No. 20-70899

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PUBLIC WATCHDOGS,

Petitioners,

v.

UNITED STATES
NUCLEAR REGULATORY
COMMISSION,

Respondent.

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.

Dated: April 2, 2019

Respectfully submitted,

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INTRODUCTION

In the action at bar, petitioner Public Watchdogs seeks review of the Nuclear Regulatory Commission's ("NRC") denial of the 10 C.F.R. § 2.206 petition by which petitioner sought to halt the decommissioning of the San Onofre Nuclear Generating Station ("SONGS"). Here, as with the § 2.206 petition, petitioner seeks an injunction to compel the NRC to order Southern California Edison Company ("SCE") to "suspend all spent nuclear fuel transfer operations at…SONGS…Units 2 and 3 pending this Court's review of the NRC's arbitrary and capricious denial of Public Watchdog's petition under 10 C.F.R. § 2.206." Dkt. 2-1 (Motion for Temporary Injunctive Relief Pending Judicial Review of Agency Action) ("Motion")) at 1.

SCE is the operator and a co-owner of SONGS. As a part of the decommissioning of SONGS, and under the oversight and regulation of the NRC, SCE is in the process of transferring spent fuel from SONGS Units 2 and 3 to an Independent Spent Fuel Storage Installation ("ISFSI") at the SONGS site where the fuel will be stored in Holtec International's HI-STORM UMAX storage system licensed for such use by the NRC. *Id* at 6-11. 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 development of the decommissioning plan, 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, SCE and its customers will suffer millions of dollars in financial harm.

SCE's motion to intervene in this proceeding is unopposed. Counsel for the NRC and Public Watchdogs have advised SCE that they do not oppose this motion. This Court previously granted SCE's motion to intervene in the preceding related case *Public Watchdogs v. NRC* No. 19-72670 (2019) wherein petitioner filed a mandamus petition in this Court seeking the suspension of fuel transfer operation at SONGS while the NRC considered the 2.206 Petition at bar here. *Public Watchdogs v. NRC*. Dkt. 19 (Order denying writ) at 4 n.2.

RELEVANT PROCEDURAL BACKGROUND

A. Public Watchdogs II

Although this is a separate action, the instant appeal and request for injunctive relief are related to a prior lawsuit petitioner filed in the United States District Court for the Southern District of California naming the NRC, SCE, Holtec, International, 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"). Motion at 4 n. 1. That lawsuit which is one of the several proceedings Public Watchdogs has initiated aimed at the same goal—halting the decommissioning of SONGS and the transfer and storage of spent fuel at the site in the ISFSI. In that action, petitioner moved for a temporary restraining order and preliminary injunction. Petitioner's claims in *Public Watchdogs II* are almost identical to the claims it made in its § 2.206 petition to the NRC and those made here. In each of those proceedings, Public Watchdog has challenged the safety of the Holtec System and the decommissioning plan approved of and overseen by the NRC. *See e.g. Public Watchdogs II* at Dkt. 60 (Dismissal Order) at 3-5, 6:24-7:6.

In *Public Watchdogs II*, the NRC and other defendants opposed petitioner's request for injunctive relief and moved to dismiss petitioner's complaint. On December 3, 2019, the District Court denied the motion for preliminary injunction, and dismissed the action. Among other findings, the District Court ruled that it lacks subject matter jurisdiction under the Hobbs Act [42 U.S.C. § 2239]. *Public Watchdogs II* at Dkt. 60 (Dismissal Order) at 16-36.

Petitioner has appealed from the District Court's dismissal of that action. *Public Watchdogs v. Southern California Edison Co.*, Case No. 19-56531, (9th Cir. Dec 31, 2019) ("*Public Watchdogs II Appeal*"). Petitioner designated the *Public Watchdogs II Appeal* as a related case. Dkt. 2-1 at 26 (Statement of Related Cases). The *Public Watchdogs II Appeal* is pending, and oral argument is scheduled for June

3, 2020. *Id.* Petitioner filed the instant motion for injunctive relief on the same day (March 31, 2020) that SCE and the NRC filed their Answering Briefs in the *Public Watchdogs II Appeal*. *Public Watchdogs II Appeal* Dkts. 26 and 27.

B. Public Watchdogs v. NRC (2019)

On October 21, 2019, while the motions to dismiss in *Public Watchdogs II* and the NRC ruling on the 2.206 Petition were still pending, petitioner sought a writ of mandamus from this Court seeking to enjoin the decommissioning of SONGS and the transfer of spent fuel into dry storage in the Holtec System certified by the NRC. *Public Watchdogs v. NRC*, Dkt. 1-3. In its mandamus petition, petitioner argued that it was likely to suffer irreparable injury unless the transfer of spent fuel was enjoined while the NRC considered the 2.206 Petition. *See e.g., id*. at 3, 30. This Court denied the writ petition thereby allowing the fuel transfer to continue while the NRC reviewed the 2.206 Petition that is the subject of this action. *Public Watchdogs v. NRC*, Dkt. 19. SCE successfully intervened in *Public Watchdogs v. NRC*. *Public Watchdogs v. NRC*, Dkt. 19 at fn. 4.

