UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	Docket Nos. 50-361 and 50-362
SOUTHERN CALIFORNIA EDISON COMPANY	)	
	)	
(San Onofre Nuclear Generating Station)	)	July 13, 2012

SOUTHERN CALIFORNIA EDISON COMPANY'S ANSWER OPPOSING FRIENDS OF THE EARTH'S HEARING REQUEST AND THE NATURAL RESOURCES DEFENSE COUNCIL RESPONSE REGARDING SAN ONOFRE NUCLEAR GENERATING STATION UNITS 2 AND 3

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TABLE OF CONTENTS

Page

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I. INTRODUCTION

On June 18, 2012, the Friends of the Earth ("FOE") submitted a "Petition to Intervene and Request for Hearing by Friends of the Earth" ("Hearing Request") to the U.S. Nuclear Regulatory Commission ("NRC"). The Hearing Request purports to be submitted under 10 C.F.R. § 2.309,[1] and includes a proposed contention claiming that San Onofre Nuclear Generating Station ("SONGS") Units 2 and 3 cannot be restarted without a license amendment for the replacement steam generators and a public hearing.[2] On June 27, 2012, the Natural Resources Defense Council ("NRDC") submitted "Natural Resources Defense Council's (NRDC) Response in Support of Friends of the Earth Petition to Intervene and NRC's Notice of Intent to Participate" ("Response"). The Response does not clearly identify the regulatory

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1 Hearing Request at 2. The Hearing Request is supported by a declaration from Mr. Arnold Gundersen. Declaration of Arnold Gundersen 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 (May 31, 2012) ("Gundersen Declaration").

2 Hearing Request at 16.

authority under which NRDC submits it, but it purports to respond to the FOE Hearing Request, and also incorporates information from the Hearing Request by reference.[3]

For all of the reasons discussed further below, the FOE Hearing Request and the NRDC Response contradict the governing statutory authority, NRC regulations, and NRC precedent, and should be dismissed without any further consideration. Nonetheless, out of an abundance of caution and to fully reserve its rights, Southern California Edison Company ("SCE") submits this Answer opposing the Hearing Request and Response pursuant to 10 C.F.R. § 2.309(h).

II. SUMMARY OF ARGUMENT

The Hearing Request suffers from a multitude of independent, fatal deficiencies. First and foremost, there is no NRC proceeding in which to request a hearing. Second, the Hearing Request is untimely due to the absence of any event specified in the NRC regulations that can trigger a hearing request. Third, FOE lacks standing to file the Hearing Request, because there is no pending proceeding and FOE cannot show an actual or threatened injury that is traceable to a challenged NRC action. Fourth, even if the Hearing Request is somehow deemed permissible, FOE has not submitted a proposed contention that satisfies the admissibility requirements set forth in 10 C.F.R. § 2.309(f)(1). Finally, although FOE's Hearing Request perhaps could have been considered as a 10 C.F.R. § 2.206 petition, FOE has expressly rejected NRC consideration under Section 2.206, and therefore this avenue is foreclosed as well.[4]

NRDC's Response similarly suffers from numerous fatal and independent deficiencies. If the Response truly is a response to the FOE Hearing Request, as it purports to be, then it must be rejected because there is no proceeding in which to file a response. Additionally, even if there was such a proceeding, NRDC would not be a party that is permitted to file a response.

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[3] Response at 1, 2 n.1.

[4] Hearing Request at 13 n.11.

Because NRDC attempts to incorporate by reference the substance of the Hearing Request, the Response is perhaps intended to be an independent hearing request and not actually a response. If so, then the Response should be rejected because NRDC has failed to comply with NRC regulations and Commission precedent for adopting another entity's proposed contention. Nonetheless, even if the Response had properly adopted FOE's proposed contention, it would suffer from the same deficiencies identified above for the FOE Hearing Request. Even beyond these deficiencies, the NRDC Response fails as an independent hearing request because NRDC has not attempted to demonstrate standing and has not submitted its own proposed contention.

For these reasons, both FOE's Hearing Request and NRDC's Response should be rejected in their entirety.

III. BACKGROUND

SONGS is located in San Clemente, California. SCE is the operator of SONGS Units 2 and 3.[5] SCE replaced the Unit 2 steam generators in January 2010, and the Unit 3 steam generators in January 2011.[6] SCE requested and obtained a license amendment for certain issues related to the SONGS Units 2 and 3 steam generator replacement (*e.g.*, change to Technical Specifications for steam generator tube integrity),[7] but a license amendment was unnecessary for other issues associated with the replacement based on SCE's evaluation of those issues under 10 C.F.R. § 50.59.[8]

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5 SONGS Unit 1 ceased operation in 1992 and has since been decommissioned. *See* NRC, SONGS – Unit 1, http://www.nrc.gov/info-finder/decommissioning/power-reactor/san-onofre-unit-1.html (last visited July 10, 2012).

6 *See* 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, CAL 4-12-001, at 3 (Mar. 27, 2012) ("CAL"), *available at* ADAMS Accession No. ML12087A323.

