

June 14, 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S MOTION TO VACATE THE LICENSING BOARD'S FULL INITIAL DECISION,
LBP-13-07

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323, the staff of the U.S. Nuclear Regulatory Commission (Staff) hereby files a motion to vacate the Atomic Safety and Licensing Board's (Board) Memorandum and Order (Resolving Issues Referred by the Commission in CLI-12-20), LBP-13-07, 77 NRC ____ (May 13, 2013) (slip op.) (LBP-13-07). As discussed below, LBP-13-07 is moot because Southern California Edison (SCE) is no longer seeking restart of San Onofre Nuclear Generating Station (SONGS) Unit 2 or 3 under the Confirmatory Action Letter (CAL) process giving rise to the Board's *de facto* license amendment holding. Instead, SCE is permanently retiring the Units.¹ Given SCE's decision to permanently retire SONGS, the Staff has ceased its review of SCE's Unit 2 Return to Service Plan and April 5, 2013 license amendment request (LAR), submitted in support of a Unit 2 restart.² Therefore, there is no outstanding controversy,

¹ See <https://www.edison.com/pressroom/pr.asp?id=8143> (last visited June 14, 2013) (announcing SCE's decision to permanently retire SONGS Units 2 and 3, effective June 7, 2013); SCE's Certification of Permanent Cessation of Power Operations, San Onofre Nuclear Generating Units 2 and 3 (June 12, 2013) (Agencywide Documents Access & Management System (ADAMS) Accession No. ML131640201) (SCE's SONGS Cessation Letter).

² See letter from Doug Broaddus, Chief SONGS Special Projects Branch, USNRC to Peter T. Dietrich, Senior Vice President and Chief Nuclear Officer, SCE, San Onofre Nuclear Generating Station, Unit 2 - Withdrawal of License Amendment Request No. 263 (TAC No. MF1379) and Cessation of Review

rendering any proposed appellate challenge to LBP-13-07 moot.³ The Staff respectfully requests that the Commission follow its customary course of action in such situations and vacate LBP-13-07.⁴

BACKGROUND

On March 27, 2012, the Staff issued a CAL to SCE following a steam generator tube leak at SONGS Unit 3 and the discovery of unexpected tube wear at Units 2 and 3.⁵ The CAL confirmed that SONGS Unit 2 will not enter Mode 2 (Startup), and SONGS Unit 3 will not enter Mode 4 (Hot Shutdown) (as defined in the Technical Specifications), until the NRC completed its review of the actions from SCE's March 23, 2012 Return to Service Plan.⁶ On June 18, 2012, Friends of the Earth (FOE) submitted a Petition to Intervene (Petition), claiming, among other things, that the CAL and the process for resolving the CAL constitute a *de facto* license amendment.⁷ On October 3, 2012, SCE submitted its Unit 2 Return to Service Plan.⁸

of Return to Service Report (TAC No. ME9727) (June 14, 2013) (ADAMS Accession No. ML13164A143) (Letter from Doug Broaddus).

³ See, e.g., *Private Fuel Storage, L.L.C.*, (Independent Spent Fuel Storage Installation), CLI-05-22, 62 NRC 542, 544 (2005) (Staff appeal is moot when there is no outstanding controversy). Accordingly, the Staff determined that the appropriate response to SCE's decision to retire SONGS was to file a motion to vacate, not a petition for review. See *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-99-24, 50 NRC 219, 221-22 (1999) (vacating two Board orders, although an appeal had been filed on only one of the orders). See also FOE's June 11, 2013 Letter to Chairman Macfarlane (stating that SCE's "recent announcement that it will retire [SONGS] makes LAR 263 and any attendant hearing deadlines moot.").

⁴ PFS, CLI-05-22, 62 NRC 542, 544 (2005).

⁵ Letter from Elmo E. Collins, Regional Administrator, Region IV, USNRC, to Peter T. Dietrich, Senior Vice President and Chief Nuclear Officer, SCE, Confirmatory Action Letter – San Onofre Nuclear Generating Station, Units 2 and 3, Commitments to Address Steam Generator Tube Degradation (Mar. 27, 2012) (ADAMS Accession No. ML12087A323) (March 27, 2012 CAL).