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

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

C. 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 Petition for Review on March 30, 2020 and its motion for injunctive relief on March 31, 2020. No other events have occurred in these proceedings.

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 (April 29, 2019) of the date petitioner's Petition for Review (March 30, 2020). SCE's motion is timely under Rule 15(d).

Lastly, SCE's timely intervention in the early stages of this proceeding will not cause prejudice to the other parties. *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."). Petitioner and the NRC do not oppose this motion.

D. 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 part of the decommissioning that petitioner seeks to enjoin, SCE has a protectable interest that is potentially jeopardized by the outcome of the motion for injunctive

relief at bar, and this appeal in general. Petitioner challenges the SONGS decommissioning plan, seeks to enjoin the decommissioning of SONGS Units 2 and 3, and ultimately seeks to compel *SCE* to "submit an amended decommissioning plan[.]" Motion at 1, 20. SCE and its customers have invested significant resources in developing the current 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 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.

Similar to Exxon in *Envtl. Def. Ct*, 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. An injunction will have a significant and detrimental impact on the value of the CCC's permits allowing the decommissioning of SONGS Units 2 and 3, as well as the NRC's approval of the various licensing actions relating to SONGS decommissioning. Further, if petitioner is ultimately successful in this appeal in stopping decommissioning activities, SCE will have wasted resources and effort that it put into developing and carrying out its decommissioning plan and acquiring related licenses, permits, and authorizations.

Additionally, temporary delay of the decommissioning of SONGS will also cause SCE (and its customers) 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. At present, briefing in this case is not scheduled to be complete until August 10, 2020, with a hearing taking place sometime after. Dkt. 1-1 (Time Schedule Order setting deadline of August 10, 2020 for petitioner's reply brief). Therefore, at minimum more than 10 million dollars in costs will accrue if petitioner's request for injunctive relief is granted and the decommissioning is suspended until this appeal is decided. 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 costs associated with remobilizing the decommissioning project. Bauder Decl. at ¶7.

E. 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, petitioner directly challenges SCE's NRC-filed decommissioning plan, SCE's related decommissioning activities, and SCE's use of the Holtec System at SONGS. *See e.g.*, Motion at 6-13. 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, petitioner here is requesting that this Court order the NRC to suspend *SCE's* decommissioning activities and ultimately stop the activities carrying out the decommissioning plan that was developed *by SCE*—all of which have previously been approved by the NRC and state regulators. Motion at 20, 24. It is SCE's decommissioning plan and conduct (*i.e.* its decommissioning activities taken pursuant to the plan) that is petitioner's ultimate target.

Second, SCE is not only best positioned to defend the plan and its own conduct, but also has the foundation necessary to provide the Court facts regarding

the harm SCE (and its customers) would suffer if petitioner's appeal is successful, or if petitioner's request for temporary injunctive relief is granted. Indeed, as to the motion at bar, in considering the balance of the equities it is SCE and its customers who will suffer millions of dollars in harm (not the NRC) if petitioner's motion is successful and decommissioning is suspended. Motion at 23. The NRC cannot speak on this topic, but SCE can. SCE has unique interests that the NRC is not suited to protect.

Third, SCE can offer unique facts relevant to the Court's consideration of Petitioner's (unfounded) contention of harm attributable to SCE's decommissioning activities. For instance, petitioner's motion is premised on the presumption that the decommissioning plan is faulty and presents such a grave danger that the NRC's failure to act on petitioner's 2.206 Petition and order SCE to halt fuel transfer and require SCE to develop a different decommissioning plan warrants extraordinary and immediate relief. *See e.g.*, Motion 17-20. 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 construction of the ISFSI and 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. At minimum, the California Coastal Commission's approval of the plan is relevant to both the balance of the equities and the public interest considerations of petitioner's request for injunctive relief. Motion at 23-24. 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 resources that SCE spent acquiring the Coastal Commission's approval, and the Coastal Commission's findings on the environmental impact and safety of the non-radiological components of the decommissioning plan.

Fourth, 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 is a private entity with private interests that may be outside the scope of the interests the NRC takes into account. *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.")

CONCLUSION

For all the reasons stated above, SCE respectfully requests that this Court grant SCE's unopposed Motion to Intervene.

Dated: April 2, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 27–1(1)(d) and Federal Rules of Appellate Procedure Rules 27(d)(1), I certify that:

This motion complies with the requirements of Ninth Circuit Rule 27–1(1)(d) and Federal Rules of Appellate Procedure Rules 27(d)(1) because it is proportionately spaced font, has a Times New Roman 14-point font, and does not exceed 20 pages or 5,200 words. This motion contains 3,169 words.

Dated: April 2, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2020, 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: April 2, 2019

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
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PUBLIC WATCHDOGS,

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UNITED STATES
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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

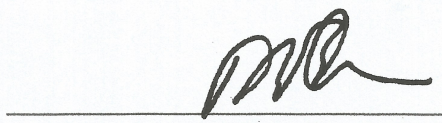
Longview, Texas.

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 April 2, 2020, in San Diego County, California.



Douglas R. Bauder

CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2020, 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: April 2, 2019

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