7 Letter from J. Hall, NRC, to R. Ridenoure, San Onofre Nuclear Generating Station, Units 2 and 3 – Issuance of Amendments Re: Technical Specification Changes in Support of Steam Generator Replacement (TAC Nos. MD9160 and MD 9161), at 1 (June 25, 2009), *available at* ADAMS Accession No. ML091670298.

8 Letter from Chairman G. Jaczko to Senator B. Boxer, at 1 (June 11, 2012) ("Jaczko Letter"), *available at* ADAMS Accession No. ML12152A131 ("NRC regulations at 10 CFR 50.59 and associated guidance in

On January 31, 2012, SCE identified a leak in a tube in one of the SONGS Unit 3 steam generators.[9] This leak was well below allowable limits in the Technical Specifications, and presented no hazard to the public health and safety.[10] Pursuant to established procedures, SCE shut down Unit 3.[11] At the time, SONGS Unit 2 was already shutdown and undergoing a refueling outage.[12] SCE initiated an investigation into the cause of the leakage at Unit 3.

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 identified instances of tube wear prior to restart of the SONGS units.[13] The NRC memorialized its understanding of the actions planned by SCE in a March 27, 2012 Confirmatory Action Letter ("CAL"), which confirmed the actions to be taken prior to restarting either unit.[14] The CAL also stated that permission for the SONGS units to resume power operations would be provided by the NRC in writing.[15]

SCE currently is in the process of implementing these actions. SCE has not requested any license amendment to support restart of the SONGS units. The current licenses for the SONGS units continue to apply, and 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. If SCE concludes that a license amendment is required, then it will seek one.

Regulatory Guide 1.187 include criteria for a licensee to determine when a license amendment is required for proposed changes to a facility. Historically, RSGs [replacement steam generators] have been evaluated against these criteria and no license amendment was required. SCE's evaluation for the SONGS RSGs was consistent with these past practices and supported by all NRC inspections to date.").

9 Letter from P. Dietrich, SCE, to E. Collins, NRC, Steam Generator Return-to-Service Action Plan, San Onofre Nuclear Generating Station, at 1 (Mar. 23, 2012), *available at* ADAMS Accession No. ML12086A182.

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.* at 2-3; *id.*, Attachment 1.

14 *See* CAL at 1-3.

15 *Id.* at 2.

On June 18, 2012, FOE submitted the Hearing Request and a request to stay any decision to restart SONGS Units 2 and 3.[16] NRDC submitted its Response on June 27, 2012. On June 28, 2012, both SCE and the NRC Staff submitted answers opposing the stay request.[17] SCE now files this Answer in response to the FOE Hearing Request and NRDC Response.

IV. LEGAL STANDARDS

A. NRC Adjudicatory Proceedings

Section 189(a)(1)(A) of the Atomic Energy Act of 1954, as amended ("AEA"), addresses NRC adjudicatory proceedings and hearings. It states:

> In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.[18]

As a threshold matter, however, the Commission has noted that "[i]t is axiomatic that a person cannot intervene in a proceeding before the proceeding actually exists."[19] NRC regulations further explain that "[a] proceeding commences when a notice of hearing or a notice of proposed action under § 2.105 is issued."[20] Citing these regulations, the Commission explained in *Millstone* that "issuance of a 'notice of hearing' or a 'notice of proposed action' is a

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16 Application to Stay any Decision to Restart Units 2 or 3 at the San Onofre Nuclear Generating Station Pending Conclusion of the Proceedings Regarding Consideration of the Safety of the Replacement Steam Generators (June 18, 2012).

17 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 (June 28, 2012); NRC Staff's Answer to Friends of the Earth's Application to Stay Any Decision to Restart Unit 2 or 3 at the San Onofre Nuclear Generating Station Pending Conclusion of the Proceedings Regarding Consideration of the Safety of the Replacement Steam Generators (June 28, 2012).

18 *See* 42 U.S.C. § 2239(a)(1)(A) (2011).

19 *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-04-12, 59 NRC 237, 239 (2004).

20 10 C.F.R. § 2.318(a).

prerequisite to the initiation of a 'proceeding.'"[21] The D.C. Circuit has further explained that there is no "automatic right of intervention upon anyone."[22]

B. Timeliness

If a proceeding exists, then the timing for hearing requests is specified in 10 C.F.R. § 2.309(b). Section 2.309(b)(3) states that for proceedings with a *Federal Register* notice, a hearing request must be filed within the time specified in a notice or hearing, or if not specified, then within 60 days of publication of the notice. Section 2.309(b)(4) states that for proceedings with no *Federal Register* notice, a hearing request is due 60 days after publication of "notice on the NRC Web site" or 60 days "after the requestor receives actual notice of a pending application." Section 2.309(b)(5) states that hearing requests for Section 2.202 orders must be filed according to the time period specified therein.[23]

Nontimely filings are addressed by 10 C.F.R. § 2.309(c). Section 2.309(c) sets forth an eight-factor balancing test for nontimely filings.[24] The burden is on a petitioner to demonstrate