⁶ March 27, 2012 CAL at 2.

⁷ Petition to Intervene and Request for Hearing by Friends of the Earth at 2 (June 18, 2012) (ADAMS Accession No. ML12171A409) (Petition). FOE also requested a stay of restart, a discretionary hearing, and raised claims concerning the § 50.59 analyses supporting the SONGS Unit 2 and 3 steam generator replacements. *Id.* at 2, 16.

⁸ Letter from Peter T. Dietrich, Senior Vice President and Chief Nuclear Officer, SCE, to Elmo E. Collins, Regional Administrator, Region IV, US NRC, Docket No. 50-361, [CAL] – Actions to Address

On November 8, 2012 the Commission issued CLI-12-20,⁹ which: (1) referred FOE's § 50.59 claims regarding the replacement of the Unit 2 and 3 steam generators to the NRC Executive Director for Operations (EDO) for appropriate action under 10 C.F.R. § 2.206, and (2) referred FOE's *de facto* license amendment claim to a Board,¹⁰ specifying that the Board consider the Staff's CAL in addressing the *de facto* license amendment question.¹¹ The Board held an oral argument on March 22, 2013.¹² On April 5, 2013, SCE submitted a license amendment request (LAR) to address a Technical Specification (TS) compliance issue identified by the Staff during its review of the Unit 2 Return to Service Plan.¹³

The Board issued LBP-13-07 on May 13, 2013. In LBP-13-07, the Board held that the CAL process between the Staff and SCE—in particular SCE's Unit 2 Return to Service Plan and the Staff's potential future authorization of that plan—constituted a *de facto* license amendment proceeding.¹⁴ Given the Board's controversial "CAL process/*de facto* license amendment

Steam Generator Tube Degradation [SONGS], Unit 2 (Oct. 3, 2012) (ADAMS Accession No. ML12285A263) (Unit 2 Return to Service Plan).

⁹ *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-12-20, 76 NRC __ (Nov. 8, 2012) (slip op.)

¹⁰ *Id.* (slip op. at 4-6). The Commission also denied without prejudice FOE's stay and discretionary hearing requests. *Id.* at 5.

¹¹ *Id.* at 5 ("Specifically, we direct the Board to consider whether: (1) the [March 27, 2012 CAL] issued to SCE constitutes a *de facto* license amendment that would be subject to a hearing opportunity under [s]ection 189a [of the Atomic Energy Act (AEA)]...").

¹² See March 22, 2013 Transcript (ADAMS Accession No. ML13085A109). Prior to oral argument, the Board requested and received briefs from the parties. The Board's briefing orders are available at ADAMS Accession Nos. ML12342A328, ML12355A452, and ML12356A241. Staff's Answering Brief is available at ADAMS Accession No. ML13030A494.

¹³ See Letter from Peter T. Dietrich, Senior Vice President and Chief Nuclear Officer, SCE, Docket No. 50-361, Amendment Application Number 263, Steam Generator Program, [SONGS], Unit 2 (Apr. 5, 2013) (ADAMS Accession No. ML13098A043). SCE separately submitted a 100% Operational Assessment to demonstrate how it complied with TS 5.5.2.11 without the need for a LAR. See SONGS U2C17 Steam Generator Operational Assessment for Tube-to-Tube Wear (Mar. 14, 2013) (ADAMS Accession No. ML12285A269).

