

January 28, 2014

The Honorable Barbara Boxer
Chairman, Committee on Environment
and Public Works
United States Senate
Washington, DC 20510

Dear Madam Chairman:

Thank you for your letter of November 21, 2013 in which you request specific categories of documents and express concerns about our responsiveness to previous Committee requests for information.

I am responding to your letter on behalf of the U.S. Nuclear Regulatory Commission (NRC). Let me first acknowledge the direction provided by Congress in Section 403 of the recently enacted Public Law 113-76, which makes appropriations for fiscal year 2014, and for other purposes. Section 403 directs the NRC to "...comply with the July 5, 2011, version of Chapter VI of its Internal Commission Procedures when responding to Congressional requests for information." I wish to emphasize that we have always recognized, and will continue to respect, the Committee's important oversight responsibilities, both in general and with specific regard to the San Onofre Nuclear Generating Station (SONGS). We are committed to cooperating with the Committee in its oversight function, consistent with section 303 of the Atomic Energy Act, as amended, Constitutional separation-of-powers principles and long-standing Executive Branch confidentiality interests.

The spirit of cooperation to which we remain committed is reflected in the Commission's responses to the requests contained in your letters of May 23, May 31, and June 19, 2013. Within one month of that initial request, we provided the Committee with tens of thousands of documents in either electronic or hard-copy form, the product of nearly 150 employees devoting what we estimate to be more than two-thousand employee hours to the task. We provided the Committee with sensitive materials, such as draft inspection reports, draft technical evaluation report inputs, draft safety evaluation reports, no significant hazards consideration determination-related documents, minutes for SONGS oversight panel meetings, notes from the NRC staff to Commissioner offices, and emails associated with each of these categories of material.

In response to your November 21, 2013 letter, we are now providing the enclosed additional documents to address your requests, particularly documents generated after the Committee's May 23, 2013 letter. These documents include the following:

- recently generated public adjudicatory documents and a supplemental index with links to pertinent portions of NRC's electronic hearing docket;
- staff updates on steam generator tube issues and other pertinent technical issues;
- the index that you requested of Office of Investigations documents;
- recent investigatory documents from the Office of Investigations; and

- the key internal directions provided to NRC staff on how to respond to the Commission's previous requests.

Your letter expressed concern that we had removed pertinent documents prior to the June 19, 2013 delivery of documents to the Committee. A draft document index suggested that we might be withholding certain documents the NRC staff generated in response to the Committee's request. I understand this concern. However, all documents responsive to the June 19, 2013 request were provided to the Committee. During the process of collecting these documents, we gathered a number that were either not responsive to the Committee's requests or that were duplicative of materials that we had already provided to you. Some of these documents were included within the draft indices that our staff prepared of the original set.

Specifically, the documents reflected in draft indices that were not ultimately provided to the Committee were in two categories—both of which fell outside of the scope of your June 19, 2013 request: (1) public adjudicatory records, which we had already provided to the Committee via a link to the Commission's electronic hearing docket; and (2) documents related to the internal NRC deliberations regarding the agency's efforts to gather and provide documents in response to the Committee's requests. Any discrepancy between the draft index and the documents that were ultimately provided is the result of focusing our production of documents to the materials specifically requested in your letter of June 19, 2013.

Regarding your request for investigatory documents, longstanding practice by the NRC and other Executive Branch agencies is to defer transmission of these documents until the investigation is completed. We have an obligation to conduct -- and maintain the appearance of conducting -- an independent, fair, and effective investigation, and to assure that the U.S. government is best positioned to take enforcement action, if warranted. Nonetheless, given our prior agreement with regard to protecting the integrity of this particular investigation or related potential enforcement actions, we are providing these documents under the same arrangements to which the Committee previously agreed in June 2013.

We respectfully request the Committee consider other ways that we may meet your needs regarding the SONGS adjudication, in lieu of providing the pre-decisional documents that are not part of the hearing docket.

Provision of this type of information to Congress, particularly on pending matters, raises separation of powers concerns and questions about the fairness and impartiality of agency adjudicatory decision-making, a fundamental due process concern. The Commission articulated these concerns in our December 23, 2013 letter to you. We are not aware of any Federal court or administrative agency that provides the Congress or the public with the recommendation of the agency's adjudicatory advisers, draft adjudicatory orders, or initial votes that are used in formulating the adjudicator's orders ultimately issued. However, we have provided to the Committee, via an index and link to the Commission's electronic hearing docket, the Atomic Safety and Licensing Board and Commission adjudicatory orders and the pleadings of the parties. These materials are already in the public domain and provide you with extensive information on the issues being adjudicated and how the Licensing Board and Commission addressed them.

Separation of powers, consistency with Executive Branch confidentiality interest, and the importance of maintaining the integrity of the NRC's decision-making processes also underlie

our concerns, which we have expressed previously, with regard to how we respond to the Committee's requests. Also, to ensure NRC personnel are able to communicate freely and candidly with one another in order for us to make sound and independent decisions, pre-decisional deliberations on how to respond to requests for pre-decisional investigatory or adjudicatory materials must themselves be afforded the same protection as the underlying materials being discussed.

We continue to be concerned about producing materials of this type and, as a result, have not included them in our production. In order to be as responsive as possible to the Committee's request, however, we are providing you with the key internal directions provided to NRC staff on how to respond to the Committee's previous requests. We trust that these documents will provide the Committee with an understanding of the NRC's approach to responding to its requests, while at the same time preserving the integrity of the NRC's internal, pre-decisional deliberations on the subject and minimizing any chill upon future internal agency deliberations associated with responding to Congressional requests.

Again, we are committed to cooperating with the Committee in the conduct of its important oversight responsibilities and the Commission is responding to your requests in this spirit. I would welcome an opportunity to discuss these matters with you further.

Sincerely,

/RA/

Allison M. Macfarlane

Enclosures:
As stated

cc: Senator David Vitter