No. 19-72670

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE PUBLIC WATCHDOGS,
a California corporation,

Petitioners,

v.

UNITED STATES
NUCLEAR REGULATORY
COMMISSION,

Respondent.

On Petition for Writ of Mandamus to the United States Nuclear Regulatory Commission

SOUTHERN CALIFORNIA EDISON COMPANY'S UNOPPOSED MOTION TO INTERVENE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure and 26.1 and Circuit Rule 21-3, Southern California Edison Company ("SCE") states that its only parent company is Edison International. There is no other publicly held corporation that owns 10% or more of SCE stock.

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INTRODUCTION

In the action at bar, Petitioner Public Watchdogs ("Petitioner") seeks a writ of mandamus compelling the U.S. Nuclear Regulatory Commission ("NRC") to order Southern California Edison Company ("SCE") to "immediately suspend decommissioning operations" at San Onofre Nuclear Generating Station ("SONGS"). Emergency Petition for Writ of Mandamus ("Mandamus") at 1.

SCE is a co-owner of SONGS. As a precondition of the decommissioning of SONGS, SCE is in the process of transferring spent fuel from SONGS Units 2 and 3 to an Independent Fuel Storage Installation ("ISFSI") at the SONGS site where the fuel will be stored in Holtec International's ("Holtec") HI-STORM UMAX storage system licensed for such use by the NRC. *Id* at 2, 12. The fuel transfer is a necessary precursor to the completion of the decommissioning of SONGS.

SCE has a strong interest in the decommissioning proceeding as planned. SCE has expended (and continues to expend) significant resources in connection with the logistical and technical aspects of the decommissioning, in acquiring NRC approval for the radiological aspects of the decommissioning, and in securing necessary permits from the California Coastal Commission ("CCC") for the non-radiological aspects of the work (the demolition of Units 2 and 3, and the construction of the ISFSI). If decommissioning operations are suspended, the delay will result in SCE (and its ratepayers) suffering millions, and potentially tens of

millions, of dollars in financial harm.

SCE's motion to intervene is unopposed. Counsel for the NRC and Public Watchdogs have advised SCE that they do not, and will not, oppose this motion.

RELEVANT PROCEDURAL BACKGROUND

Petitioner's request for a writ of mandate is connected to a lawsuit that Petitioner initially filed in the United States District Court for the Southern District of California. Petitioner filed its complaint in the District Court on August 29, 2019, and an amended complaint on September 24, naming the NRC, SCE, Holtec, San Diego Gas & Electric Company, and Sempra Energy as defendants (*Public Watchdogs v. Southern California Edison Company et al*., 19-cv-1635-JLS (MSB) ("*Public Watchdogs II*"). Petitioner's allegations in *Public Watchdogs II* are substantively identical to the claims it makes here, including a request for an injunction suspending the decommissioning of SONGS Units 2 and 3 and the transfer of the spent fuel. Together with its original complaint, Petitioner moved for a temporary restraining order and preliminary injunctive relief.

The NRC and *Public Watchdogs II* Defendants opposed Petitioner's request for injunctive relief and also moved to dismiss Petitioner's complaint on multiple grounds—including arguments that the District Court does not have jurisdiction because, under the Hobbs Act [42 U.S.C. § 2239], Petitioner is required to first petition the NRC when challenging the NRC's licensing and certification decisions.

Defendants further asserted in *Public Watchdogs II* that, assuming that the NRC's decision is reviewable, the Circuit Court of Appeals has original jurisdiction to determine the validity of NRC final orders. After Defendants filed their motions to dismiss, Petitioner filed its petition with the NRC on September 24, 2019. The District Court has not yet ruled on the Motions or Petitioner's request for preliminary injunctive relief. A hearing on those motions is scheduled for November 25, 2019.