¹⁴ LBP-13-07 at 24-25. Notably, the Board recognized that (1) the Staff's CAL did not constitute a *de facto* license amendment, *id.* at 15, 16 n.33, (2) the Staff had not approved SCE's Unit 2 Return to Service Plan or closed out the CAL for Unit 2 or 3, *id.* at 13, and (3) SCE's April 5, 2013 LAR mooted the

proceeding” holding,¹⁵ the Staff planned to file a petition for review of LBP-13-07 on June 7, 2013. See 10 C.F.R. § 2.341(b). However, on the morning of June 7, 2013, SCE notified Michael Johnson, NRC Deputy Executive Director for Reactor and Preparedness Programs, that it is not seeking restart of either SONGS Unit 2 or 3.¹⁶ SCE issued a press release on the same date, announcing its decision to permanently retire SONGS Units 2 and 3.¹⁷ Given SCE’s decision to retire SONGS, the Staff requested and received an extension of time to determine an appropriate course of action.¹⁸ On June 12, 2013, SCE submitted to the NRC its certification that it has permanently ceased power operation of SONGS.¹⁹ Consistent with the established process reflected in pertinent case law, the Staff submits the instant motion to vacate LBP-13-07, instead of a petition for review under 10 C.F.R. § 2.341(b).²⁰

Board’s first reason for holding that the “CAL process” constituted a *de facto* license amendment. *Id.* at 29-30 n.48.

¹⁵ The Board’s holding was controversial because the Board considered the entire CAL process (an enforcement-related process), including a licensee’s plan in response to a CAL and future hypothetical Staff actions closing out the CAL process, instead of Staff action (*i.e.*, issuance of the CAL) when determining whether there was a *de facto* license amendment. See *contra Cleveland Elec. Illum. Co.* (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315 (1996) (*Perry*) and Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-28, 30 NRC 271, 276 (1989), *aff’d*, 32 NRC 225, 225 (1990) (*Seabrook*) (analyzing completed Staff actions to answer *de facto* questions). See *San Onofre*, CLI-12-20, 76 NRC ___ (slip op. at 5 n.15) (*citing Perry* and *Seabrook* as relevant precedent for Board to apply). In *Seabrook*, the Board looked only to the CAL, not the CAL process, in determining whether there was a *de facto* action triggering sec. 189a. hearing rights.

¹⁶ See Affidavit of Michael Johnson (June 14, 2013) (attachment 1).

¹⁷ See <https://www.edison.com/pressroom/pr.asp?id=8143> (last visited June 14, 2013).

¹⁸ See NRC Staff Motion for Extension of Time to File Petition for Review (June 7, 2013) (ADAMS Accession No. ML13158A183); See unpublished Order of the Secretary (Granting Request for Extension) (June 7, 2013 (ADAMS Accession No. ML13158A275).

¹⁹ See SCE’s SONGS Cessation Letter; 10 C.F.R. § 50.82(a) (requiring cessation letter).

²⁰ See, e.g., *PFS*, CLI-05-22, 62 NRC 542 (2005); *Yankee Nuclear Power Station*, CLI-99-24, 50 NRC 219, 221-22 (1999). In accordance with 10 C.F.R. § 2.323(b), the Staff made a sincere effort to consult with the parties on this motion. SCE does not oppose this motion. FOE opposes this motion.

LEGAL STANDARDS

Unreviewed Board decisions do not constitute precedent or binding law.²¹ However, established Supreme Court and NRC precedent provides that unreviewed judgments are vacated when their appellate review becomes unavailable because of mootness.²² A case is moot when there is no reasonable expectation that the matter will recur and the interim relief or intervening events have eradicated the effects of the allegedly unlawful action.²³

It is the Commission's customary course of action to vacate Board orders under these circumstances to eliminate any confusion or future effects stemming from these decisions,²⁴ particularly where the decision is controversial.²⁵ For example, participants in other cases can cite to unreviewed Board decisions to support their positions in NRC licensing litigation.²⁶ Similarly, Boards have relied on decisions of other Boards for guidance.²⁷ Likewise, parties can

²¹ *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 343 n.3 (1998). See LBP-13-07 at 16 (citing same).

