

**BEFORE THE UNITED STATES
NUCLEAR REGULATORY COMMISSION**

<u>In the Matter of</u>)	
)	
SOUTHERN CALIFORNIA EDISON COMPANY)	Docket Nos. 50-361, 50-362
)	
<u>(San Onofre Nuclear Generating Station)</u>)	July 20, 2012

**REPLY TO SCE’S AND NRC STAFF’S ANSWER TO
PETITION TO INTERVENE AND REQUEST FOR HEARING
BY FRIENDS OF THE EARTH**

INTRODUCTION

On June 18, 2012, Friends of the Earth (FOE) filed requests for a stay and an emergency stay of the restart of the San Onofre Nuclear Generating Station (San Onofre) Units 2 and 3 until the Nuclear Regulatory Commission (NRC or Commission) completed a license amendment proceeding addressing the changes in the safety analysis for these units based on the major changes in the replacement steam generators made by Southern California Edison (SCE) when it replaced the generators. Petitioner asserts that SCE was plainly required to seek a license amendment when the original steam generators were replaced and may not operate further without obtaining such an amendment. Petitioner urges that the Commission either provide the necessary public hearing by (1) formalizing that the current NRC proceeding is in fact a licensing amendment proceeding; or, alternatively, (2) convening such a proceeding under its general supervisory authority.

Both the NRC Staff (Staff) and SCE filed Answers to FOE’s Petition.¹ These Answers seek to prevent a proper public airing of the issues surrounding the San Onofre replacement

¹ The Natural Resources Defense Council (NRDC) filed a Response in support of FOE’s Petition. NRDC expressed support for FOE’s petition and did not attempt to make a showing of standing beyond declaring an intent to

steam generators by clinging to a narrow reading of the NRC's regulations regarding the term "proceeding," which the Commission can dispense with on either of the grounds offered by Petitioner.

Although the Respondents have filed forty-four pages of Answers to FOE's petition, their objections are virtually all built on their interpretation of the word "proceeding." This is true with respect to (1) timeliness, (2) standing, (3) whether Petitioner is within the scope of the proceeding, (4) materiality, and, of course, (5) the requirement that SCE obtain a license amendment for its replacement steam generators.

Petitioner has demonstrated that its claims are material because they would make a difference in the outcome of the proceeding. Respondents' defense is that SCE's flawed use of 10 C.F.R. § 50.59 during the steam generator replacement process to avoid public scrutiny is sufficient to prevent any further formal legal process, such as a public adjudicatory hearing, even after the discovery of unprecedented tube degradation in the replacement steam generators related to the design changes SCE did not reveal to the public. In support of its contention, FOE has provided specific and well-supported analysis from a highly qualified expert nuclear plant operator and consultant, Mr. Arnold Gundersen. Respondents' attempt to question Mr. Gundersen's Declaration is superficial and flatly wrong, as further evidenced by the recently released AIT Report that fully corroborates his assessment of the mechanisms of the tube degradation and failures at San Onofre.²

participate should the Commission grant the relief requested in FOE's petition. Respondents' arguments about NRDC's standing and timeliness are therefore beside the point.

² SAN ONOFRE NUCLEAR GENERATING STATION – NRC AUGMENTED INSPECTION TEAM REPORT 05000361/2012007 and 05000362/2012007 (July 19, 2012) ("AIT REPORT").

I. RESPONDENTS' RELIANCE ON THE ARGUMENT THAT THERE IS NO PROCEEDING IS MISPLACED

The Answers filed by SCE and the NRC Staff to FOE's Petition rely primarily on one contention. They argue, based on a technical reading of NRC regulations, that Petitioner and the public should be denied the opportunity to present evidence and question the NRC Staff and SCE about the causes of, and potential remedies for, the premature degradation of the replacement steam generators at the San Onofre nuclear power station. As grounds for denying such a public review of the serious issues raised by the rapid wear of the replacement steam generators, Respondents offer only the formalistic argument that the NRC Staff has not designated the current review of San Onofre in the Federal Register or on the NRC website as a license amendment proceeding.³

