is no need for the Commission to notice a *de facto* license amendment addressing Reason 1.[18]

In Reasons 2 and 3, the Board found that SCE must augment its UFSAR with a vibration analysis assuring that the steam generator tubes do not fail prematurely due to TTW.[19] FOE and NRDC are essentially requesting the Commission to take action inconsistent with its well-established license amendment process for accepting, noticing, evaluating, and deciding a LAR.[20] Under the traditional LAR process, "[a] proceeding commences when a notice of hearing or a notice of proposed action under § 2.105 is issued."[21] NRC regulations contemplate an application as a prerequisite to a notice of proposed action.[22] Until an application is filed, the NRC would not be able to fulfill the purpose of the notice, which is, in part, to define the scope

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16 LBP-13-07 at 29.

17 *See id.* at 29-30 & n.48.

18 *See* Application and Amendment to Facility Operating License Involving Proposed No Significant Hazards Consideration Determination; San Onofre Nuclear Generating Station, Unit 2, 73 Fed. Reg. 22,576 (Apr. 16, 2013).

19 LBP-13-07 at 33 n.52, 35 n.55.

20 10 C.F.R. §§ 2.101, 2.102, 2.105, 2.106. *See generally* LIC-101, Rev. 4, NRR Office Instruction, License Amendment Review Procedures (May 22, 2013), *available at* ADAMS Accession No. ML113200053.

21 10 C.F.R. § 2.318(a).

22 *See, e.g.*, 10 C.F.R. § 2.105(a) (containing requirements for "a notice of proposed action with respect to an application").

and nature of the proceeding.[23] Accordingly, the NRC should not issue a notice of proposed action pursuant to 10 C.F.R. § 2.105 until SCE first requests a proposed action (*i.e.*, submits a LAR).

In summary, the Commission should deny the request to notice a new proceeding, because there is no pending LAR to notice.

### C. The Request to Convene a Licensing Board Should Be Denied Because There Is No Extant Request for Hearing and Petition to Intervene.

FOE and NRDC request that the Commission convene a licensing board to preside over a *de facto* license amendment proceeding.[24] However, until a person files a request for hearing and petition to intervene in response to a 10 C.F.R. § 2.105 notice of proposed action, there is no reason to convene a licensing board.[25]

FOE and NRDC have not submitted a request for hearing or petition to intervene on the April LAR nor does a *de facto* LAR yet exist. Thus, the Commission should deny FOE and NRDC's Motion because there is no pending request for hearing and petition to intervene.

Furthermore, FOE and NRDC's argument is premature for another reason. As the Commission explained in *Millstone*, no proceeding exists until the NRC issues a notice of proposed action under 10 C.F.R. § 2.105 and one "cannot intervene in a proceeding before the proceeding actually exists."[26] Until a new *de facto* LAR is filed and NRC notices such a LAR,

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[23] *See, e.g.*, *Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), CLI-07-27, 66 NRC 215, 233-34 (2007); *see also Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-825, 22 NRC 785, 790-91 (1985).

[24] Motion at 3.

[25] 10 C.F.R. § 2.308 ("Upon receipt of a request for hearing or a petition to intervene, the Secretary will forward the request or petition and/or proffered contentions and any answers and replies either to the Commission for a ruling on the request/petition and/or proffered contentions or to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel for the designation of a presiding officer under § 2.313(a) to rule on the matter.").

[26] *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-04-12, 59 NRC 237, 239-40 (2004).

no proceeding exists in which FOE and NRDC can request a hearing and petition to intervene. As such, there are no hearing issues to refer to a licensing board. Accordingly, the request should be denied.

### D. The Request to Consolidate the Proceedings Should Be Denied Because There Are No Proceedings to Consolidate.

FOE and NRDC ask that the Commission consolidate the April LAR proceeding with any future proceeding addressing the issues identified by the Board in LBP-13-07.[27] As an initial matter, FOE and NRDC are not parties to the April LAR proceeding and there is no *de facto* LAR proceeding. Therefore, they have no right to seek consolidation of the April LAR with any proceeding, much less one that does not exist.[28]

Even if FOE and NRDC had the right to seek consolidation, there is no second proceeding to consolidate as no *de facto* LAR has been filed with or noticed by the NRC. Moreover, no person has requested a hearing on the April LAR.[29]

Furthermore, even if it is assumed that there are two proceedings to consolidate, consolidation is only appropriate under 10 C.F.R. § 2.317(b) "if it is found that the action will be conducive to the proper dispatch of its business and to the ends of justice and will be conducted in accordance with the other provisions" in 10 C.F.R. Part 2, Subpart C. FOE and NRDC have not met that standard. There is no indication that hearing activities for the April LAR and a *de facto* LAR proceeding will involve common legal or factual questions because FOE and NRDC

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[27] Motion at 4-7.