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

22 *BPI v. AEC*, 502 F.2d 424, 426 (D.C. Cir. 1974) ("Section 189(a) does not in literal terms state that any person whose interest is affected may intervene; it states that such a party shall be granted a hearing upon request and the Commission shall admit any such person as a party to the proceeding. The statute does not confer the automatic right of intervention upon anyone."); *see also AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 677-78 (2008) (citing *BPI*, 502 F.2d at 428 ("The hearing right provided in section 189(a) is not automatic . . . ."); *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 55 (D.C. Cir. 1990) (quoting *BPI*, 502 F.2d at 428 ("Indeed, we have long recognized that Section 189(a) 'does not confer the automatic right of intervention upon anyone.'")).

23 Sections 2.309(b)(1) and 2.309(b)(2) relate to transfers of control and high-level waste repositories and are entirely unrelated to any issues raised in the FOE Hearing Request.

24 These factors are: (i) Good cause, if any, for the failure to file on time; (ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; (iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest; (v) The availability of other means whereby the requestor's/petitioner's interest will be protected; (vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties; (vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and (viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

"that a balancing of these factors weighs in favor of granting the petition."[25] The eight factors in Section 2.309(c)(1) are not of equal importance. The first factor, whether "good cause" exists for the failure to file on time, is entitled to the most weight.[26]

C. 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.[27] Thus, to demonstrate standing, a petitioner must show: (1) an actual or threatened, concrete and particularized injury that is (2) fairly traceable to the challenged action and (3) likely to be redressed by a favorable decision.[28] These three criteria are referred to as injury-in-fact, causation, and redressability, 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.[29] Where the affidavit of the member is devoid of any statement that he or she has authorized the organization to represent his or her interests, the presiding officer

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25 *Tex. Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-88-12, 28 NRC 605, 609 (1988).

26 *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-15, 75 NRC __, slip op. at 25 n.96 (June 7, 2012) ("The standard for new or amended contentions involves a balancing of eight factors set forth in 10 C.F.R. § 2.309. The factor given the most weight is whether there is 'good cause' for the failure to file on time."); *see also Dominion Nuclear Conn., Inc.* (Millstone Power Station, Unit 3), CLI-09-5, 69 NRC 115, 125-26 (2009).

27 *See Nuclear Mgmt. Co., LLC* (Monticello Nuclear Generating Plant), CLI-06-6, 63 NRC 161, 163 (2006); *Calvert Cliffs Nuclear 3 Project, LLC* (Combined License Application for Calvert Cliffs, Unit 3), CLI-09-20, 70 NRC 911, 915-16 (2009).

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

29 *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 385, 395 (2009) (citing *Vt. Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 163 (2000)).

should not infer such authorization.[30] 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."[31]

D. Contention Admissibility

In addition to demonstrating standing, a hearing request also must include an admissible contention. The contention admissibility requirements are set forth in 10 C.F.R. § 2.309(f)(1). Specifically, under Section 2.309(f)(1), a petitioner "must set forth with particularity the contentions sought to be raised." The regulation specifies that each contention must:

> (1) provide a specific statement of the legal or factual issue sought to be raised;
>
> (2) provide a brief explanation of the basis for the contention;
>
> (3) demonstrate that the issue raised is within the scope of the proceeding;
>
> (4) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding;
>
> (5) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents that support the petitioner's position and upon which the petitioner intends to rely; and
>
> (6) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact.[32]

As the Commission recently explained, failure to comply with any one of the six admissibility criteria is grounds for rejection.[33] The Commission further explained that its "strict

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

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

32 10 C.F.R. § 2.309(f)(1)(i)-(vi).

33 *See, e.g.*, *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-08, 75 NRC __, slip op. at 3 (Mar. 27, 2012) (stating that proposed contentions "must satisfy all six of the [admissibility] requirements"); *see also* Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004).

contention rule is designed to avoid resource-intensive hearings where petitioners have not provided sufficient support for their technical claims, and do not demonstrate a potential to meaningfully participate and inform a hearing."[34] The NRC revised the admissibility rules in 1989 "to prevent the admission of 'poorly defined or supported contentions,' or those 'based on little more than speculation.'"[35]

V. THE FOE HEARING REQUEST SHOULD BE REJECTED

As discussed below, the FOE Hearing Request should be rejected for numerous, independent reasons.

A. No Proceeding Exists in Which to Request a Hearing

As explained above, AEA Section 189(a) allows for hearing requests in proceedings "for the granting, suspending, revoking, or amending of any license." In this case, however, SCE has not requested, and the NRC has not instituted, any proceeding to grant, suspend, revoke, or amend *any* license. The Commission has ruled that intervention is not available when there is no pending "proceeding" of the sort specified in AEA Section 189(a).[36]

As further explained above, the NRC regulations, as confirmed by the Commission in *Millstone*, specify that "[a] proceeding commences when a notice of hearing or a notice of proposed action under § 2.105 is issued."[37] There has been no notice of hearing or notice of

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[34] *Davis-Besse*, CLI-12-08, slip op. at 31; *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001) (explaining that the Commission's rules on contention admissibility are "strict by design").