A. Respondents' Argument Would Foreclose All Public Participation

We do not need to remind the Commission that extremely serious issues of safety and process have been raised with respect to the San Onofre plant. As FOE noted in its Petition, 8.2 million people live within 50 miles of San Onofre. To restart the plant without complete certainty of its safety would risk the future of the people and environment of Southern California. As FOE stated in its Petition, the magnitude of the risks to public health and safety from the excessive and rapid tube degradation at San Onofre are too great for too many people to be dealt with without public participation.⁴ Under the Atomic Energy Act (AEA), the Commission owes the people of Southern California the opportunity for a full exploration of the safety issues at San Onofre that are provided in a license amendment proceeding, in particular, through a public

³Southern 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 (July 13, 2012) ("SCE Answer") and NRC Staff's Answer to Petition to Intervene and Request for Hearing By Friends of the Earth on the Restart of the San Onofre Reactors (July 13, 2012) ("NRC Staff Answer").

⁴ Petition at 22.

adjudicatory hearing. The Staff and licensee would use a constricted reading of NRC regulations to strip citizens of the chance to participate; the Commission must consider the need for public confidence in the outcome.

Petitioner asserts that the substantial changes in the replacement steam generators required, and continue to require, an amendment to the San Onofre operating license with the attendant level of public and official scrutiny.⁵ The premature degradation of the replacement steam generators and the unprecedented failure of multiple tubes only confirm that the flawed and drastically altered design of the replacement steam generators is the cause of new and previously unconsidered safety considerations requiring a license amendment. The changes in the steam generators include, but are not limited to, the addition of more than 400 tubes, the elimination of the stay cylinder, thickening of the tube sheet, changes in the tube support structure, and changes in the water/steam balance within the steam generator, all of may contribute to the reactor failures detailed in FOE's Petition.

Contrary to the categorical opposition to Petitioner's position expressed by the Staff's attorneys in the Answer filed in this proceeding, the Chairman of the Commission has indicated that the Commission is itself considering whether SCE is obliged under 10 C.F.R. § 50.59 to seek a broad license amendment for the replacement steam generators. In a June 11, 2012 letter to Senator Barbara Boxer, Chair of U.S. Senate Committee on Environment and Public Works, Chairman Jaczko stated that: "The NRC is currently re-examining the need for a license

⁵ As noted in the Petition, SCE did seek non-controversial license amendments for minor changes flowing from installation of the replacement steam generator. These amendments neither revealed nor addressed the major structural changes in the replacement steam generator apparently responsible for the premature degradation of the generator.

amendment at SONGS as part of an Augmented Inspection Team (AIT) review that is now underway.”⁶

In any case, whether or not the Staff is prepared to characterize the current NRC process as a license amendment proceeding is not conclusive: the NRC’s current CAL activity is a constricted version of a licensing proceeding, absent the process due under Section 189(a) of the Atomic Energy Act (AEA) and, of course, absent a regulatory decision by the NRC. Moreover, the NRC’s regulations require a license amendment. As the United States Court of Appeals for the First Circuit said in a similar case, “It is the *substance* of the NRC action that determines entitlement to a section 189(a) hearing *not* the particular label the NRC chooses to assign to its action” (emphasis in original).⁷ SCE’s citation of *Dominion Nuclear Conn., Inc.*,⁸ prohibiting intervention before a proceeding exists, and other cases to the same effect, is therefore beside the point.

According to engineers at SCE and Mitsubishi Heavy Industries (MHI), “the major premise of the steam generator replacement project was that it would be implemented under the 10 C.F.R. § 50.59 rule, that is, without prior approval” by the NRC. In effect, SCE now seeks NRC approval for its strategy of evading public scrutiny. Even after serious and potentially very dangerous design flaws in the replacement steam generators have been revealed, SCE continues to assert that its decision to circumvent the public review required by a license amendment cannot be revisited. SCE’s Section 50.59 evaluations, the company says, “do not provide an

⁶ Letter from Chairman G. Jaczko to Senator B. Boxer, at 1 *available at* ADAMS Accession No. ML12152A131.