LEGAL STANDARD

"Intervention on appeal is governed by Rule 24 of the Federal Rules of Civil Procedure." *Bates v. Jones*, 127 F.3d 870, 873 (9th Cir. 1997). Under Rule 24(a)(2), a movant seeking to intervene as of right "must demonstrate that four requirements are met: (1) the intervention application is timely; (2) the applicant has a significant protectable interest relating to the property or transaction that is the subject of the action; (3) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the existing parties may not adequately represent the applicant's interest." *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011) (internal citation omitted)

While the proposed intervenor bears the burden of showing these four elements are met, "the requirements are broadly interpreted in favor of intervention." *Montana Wilderness Ass'n*, 647 F.3d at 897; *see also Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001) ("In general, *we construe Rule*

24(a) liberally in favor of potential intervenors.") (emphasis added). This Court's review is "guided primarily by practical considerations, not technical distinctions." *Berg*, 268 F.3d at 818 (internal quotation marks and citation omitted). "[A] liberal policy in favor of intervention serves both efficient resolution of *issues and broadened access to the courts." Wilderness* Soc'y v. *U.S. Forest Serv*., 630 F.3d 1173, 1179 (9th Cir. 2011) (citing *United States v. City of Los Angeles*, 288 F.3d 391, 397–98 (9th Cir. 2002))(emphasis added).

ARGUMENT

I. SCE Satisfies the Requirements of Rule 24(a)(2).

A. SCE's Motion Is Timely.

Timeliness with respect to motions to intervene "is a flexible concept," *United States v. Alisal Water Corp*., 370 F.3d 915, 921 (9th Cir. 2004), which is "determined by the totality of the circumstances facing would-be intervenors[.]" *Smith v. Los Angeles Unified Sch. Dist*., 830 F.3d 843, 854 (9th Cir. 2016). Three factors guide determination of timeliness: "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *Id*. (citation omitted).

A consideration of each of these factors here leads to the conclusion that SCE's intervention is timely: this proceeding is at the earliest of stages, there exists *no delay*, and intervention will cause no prejudice if granted. As to the early stage

of the proceedings, Petitioner filed its 10 C.F.R. § 2.206 Petition on September 24, 2019, the NRC has yet to schedule a hearing on Petitioner's Petition, and Petitioner moved for an emergency writ in this Court on October 21, 2019. This Court has not yet decided whether to deny Petitioner's writ outright, or to order responsive briefs under FRAP 21(b). No other events have occurred in these proceedings.

Accordingly, there has been no delay by SCE in seeking to intervene. Under FRAP 15(d) "[t]he motion [for intervention in a petition for review of an agency order] must be filed within 30 days after the petition for review is filed and must contain a concise statement of the interest of the moving party and the grounds for intervention." SCE's motion is timely because it has been made within 30 days (November 20, 2019) of the date Petitioner's writ was filed (October 21, 2019). SCE's motion is timely under Rule 15(d) even though it was not served with the petition (*see* Petitioner's Certificate of Service); SCE first learned of the petition on October 24, 2019 when Petitioner mentioned the writ in its Opposition to SCE's Motion to Dismiss in *Public Watchdogs II*.

Lastly, SCE's timely intervention in the early stages of this proceeding will not cause prejudice to the other parties. Petitioner and the NRC do not oppose this Motion. *Montana Wilderness Ass'n*, 647 F.3d at 897 (finding that motion to intervene was timely when it "was made at an early stage of the proceedings, the

parties would not have suffered prejudice from the grant of intervention at that early stage, and intervention would not cause disruption or delay in the proceedings.").

B. SCE Has Significant Protectable Interests in SONGS and the Decommissioning of It, And The Disposition Of This Action May Impair SCE's Ability To Protect Its Interests.

The "significant protectable interest" test asks whether SCE "will suffer a practical impairment of [its] interests as a result of the pending litigation." *Cal. ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006). The inquiry, importantly, is "whether the [court's decision] 'may' impair rights 'as a practical matter' rather than whether the decree will 'necessarily' impair them." *City of Los Angeles*, 288 F.3d at 40.