[35] *Davis-Besse*, CLI-12-08, slip op. at 3-4 (citations omitted) (quoting *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 & 3), CLI-99-11, 49 NRC 328, 334 (1999)).

[36] *See New Jersey* (Department of Law and Public Safety's Requests Dated October 8, 1993), CLI-93-25, 38 NRC 289, 292 (1993); *see also Oyster Creek*, CLI-08-28, 68 NRC at 677-78 (rejecting a request to hold a hearing and concluding "the AEA's guarantee of a hearing on material issues is not without limitation" and the "hearing right provided in section 189(a) is not automatic").

[37] 10 C.F.R. § 2.318(a); *see Millstone*, CLI-04-12, 59 NRC at 240. In *Millstone*, a notice of hearing eventually issued, but the hearing request was premature because it was submitted prior to that notice of hearing. *Millstone*, CLI-04-12, 59 NRC at 240. The circumstances here are much more prejudicial against the FOE Hearing Request because there has been no application or other action taken that would give rise to a notice of

proposed action related to the SONGS units. Therefore, no proceeding has commenced in which to file the FOE Hearing Request.

These conclusions are confirmed by the scope of 10 C.F.R. Part 2, "Rules of Practice for Domestic Licensing Proceedings and Issuance or Orders." Section 2.1 addresses the scope of the NRC rules for proceedings, stating:

> This part governs the conduct of all proceedings, other than export and import licensing proceedings described in part 110, under the Atomic Energy Act of 1954, as amended, and the Energy Reorganization Act of 1974, for—
> (a) Granting, suspending, revoking, amending, or taking other action with respect to any license, construction permit, or application to transfer a license;
> (b) Issuing orders and demands for information to persons subject to the Commission's jurisdiction, including licensees and persons not licensed by the Commission;
> (c) Imposing civil penalties under Section 234 of the Act;
> (d) Rulemaking under the Act and the Administrative Procedure Act; and
> (e) Standard design approvals under part 52 of this chapter.

None of these criteria apply here. In particular, there is no pending action associated with the granting, suspending, revoking, amending, or taking other action regarding the issues raised in the FOE Hearing Request; the NRC has not issued any orders or 10 C.F.R. § 2.204 "demands for information" regarding the issues raised in the FOE Hearing Request; the NRC has imposed no civil penalties regarding the issues raised in the FOE Hearing Request; the NRC has not begun rulemaking regarding the issues raised in the FOE Hearing Request; and there is no standard design approval regarding the issues raised in the FOE Hearing Request. Therefore, nothing has occurred that would initiate or justify a Part 2 adjudicatory proceeding.

Ignoring these directly-applicable regulations, FOE instead claims that its Hearing Request is allowed by the AEA because it is a person "whose interest may be affected by *the*

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hearing. If the Commission rejected the hearing request in *Millstone*, then the circumstances here weigh in even more favor of rejecting the FOE Hearing Request.

proceeding."[38] This claim simply makes no sense because there is no proceeding on the matters raised in the Hearing Request. The Commission has clearly ruled that "a person cannot intervene in a proceeding before the proceeding actually exists."[39] The D.C. Circuit has further explained that there is no "automatic right of intervention upon anyone."[40] Accordingly, FOE does not have a right to intervene.

Moreover, SCE's Section 50.59 evaluations for the steam generator replacements do not provide an opportunity to request a hearing. The FOE Hearing Request is similar to a request in *Yankee* in which the Commission rejected a request for an adjudicatory hearing regarding decommissioning plans for the Yankee Nuclear Power Station because there was no proceeding on which to request a hearing.[41] The Commission concluded that the only "right" to an opportunity for a hearing under AEA Section 189 is for the specific actions identified in Section 189.[42] Similar to the past actions taken with the SONGS Units 2 and 3 steam generators, the licensee in *Yankee* had undertaken activities pursuant to 10 C.F.R. § 50.59, which did not require prior NRC approval through a license amendment.[43] The Commission concluded that "the activities that are the subject of the petition are not activities that invoke NRC actions that implicate the hearing rights afforded by section 189a," and rejected the request for an adjudicatory hearing.[44] A similar result is appropriate here.[45]

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38 Hearing Request at 5, 9 (emphasis added).

39 *Millstone*, CLI-04-12, 59 NRC at 239.

40 *BPI*, 502 F.2d at 426 ("Section 189(a) does not in literal terms state that any person whose interest is affected may intervene; it states that such a party shall be granted a hearing upon request and the Commission shall admit any such person as a party to the proceeding. The statute does not confer the automatic right of intervention upon anyone.").

41 *See Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 100-04 (1994).

42 *Id.* at 101.

43 *Id.*

44 *Id.* at 102-03.