²² See *United States v. Munsingwear, Inc.*, 340 US 36, 39-40 (1950) (applying its "established practice" to vacate a judgment in a civil case where review is prevented because the case has become moot). See, e.g., *PFS*, CLI-05-22, 62 NRC 542 (2005) (vacating a Board's redaction order where compliance with the order rendered the order moot and providing guidance on redaction orders); *Kerr-McGee Chem. Corp.* (West Chicago Rare Earths Facility), CLI-92-2, 43 NRC 13 (1996) (vacating unreviewed Board decision because it involved complex questions and vigorously disputed interpretations of agency provisions for disposal of byproduct material); *Rochester Gas and Elec. Corp.* (Sterling Power Project, Nuclear Unit No. 1) ALAB-596, 11 NRC 867, 868-69 (1980) (vacating a Board order where applicant's decision to abandon a construction project mooted intervenor's challenges to the project).

²³ *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-8, 37 NRC 181, 185 (1993) (citing *County of Los Angeles v. Davis*, 440 US 625, 631 (1979)).

²⁴ *PFS*, CLI-05-22, 62 NRC at 543 (2005). Vacatur does not reflect on the soundness of the Board's decision. *Kerr-McGee*, CLI-92-2, 43 NRC 13 (1996).

²⁵ *Kerr-McGee*, CLI-92-2, 43 NRC 13 (1996) (finding proceeding for on-site disposal of waste moot when applicant withdrew its on-site disposal application and pursued off-site disposal plan and vacating Board and Appeal Board decisions based on the on-site disposal application).

²⁶ Notably, petitioners in another proceeding have already cited and significantly relied on LBP-13-07 as support when submitting contentions on steam generator replacement issues. See Petition to Intervene, *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), at 12-16, Docket No. 50-346-LA (May 20, 2013) (citing LBP-13-07 for proposition that FENOC's steam generator replacement project is an "experiment" per § 50.59(c)(2)(viii)).

²⁷ See, e.g., *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), LBP-08-871-13, 68 NRC 905, 925 (2008) (admitting a contention, in part, because of the "reasoning of

be confused by an unreviewed decision's effect.²⁸ Therefore, the Commission vacates an unreviewable Board decision for mootness to avoid confusion and ensure that the decision has no future influence, particularly where the decision is controversial.²⁹

DISCUSSION

In LBP-13-07, the Board concluded that the Commission directed the Board to broadly “determin[e] whether any aspect of this CAL process, including a close-out of the CAL for Unit 2 that results in a plant start-up pursuant to SCE’s Unit 2 Return to Service Plan, would constitute a *de facto* license amendment proceeding.” LBP-13-07 at 10; 16. The Board stated that in determining whether there was a *de facto* license amendment, it looked to SCE’s Unit 2 Return to Service Plan and the Staff’s possible future authorization of this plan.³⁰ The Board held that “this CAL process constitutes a *de facto* license amendment proceeding that is subject to a hearing opportunity.” *Id.* at 1.

Specifically, the Board determined that SCE’s Unit 2 Return to Service Plan constituted a *de facto* license amendment request proceeding because if the NRC authorized what SCE proposed in the plan, SCE would “deviate from a technical specification or otherwise operate Unit 2 in a manner that is inconsistent with existing licensing requirements or restrictions.” *Id.* at

the *Indian Point* Licensing Board in recently admitting a similar contention”), *citing Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43, 102 (2008).

²⁸ See, e.g., 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) ADAMS Accession No. ML13143A517) (Motion) (requesting consolidation of several license amendment proceedings contemplated by LBP-13-07).

²⁹ See e.g., *Kerr-McGee*, CLI-92-2, 43 NRC 13 (1996) (noting that the proceeding was moot because it was “no longer realistic’ to believe that the Commission will need to address a proposal for on-site disposal at the West Chicago site,” *id.* at 13, when the applicant withdrew its on-site disposal application). In vacating the underlying Board and Appeal Board decisions, which involved complex questions and vigorously disputed interpretations of agency provisions for disposal of byproduct material, the Commission reasoned that doing so would “permit any similar questions that may come up to be considered anew, without the binding influence of an apparently controversial Appeal Board decision that the Commission has not had the occasion to review.” *Id.*

³⁰ LBP-13-07 at 24. The Board also used § 50.59 as guidance to determine “whether SCE’s Unit 2 Return to Service Plan requires a license amendment.” *Id.* at 23-24.