⁷ *Citizens Awareness Network v. U.S. Nuclear Regulatory Commission*, 59 F. 3rd 28, 285 (1st Cir. 1995.) *See also e.g., Brodsky v. U.S. Nuclear Regulatory Com’n*, 578 F.3d 175 (2009), quoting *Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407, 416 (1942) (“The particular label placed upon [an order] by [an agency] is not necessarily conclusive, for it is the substance of what the [agency] has purported to do and has done which is decisive”).

⁸ *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), SCE’s Answer at 5.

opportunity to request a hearing.”⁹ The Commission needs to make clear that the NRC, not the licensee, decides which decisions must be subject to public review.

The same must be said of any legal conclusions about SCE’s section 50.59 process reached by the AIT in its Report, released on July 19, 2012. The AIT process is not a substitute for the appropriate legal process that Petitioner and the public are owed. To the extent that the AIT Report draws legal, as opposed to technical, conclusions about the extent to which SCE properly complied with Section 50.59 requirements, the AIT exceeds its purview. As the AIT itself states:

It is not the responsibility of an AIT to determine compliance with the NRC rules and regulations or to recommend enforcement actions, this will be done through subsequent NRC inspection or review.¹⁰

Finally, the Commission possesses ample power to formally convene a license amendment proceeding under its inherent supervisory authority over the nuclear industry.¹¹ The Staff Answer to the Petition admits that the Commission has such power – “the inherent discretion to institute a proceeding even where none is required by law” — and that exercising this discretion is “appropriate where substantial health and safety issues have been identified.”¹² Petitioner submits that the Commission has already conceded the seriousness of the health and safety issues identified at San Onofre. Mr. Werner’s statement at the AIT’s June 16, 2012, public meeting emphasized the seriousness for public safety of the degradation of the San Onofre replacement steam generator:

The pressure testing identified the strength of the 8 tubes was not adequate and structural integrity might not be maintained during an accident. It is important that both SONGS and the NRC understand what occurred and why. This is a *serious safety issue that must*

⁹ SCE Answer at 11.

¹⁰ AIT REPORT.

¹¹ See Statement of Policy on Conduct of Adjudicatory Proceedings, 48 N.R.C. 18, 20, 1998 WL 518232 (N.R.C.); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 229 (1990).

¹² NRC Staff Answer at 12.

be resolved to prevent further failures from occurring again and this information will be shared throughout the nuclear industry.¹³

B. Petitioner Is Not Untimely

Both SCE and the Staff argue that the Petition is untimely. Their arguments are little more than a reiteration of their “no proceeding” claim. Certainly if there is no proceeding, then the issue of timeliness is moot. However, if, as Petitioner contends, SCE and the Staff are simply avoiding the process due under the Atomic Energy Act by refusing to properly characterize what is plainly a license amendment, then Petitioner can hardly be faulted on grounds of timeliness.

The Staff also errantly argues that Petitioner lost its rights when it did not raise the issue of compliance with 10 C.F.R. § 50.59 back in 2008 when SCE sought license amendments covering tube inspection, repair, and changes to certain Technical Specifications – notably, *not* the major design changes made to the replacement steam generators.¹⁴ This is truly a “Catch-22” argument, since SCE relied on its improper reading of 10 C.F.R. § 50.59 in 2006 to avoid a public licensing proceeding. Thus, there was no way that a member of the public could have known what changes SCE planned to make in the design of its proposed replacement steam generators, and no way the public could have raised these issues in the context of SCE’s minor license amendments.