As noted above, the NRC has issued a CAL regarding the SONGS steam generators. There are no NRC proceedings or hearing rights associated with the CAL.[46] FOE conceded this by stating: "The NRC's CAL fails to provide the public involvement that NRC regulations, e.g., 10 C.F.R. § 2.309, require."[47] Similarly, FOE stated: "The current shutdown . . . is the result of a closed process including only the licensee and the NRC staff."[48] Therefore, the CAL does not provide an opportunity to request a hearing.

In summary, for the numerous reasons discussed above, there is no pending or ongoing proceeding in which FOE can submit its Hearing Request, and, therefore, FOE has no right to litigate the issues raised in the Hearing Request. The Hearing Request should be summarily dismissed by the Commission.[49]

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[45] In *Yankee*, the Commission also evaluated whether a discretionary hearing is warranted under AEA Section 161(c), but concluded that it was not. *Id.* at 103. AEA Section 161(c) authorizes the Commission to "make such studies and investigations, obtain such information, and hold such meetings or hearings as the Commission may deem necessary or proper." 42 U.S.C. § 2201(c) (2011). Such a discretionary hearing would not be appropriate in response to the FOE Hearing Request. First, FOE never requested a discretionary hearing under AEA Section 161(c). Second, an AEA Section 161(c) hearing is to instruct the Commission, not satisfy the desires of a petitioner. Third, the NRC Staff is fully aware of the issues raised by FOE and has been inspecting the steam generator issues closely. Additionally, under the CAL, SCE will not be able to restart SONGS Units 2 and 3 until it has received written permission from the NRC. *See* CAL at 2.

[46] *See, e.g.*, *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), LBP-89-28, 30 NRC 271, 275-76 (1989) (holding that a CAL whereby the applicants voluntarily ceased low-power testing and agreed to obtain NRC Staff approval prior to resuming operations is not a suspension within the meaning of AEA Section 189(a), and does not give the intervenors the right to a hearing), *aff'd*, ALAB-940, 32 NRC 225 (1990). Similar to *Seabrook*, the SCE CAL does not allow commencement of the activities at issue (*e.g.*, restart) until the licensee obtains NRC approval. Therefore, the requested hearing would address "lifting of a suspension," which is not covered by AEA Section 189(a). *See Seabrook*, LBP-89-28, 30 NRC at 275-76.

[47] Hearing Request at 12.

[48] *Id.* at 22.

[49] FOE also requests that the Commission utilize its "inherent supervisory authority" to convene a license amendment proceeding. *See* Hearing Request at 2, 15. The references identified by FOE address the Commission's ability to assume all or parts of the function of the presiding officer in an existing adjudication, not to implement a brand new license amendment proceeding. *See* Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 20 (1998); *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), CLI-90-3, 31 NRC 219, 229 (1990). Additionally, the Commission already is exercising its authority to investigate the very issues raised by the Hearing Request. For example, Chairman Jaczko recently explained to Senator Boxer that "[t]he NRC is currently re-examining the need for a license amendment at SONGS as part of an Augmented Inspection Team (AIT) review that is now underway," including "SCE's determination that a license amendment was not necessary." Jaczko Letter at 1. The NRC is fully aware of the issues raised by FOE, and no additional proceeding is necessary.

B. The Hearing Request Is Untimely

As discussed in detail above, no proceeding exists in which to request a hearing. Accordingly, none of the timing requirements in 10 C.F.R. § 2.309(b) have been triggered. The Hearing Request therefore should be considered untimely.[50] FOE appears to concede that its Hearing Request is untimely in some undefined fashion, because it attempts to satisfy the 10 C.F.R. § 2.309(c)(1) criteria for untimely filings.[51] This attempt, however, is inappropriate because FOE cannot attempt to cure an untimely filing if there was never a deadline in the first place.[52] The untimely nature of the Hearing Request provides an independent reason for rejecting it.

C. FOE Has Not Demonstrated Standing

FOE attempts to address its standing primarily by relying on the declaration of its member, Ms. Lyn Harris Hicks.[53] The FOE Hearing Request and the declaration of Ms. Hicks, however, fall short of demonstrating that FOE has standing.

Because 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.[54] In addition, FOE has

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50 Assuming arguendo that there was a proceeding, the longest timeliness period specified in the regulations is 60 days. FOE's Hearing Request is well beyond any event that could be considered as a basis for timeliness. For example, the CAL was issued on March 27, 2012. FOE's June 18, 2012 Hearing Request was submitted well beyond 60 days after the CAL. Similarly, much of the Hearing Request challenges whether the license amendment approved by the NRC in 2009 was broad enough, and whether SCE appropriately considered steam generator design changes under 10 C.F.R. § 50.59. *See* Hearing Request at 16-22. These challenged events occurred years ago and cannot support a timely Hearing Request now.

51 *See* Hearing Request at 9-15. FOE, however, provides no explanation for why it attempts to satisfy the 10 C.F.R. § 2.309(c)(1) requirements for untimely filings.