24. Therefore, the Board's "CAL process/*de facto* license amendment proceeding" holding was based on SCE's Unit 2 Return to Service Plan, Staff's review and possible authorization of that plan, and SCE's April 5, 2013 LAR submitted in response to Staff's request for additional information. *Id.* at 29-37 (outlining three independent reasons for holding). The Board recognized that its decision involved complex issues and vigorously disputed interpretations of the scope of the proceeding and applicable law.³¹ Moreover, LBP-13-07 has created confusion; the decision is unclear³² and FOE has sought Commission relief based on LBP-13-07.³³

Simply stated, the Board's decision in LBP-13-07 is now moot. Specifically, given SCE's intervening decision to retire SONGS,³⁴ it is no longer realistic to believe that the Commission will need to address a plan to restart either SONGS Unit 2 or 3.³⁵ The Staff has ceased its review of SCE's Unit 2 Return to Service Plan and April 5, 2013 LAR,³⁶ and will not be authorizing any plan outlined in the Unit 2 Return to Service Plan, or granting permission for Unit 2 or 3 to restart. Therefore, there will be no *de facto* license amendment proceeding resulting from the restart of SONGS Unit 2 under the Unit 2 Return to Service Plan.³⁷ Moreover,

³¹ See LBP-13-07 at 13 (calling SONGS CAL process complex); *id.* at 11 (recognizing that the parties "disagree sharply" about the scope of the *de facto* license amendment issue); *id.* at 22 (discussing how its *de facto* approach differed from established *de facto* case law).

³² See, e.g., <http://www.latimes.com/local/lanow/la-me-ln-san-onofre-decision-20130513,0,3187177.story> (last visited June 14, 2013) ("San Onofre ruling creates confusion").

³³ See FOE's Motion (requesting that Commission convene a Board and consolidate the license amendment proceedings contemplated by LBP-13-07).

³⁴ See <https://www.edison.com/pressroom/pr.asp?id=8143> (last visited June 14, 2013); SCE's SONGS Cessation Letter.

³⁵ See *Kerr-McGee*, CLI-92-2, 43 NRC 13 (1996) (providing similar rationale for finding proceeding moot).

³⁶ See Letter from Doug Broaddus.

³⁷ See LBP-13-07 at 24, 29, 32-33, 36-37 (reasoning that if the Staff permitted SCE to restart SONGS Unit 2 as described in SCE's Unit 2 Return to Service Plan, there would be a *de facto* license amendment). FOE's Motion to convene a Board and consolidate the license amendment proceedings contemplated by LBP-13-07 is also moot given SCE's decision to retire SONGS. Thus, the Commission should deny this pending motion. See *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-5, 47 NRC 113, 114 (1998) (granting of motion to withdraw application and terminate proceeding renders moot all remaining issues).

because SCE decided to permanently retire SONGS, there is no reasonable expectation that the events which prompted the issuance of the CAL and the Unit 2 Return to Service Plan will recur. Therefore, LBP-13-07 is moot.³⁸

Commission case law provides that a Staff appeal is moot when there “is no outstanding controversy for the Commission to resolve on appeal.”³⁹ The controversy raised by LBP-13-07 was whether the SONGS CAL process for the SONGS Unit 2 restart, including the Staff’s potential future authorization of the Unit 2 Return to Service Plan, constitutes a *de facto* license amendment proceeding.⁴⁰ This controversy is now moot because SCE is no longer seeking restart of Unit 2 or 3.⁴¹ Therefore, the Staff is not submitting a petition for review of LBP-13-07.⁴²

FOE opposes this motion to vacate and argues that to challenge LBP-13-07, the Staff must file a petition for review of LBP-13-07.⁴³ However, the Commission’s practice is to dismiss any pending appeals as moot if the underlying controversy is moot.⁴⁴ Thus, any Staff petition for review of LBP-13-07 filed after SCE’s June, 7, 2013 announcement to permanently retire

³⁸ *Advanced Medical Systems, Inc.*, CLI-93-8, 37 NRC at 185.

