

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Allison M. Macfarlane, Chairman
Kristine L. Svinicki
George Apostolakis
William D. Magwood, IV
William C. Ostendorff

In the Matter of)

SOUTHERN CALIFORNIA EDISON COMPANY)

(San Onofre Nuclear Generating Station, Units 2 and 3))

Docket Nos. 50-361-LA &
50-362-LA

CLI-13-10

MEMORANDUM AND ORDER

Earlier this year, Citizens Oversight, Inc. appealed the Atomic Safety and Licensing Board's denial of its request for hearing and petition to intervene in this license amendment proceeding, challenging the Board's rejection of one of its proposed contentions.¹ While Citizens Oversight's appeal was pending, Southern California Edison Company filed a motion to withdraw its license amendment request, vacate the Board's decision, and dismiss the appeal as moot.² The NRC Staff likewise seeks to vacate the Board's decision and dismiss the

¹ *Citizens Oversight Petition for Review of LBP-12-25* (Jan. 14, 2013) (filed Jan. 15, 2013) (Appeal).

² *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) (Edison Motion).

appeal.³ For the reasons set forth below, we grant Southern California Edison's and the Staff's motions.

I. BACKGROUND

In 2011, Southern California Edison submitted a request to amend the operating licenses for San Onofre Nuclear Generating Station Units 2 and 3, in which it sought to revise the technical specifications for both units.⁴ Among other things, Southern California Edison proposed to relocate a number of surveillance frequencies from the technical specifications to a separate, licensee-controlled document describing a new "Surveillance Frequency Control Program."⁵ Surveillance frequencies indicate how often Southern California Edison must test or inspect (that is, fulfill the surveillance requirements⁶ for) certain structures, systems, and components.⁷ Under Southern California Edison's proposal, the surveillance requirements would have remained in the operating licenses' technical specifications, but the details concerning surveillance frequencies would, in most cases, have resided in the licensee's

³ *NRC Staff's Motion to Vacate Licensing Board Order LBP-12-25* (Aug. 9, 2013) (Staff Motion).

⁴ The complete license amendment request is available at ADAMS accession no. ML112510214 (package) (LAR).

⁵ See LAR, Attachment 1, Vol. 14, at 83 (ML11251A108) (proposed revision to Technical Specification 5.5.2.18); Bauder, Douglas R., Site Vice President and Station Manager, San Onofre Nuclear Generating Station, letter to NRC (July 29, 2011), Enclosure 2, at 2, Enclosure 3, at 2 (ML11251A086).

⁶ Surveillance requirements "are requirements relating to test, calibration, or inspection to assure that the necessary quality of systems and components is maintained, that facility operation will be within safety limits, and that the limiting conditions for operation will be met." 10 C.F.R. § 50.36(c)(3).

⁷ See LAR, Attachment 1, Vol. 1, at 30-38 (ML11251A094) (describing surveillance frequencies and providing examples).

Surveillance Frequency Control Program.⁸ The program, if approved, generally would have enabled Southern California Edison to make future changes to the surveillance frequencies without further amending its operating licenses.⁹

The Staff published a notice of the license amendment request in the *Federal Register* with an opportunity for public comment, along with an opportunity to request a hearing.¹⁰ Citizens Oversight requested a hearing and submitted three proposed contentions—Contentions 1, 2, and 3.¹¹ Southern California Edison and the Staff opposed the hearing request.¹² The Board denied the hearing request, finding that none of the proposed contentions were admissible.¹³

Citizens Oversight was particularly concerned that relocation of the surveillance frequencies to the Surveillance Frequency Control Program would permit Southern California

⁸ See *id.*, Vol. 14, at 83.

⁹ As proposed, Southern California Edison would have controlled changes to the surveillance frequencies as long as those changes satisfied the provisions of NEI 04-10. See *id.* (citing NEI-04-10, Risk-Informed Technical Specifications Initiative 5b, Risk-Informed Method for Control of Surveillance Frequencies, Rev. 1 (Apr. 2007) (ML071360456)). If Southern California Edison sought to make a change to a surveillance frequency that did not conform to NEI 04-10, it would then need to request a license amendment pursuant to 10 C.F.R. § 50.90.

¹⁰ 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, 49,463-64, 49,471 (Aug. 16, 2012) (Notice).

¹¹ *Petition to Intervene and Request for Hearing by Citizens Oversight* (Oct. 17, 2012), at 5-16 (Hearing Request).

¹² *Southern California Edison Company's Answer Opposing Petition to Intervene and Request for Hearing by Citizens Oversight* (Nov. 13, 2012), at 2; *NRC Staff's Answer to Petition to Intervene and Request for Hearing by Citizens Oversight* (Nov. 9, 2012), at 1.

¹³ LBP-12-25, 76 NRC 540, 543 (2012).