52 FOE's timeliness discussion suffers from other deficiencies as well. For example, the first factor in Section 2.309(c)(1)(i) is "Good cause, if any, for the failure to file on time." FOE does not address good cause for failure to file on time; instead, it simply claims that it has "good cause to become a party to the current San Onofre license amendment proceeding." Hearing Request at 9. FOE addresses the wrong standard. Additionally, the fifth factor relates to the availability of other means to represent interests. FOE could have submitted a 10 C.F.R. § 2.206 petition, but expressly decided not to do so. *See id.* at 13 n.11.

53 *See* Hearing Request at 5-9; Declaration of Lyn Harris Hicks (May 29, 2012) ("Hicks Declaration").

54 *See Yankee*, CLI-96-1, 43 NRC at 6.

not demonstrated representational standing, which requires that the organization member authorize the organization to request a hearing on behalf of the member.[55] Although the declaration of Ms. Hicks states "I request that the [NRC] hold a public hearing" and "I strongly support the [hearing request filed by FOE]," she does not say that she has authorized FOE to represent her interest in such a proceeding.[56] Therefore, even if a proceeding existed, FOE has not demonstrated standing. This provides yet another independent basis for rejecting the Hearing Request.

D. FOE Has Not Submitted an Admissible Contention

FOE has proposed one contention, which states: "Petitioner contends that San Onofre cannot be allowed to restart wihout [sic] a license amendment and attendant adjudicatory public hearing as required by 10 C.F.R. § 2.309, in which Petitioner and other members of the public may participate."[57] The proposed contention fails to satisfy multiple contention admissibility requirements.

1. The Proposed Contention Is Not Within the Scope of Any Proceeding

The proposed contention is not within the scope of any pending or ongoing proceeding related to SONGS Units 2 and 3, contrary to 10 C.F.R. § 2.309(f)(1)(iii). The scope of a proceeding is defined by the Commission's notice of opportunity for a hearing.[58] Moreover, contentions are necessarily limited to issues that are germane to the specific application pending before the licensing board.[59] Any contention that falls outside the specified scope of the

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55 *See Consumers Energy*, CLI-07-18, 65 NRC at 409-10.

56 Hicks Declaration ¶¶ 11-12. FOE claims that "Ms. Hicks supports this Petition, and has *authorized* FOE to intervene in this proceeding and *request a hearing on her behalf*." Hearing Request at 6 (emphasis added). These claims of authorization to request a hearing on Ms. Hicks' behalf, however, are not supported by the Hicks Declaration itself. *See* Hicks Declaration ¶¶ 11-12.

57 Hearing Request at 16.

58 *See Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-825, 22 NRC 785, 790-91 (1985).

59 *See Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 204 (1998).

proceeding must be rejected.[60] Because there is no proceeding, no hearing notice, and no application, FOE's hearing request is not within the scope of any pending or ongoing proceeding.

Additionally, FOE improperly challenges the NRC Staff's review of SCE's Section 50.59 evaluation regarding the steam generator replacement.[61] For example, FOE alleges that "[t]he NRC failed to follow its own regulations by allowing SCE to replace the steam generators without the requisite proceeding to amend the license."[62] The Commission, however, has explained that "[t]he purpose and scope of a licensing proceeding is to allow interested persons the right to challenge the sufficiency of the application. The NRC has not, and will not, litigate claims about the adequacy of the Staff's safety review in licensing adjudications."[63] Therefore, assuming that a license amendment request was pending—which it is not—any such challenges about the Staff's review still would be outside the scope of the requested hearing. For these reasons, the Hearing Request should be rejected.

2. The Proposed Contention Does Not Raise a Material Issue

The proposed contention does not raise a material issue, contrary to 10 C.F.R. § 2.309(f)(1)(iv). Section 2.309(f)(1)(iv) requires a petition to demonstrate "that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding." As the Commission has concluded, "[t]he dispute at issue is 'material' if its resolution would 'make a difference in the outcome of the licensing proceeding.'"[64] Because there is no proceeding and there is no application, FOE simply cannot

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60 *See Portland Gen. Elec. Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n.6 (1979) (affirming the board's rejection of issues raised by intervenors that fell outside the scope of issue identified in the notice of hearing).

61 *See* Hearing Request at 11-22.

62 *Id.* at 18.

63 *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 476 (2008).

64 *Oconee*, CLI-99-11, 49 NRC at 333-34 (citing Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,172 (Aug. 11, 1989)).

raise an issue that would make a difference in the outcome of the proceeding. Therefore, the proposed contention should be rejected on this additional basis.