³⁹ *PFS*, CLI-05-22, 62 NRC 542 (2005).

⁴⁰ LBP-13-07 at 24, 29, 32-33, 36-37. The Staff notes that the case or controversy referred to the Board was whether the Staff’s CAL constituted a *de facto* license amendment, and if so, whether FOE’s Petition met the Commission’s contention admissibility requirements. See *San Onofre*, CLI-12-20, 76 NRC ___ (slip op. at 4-5). LBP-13-07 settled those controversies, by noting that the Staff’s CAL did not constitute a *de facto* license amendment, and holding that FOE’s Petition was moot. LBP-13-07 at 15-16 n. 33, 37. Regardless, those issues are also moot because even if the Board had held that the Staff’s CAL was a *de facto* license amendment and that FOE’s Petition to Intervene met the contention admissibility standards, there would be no controversy to resolve upon Commission review because SCE will not restart Units 2 or 3.

⁴¹ See SCE’s SONGS Cessation Letter; FOE’s June 11, 2013 Letter.

⁴² As the Commission and other parties are aware, the Staff intended to file a petition for review of LBP-13-07; SCE’s intervening announcement to permanently retire SONGS Units 2 and 3 was a significant development impacting Staff’s plan to do so.

⁴³ See Email re: 2.323 consultation regarding Staff motion for vacatur of LBP-13-07 from Richard Ayers to Catherine Kanatas (June 12, 2013) (attachment 2).

⁴⁴ *Yankee Atomic Electric Co.*, CLI-99-24, 50 NRC 219, 221-22 (1999). Notably, FOE appears to recognize that the April 5, 2013 LAR is moot. See FOE’s June 11, 2013 Letter.

SONGS Units 2 and 3 would be considered a pending appeal on a moot order. Filing a Petition for Review of a moot issue is inefficient and contrary to the objectives stated in the Commission's *Policy on Conduct of Adjudicatory Proceedings*.⁴⁵

Therefore, the Staff respectfully requests that the Commission “follow [its] customary practice and ‘wipe the slate clean’ by vacating the Board decision . . . that [the Commission] had not yet reviewed at the time the case became moot.”⁴⁶

CONCLUSION

For the reasons outlined above, the Staff respectfully requests the Commission to vacate LBP-13-07.

Respectfully submitted,

/Signed (electronically) by/

David E. Roth
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
Telephone: (301) 415-2749
E-mail: David.Roth@nrc.gov

Executed in Accord with 10 CFR 2.304(d)

Catherine E. Kanatas
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
Telephone: (301) 415-2321
E-mail: Catherine.kanatas@nrc.gov

⁴⁵ See *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 19 (1998) (to ensure efficient conduct of proceedings, the hearing process must be fair, free of unnecessary delay, and focused on genuine issues and real disputes).

⁴⁶ *North Atlantic Energy Service Corp.* (Seabrook Station Unit No. 1), CLI-98-24, 48 NRC 267, 269 (1998).

June 14, 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

AFFIDAVIT OF MR. MICHAEL R. JOHNSON CONCERNING
SCE'S DECISION TO RETIRE SONGS UNITS 2 AND 3

I, Michael R. Johnson, do hereby state as follows:

1. I am employed as the Deputy Executive Director for Reactor and Preparedness Programs, Office of the Executive Director for Operations, at the U.S. Nuclear Regulatory Commission (NRC). As part of my responsibilities, I am familiar with: the March 27, 2012 Confirmatory Action Letter (CAL) issued to Southern California Edison (SCE) regarding the steam generator tube degradation issues at San Onofre Nuclear Generating Station (SONGS) Units 2 and 3;¹ SCE's response to that CAL, the Unit 2 Return to Service Plan;² and SCE's April 5, 2013 license amendment request (LAR) No. 263, submitted in response to questions raised during Staff's review of the Unit 2 Return to Service Plan.³

¹ Letter from Elmo E. Collins, Regional Administrator, Region IV, USNRC, to Peter T. Dietrich, Senior Vice President and Chief Nuclear Officer, SCE, *Confirmatory Action Letter – San Onofre Nuclear Generating Station, Units 2 and 3, Commitments to Address Steam Generator Tube Degradation* (Mar. 27, 2012) (ADAMS Accession No. ML12087A323) (March 27, 2012 CAL).