C. Petitioner Has Demonstrated Standing

The Answers of both the Staff and SCE confirm that FOE has standing to participate in this proceeding. The Staff offers no objection to Petitioner’s standing except to argue that standing can only exist in the context of a proceeding. Whatever the merits of that position, the

¹³ Transcript and video copy of AIT meeting, at <http://www.copswiki.org/Common/NRCMeetingTranscript2012-06-18> (emphasis supplied).

¹⁴ NRC Staff Answer at 4.

Staff's objection fails to the extent that the Commission declares the current review of San Onofre a license amendment proceeding, or initiates a license amendment proceeding under its inherent powers.

SCE's standing argument, though couched as an objection to "traceability," is the same "no proceeding" argument as that raised by the Staff and is subject to the same response. SCE also objects that Ms. Hicks has not "authorized FOE to represent her interest in such a proceeding."¹⁵ It is, of course, established law that the NRC will construe standing allegations in favor of the proponent.¹⁶ In fact, it is difficult to see how anyone who has read her declaration could suggest that she has not authorized FOE to represent her, but in an excess of caution Petitioner submits with this Reply an explicit statement by Ms. Hicks authorizing FOE to represent her in this matter.¹⁷

**II. RESPONDENTS' ARGUMENTS REGARDING THE
CONTENTION ADMISSIBILITY REQUIREMENTS WOULD CREATE
AN ABSURD RESULT IF ADOPTED**

Respondents assert that FOE has not satisfied the contention admissibility requirements under 10 C.F.R. §2.309(f).¹⁸ As a general matter, SCE contends that FOE has not met the "strict" contention rule cited by the Commission in *Dominion Nuclear Conn., Inc.* ("Millstone").¹⁹ FOE's contention, however, is readily distinguishable from the Petitioners' contention in *Millstone*, where the majority found that "[t]he Petitioners' contention ... makes no

¹⁵ SCE Answer at 14.

¹⁶ See, e.g., *In the Matter of Georgia Institute of Technology* (Georgia Tech Research Reactor), 42 N.R.C. 111, 115 (1995) ("To evaluate a petitioner's standing, we construe the petition in favor of the petitioner."); *In the Matter of Portland General Electric Company, et. al.* (Pebble Springs Nuclear Plant, Units 1 and 2), 4 N.R.C. 610, 615 (1976) ("Because of the value perceived in such [public] participation, this Commission and its predecessor, the Atomic Energy Commission, have always followed a liberal construction of judicial standing tests in determining whether a petitioner is entitled to intervention as a matter of right in our domestic licensing proceedings."); and *Kelley v. Selin*, 42 F.3d 1501, 1507-08 (1995).

¹⁷ Supplemental Declaration of Lyn Harris Hicks at ¶ 2, July 19, 2012, submitted with Petitioner's Reply Brief.

¹⁸ SCE Answer at 14-17; NRC Staff Answer at 17-18.

¹⁹ *Id.* at 8-9.

claim that there is a statutory or regulatory requirement” forming the basis of Petitioners’ argument.²⁰ FOE’s contention does not suffer from the same defect: it is firmly grounded in Section 189(a) of the AEA and Section 50.59’s legal mandate for when a license amendment is required.

Nor is FOE’s contention, as SCE argues, unable to meet the NRC’s revised contention admissibility standards.²¹ In *Millstone*, which SCE cites to claim that FOE has not demonstrated the potential to meaningfully participate and inform a hearing, the Commission discussed the revised contention admissibility standards as those “which insist upon some ‘reasonably specific factual and legal basis’ for the contention.”²² The Commission there explained that the revised standards sought to prevent contentions based on “little more than speculation” and intervenors who had “negligible knowledge of nuclear power issues and, in fact, no direct case to present”.²³ The revised standards, instead, required petitioners to “articulate at the outset the specific issues they wish to litigate”.²⁴

FOE has no difficulty meeting these standards. FOE has submitted a contention with a specific factual and legal basis, supported by the technical analysis of highly qualified nuclear expert who has spent more than five months to date focusing on the specific reactor issues at San Onofre—and whose assessment of the mechanisms causing the reactor problems is confirmed by the AIT Report.²⁵ In sum, FOE has no difficulty meeting the standards articulated in *Millstone* with its present contention.