3. The Proposed Contention Is Not Adequately Supported

FOE submitted the Gundersen Declaration as support for its proposed contention, but the Declaration does not provide the requisite support, contrary to 10 C.F.R. § 2.309(f)(1)(v). The proposed contention relates to whether a license amendment should have been obtained for the replacement steam generators for SONGS Units 2 and 3.[65] The Gundersen Declaration, on the other hand, consists primarily of a recitation of background information, Mr. Gundersen's general complaints about the replacement steam generators, and a discussion of the options for how to address steam generators going forward—not an evaluation of whether a license amendment should have been obtained.[66] The only support for Mr. Gundersen's conclusory statements regarding the need for a license amendment is a table—reflecting a "yes" or "no" entry—summarizing Mr. Gundersen's characterization of whether certain steam generator design changes satisfy the criteria in 10 C.F.R. § 50.59.[67] Mr. Gundersen provides no explanation or discussion to support the "yes" or "no" entries in this table.[68]

In this regard, the Commission has stated that "an expert opinion that merely states a conclusion (e.g., the application is 'deficient,' 'inadequate,' or 'wrong') without providing *a reasoned basis or explanation* for that conclusion is inadequate because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion."[69] The Commission has

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65 *See* Hearing Request at 16.

66 *See* Gundersen Declaration at 1-6, 10-16.

67 *See id.* at 7-10.

68 *See id.* at 9-10. Although Note B of this table identifies changes alleged by Mr. Gundersen, he never explains how these changes fail to satisfy the Section 50.59 criteria.

69 *USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006) (emphasis added) (quoting *Private Fuel Storage* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181 (1998)); *see also NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-05, 75 NRC __, slip op. at 24-25

further held that it is the responsibility of the petitioner, not the presiding officer, to formulate the contention and demonstrate that it is admissible.[70] FOE's and Mr. Gundersen's unsupported conclusory statements, therefore, do not provide the requisite support for the proposed contention. The Hearing Request should be rejected on yet this additional, independent basis.

4. The Proposed Contention Does Not Reflect a Genuine Dispute

The proposed contention does not show that a genuine dispute exists with SCE on a material issue of law or fact, contrary to 10 C.F.R. § 2.309(f)(1)(vi). This regulation requires that the contention "include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute." Because there is no application to challenge, the proposed contention fails to show the requisite genuine dispute. Instead, FOE seeks a hearing in the abstract that is not linked to any request by SCE or action by the NRC, but there is no general right to a hearing for a hearing's sake.[71] Therefore, the Hearing Request should be rejected.

VI. THE NRDC RESPONSE ALSO SHOULD BE REJECTED

The NRDC Response characterizes itself as a "response" in support of the FOE Hearing Request. However, it also states that it "incorporate[s] by reference the background, assertion of timeliness, supporting documentation and the single contention filed by FOE in its Petition for Hearing and Stay Application."[72] As such, it could be evaluated as a hearing request as well.

(Mar. 8, 2012) (explaining that conclusory statements are insufficient to support a proposed contention, and a petitioner must "provide sufficient factual information or expert opinion to merit further consideration of the matter").

70 Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 22 (1998) (stating that "[a] contention's proponent, not the licensing board, is responsible for formulating the contention and providing the necessary information to satisfy [the contention admissibility requirements]").

71 *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Units 2 & 3), LBP-01-10, 53 NRC 273, 282 (2001), *aff'd sub nom. Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), 54 NRC 349 (2001), *reconsid. denied*, 55 NRC 1 (2002).

72 Response at 2 n.1.

Either way, the Response fails for the numerous reasons set forth below and should be rejected in its entirety.

A. There Is No Proceeding in Which to File NRDC's Response

Assuming that the NRDC Response is a response to the FOE Hearing Request, it fails because there is no proceeding in which to file a response. The NRC regulations, 10 C.F.R. § 2.309(h)(1), only allow a participant to a "proceeding" to file a response to a hearing request. As discussed above in Section V.A of this Answer, there is no "proceeding" related to SONGS Units 2 and 3. In fact, NRDC itself concedes that there is no proceeding by stating that it intends "to participate when a notice of hearing has been issued."[73] Therefore, no right to a response exists, and NRDC's Response should be rejected on this basis alone.

B. NRDC Is Not a Party and Has No Right to File a Response

Again, assuming that the NRDC Response is a response to the FOE Hearing Request, it also fails because NRDC is not a party to a proceeding and has no right to file a response. The governing NRC regulation, 10 C.F.R. § 2.309(h)(1), only allows answers from the applicant/licensee, the NRC Staff, and "any other party." NRDC is none of these. To be a "party," NRDC must already have demonstrated standing and submitted an admissible contention.[74] As discussed below, it has not done so. Therefore, NRDC's Response should be rejected as unauthorized under NRC regulations.

C. NRDC Has Not Properly Adopted FOE's Proposed Contention

As noted above, NRDC attempts to incorporate by reference the FOE Hearing Request, including the proposed contention.[75] Specifically, NRDC states that it "support[s]" the proposed contention, which would allow NRDC "redress," and that "[w]e adopt and incorporate FOE's

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[73] *Id.* at 10.

[74] *See* 10 C.F.R. § 2.309.

[75] Response at 2 n.1.

assertions."[76] These statements imply that NRDC also is seeking to co-sponsor FOE's proposed contention, calling into play 10 C.F.R. § 2.309(f)(3). This regulation states:

> If two or more requestors/petitioners seek to co-sponsor a contention, the requestors/petitioners shall jointly designate a representative who shall have the authority to act for the requestors/petitioners with respect to that contention. If a requestor/petitioner seeks to adopt the contention of another sponsoring requestor/petitioner, the requestor/petitioner who seeks to adopt the contention must either agree that the sponsoring requestor/petitioner shall act as the representative with respect to that contention, or jointly designate with the sponsoring requestor/petitioner a representative who shall have the authority to act for the requestors/petitioners with respect to that contention.