² Letter from Peter T. Dietrich, Senior Vice President and Chief Nuclear Officer, SCE, to Elmo E. Collins, Regional Administrator, Region IV, US NRC, Docket No. 50-361, [CAL] – *Actions to Address Steam Generator Tube Degradation [SONGS], Unit 2* (Oct. 3, 2012) (ADAMS Accession No. ML12285A263) (Unit 2 Return to Service Plan).

³ See Letter from Peter T. Dietrich, Senior Vice President and Chief Nuclear Officer, SCE, (continued. . .)

2. This affidavit is prepared in support of the Staff's Motion to Vacate LBP-13-07 in the SONGS Units 2 and 3 CAL proceeding.

3. At approximately 8:00 am Eastern Time on June 7, 2013, I received a call from Peter T. Dietrich, Senior Vice President and Chief Nuclear Officer, Southern California Edison (SCE). On that call, Mr. Dietrich relayed that SCE would soon be informing its investors that it will not be seeking restart of either SONGS Unit 2 or Unit 3.

4. SCE issued a press release the morning of June 7, 2013 stating its decision to permanently retire SONGS: <https://www.edison.com/pressroom/pr.asp?id=8143>.

5. Later on June 7, 2013, I received a call from Mr. Dietrich. On that call, Mr. Dietrich stated that SCE would be submitting a letter certifying SCE's determination to cease operations, as required by 10 C.F.R. § 50.82(a) (Cessation Letter).

6. On June 11, 2013, I was informed that SCE's Cessation Letter would be sent to the NRC shortly after SCE's formal notification to the plant's co-owners.

7. On June 12, 2013, SCE submitted its Cessation Letter, certifying that it has permanently ceased power operation of SONGS Units 2 and 3 effective June 7, 2013.⁴

8. On June 14, 2013, SCE requested withdrawal of LAR No. 263 in light of the decision to permanently cease power operation of SONGS Units 2 and 3.⁵

(. . .continued)

Docket No. 50-361, Amendment Application Number 263, Steam Generator Program, [SONGS], Unit 2 (Apr. 5, 2013) (ADAMS Accession No. ML13098A043).

⁴ SCEC's Certification of Permanent Cessation of Power Operations San Onofre Nuclear Generating Station Units 2 and 3 (ADAMS Accession No. ML131640201).

⁵ See Letter from Richard St. Onge, Director, Nuclear Regulatory Affairs and Emergency Planning, SCE, to USNRC, Withdrawal of Amendment Application 263, Proposed Change Number (PCN) 602, Steam Generator Program, San Onofre Nuclear Generating Station, Unit 2 (June 13, 2013) (ADAMS Accession No. ML13165A217).

Affidavit of Mr. Michael R. Johnson

9. On June 14, 2013, NRC issued a letter to SCE stating that given SCE's decision to permanently retire SONGS Units 2 and 3, and to withdraw LAR No. 263, the NRC is ceasing its review of SCE's Unit 2 Return to Service Plan and April 5, 2013 LAR No. 263.⁶

10. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed in Accord with 10 CFR
2.304(d)

Michael R. Johnson
Deputy Executive Director for
Reactor and Preparedness
Programs
U.S. Nuclear Regulatory
Commission
Mail Stop O- 16 E15
Washington, DC 20555-0001
(301) 415-1713
Michael.Johnson@nrc.gov

Executed in Rockville, Maryland
this 14th day of June 2013

⁶ See letter from Doug Broaddus, Chief SONGS Special Projects Branch, USNRC to Peter T. Dietrich, Senior Vice President and Chief Nuclear Officer, SCE, San Onofre Nuclear Generating Station, Unit 2 - Withdrawal of License Amendment Request No. 263 (TAC No. MF1379) and Cessation of Review of Return to Service Report (TAC No. ME9727) (June 14, 2013) (ADAMS Accession No. ML13164A143).