As the co-owner of SONGS who is undertaking the fuel transfer as a necessary precursor to the decommissioning that Petitioner seeks to enjoin, SCE has a protectable interest that is potentially jeopardized by the outcome of the mandamus petition at bar. Petitioner challenges the SONGS decommissioning plan and seeks to enjoin the decommissioning of SONGS Units 2 and 3. Mandamus at 1. SCE and its ratepayers have invested significant resources in developing a decommissioning plan for SONGS Units 2 and 3, acquiring approval for the radiological aspects of the plan from the NRC, acquiring permits for the non-radiological aspects of the plan (the construction of the ISFSI and the demolition of Units 2 and 3) from the state of

California, investing in human resources and technology necessary for the decommissioning, and constructing the ISFSI necessary to carry out the decommissioning plan.

SCE's interest in protecting the value of the authorizations and permits it acquired is a "significantly protectable interest[] related to this litigation." *Envtl. Def. Ctr. v. Bureau of Safety & Envtl. Enf't*, 2015 U.S. Dist. LEXIS 187137, at *9 (C.D. Cal. Apr. 2, 2015). In *Envtl. Def. Ctr* Plaintiff Environmental Defense Center filed an action against Defendant Bureau of Safety and Environmental Enforcement in connection with the Bureau's approval of fifty-one applications for Permits to Drill ("APDs") and applications for Permits to Modify ("APMs") authorizing well stimulation methods — including acid well stimulation and hydraulic fracturing— related to during drilling operations from offshore oil platforms located within the Santa Barbara Channel. *Id*. *3-4. Plaintiff sought to enjoin the Bureau from implementing the challenged APDs and APMs. *Id*. at *4. Exxon Mobil Corporation, which operated a Santa Ynez station located in the Santa Barbara Channel and obtained ten of the APDs and nineteen of the APMs that Plaintiff challenged, sought to intervene. *Id*. at *4-5. In allowing intervention, the Court found that the "relief sought by Plaintiff would undoubtedly have a 'significant detrimental impact on [Exxon's]' interests in its Santa Ynez Unit leases and permits [as Exxon has] legally protectable interests in the challenged permits and their plans to further use the

challenged well stimulation technology will be impaired by Plaintiff's requested relief." *Id*. at *9. Similarly, here an injunction will have a significant and detrimental impact on the value of the CCC's permits allowing the demolition of SONGS Units 2 and 3, as well as the NRC's approval of the various licensing actions relating to SONGS decommissioning. As things currently stand, SCE has acquired all necessary regulatory authorization for the transfer of spent fuel from Units 2 and 3 to the ISFSI and the decommissioning of Units 2 and 3. Mandamus at 16 ("Licensees have now obtained permission to demolish the wet storage facilities at SONGS as soon as all the fuel is transferred."). An injunction will impair SCE's ability to decommission SONGS as allowed by the permits and NRC approval.

Delay to the SONGS decommissioning will also cause SCE (and its ratepayers) significant financial harm. Declaration of Douglas R. Bauder at ¶¶6-7. At present, the spent fuel that has not yet been (but is scheduled to be) transferred into the Holtec System is stored in spent fuel pools in Units 2 and 3. *Id*. at ¶6. Spent fuel pools (referred to as "wet storage") store spent fuel in pools of water that provide radiation shielding and cooling. *Ibid*. NRC regulations require SCE to employ significantly more security personnel around Units 2 and 3 while the fuel pools contain spent fuel than will be required at SONGS when all spent fuel is secured in the ISFSI. *Ibid.* For each additional day by which removal of the spent fuel from the fuel pools is delayed, a minimum cost of approximately $100,000 will accrue,

resulting in unavoidable fixed costs of approximately $3 million per month to maintain the spent fuel in the existing fuel pools. *Id*. at ¶7. There may also be millions of dollars in additional costs due to schedule impacts on contractors supporting the offload of spent fuel to the ISFSI and—depending upon the duration of the delay and the measures taken to mitigate such delay—costs associated with remobilizing the decommissioning project. *Ibid*.

