

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of)	
)	
SOUTHERN CALIFORNIA EDISON COMPANY)	Docket Nos. 50-361 and 50-362
)	
(San Onofre Nuclear Generating Station))	June 28, 2012
)	

**SOUTHERN CALIFORNIA EDISON’S ANSWER OPPOSING FRIENDS OF THE
EARTH’S APPLICATION TO STAY ANY DECISION TO RESTART UNITS 2 OR 3 AT
THE SAN ONOFRE NUCLEAR GENERATING STATION**

I. INTRODUCTION

On June 18, 2012, the Friends of the Earth (“FOE”) distributed an “Application to Stay Any Decision to Restart Units 2 or 3 at the San Onofre Nuclear Generating Station Pending Conclusion of the Proceeding Regarding Consideration of the Safety of the Replacement Steam Generators” (“Stay Application”). The Stay Application purports to be filed pursuant to 10 C.F.R. § 2.342(e), although FOE also requests a temporary stay under 10 C.F.R. § 2.342(f) until the Commission renders a decision on the Stay Application under Section 2.342(e). Southern California Edison Company (“SCE”) opposes the Stay Application, as well as the request for temporary relief, as both requests lack bases and/or validity in law or fact. Nonetheless, out of an abundance of caution and to fully reserve its rights, SCE submits this Answer to the Stay Application pursuant to 10 C.F.R. § 2.342(d).¹

¹ Along with the Stay Application, FOE submitted other documents, including a June 18, 2012, “Petition to Intervene and Request for Hearing by Friends of the Earth,” and a May 31, 2012, “Declaration of Arnold Gunderson Supporting the Petition to Intervene by Friends of the Earth Regarding the Ongoing Failure of the Steam Generators at the San Onofre Nuclear Generating Station.” For the same reasons fully set forth in this Answer, these other documents also should be summarily rejected by the Commission. However, SCE reserves the right to respond to these documents, if necessary, at a later date, in accordance with 10 C.F.R. § 2.309(h). Additionally, the Natural Resources Defense Council (“NRDC”) submitted a June 27, 2012, “Natural Resources Defense Council’s (NRDC) Response in Support of Friends of the Earth Petition to Intervene and NRDC’s Notice of Intent to Participate.” This filing also lacks legal bases and should be

In summary, the Stay Application is fatally deficient for several reasons and should be rejected in its entirety. First, there is no existing proceeding in which to file the Stay Application. There simply is no proceeding to be stayed—and FOE cannot create such a proceeding by filing a Stay Application. Second, FOE does not have a right to file a Stay Application under 10 C.F.R. § 2.342. Third, FOE lacks standing to file the Stay Application. Finally, even if the Stay Application were permissible, FOE has failed to satisfy the standards prerequisite to issuance of a stay, as set forth in 10 C.F.R. §§ 2.342(e) and (f). For all of these reasons, the Stay Application should be rejected in its entirety by the Commission.

II. BACKGROUND

On January 31, 2012, a leak was identified in a steam generator tube in one of the SONGS Unit 3 steam generators. This leak was well below allowable limits, and presented no hazard to the public health and safety. Pursuant to established procedures, the plant's Licensed Operators shut down Unit 3. At the time, SONGS Units 2 was already shut down and undergoing a refueling outage.

On March 23, 2012, SCE sent a letter to the NRC committing to take certain actions to determine and address the causes of the leak and related instances of tube wear prior to restart of the SONGS units.² The NRC memorialized its understanding of the actions planned by SCE in a Confirmatory Action Letter (CAL), which confirmed the actions to be taken prior to restarting either unit. The CAL also stated that permission for the SONGS units to resume power operations would be provided by the NRC in writing.³ SCE is currently in the process of

summarily rejected by the Commission. Nevertheless, SCE again reserves the right to respond as necessary to the NRDC filing at a later date as well.

² Letter from P. Dietrich, SCE, to E. Collins, NRC, Steam Generator Return to Service Action Plan, San Onofre Nuclear Generating Station (Mar. 23, 2012).

