

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of)		
SOUTHERN CALIFORNIA EDISON COMPANY)		Docket Nos. 50-361-LA
(San Onofre Nuclear Generating Station, Units 2 and 3))		50-362-LA
		August 8, 2013

**SOUTHERN CALIFORNIA EDISON COMPANY’S MOTION TO WITHDRAW
LICENSE AMENDMENT REQUEST AND TO VACATE LBP-12-25 AND
ASSOCIATED PETITION FOR REVIEW AS MOOT**

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.107(a) and § 2.323(a), Southern California Edison Company (“SCE”) moves to withdraw its pending license amendment request (“LAR”) dated July 29, 2011 to convert the current Technical Specifications for San Onofre Nuclear Generating Station (“SONGS”) Units 2 and 3 to the updated Improved Standard Technical Specifications for Combustion Engineering plants. Based on such withdrawal, SCE also moves to vacate as moot (1) the decision of the Atomic Safety and Licensing Board (“Board”) in LBP-12-25,¹ which rejected a “Petition to Intervene and Request for Hearing” (“Petition to Intervene”) filed on October 17, 2012 by Citizens Oversight, Inc. (“COPS”) with respect to the LAR, and (2) the associated January 14, 2013 petition for review of LBP-12-25 filed by COPS.

¹ See *S. Cal. Edison Co.* (San Onofre Nuclear Generating Station, Units 2 & 3), LBP-12-25, 76 NRC ___, slip op. (Dec. 21, 2012) (“LBP-12-25”).

II. BACKGROUND AND PROCEDURAL HISTORY

On July 29, 2011, SCE submitted the LAR to convert the current Technical Specifications for SONGS Units 2 and 3 to the updated Improved Standard Technical Specifications for Combustion Engineering plants.²

COPS filed its Petition to Intervene on October 17, 2012, alleging three contentions. The Petition to Intervene included proposed Contention 1, which objected to the relocation of surveillance frequencies to a licensee-controlled document; proposed Contention 2, which alleged errors in the LAR; and proposed Contention 3, which alleged use of the LAR to support restart of SONGS Unit 2.³ On November 13, 2012, SCE filed its answer opposing the Petition to Intervene on the grounds that it was late without good cause, COPS had failed to demonstrate standing to intervene, and none of the three proposed contentions was admissible.⁴ SCE opposed the admission of Contention 1 for several reasons, including that it was outside the scope of this proceeding, it did not identify any issue that was material to this proceeding, it was not adequately supported, and it did not raise a genuine dispute.⁵ The NRC Staff filed its answer on November 9, 2012 opposing the Petition to Intervene on similar grounds.⁶ COPS filed its reply on November 16, 2012.⁷ The Board held oral argument on the Petition to Intervene on December 5, 2012.

² See Letter from D. Bauder, SCE, to NRC, License Amendment Requests (LAR) 260 and 246, Technical Specifications Conversion to NUREG-1432, Rev. 3.0 Plus Selected Approved Travelers (July 29, 2011), available at ADAMS Accession No. ML112510214.

³ See Petition to Intervene at 5-16.

⁴ See generally Southern California Edison Company's Answer Opposing Petition to Intervene and Request for Hearing by Citizens Oversight (Nov. 13, 2012).

⁵ See *id.* at 18-27.

⁶ See NRC Staff's Answer to Petition to Intervene and Request for a Hearing by Citizens Oversight (Nov. 9, 2012).

⁷ See Citizens Oversight's Answer to Submissions by NRC Staff and Southern California Edison Opposing the Petition to Intervene and Request for a Hearing by Citizens Oversight (Nov. 16, 2012).

On December 21, 2012, the Board issued LBP-12-25 denying COPS' Petition to Intervene, and ruling that all of the proposed contentions were inadmissible because they did not satisfy the contention admissibility requirements in 10 C.F.R. § 2.309(f)(1). The Board ruled that Contention 1 fails to raise a material issue and, in part, is outside the scope of this proceeding.⁸ Given this ruling and the rejection of the proposed contentions, the Board did not rule on the other grounds proffered by SCE and the NRC Staff for why Contention 1 was inadmissible,⁹ and also did not rule on timeliness, standing, and a pending motion to strike.¹⁰ Because the Petition to Intervene was denied, a notice of hearing on the LAR was never issued.

On January 14, 2013, COPS filed "Citizens Oversight Petition for Review of LBP-12-25" ("Petition for Review") regarding the Board's ruling on Contention 1, but not on Contentions 2 and 3. On February 8, 2013, SCE and the NRC Staff filed answers in opposition to the Petition for Review.¹¹

On July 30, 2013, SCE informed the NRC Staff that it was withdrawing its LAR.¹² The NRC Staff notified the Commission of this action on August 6, 2013.¹³

⁸ See LBP-12-25, slip op. at 14-15.

⁹ See *id.* at 10 n.20.

¹⁰ See *id.* at 4, 21 n.30.

¹¹ Southern California Edison Company's Answer in Opposition to the Citizens Oversight Petition for Review of LBP-12-25 (Feb. 8, 2013); NRC Staff Answer to Citizens Oversight Appeal (Feb. 8, 2013).

¹² Letter from R. St. Onge, SCE, to NRC, Withdrawal of Licensing Actions due to Permanent Cessation of Operations (July 30, 2013), *available at* ADAMS Accession No. ML13212A250.

¹³ Commission Notification of Southern California Edison's Withdrawal of Standard Technical Specifications License Amendment Request (Aug. 6, 2013).