C. SCE Satisfies the Fourth Factor of Rule 24(a)(2).

In assessing whether a party to the petition will adequately represent SCE's interests—this Court considers "several factors, including whether [the NRC] will undoubtedly make all of the intervenor's arguments, whether [the NRC] is capable of and willing to make such arguments, and whether the intervenor offers a necessary element to the proceedings that would be neglected." *Prete v. Bradbury*, 438 F.3d 949, 956 (9th Cir. 2006) (quoting *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983)). The showing required for this factor is "minimal" and "is satisfied if the applicant shows that representation of its interests '*may be*' inadequate[.]" *Id*. (internal citations omitted) (emphasis added).

SCE satisfies this "minimal" requirement for multiple reasons. First the petition contains numerous claims and accusations regarding SCE's actions and characterizations of SCE statements. *See e.g.*, Mandamus at 9-12, 18-20, 22-27, 36. SCE is the only party that can speak for itself on these issues and offer the Court

relevant facts to rebut Petitioner's claims and accusations. Importantly, unlike the cases cited by Petitioner where the mandamus relief sought was limited to compelling an agency to issue a final order to allow for potential judicial review (*see e.g., In re Pesticide Action Network N. Am.*, 798 F.3d 809, 815 (9th Cir. 2015)), Petitioner here is requesting that this Court order the NRC to suspend SCE's decommissioning activities—which have previously been approved by the NRC and state regulators. Mandamus at 1 ("Public Watchdogs seeks a writ pursuant to 28 U.S.C. § 1651 compelling a recalcitrant Nuclear Regulatory Commission ("NRC") to immediately suspend decommissioning operations at San Onofre Nuclear Generating Station ("SONGS") Units 2 and 3 until it has issued a reasoned decision."). Petitioner is not only seeking a writ of mandate from this Court compelling the NRC to suspend decommissioning operations at SONGS, but also seeks an order from this Court to "stop[] cold" SCE's transfer of spent fuel. *Id.* at 36. It is SCE's conduct, not the NRC's, that is Petitioner's ultimate target. As such, SCE is not only best positioned to defend its own conduct, but also has the foundation necessary to provide the Court facts regarding the harm it (and its ratepayers) would suffer if Petitioners requested relief is granted. SCE has unique interests SONGS and in the petition at bar that the NRC is simply not suited to protect.

Second, SCE will bring a materially different perspective to this dispute than its regulator, the NRC. *Sagebrush Rebellion*, 713 F.2d at 528 (granting motion to intervene where "the intervenor offers a perspective which differs materially from that of the present parties to this litigation."). The NRC is a federal agency charged with making decisions for the benefit of the entire nation, while SCE as more specific private interests outside the scope of the broad interests the NRC takes into account which the NRC may neglect. *Snowlands Network v. U.S.*, 2012 U.S. Dist. LEXIS 144073, 2012 WL 4755161, at *3 (E.D. Cal. 2012) ("Defendant is a regulatory agency charged with making decisions for the benefit of the entire population. As a result, Applicants necessarily set forth more specific goals and objectives than the much broader interests that Defendant must take into account."); *Envtl. Def. Ctr.*, 2015 U.S. Dist. LEXIS 187137, at *12 ("As a result of these divergent interests, the Defendants may not make the same arguments as the Proposed Intervenors and it is clear that the Proposed Intervenors would offer necessary elements to the litigation that the Defendants, which much broader interests, may neglect.")

Third, SCE can offer unique facts relevant to the Court's consideration of Petitioner's (unfounded) contention of harm attributable to SCE's decommissioning plan. The petition at bar is premised on the presumption that the decommissioning plan presents such a grave and immediate danger that the NRC's failure to act on Petitioner's petition within a month warrants extraordinary relief. Mandamus at 34-

35. While the NRC has the expertise, jurisdiction and plenary authority to discuss and rebut Petitioner's contentions regarding any threat posed by the radiological components of the decommissioning plan, the decommissioning plan also has non-radiological components (such as the demolition of SONGS Units 2 and 3). As discussed previously, the California Coastal Commission has evaluated the non-radiological components and related environmental impact(s) and granted permits authorizing the decommissioning plan to proceed. It was SCE, not the NRC, who sought these permits and acquired the necessary authorizations from state regulators. It is SCE who is best positioned to offer facts regarding the Coastal Commission's findings on the environmental impact and safety of these components of the decommissioning plan.