³ Letter from E. Collins, NRC, to P. Dietrich, SCE, Confirmatory Action Letter – San Onofre Nuclear Generating Station, Units 2 and 3, Commitments to Address Steam Generator Tube Degradation, at 3 (Mar. 27, 2012), *available at* ADAMS Accession No. ML12087A323.

implementing these actions. SCE has not requested any license amendment to support restart of the SONGS units, and has not determined whether such a license amendment will be necessary. The current licenses for the SONGS units continue to apply. Neither the NRC nor SCE has initiated a proceeding under Part 2 of the Commission's regulations with respect to restart of the SONGS units.

III. LEGAL STANDARDS

A. NRC Proceedings

As a threshold matter, the Commission has noted that “[i]t is axiomatic that a person cannot intervene in a proceeding before the proceeding actually exists.”⁴ NRC regulations explain that “[a] proceeding commences when a notice of hearing or a notice of proposed action under § 2.105 is issued.”⁵ Citing these regulations, the Commission explained in *Millstone* that “issuance of a ‘notice of hearing’ or a ‘notice of proposed action’ is a prerequisite to the initiation of a ‘proceeding.’”⁶

Herein, there is no “notice of hearing.” There is no “notice of proposed action.” There simply is no proceeding to be stayed as a matter of law, fact, or NRC procedure.

B. Standing

Under 10 C.F.R. § 2.309(d)(1), a petitioner must provide specified information to support a claim of standing. Judicial concepts of standing are generally followed in NRC proceedings.⁷ Thus, to demonstrate standing, a petitioner must show: (1) an actual or threatened, concrete and

⁴ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-12, 59 NRC 237, 240 (2004)

⁵ 10 C.F.R. § 2.318(a).

⁶ *See Millstone*, CLI-04-12, 59 NRC at 240.

⁷ *See Nuclear Mgmt. Co., LLC* (Monticello Nuclear Generating Plant), CLI-06-6, 63 NRC 161, 163 (2006); *Calvert Cliffs Nuclear 3 Project, LLC and UniStar Nuclear Project, LLC* (Combined License Application for Calvert Cliffs, Unit 3), CLI-09-20, 70 NRC ___, slip op. at 4-5 (Oct. 13, 2009); *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-09-22, 70 NRC ___, slip op. at 2-3 (Nov. 17, 2009).

particularized injury that is (2) fairly traceable to the challenged action and (3) likely to be redressed by a favorable decision.⁸ These three criteria are referred to as injury-in-fact, causation, and redressibility, respectively.

To establish representational standing, an organization must: (1) show that at least one of its members *has standing in his or her own right*; (2) identify that member; and (3) show, “preferably by affidavit,” that the organization is authorized by that member to request a hearing on behalf of the member.⁹ Where the affidavit of the member is devoid of any statement that he or she wants and has authorized the organization to represent his or her interests, the presiding officer should not infer such authorization.¹⁰ Indeed, the Commission has held that “[t]he failure both to identify the member(s) [that the petitioners] purport to represent and to provide proof of authorization therefore precludes [the petitioners] from qualifying as intervenors.”¹¹

C. Stay Criteria

NRC regulations authorize a party to a proceeding to file an application for a stay.¹² Furthermore, NRC regulations specify that, in determining whether to grant or deny an application for a stay, the Commission or presiding officer will consider:

- (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
- (2) Whether the party will be irreparably injured unless a stay is granted;

⁸ See *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996).

⁹ *Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 408-10 (2007); see also *N. States Power Co.* (Monticello Nuclear Generating Plant, Prairie Island Nuclear Generating Plant, Units 1 & 2; Prairie Island Independent Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37, 47 (2000); *GPU Nuclear Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000); *PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), LBP-09-18, 70 NRC __, slip op. at 6 (Aug. 10, 2009) (citing *Vt. Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 163 (2000)).

¹⁰ *Duquesne Light Co.* (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 411 (1984).

¹¹ *Consumers Energy*, CLI-07-18, 65 NRC at 410.