III. LEGAL STANDARDS

A. Legal Standards on Withdrawal of Applications

As stated in 10 C.F.R. § 2.107(a):

The Commission may permit an applicant to withdraw an application prior to the issuance of a notice of hearing on such terms and conditions as it may prescribe, or may, on receiving a request for withdrawal of an application, deny the application or dismiss it with prejudice. If the application is withdrawn prior to issuance of a notice of hearing, the Commission shall dismiss the proceeding.

Absent a decision on the merits, dismissal with prejudice is ordinarily inappropriate.¹⁴ Although the Commission has authority to impose “terms” on an application’s withdrawal, withdrawal with prejudice “is a particularly harsh and punitive term,” and “[t]he terms prescribed at the time of withdrawal must bear a rational relationship to the conduct and legal harm at which they are aimed.”¹⁵

In that regard, it is well settled in NRC case law that the mere potential of a future application and associated litigation does not constitute a legal injury warranting dismissal with prejudice.¹⁶ Likewise, even dismissal of a proceeding with admitted contentions is not a legal injury sufficient to warrant the imposition of conditions on withdrawal.¹⁷

¹⁴ *Phila. Elec. Co.* (Fulton Generating Station, Units 1 & 2), ALAB-657, 14 NRC 967, 973 (1981) (citing *Jamison v. Miracle Mile Rambler, Inc.*, 536 F.2d 560, 564 (3d Cir. 1976)); *P.R. Elec. Power Auth.* (N. Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1133 (1981).

¹⁵ *Fulton*, ALAB-657, 14 NRC at 974.

¹⁶ *See id.* at 979; *N. Coast*, ALAB-662, 12 NRC at 1135.

¹⁷ *See Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), LBP-99-27, 50 NRC 45, 56 (1999).

B. Legal Standards on Vacatur

The Commission will vacate unreviewed decisions of a licensing board because of mootness.¹⁸ A case is moot when there is no reasonable expectation that the matter will recur and intervening events have eradicated the effects of the action in question.¹⁹ The Commission will not only vacate board decisions under these circumstances, but also will vacate pending appeals of such decisions.²⁰

IV. THE COMMISSION SHOULD DISMISS THE LAR WITHOUT PREJUDICE AND VACATE LBP-12-25 AND THE PETITION FOR REVIEW AS MOOT

As noted above, Commission precedent dictates that, absent a decision on the merits, an applicant request for withdrawal of an application should be granted without prejudice.²¹ In this case, the Board denied COPS' Petition to Intervene, and the Commission has not yet reached the merits on the COPS' Petition for Review of LBP-12-25. Moreover, SCE's withdrawal decision is not based on the merits of the LAR or the Petition for Review.

SCE's decision is based solely on its announcement of the retirement of SONGS. SCE has no plans to re-file the LAR.²² Accordingly, the Commission should dismiss this proceeding without imposing any conditions.

¹⁸ See *Kerr-McGee Chem. Corp.* (West Chicago Rare Earths Facility), CLI-96-2, 43 NRC 13 (1996) (vacating unreviewed board decisions as moot); *Rochester Gas & Elec. Corp.* (Sterling Power Project, Nuclear Unit No. 1), ALAB-596, 11 NRC 867, 868-69 (1980) (vacating a board order where applicants decided to abandon a construction project).

¹⁹ *Advanced Med. Sys., Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-8, 37 NRC 181, 185 (1993).

²⁰ *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-05-22, 62 NRC 542, 544 (2005) (when a Board decision became moot, both the decision and the appeal of the decision were vacated as moot). See also *Kerr-McGee*, CLI-96-2, 43 NRC at 14-15; *Sterling Power Project*, ALAB-596, 11 NRC at 868-69.

²¹ See *Fulton*, ALAB-657, 14 NRC at 973; *N. Coast*, ALAB-662, 12 NRC at 1138.

²² The hypothetical possibility that SCE could submit a similar LAR at some indeterminate point in the future does not constitute legal harm. See *Energy Fuels Nuclear, Inc.* (Source Material License No. SUA-1358), LBP-95-20, 42 NRC 197, 198-99 (1995) (finding that the possibility that an applicant could re-file its license amendment application was not sufficient to support "placing onerous conditions" on the withdrawal of the license application).

Furthermore, given SCE's decision to retire SONGS and to withdraw its LAR, the Board's decision in LBP-12-25 is moot. Accordingly, the Commission should vacate LBP-12-25 and dismiss COPS' Petition for Review as moot.

V. CONCLUSION

For the foregoing reasons, the Commission should grant SCE's motion to withdraw the LAR without prejudice and to vacate LBP-12-25 and COPS' Petition for Review as moot.²³ Accordingly, the Commission should dismiss this proceeding.

Respectfully submitted,

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

Steven P. Frantz

William E. Baer, Jr.

Stephen J. Burdick

Morgan, Lewis & Bockius LLP

1111 Pennsylvania Avenue, NW

Washington, DC 20004

Phone: 202-739-5460

Fax: 202-739-3001

E-mail: sfrantz@morganlewis.com

Counsel for Southern California Edison Company

Dated in Washington, DC
this 8th day of August 2013

²³ SCE certifies that it contacted representatives for COPS and the NRC Staff pursuant to 10 C.F.R. § 2.323(b) and has made a sincere effort to resolve the issues raised in this motion. The NRC Staff stated that it does not object to the motion. COPS stated that it would be filing a written answer on the motion.

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, a copy of “Southern California Edison Company’s Motion to Withdraw License Amendment Request and to Vacate LBP-12-25 and Associated Petition for Review as Moot” was filed through the E-Filing system.

Signed (electronically) by Stephen J. Burdick
Stephen J. Burdick
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Phone: 202-739-5059
Fax: 202-739-3001
E-mail: sburdick@morganlewis.com

Counsel for Southern California Edison Company