Edison to modify the time between surveillances “with no oversight by the public and no approval from the NRC.”¹⁴ Citizens Oversight appealed the Board’s ruling, urging us to reverse the Board and admit Contention 1.¹⁵ In Contention 1, Citizens Oversight had asserted that public oversight through the NRC’s adjudicatory hearing process is necessary to prevent the diminished safety that Citizens Oversight had argued would result from the Surveillance Frequency Control Program.¹⁶

During the pendency of Citizens Oversight’s appeal, Southern California Edison notified the Staff of its intent to permanently shut down San Onofre Units 2 and 3.¹⁷ Southern California Edison subsequently issued a certification of permanent shutdown.¹⁸ A month later, Southern California Edison informed the Staff that it was withdrawing a number of proposed licensing

¹⁴ Appeal at 6.

¹⁵ *Id.* at 5. Citizens Oversight did not challenge the Board’s dismissal of Contentions 2 and 3. In Contention 2, Citizens Oversight pointed out perceived errors and inconsistencies in the license amendment request. See Hearing Request at 9-16. In Contention 3, Citizens Oversight asserted that the Staff should process as a separate license amendment request Southern California Edison’s proposal to restart Units 2 and 3 after the January 2012 emergency shutdown. *Id.* at 16. Southern California Edison and the Staff opposed the appeal. *Southern California Edison Company’s Answer in Opposition to the Citizens Oversight Petition for Review of LBP-12-25* (Feb. 8, 2013), at 2 (Southern California Edison Answer); *NRC Staff Answer to Citizens Oversight Appeal* (Feb. 8, 2013), at 1 (Staff Answer).

¹⁶ See Hearing Request at 5-9; Appeal at 6.

¹⁷ See *NRC Staff Motion for Extension of Time to File Petition for Review* (filed in the San Onofre Confirmatory Action Letter electronic hearing docket) (June 7, 2013) (ML13158A183).

¹⁸ Dietrich, Peter T., Senior Vice President and Chief Nuclear Officer, Southern California Edison, letter to NRC (June 12, 2013), at 1 (ML131640201).

actions, including the license amendment request challenged here.¹⁹ Southern California Edison and the Staff filed the instant motions shortly thereafter.

Southern California Edison now requests that we permit it to withdraw its license amendment request without conditions and without prejudice.²⁰ Both Southern California Edison and the Staff request that we dismiss Citizens Oversight's appeal and vacate as moot the Board's decision in LBP-12-25.²¹

Citizens Oversight opposes the motions, in part.²² Although it does not object to Southern California Edison's motion to withdraw the license amendment request, Citizens Oversight argues that it would be inappropriate to vacate LBP-12-25 and dismiss its appeal as moot.²³ According to Citizens Oversight, other licensees might in the future seek to relocate their surveillance frequencies to licensee-controlled documents.²⁴ Therefore, Citizens Oversight asserts that its appeal presents an opportunity for us to consider its challenge to the relocation

¹⁹ St. Onge, Richard, Director, Nuclear Regulatory Affairs and Emergency Planning, Southern California Edison, letter to NRC (July 30, 2013), at 1 (ML13212A250); *Commission Notification of Southern California Edison's Withdrawal of Standard Technical Specifications License Amendment Request* (Aug. 6, 2013).

²⁰ See Edison Motion at 5.

²¹ See *id.* at 5-6; Staff Motion at 2.

²² See *Citizens Oversight's Answer to Motion to Vacate Ruling of ASLB on Petition to Intervene and Request a Hearing and the Subsequent Appeal of that Ruling* (Aug. 18, 2013) (filed Aug. 19, 2013), at 2 (Citizens Oversight Answer).

²³ *Id.* at 12, 16.

²⁴ *Id.* at 12.

of surveillance frequencies as a general matter, outside of an active license amendment request.²⁵

II. DISCUSSION

Upon receipt of a motion to withdraw an application, we may place terms and conditions on the withdrawal, deny the application, or dismiss the application with prejudice.²⁶ Southern California Edison's motion to withdraw is unopposed, and it appears that neither Citizens Oversight nor the public will be prejudiced by the withdrawal.²⁷ Southern California Edison has permanently shut down both units; both reactors have been defueled.²⁸ We therefore grant Southern California Edison's motion to withdraw its license amendment request without placing terms or conditions on the withdrawal, and we decline to dismiss the application with prejudice.²⁹ As a result of Southern California Edison's withdrawal, this proceeding is now moot.³⁰

²⁵ *Id.*

²⁶ See 10 C.F.R. § 2.107(a).

²⁷ See *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-99-24, 50 NRC 219, 222 (1999) (finding no prejudice to either the intervenors or the public where the intervenors would have been "in precisely the same position in any subsequent proceeding as if they had prevailed not only on their instant appeal but also on the subsequent merits portion of th[e] proceeding"); *Puerto Rico Electric Power Authority* (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1135 & n.11 (1981) (observing that an opposing party's litigation expenses—present or future—do not "provide a basis for departing from the usual rule that a dismissal should be without prejudice").