¹² 10 C.F.R. § 2.342(a). As noted previously, however, there is no proceeding in which to file the instant Stay Application.

- (3) Whether the granting of a stay would harm other parties; and
- (4) Where the public interest lies.¹³

In discussing the four stay criteria, the Commission recently explained in the *Vogtle* combined license proceeding that:

Of these factors, irreparable injury is the most important. Specifically, “[a] party seeking a stay must show it faces imminent, irreparable harm that is both ‘certain and great.’” Without a showing of irreparable injury, Petitioners must make “an overwhelming showing” of likely success on the merits. (This has also been referred to as a demonstration of “virtual certainty.”) And if a movant makes neither of these first two showings, then we need not consider the remaining factors.¹⁴

IV. THE STAY APPLICATION SHOULD BE REJECTED

A. The Stay Application Should Be Rejected Because There Is No Proceeding to Stay

The Stay Application is improper, lacks factual or legal bases, and should be rejected by the Commission. As explained above, there simply is no NRC proceeding to be stayed. There is no notice of hearing or notice of proposed action with respect to SCE or SONGS Units 2 and 3. Therefore, the Stay Application is improper as a threshold matter and should be rejected on this basis alone.

B. FOE Is Not Authorized to File the Stay Application Under 10 C.F.R. § 2.342

FOE states that its Stay Application is filed pursuant to 10 C.F.R. § 2.342.¹⁵ Section 2.342 does not authorize such a request. As explained above, Section 2.342(a) provides an opportunity for a “party to a proceeding” to file an application for a stay of a decision or action of the presiding officer in that proceeding pending Commission review. Here, however, there is

¹³ 10 C.F.R. § 2.342(e).

¹⁴ *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-12-11, 75 NRC ___, slip op. at 7 (Apr. 16, 2012) (citations omitted).

¹⁵ FOE Application at 1.

no proceeding, no presiding officer has issued a decision, FOE is not a party, and there is no pending or anticipated request for NRC Commission review.

Since there is no decision of a presiding officer, in fact no decision has been made by any NRC decision-maker, there is nothing to stay. Section 2.342(a) further specifies that a stay request must be filed after a decision has been issued. It makes no sense to allow a stay request to be filed before a decision, since there is no possibility for any rational consideration of the four factors specified in § 2.342(e). FOE cannot show that there is an error to be corrected on appeal since there has been no decision that could be in error.

Finally, FOE does not seek a stay pending Commission review of a decision. Instead, FOE states that it seeks a stay “pending the conclusion of a license amendment proceeding.”¹⁶ Consequently, FOE’s reference to Section 2.342 is completely inapposite as there is no such license amendment proceeding, much less pending Commission review of such a proceeding.

C. FOE Has Not Demonstrated Standing

Here, FOE has not addressed its standing in its Stay Application. FOE attempts to address its standing in its Intervention Petition, primarily by relying on the declaration of its member, Ms. Lyn Harris Hicks.¹⁷ The FOE Petition and the declaration of Ms. Hicks, however, fall short of demonstrating that FOE has standing.

Since there is no pending proceeding, FOE has failed to—and cannot—show that an actual or threatened injury is fairly traceable to a challenged NRC action. Nor has it, or can it, show that an alleged injury is redressible in the proceeding they seek to create by virtue of the filing of their Stay Application. In addition, although the declaration of Ms. Hicks says “I request that the [NRC] hold a public hearing” and “I strongly support the [petition filed by

¹⁶ Stay Application at 1

¹⁷ FOE Petition at 6.

FOE],” she does not say that she has authorized FOE to represent her interest in such a proceeding.¹⁸

D. The Stay Application Does Not Satisfy the Stay Requirements

As demonstrated below, even if one suspends reality, assumes there is a proceeding, and applies the stay criteria specified in Sections 2.342(e) and (f), the stay factors clearly do not weigh in favor of granting FOE’s Stay Application.

