

August 9, 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S MOTION TO VACATE LICENSING BOARD ORDER LBP-12-25

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 (Denial of Petition to Intervene and Request for Hearing), LBP-12-25, 76 NRC ____ (Dec. 21, 2012) (slip op.) (LBP-12-25). As discussed below, this case is moot because Southern California Edison (SCE) has permanently retired San Onofre Nuclear Generating Station (SONGS) Unit 2 and 3¹ and has requested to withdraw the July 29, 2011 license amendment request giving rise to the Board's holding in LBP-12-25.² Thus, SCE's withdrawal of its license amendment request and the basis for affording the opportunity for a

¹ Letter from P.T. Dietrich, Senior Vice President & Chief Nuclear Officer, to NRC, Certification of Permanent Cessation of Power Operations (June 12, 2013) (Agencywide Documents Access & Management System (ADAMS) Accession No. ML131640201) (Cessation Letter).

² Withdrawal of Licensing Action Due to Permanent Cessation of Operations San Onofre Nuclear Generating Station (SONGS), Units 2 and 3 (July 30, 2013) (ADAMS Accession No. ML13212A250) (Withdrawal Letter). On August 8, 2013, SCE, pursuant to 10 C.F.R. § 2.107, has appropriately moved to withdraw its License Amendment Request, vacate LBP-12-25, and dismiss the proceeding. Southern California Edison Company's Motion to Withdraw License Amendment Request and to Vacate LBP-12-25 and Associated Petition for Review as Moot (Aug. 8, 2013) (ADAMS Accession No. ML_____) (Motion to Withdraw and Vacate).

hearing has rendered Citizens Oversight's pending appellate challenge to LBP-12-25³ moot.⁴

The Staff respectfully requests that the Commission follow its customary course of action in such situations and vacate LBP-12-25 and dismiss Citizens Oversight's appeal as moot.⁵

BACKGROUND

On July 29, 2011, SCE submitted a license amendment request (LAR)⁶ for SONGS Units 2 and 3, asking to amend the technical specifications for each Unit to follow NUREG-1432, "Standard Technical Specifications [(STS)], Combustion Engineering Plants," Rev. 3.0, as modified by certain NRC-approved Technical Specification Task Force (TSTF) travelers.⁷ The NRC published a notice of opportunity to request a hearing on the LAR on August 16, 2012.⁸

³ See Citizens Oversight Petition for Review of LBP-12-25 (Jan. 14, 2013) (ADAMS Accession No. ML13015A000) (Appeal).

⁴ See *Private Fuel Storage, L.L.C.*, (Independent Spent Fuel Storage Installation), CLI-05-22, 62 NRC 542, 544 (2005) (holding that an appeal of a Board decision is moot when there is no outstanding controversy); *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).

⁵ *PFS*, CLI-05-22, 62 NRC at 544.

⁶ Letter from Douglas R. Bauder, Site Vice President & Station Manager, San Onofre Nuclear Generating Station, License Amendment Requests (LAR) 260 and 246 Technical Specifications Conversion to NUREG-1432, Rev. 3.0 Plus Selected Approved Travelers (July 29, 2011) (ADAMS Accession No. ML11251A086) (LAR Cover Letter). The 19 electronic documents composing the LAR are in an electronic package at ADAMS Accession No. ML112510214.

⁷ Among other proposals, SCE proposed to add administrative technical specification (TS) 5.5.2.18 "Surveillance Frequency Control Program" (SFCP) to "ensure that Surveillance Requirements specified in the Technical Specifications are performed at intervals sufficient to assure the associated Limiting Conditions for Operation are met." LAR Attachment 1, Vol. 14, Rev. 0, ITS Chapter 5.0, Administrative Controls, page 83 of 209 (ADAMS Accession No. ML11251A108). Under proposed TS 5.5.2.18.a, the SFCP "shall contain a list of Frequencies of those Surveillance Requirements for which the Frequency is controlled by the program." *Id.* Pursuant to proposed TS 5.5.2.18.b, "Changes to the Frequencies listed in the Surveillance Frequency Control Program shall be made in accordance with NEI-04-10, 'Risk-Informed Method for Control of Surveillance Frequencies,' Revision 1." *Id.*

The proposed TS 5.5.2.18 SFCP is based on TSTF-425, Relocate Surveillance Frequencies to Licensee Control - RITSTF Initiative 5b, and would be incorporated throughout the TS. See LAR Enclosure 2 at 2; Notice of Availability of Technical Specification Improvement to Relocate Surveillance Frequencies to Licensee Control – Risk Informed Technical Specification Task Force (RITSF) Initiative 5b, Technical Specification Task Force – 425, Revision 3, 74 Fed. Reg. 31,996 (July 6, 2009).