²⁸ See Dietrich, Peter T., Senior Vice President and Chief Nuclear Officer, Southern California Edison, letter to NRC (July 22, 2013) (ML13204A304); Dietrich, Peter T., Senior Vice President and Chief Nuclear Officer, Southern California Edison, letter to NRC (June 28, 2013) (ML13183A391).

²⁹ See *Yankee Rowe*, CLI-99-24, 50 NRC at 221-22 ("[T]he dismissal of an appeal with prejudice (similar to termination of a proceeding with prejudice) generally implies that we have (continued. . .)

Citizens Oversight argues that we should not dismiss its appeal or vacate LBP-12-25 notwithstanding Southern California Edison's withdrawal of its license amendment request.³¹ In particular, Citizens Oversight asserts that its appeal is not moot because the safety concerns that it raised in Contention 1 would apply equally to similar, future license amendment requests sought by licensees other than Southern California Edison.³² But the possibility that an issue may arise in the future is not grounds to continue with an appeal in a proceeding where no live controversy remains between the litigants.³³ To be sure, we have recognized an exception to the mootness doctrine when the same litigants are likely to be subject to similar future action.³⁴ But because Southern California Edison has permanently ceased operation of San Onofre Units 2 and 3, we do not expect the issues raised on appeal to arise in a future adjudication involving Citizens Oversight, Southern California Edison, and the NRC Staff.³⁵

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ruled on the merits of the appeal . . . [and is] reserved for unusual situations involving substantial prejudice to an opposing party or to the public interest in general.”).

³⁰ See *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-98-24, 48 NRC 267, 268-69 (1998); *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-5, 47 NRC 113, 114-15 (1998).

³¹ Citizens Oversight Answer at 12.

³² See *id.* at 12-13.

³³ CLI-13-9, 78 NRC __, __ (Dec. 5, 2013) (slip op. at 7-8).

³⁴ See CLI-13-9, 78 NRC at __ (slip op. at 7-8 n.23); *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-8, 37 NRC 181, 187 (1993). See also *Toledo Edison Co. and Cleveland Electric Illuminating Co.* (Davis-Besse Nuclear Power Station, Units 1, 2, and 3), ALAB-560, 10 NRC 265, 400 (1979).

³⁵ See CLI-13-9, 78 NRC at __ (slip op. at 8). In the same vein, we have recognized an exception to the mootness doctrine when a case is “capable of repetition, yet evading review.” *Advanced Medical Systems*, CLI-93-8, 37 NRC at 185 (quoting *Southern Pacific Terminal Co. v. Interstate Commerce Comm’n*, 219 U.S. 498, 515 (1911)); *Securities & Exchange Comm’n v.* (continued. . .)

In essence, Citizens Oversight has requested that we issue an advisory opinion—a practice we disfavor³⁶—on the soundness of relocating certain surveillance frequencies from operating license technical specifications to licensee-controlled documents.³⁷ We find, however, that such an issue is better resolved in the context of a concrete dispute, where all of the parties have a stake in the outcome of the litigation.³⁸ If Citizens Oversight wishes to pursue its concerns about the safety of relocating certain surveillance frequencies generically, it may, at any time, file a petition for rulemaking to amend 10 C.F.R. § 50.36 (or any other regulatory provision).³⁹ But in the absence of a live controversy here, we dismiss this proceeding, and Citizens Oversight’s appeal, as moot.⁴⁰

It is our customary practice to vacate a challenged licensing board decision when, during the pendency of an appeal, the proceeding becomes moot.⁴¹ We see no reason to depart from

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Sloan, 436 U.S. 103, 109 (1978); *Center for Science in the Public Interest v. Regan*, 727 F.2d 1161, 1170 (D.C. Cir. 1984)). But a challenge to a different licensee’s request to relocate its surveillance frequencies would not evade future review. See *id.* at 188. If a licensee sought to relocate its surveillance frequencies from its operating license to a licensee-controlled document, then it would need to request a license amendment, which would trigger an opportunity for a member of the public to request a hearing. See 42 U.S.C. § 2239(a)(1)(A), AEA § 189a.

³⁶ *Calvert Cliffs 3 Nuclear Project, LLC & UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-13-4, 77 NRC 101, 105 (2013).

³⁷ See Citizens Oversight Answer at 12-13.

³⁸ See CLI-13-9, 78 NRC at __ (slip op. at 8).

³⁹ See 10 C.F.R. § 2.802(a) (“Any interested person may petition the Commission to issue, amend[,] or rescind any regulation.”).

⁴⁰ See *id.* § 2.107(a) (“If the application is withdrawn prior to issuance of a notice of hearing, the Commission shall dismiss the proceeding.”).

⁴¹ See CLI-13-9, 78 NRC at __ (slip op. at 9-10 & n.30) (and cases cited therein).