[28] *Edlow Int'l Co.* (Agent for the Gov't of India on Application to Export Special Nuclear Materials), CLI-77-16, 5 NRC 1327, 1328-29 (1977).

[29] *See Millstone*, CLI-04-12, 59 NRC at 239-40.

have not submitted any contentions.[30] Thus, the Motion fails to satisfy the consolidation standard in 10 C.F.R. § 2.317(b).

In summary, the Commission should deny the request for consolidation because it is inconsistent with NRC regulations.

### E. The Commission Should Not Entertain FOE and NRDC's Request Related to the NRC Staff's Proposed NSHC Determination.

FOE and NRDC request that the Commission find that a NSHC determination is inappropriate in the consolidated license amendment proceeding.[31] As support for this claim, the Motion summarizes comments FOE and NRDC submitted on the NRC Staff's proposed NSHC determination for the April LAR.[32] As discussed below, the Commission should summarily reject FOE and NRDC's NSHC-related request.

The Atomic Energy Act expressly authorizes the NRC to grant and make immediately effective a license amendment that "involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person."[33] Under the Commission's implementing regulations, "[n]o petition or other request for review of or hearing on the staff's significant hazards consideration determination will be entertained by the Commission. The staff's determination is final, subject only to the Commission's discretion, on its own initiative, to review the determination."[34] Thus, the

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30 *See Edlow Int'l*, CLI-77-16, 5 NRC at 1328 (explaining that 10 C.F.R. § 2.317 (formerly 10 C.F.R. § 2.716) "mirrors Rule 42(a) of the Federal Rules of Civil Procedure which establishes general standards used by Federal courts in determining whether consolidation of proceedings is appropriate. Rule 42(a) provides that, if actions involve common questions of law or fact, they may be consolidated if consolidation would 'avoid unnecessary costs or delay.'").

31 Motion at 7.

32 *Id.* at 7-13, 15-16.

33 Atomic Energy Act §189a(2)(A); 42 U.S.C. § 2239a(2)(A).

34 10 C.F.R. § 50.58(b)(6). To the extent that the Motion raises procedural concerns about SCE submitting information after the comment period for the April LAR, FOE and NRDC concede this information is "essentially ministerial." Motion at 15. In other words, this information does not expand the scope of the

Commission should reject FOE and NRDC's request that the Commission examine the NRC Staff's proposed NSHC determination for the April LAR (or any yet-to-be-proposed NSHC determination for a *de facto* LAR).[35]

Furthermore, in this case, Commission action would be doubly inappropriate because the Staff has not yet issued a final NSHC determination addressing the issues raised by FOE and NRDC. Specifically, the Staff has not made a final NSHC determination resolving FOE and NRDC's comments on the proposed NSHC determination for the April LAR.[36] The Staff also has not issued a proposed NSHC determination for a *de facto* LAR, because there is no such LAR.[37] Thus, the Commission should not entertain FOE and NRDC's request, because there are no final Staff NSHC determinations for the Commission to review.

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April LAR, as originally noticed, and does not change the NRC Staff's proposed NSHC determination as published in the *Federal Register*.

35 *See Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-07, 53 NRC 113, 116-18 (2001) (rejecting summarily a petition for review and request for immediate suspension of NRC Staff's NSHC determination on a spent fuel pool expansion license amendment).

36 *See* Application and Amendment to Facility Operating License Involving Proposed No Significant Hazards Consideration Determination; San Onofre Nuclear Generating Station, Unit 2, 73 Fed. Reg. at 22,576.

37 *See* 10 C.F.R. § 50.91(a)(1).

## IV. CONCLUSION

For the reasons discussed above, the Commission should deny FOE and NRDC's Motion as contrary to established NRC regulations, precedent, and practice.

Respectfully submitted,

*Executed in Accord with 10 C.F.R. § 2.304(d)*

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Dated in Washington, DC
this 3rd day of June 2013

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## CERTIFICATE OF SERVICE

I hereby certify that, on this date, a copy of "Southern California Edison Company's Answer Opposing Motion to Notice a *De Facto* License Amendment Proceeding, Convene a Board, Consolidate License Amendment Proceedings, and Prohibit No Significant Hazards Consideration Determinations" was filed through the E-Filing system.

*Signed (electronically) by Stephen J. Burdick*
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