⁸ Southern California Edison, San Onofre Nuclear Generating Station, Units 2 and 3; Application and Amendment to Facility Operating License Involving Proposed No Significant Hazards Consideration Determination, 77 Fed. Reg. 49,463, (Aug. 16, 2012).

On October 17, 2012, Citizens Oversight filed a petition to intervene and a request for hearing containing three contentions.⁹ The Staff and SCE filed answers opposing admission on November 9, 2012, and November 13, 2012, respectively.¹⁰ The Board held an oral argument on the Petition in Rockville, Maryland on December 5, 2012¹¹ and issued LBP-12-25 on December 21, 2012, denying Citizens Oversight's petition and holding that all three contentions were inadmissible.¹² On January 14, 2013, Citizens Oversight filed an appeal of LBP-12-25 which claimed that denial of the petition was inappropriate, requested reversal of the Board's decision with respect to Contention 1 (regarding the "Surveillance Frequency Control Program" (SFCP)), and repeated the Petition's claims as to why Contention 1 should be admitted in the license amendment proceeding.¹³ The Staff and SCE each answered the appeal on February 8, 2013, arguing that the appeal should be denied.¹⁴ On May 13, 2013, the Secretary of the Commission extended the time to review Citizens Oversight's appeal, pending further order.¹⁵

On July 30, 2013, during the pendency of Citizens Oversight's appeal of LBP-12-25 and before the Staff issued or denied SCE's July 29, 2011 LAR, SCE submitted to the NRC its

⁹ Petition to Intervene and Request for Hearing by Citizens Oversight at 1 (Oct. 17, 2012) (ADAMS Accession No. ML12291B227) (Petition). Contention 1 asserted "that removing surveillance frequencies from the operating license document obfuscates the minimum requirements, may introduce human error, and limits review by the public." *Id.* at 5. Contention 2 claimed that SCE's July 29, 2011 LAR contained "a number of mistakes and other problems." *Id.* at 9. Contention 3 challenged SCE's proposed return to service plan for SONGS Unit 2. *Id.* at 9, 16.

¹⁰ NRC Staff's Answer to Petition to Intervene and Request for Hearing by Citizens Oversight, (Nov. 9, 2012) (ADAMS Accession No. ML12314A361); Southern California Edison Company's Answer Opposing Petition to Intervene and Request for Hearing by Citizens Oversight (Nov. 13, 2012) (ADAMS Accession No. ML12318A322).

¹¹ LBP-12-25, 76 NRC at ___ (slip op. at 3-4).

¹² *Id.* at 21. The Board did not rule on standing or timeliness. *Id.* at 14 n.23.

¹³ Appeal at 4-5. Citizens Oversight did not appeal Contentions 2 and 3. *Id.* at 5.

¹⁴ See NRC Staff Answer to Citizens Oversight Appeal (Feb. 8, 2013) (ADAMS Accession No. ML13039A193); Southern California Edison Company's Answer in Opposition to the Citizens Oversight Petition for Review of LBP-12-25 (Feb. 8, 2013) (ADAMS Accession No. ML13039A108).

¹⁵ Order (Order of Secretary Extending Time for Commission Review) (May 13, 2013) (unpublished Commission Order) (ADAMS Accession No. ML13133A368).

withdrawal of the July 29, 2011 LAR,¹⁶ and on August 8, 2013, pursuant to 10 C.F.R. § 2.107(a), moved to withdraw the LAR, vacate LBP-12-25, and dismiss the proceeding.¹⁷

SCE's withdrawal of the LAR renders the proceeding and Citizens Oversight's pending appeal of LBP-12-25 moot. Therefore, consistent with the established process reflected in pertinent case law, the Staff submits the instant motion¹⁸ to vacate the unreviewed Board order in LBP-12-25.¹⁹

LEGAL STANDARDS

Unreviewed Board decisions do not constitute precedent or binding law.²⁰ However, established Supreme Court and NRC precedent provides that unreviewed judgments are vacated when their appellate review becomes unavailable because of mootness.²¹ A case is

¹⁶ Withdrawal Letter. On August 6, 2013, the Staff notified the Commission of this withdrawal. Commission Notification of Southern California Edison's Withdrawal of Standard Technical Specifications License Amendment Request (Aug. 6, 2013) (ADAMS Accession No. ML13218A431).