1. FOE Has Not Made a Strong Showing that It Is Likely to Prevail on the Merits

FOE has failed to make a strong showing that it is likely to prevail on the merits. Instead, FOE simply claims in a conclusory fashion: “Pursuant to 42 U.S.C. § 2239(a)(1)(A) and 10 C.F.R. § 2.309, the Commission is required as part of a license amendment proceeding to provide a public hearing and allow intervention.”¹⁹ As discussed above, there is no license amendment proceeding. Thus, it is impossible for FOE to demonstrate that it would prevail on the merits of the hypothetical proceeding.

2. FOE Has Not Demonstrated Irreparable Injury

FOE will not be irreparably injured if its Stay Application is not granted, nor if temporary relief is denied by the Commission. As discussed above, this is the most important factor, and “[a] party seeking a stay must show it faces imminent, irreparable harm that is both ‘certain and great.’”²⁰

FOE argues that its “harm is imminent because without a stay the NRC could approve the restart of San Onofre Units 2 and 3 at any time” and it “will suffer certain and great harm of increased risk of exposure to radioactivity if San Onofre Units 2 and 3 are restarted without a

¹⁸ See *Consumers Energy*, CLI-07-18, 65 NRC at 410.

¹⁹ Stay Application at 4.

²⁰ *Vogtle*, CLI-12-11, slip op. at 7.

complete understanding of the causes of the tube rupture and tube wear.”²¹ FOE provides no support for this alleged harm, much less that the harm is “imminent” or “irreparable.” Instead, FOE provides only speculation. Such guesswork cannot support the Stay Application.

FOE, surprisingly, argues that “[i]t is unlikely that the stay requested will result in any delay in placing San Onofre Units 2 and 3 back into service.”²² This position clearly demonstrates that there is no “imminent, irreparable harm,” because FOE’s position is that the stay will not delay restart.

3. Issuance of a Stay Would Harm Other “Parties”

Having failed to make the requisite showing on the first two stay criteria, there is no need to consider the remaining two criteria.²³ Nonetheless, even if the latter two criteria are taken into consideration, they too weigh in favor of rejecting the Stay Application as well as the request for temporary relief—as the latter is only available in “extraordinary cases.”²⁴

Turning to the third criterion, FOE fails to demonstrate that a stay would not harm other “parties.”²⁵ As discussed above, there is no proceeding and no parties to a proceeding. Therefore, FOE cannot and does not demonstrate that a stay would not harm other “parties.”

Assuming, however, that there was a proceeding that could be stayed, then SCE would be a party to such a hypothetical proceeding. Moreover, SCE would be harmed by issuance of a stay as it would directly and adversely affect SCE’s ongoing actions to restart Units 2 and 3.

²¹ Stay Application at 4.

²² *Id.* at 7.

²³ *Vogtle*, CLI-12-11, slip op. at 7.

²⁴ 10 C.F.R. § 2.342(f). By definition, a stay application, which itself fails to satisfy the two most important stay criteria in Section 2.342(e), cannot constitute an “extraordinary case” worthy of extraordinary, temporary relief.

²⁵ 10 C.F.R. § 2.342(e)(3).

4. Public Interest Weighs in Favor of Rejecting the Stay Application

FOE has failed to demonstrate that the public interest weighs in favor of granting the Stay Application. In this regard, FOE seems to argue that the public interest would be served by staying restart “until the public has exercised its right to participate in a hearing,” by requiring adherence to the NRC regulations, and by allowing testimony by Mr. Gunderson.²⁶ FOE provides nothing but conclusory statements in support thereof. The public interest weighs in favor of rejecting the Stay Application because, independent of whether a hearing is held, SCE must satisfy NRC regulations. In addition, it is not necessary to hold a hearing in order for the NRC to consider issues raised in Mr. Gunderson’s declaration. FOE can request an order under 10 C.F.R. § 2.206 to address the underlying concerns set forth in the Stay Application.

V. CONCLUSION

For all of the above reasons, the Stay Application is fatally deficient and should be rejected in its entirety.

Respectfully submitted,

Executed in Accord with 10 C.F.R. § 2.304(d)

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²⁶ Stay Application at 8-9.

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