CONCLUSION

For all the reasons stated above, SCE respectfully requests that this Court grant SCE's unopposed Motion to Intervene and allow SCE an opportunity to respond to Petitioner's writ—if the Court decides responsive briefing is necessary under FRAP 21(b).

Dated: November 20, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: November 20, 2019

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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DECLARATION OF DOUGLAS R. BAUDER IN SUPPORT OF SOUTHERN CALIFORNIA EDISON COMPANY'S UNOPPOSED MOTION TO INTERVENE

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DECLARATION OF DOUGLAS R. BAUDER

I, DOUGLAS R. BAUDER, declare and state:

1. I have personal knowledge of the facts set forth in this declaration, and if called as a witness I would testify competently and truthfully to those facts. I make this declaration in support of the unopposed motion to intervene of Southern California Edison Company ("SCE").

2. I am employed by SCE, and since October of 2013 I have worked for SCE in the positions described below.

3. I am presently SCE's Vice President of Decommissioning and Chief Nuclear Officer at San Onofre Nuclear Generating Station ("SONGS"). I have served in my present role at SONGS since November 12, 2018. In that role, I am responsible for (among other things) the safe storage and transfer of spent nuclear fuel ("SNF" or "spent fuel"), and compliance with all federal, state and local laws pertaining to the possession and storage of spent fuel at SONGS.

4. Between October 2013 and November 2018, I served as Vice President of SCE's Operational Services and Chief Procurement Officer, where I oversaw multiple business functions such as Supply Chain, Environmental Services, and Transportation Services.

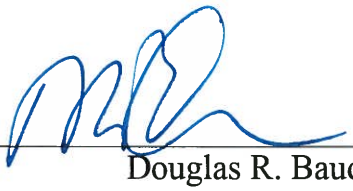
5. I have more than thirty years of experience in the nuclear energy industry. Prior to my work in the nuclear energy industry, I served as a United States Naval nuclear submarine officer. I hold a Bachelor of Science in Engineering from LeTourneau University in Longview, Texas.

6. SCE and its customers will be financially harmed by costs that will be incurred by SCE and its customers if the spent fuel transfer operations at SONGS are halted, which will necessarily delay decommissioning of

SONGS Units 1 and 2. Currently, spent fuel stored in spent fuel pools in Units 2 and 3 is being transferred to an ISFSI. Spent fuel pools (referred to as "wet storage") store spent fuel in pools of water that provide radiation shielding and cooling. Current NRC regulations require SCE to employ significantly more security personnel while the fuel pools contain spent fuel than will be required at SONGS when all spent fuel is secured in the ISFSI. SONGS employs dozens of security officers and support crew in connection with the fuel pools. Spent fuel pools also require the ongoing maintenance of infrastructure systems to ensure the pools are maintained and cooled.

7. For each additional day by which the removal of the spent fuel from the fuel pools is delayed, a minimum cost of $100,000 will accrue, resulting in unavoidable fixed costs of approximately $3 million per month to maintain operable fuel pools. The $3 million per month figure solely relates to maintaining operable fuel pools. Each 30-day delay may also result in millions of dollars in additional costs due to schedule impacts on contractors supporting the offload of spent fuel to the ISFSI. Further delay may — depending upon the duration of the delay and the measures taken to mitigate such delay — cause millions of dollars more in costs due to impacts on the subsequent decommissioning project, and costs of remobilizing the decommissioning equipment, as well as the personnel needed for the fuel-transfer project

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on November 20, 2019, in San Diego County, California.



Douglas R. Bauder