¹⁷ Motion to Withdraw and Vacate. If the application is withdrawn, the Commission shall dismiss the proceeding. 10 C.F.R. § 2.107(a).

¹⁸ In accordance with 10 C.F.R. § 2.323(b), Counsel for the Staff certifies that he has made a sincere effort to contact other parties in the proceeding and resolve the issue raised in the motion, and that the efforts to resolve the issue have been unsuccessful. SCE does not object to the motion. Citizens Oversight intends to file a written answer.

¹⁹ See, e.g., *PFS*, CLI-05-22, 62 NRC at 544; *Yankee Nuclear Power Station*, CLI-99-24, 50 NRC at 221-22.

²⁰ *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 343 n.3 (1998)). See *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-13-07, && NRC ____ (May 13, 2013) (slip op. at 16) (citing same).

²¹ See *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950) ("The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss."). See, e.g., *PFS*, CLI-05-22, 62 NRC at 544 (vacating a Board's redaction order where compliance with the order rendered the order moot and providing guidance on redaction orders); *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); *Kerr-McGee Chem. Corp.* (West Chicago Rare Earths Facility), CLI-96-2, 43 NRC 13, 15 (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 that were based on the on-site disposal application).

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.²²

It is the Commission's customary and prudent course of action to vacate Board orders when appellate review is cut short by mootness thereby eliminating any confusion or future effects stemming from unreviewed Board decisions.²³ For example, participants in other cases can cite to unreviewed Board decisions to support their positions in NRC licensing litigation.²⁴ Similarly, Boards have relied on decisions of other Boards for guidance.²⁵ Likewise, parties can be confused by an unreviewed decision's effect.²⁶ 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.²⁷

²² *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)).

²³ *PFS*, CLI-05-22, 62 NRC at 544. Vacatur does not reflect on the soundness of the Board's decision. *Kerr-McGee*, CLI-96-2, 43 NRC at 15.

²⁴ See, e.g., Petition to Intervene and for an Adjudicatory Public Hearing of FENOC License Amendment Request (*FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1)) at 15–16 (May 20, 2013) (ADAMS Accession No. ML13141A250) (citing and significantly relying on an unreviewed board decision, LBP-13-07, as support when submitting contentions on steam generator replacement issues).

²⁵ 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 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).

²⁶ 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) (requesting consolidation of several license amendment proceedings contemplated by LBP-13-07, an unreviewed board decision).

²⁷ See e.g., *Kerr-McGee*, CLI-96-2, 43 NRC at 15 ("In these circumstances, and because these unreviewed Board decisions involve complex questions and vigorously disputed interpretations of agency provisions for disposal of byproduct material, the Commission as a policy matter chooses to vacate and thereby eliminate as precedent all three underlying decisions in this proceeding. This will 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.").

DISCUSSION

As noted above and in LBP-12-25, this case arises from a July 29, 2011 LAR “submitted by [SCE] to the [NRC] seeking to amend the technical specifications contained in the licenses that govern the operation of SCE’s two nuclear power reactors located near San Onofre, California.” LBP-12-25 at 1. In LBP-12-25, the Board concluded that all three of Citizens Oversight’s contentions related to SCE’s July 29, 2011 LAR were inadmissible, and therefore denied Citizen’s Petition and request for hearing. *Id.* at 1, 21.

Citizens Oversight appealed LBP-12-25, but only with respect to Contention 1.²⁸ The “key issue” raised by Contention 1 is that “relocating” the “surveillance frequency requirements from the license to a licensee-controlled document is improper because it will deprive the public of any opportunity to scrutinize or challenge further changes to the surveillance frequencies.”²⁹ After discussing the differing positions of the parties, the Board held that the “Commission’s *Millstone* decision compels the rejection of Contention 1 on the ground that it fails to raise a material issue and is therefore inadmissible under 10 C.F.R. § 2.309(f)(1)(iv).”³⁰ The Board stated that Citizens Oversight had not, as required by *Millstone*, explained with specificity particular safety or legal reasons why moving a requirement from the license into a licensee-controlled document would be improper.³¹

²⁸ Appeal at 5 (“In this request for review of LBP-12-25, Citizens Oversight suggests that the review be confined to Contention 1...”).

²⁹ LBP-12-25 at 10-11 (stating that this is “key issue” raised by Contention 1).