Roth(OGC), David

From: Richard Ayres [ayresr@ayreslawgroup.com]
Sent: Wednesday, June 12, 2013 5:05 PM
To: Kanatas, Catherine; 'Kristin Hines Gladd'; 'Jessica L. Olson'; 'Frantz, Steven P.'; 'Burdick, Stephen J.'
Cc: Roth(OGC), David; Williamson, Edward
Subject: RE: 2.323 consultation regarding Staff motion for vacatur of LBP-13-07

Dear Cathy –

In the view of Friends of the Earth, NRC regulations provide that, if a party wishes to challenge a decision rendered by an Atomic Safety and Licensing Board, that party must file an appeal as provided in 10 CFR Section 2.341. We are unaware of any other authority that would allow such a decision to be vacated.

We will oppose any such motion.

Richard Ayres
Ayres Law Group
1707 L Street, N.W., Suite 850
Washington, D.C. 20036
202-452-9200
AyresR@AyresLawGroup.com

From: Kanatas, Catherine [mailto:Catherine.Kanatas@nrc.gov]
Sent: Wednesday, June 12, 2013 4:32 PM
To: Richard Ayres; 'Kristin Hines Gladd'; 'Jessica L. Olson'; 'Frantz, Steven P.'; 'Burdick, Stephen J.'
Cc: Roth(OGC), David; Williamson, Edward
Subject: 2.323 consultation regarding Staff motion for vacatur of LBP-13-07

Hello,

I am writing to consult on a motion the Staff intends to file no later than Friday, June 14, 2013. As you know, we filed and received an extension of time until June 14, 2013 to file a petition for review of LBP-13-07 or take other appropriate action. After reviewing the relevant case law, the Staff intends to file a motion to vacate the memorandum and order of LBP-13-07. The Staff's position is that the controversy underlying LBP-13-07 is moot given SCE's decision to retire SONGS Unit 2 and 3. It is Commission and court practice in these situations to vacate the unreviewed Board decision. This eliminates any confusion or future effects stemming from this decision.

In moving to vacate LBP-13-07, our Motion will note that FOE and NRDC's pending motion to convene a Board and consolidate LAR proceedings is moot given SCE's decision to retire SONGS Units 2 and 3.

Please let me know if you object to this motion or support this motion. If you would like to discuss further, I can be reached by email at cek2@nrc.gov or by phone at 301-415-2321. If you cannot reach me, you can contact my co-counsel David Roth at david.roth@nrc.gov or by phone at 301-415-2749.

Thank you,

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R § 2.305, I hereby certify that copies of the foregoing NRC STAFF'S MOTION TO VACATE THE LICENSING BOARD'S FULL INITIAL DECISION, LBP-13-07 dated June 14, 2013, with ATTACHMENT 1, AFFIDAVIT OF MR. MICHAEL R. JOHNSON CONCERNING SCE'S DECISION TO RETIRE SONGS UNITS 2 AND 3 dated June 14, 2013, and ATTACHMENT 2, EMAIL RE: 2.323 CONSULTATION REGARDING STAFF MOTION FOR VACATUR OF LBP-13-07 FROM RICHARD AYERS TO CATHERINE KANATAS (JUNE 12, 2013) have been served upon the Electronic Information Exchange, the NRC's E-Filing System, in the above captioned proceeding, this 14th day of June, 2013.

/Signed (electronically) by/

David E. Roth
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
Telephone: (301) 415-2749
E-mail: David.Roth@nrc.gov

Dated at Rockville, Maryland
this 14th day of June, 2013