NRDC's attempt to co-sponsor FOE's proposed contention is facially-deficient because: (1) FOE and NRDC did not jointly submit the proposed contention; (2) there has been no indication by FOE that it agrees to NRDC co-sponsoring the proposed contention; and (3) there has been no identification of the representative who would have the authority to act for FOE and NRDC with respect to the proposed contention. The Commission has recognized: "With contention adoption explicitly recognized as the method by which an intervenor can gain a role relative to another petitioner's proffered contentions, to permit any party to the proceeding to take an active role regarding any contention without regard to whether that party made any attempt to adopt that contention would seriously undermine the efficacy of that provision."[77]

Moreover, the Commission has stated that it "would not accept incorporation by reference of another petitioner's issues in an instance where the petitioner has not independently established compliance with our requirements for admission as a party in its own pleadings by submitting at least one admissible issue of its own."[78] Because NRDC has not demonstrated standing and has not submitted its own admissible contention, and therefore cannot be a party, its

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[76] *Id.* at 7, 9-10.

[77] *La. Energy Servs., L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 627 (2004).

[78] *Consolidated Edison Co. of N.Y.* (Indian Point, Units 1 & 2), CLI-01-19, 54 NRC 109, 133 (2001).

attempts to jointly sponsor FOE's proposed contention are impermissible and should be rejected by the Commission.

D. The Issues Raised by NRDC Are Untimely

Much of the NRDC Response focuses on issues that are untimely. In addition to questioning whether a license amendment should have been obtained in the *past*, given the steam generator design changes, NRDC also alleges that a license amendment will be needed in the *future* to make changes to the SONGS Units 2 and 3 licenses before the units can restart.[79] For example, NRDC alleges that changes to the Technical Specifications or limitations on maximum thermal power will require a license amendment.[80]

These issues are untimely, because SCE continues to evaluate appropriate actions before restarting the units, and only when these activities are complete will it be possible to conclude whether a license amendment is necessary. If SCE concludes that a license amendment is required, then it will seek one. If there is a formal license amendment proceeding, then FOE and NRDC can attempt to intervene in response to any hearing opportunity if they so desire.

E. The NRDC Response Would Be Rejected Even if Treated as a Hearing Request

Assuming arguendo that the NRDC Response is an independent *hearing request*, it should be rejected for a multitude of reasons. First, as discussed in Section V.A above with respect to the FOE Hearing Request, there is no proceeding in which to submit a request for a hearing. Additionally, for reasons similar to those in Section V.B above with respect to the FOE Hearing Request, the timing requirements for hearing requests specified in 10 C.F.R. § 2.309(b) have not been triggered.

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79 *See* Response at 4-9.

80 *See id.*

Moreover, for reasons similar to those in Section V.C above with respect to the FOE Hearing Request, NRDC has not demonstrated standing, as required by 10 C.F.R. § 2.309(d). Since there is no pending proceeding, NRDC has failed to—and cannot—show that an actual or threatened injury is fairly traceable to a challenged NRC action. Furthermore, NRDC has not identified any specific individual on which to base representational standing. NRDC concedes this by stating that if FOE is granted relief, then it would "enter individual standing declarations."[81] Similarly, NRDC has not attempted to demonstrate any harm to itself as an organization that would support organizational standing. For these reasons, NRDC has not demonstrated standing and its Response should be dismissed.

Finally, NRDC has not submitted its own proposed contention, as required by 10 C.F.R. § 2.309(f)(1). For all of these reasons, the NRDC Response does not satisfy NRC requirements for a hearing request, and should be rejected.

VII. CONCLUSIONS

For the numerous reasons discussed above, both the FOE Hearing Request and the NRDC Response should be summarily rejected by the Commission. Most importantly, there is no proceeding in which to request a hearing. Even if that fundamental deficiency is ignored, the FOE Hearing Request and the NRDC Response are untimely and fail to comply with NRC pleading requirements. Therefore, they should be rejected in their entirety.

[81] *Id.* at 9.

Respectfully submitted,

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

Signed (electronically) by Paul M. Bessette

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Dated in Washington, DC
this 13th day of July 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	Docket Nos. 50-361 and 50-362
SOUTHERN CALIFORNIA EDISON COMPANY	)	
	)	
(San Onofre Nuclear Generating Station)	)	July 13, 2012

CERTIFICATE OF SERVICE

I hereby certify that, on this date, a copy of "Southern California Edison Company's Answer Opposing Friends of the Earth's Hearing Request and the Natural Resources Defense Council Response Regarding San Onofre Nuclear Generating Station Units 2 and 3" was filed with the Electronic Information Exchange in the above-captioned matter on the following recipients.

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