³⁰ LBP-12-25 at 10-11 (stating that the *Millstone* holding makes clear that the surveillance frequency “relocation” at issue in this proceeding is legal and unobjectionable).

³¹ LBP-12-25 at 13 (quoting excerpts from *Millstone* at 359-60). The Board held that the other portion of Contention 1, challenging the once-per-72-hour frequency of a particular surveillance test, was outside the scope of the proceeding because SCE had not requested to change that provision. *Id.* at 14-15. The Board held that Contention 2, regarding errors and other problems in the LAR, was inadmissible because most of the claims were outside the scope of the proceeding and one claim failed to raise a genuine dispute. *Id.* at 18. *See also id.* at 15-18 (discussing the different claims in Contention 2). The Board concluded that Contention 3, which focused on SCE’s return to service plan for Unit 2, is outside the scope of the proceeding. *Id.* at 20-21. Because Contention 1 is the only Contention before the Commission on appeal, it is the focus of the Staff’s instant motion.

The Board stated that “[i]t is somewhat misleading to say that the technical specifications have been ‘relocated’” and speculated about the interplay of 10 C.F.R. §§ 50.36, 50.59(c)(1)(i), and potential enforcement actions applicable to the proposed SFCP.³² While ruling that *Millstone* compelled dismissal of Contention 1, the Board stated that it “reject[ed] the suggestions by SCE and the NRC Staff that the ‘relocation’ of these surveillance frequency requirements is necessarily legal because (a) the nuclear industry endorses this practice, (b) NRC policy endorses it, or (c) everybody else is doing it” and the Board questioned the degree to which 10 C.F.R. § 50.59 applies to the SFCP.³³ Thus, LBP-12-25 involved discussions which are potentially confusing and complex, and in its appeal of LPB-12-25, Citizens Oversight has asked the Commission to resolve these issues as they relate to Contention 1.

However, SCE's withdrawal of its license amendment request has made Commission review of LBP-12-25 moot because SCE is no longer requesting to amend its license. Given SCE's intervening withdrawal of the July 29, 2011 LAR,³⁴ there is no remaining controversy with respect to SCE requesting to use a SFCP pursuant to TS 5.5.2.18. Moreover, because SCE decided to permanently retire SONGS, there is no reasonable expectation that SCE will submit another STS license amendment similar to the July 29, 2011 LAR.³⁵ In short, there is no license amendment that affords Citizens Oversight with a hearing opportunity. Commission case law provides that an appeal of a Board decision is moot when there “is no outstanding controversy

³² LBP-12-25 at 10 n.21.

³³ *Id.* at 14 n.23.

³⁴ See Withdrawal Letter at 1.

³⁵ *Advanced Medical Systems, Inc.*, CLI-93-8, 37 NRC at 185; Motion to Withdraw and Vacate at 5 (“SCE has no plans to re-file the LAR”).

for the Commission to resolve on appeal."³⁶ Therefore, this license amendment proceeding and Citizens Oversight's appeal of LPB-12-25 are moot.³⁷

The Commission's practice is to dismiss any pending appeals as moot if the underlying controversy is moot.³⁸ Since appellate review of LBP-12-25 has become unavailable because of mootness, the Commission should vacate LBP-12-25.³⁹ This practice is consistent with the *Policy on Conduct of Adjudicatory Proceedings*, which states that the hearing process must be focused on genuine issues and real disputes to ensure the efficient conduct of proceedings.⁴⁰ Therefore, the Commission should dismiss Citizens Oversight's pending appeal of LBP-12-25.

CONCLUSION

For the reasons discussed above, the Staff respectfully requests that the Commission follow its customary practice by vacating LBP-12-25, a Board decision that the Commission had not yet reviewed at the time the case became moot and dismiss Citizens Oversight's pending appeal as moot.

Respectfully submitted,

/Signed (electronically) by/

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³⁶ *PFS*, CLI-05-22, 62 NRC at 544.

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

³⁸ *Yankee Atomic Electric Co.*, CLI-99-24, 50 NRC at 221-22.

³⁹ See, e.g., *PFS*, CLI-05-22, 62 NRC at 544.

⁴⁰ See *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 19 (1998).

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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 LICENSING BOARD ORDER LBP-12-25 dated August 9, 2013, have been served upon the Electronic Information Exchange, the NRC's E-Filing System, in the above captioned proceeding, this 9th day of August, 2013.

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 9th day of August, 2013