²⁰ *In the Matter of Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 357 (2001) (hereinafter “*Millstone*”).

²¹ SCE Answer at 8-9 (citing the NRC’s revised admissibility rules).

²² *Millstone*, 54 NRC 349, 359 (internal citations omitted).

²³ *Id.* at 358 (internal citations omitted).

²⁴ *Id.* at 359 (internal citations omitted).

²⁵ AIT REPORT.

Respondents further submit a number of additional, specific arguments for why FOE's contention should not be found admissible. For the reasons discussed below, Respondents' arguments should be rejected.

A. Petitioner Is Within the Scope of a License Amendment Hearing

Both SCE and the Staff rely on the argument that, since there is no proceeding, FOE's petition cannot be within the proceeding's scope. This argument fails in two regards. Foremost, as FOE has demonstrated in its Petition and previously in this Reply, a proceeding triggering hearing rights is underway regardless of the "label" the staff chooses to put on it. Moreover, the "no proceeding" argument is not responsive to FOE's argument in the alternative requesting that if the Commission does not recognize the current NRC process as a *de facto* license amendment proceeding, then it convene such a proceeding under its inherent authority to do so.²⁶

Second, SCE's argument fails as a basic policy matter. SCE's argument is essentially that because there is no specific application pending before the licensing board, there can be no contention that is "within the scope" of the license amendment proceeding, nor any contention that could be considered germane to an application – including whether an application is even required. What SCE proposes, in essence, is that the licensee should have complete power to prevent the public from knowing the information the licensee considered in conducting its internal Section 50.59 evaluation. Unless the public has a right to seek a hearing, only the licensee would know the basis and reasoning supporting its characterization of the replacement steam generator as a like-for-like replacement satisfying the requirements of Section 50.59. The result in the present case exposes the fallacy of this view, as well as the public health and safety risks such a policy would create.

²⁶ Petition at 2.

Nor is it an adequate response that FOE could instead file a petition under 10 C.F.R. § 2.206. A petitioner is not entitled to an adjudicatory hearing under Section 2.206, which, as NRC regulations and precedent make clear, is a petition to the NRC to take *enforcement* action.²⁷ Holding an adjudicatory hearing is critical from a due process and public participation standpoint, as it is the mechanism through which information about the changes the licensee made to the facility is tested and provided to the public.

Further, a Section 2.206 petition is in fact not a viable alternative for obtaining substantive relief. The point is underscored by an Atomic Safety Licensing Board's (ASLB or Board) recent Memoranda and Orders concerning the effectiveness of Section 2.206 petitions in obtaining the relief requested. On May 17, 2012, the Board directed the NRC Staff to submit a list of occasions since 1975 in which the NRC official to whom a Section 2.206 petition was submitted granted the substantive relief sought.²⁸ Although the Board and Staff are at this time disputing the Staff's figures, it is apparent that the number of occasions in which even *some* modicum of substantive relief was granted is strikingly small. An easier figure to report, which nevertheless lends some context, is the number of instances in which the Staff granted a § 2.206 petition in whole: 2 out of 387, or one-half of one percent.²⁹

²⁷ See, e.g., *In the Matter of Envirocare of UT, Inc.*, 1997 WL 252631 (N.R.C.) 1 (explaining that enforcement actions are distinct from licensing proceedings, which do not come under the scope of §2.206).

²⁸ *In the Matters of All Operating Boiling Water Reactor Licensees with Mark I and Mark II Contaminants: Order Modifying Licenses with Regard to Reliable Hardened Containment Vents (Effective Immediately) and All Power Reactor Licensees and Holders of Construction Permits in Active or Deferred Status: Order Modifying Licenses with Regard to Reliable Spent Fuel Pool Instrumentation (Effective Immediately)*, Docket No. EA-12-050 and Docket No. EA-12-051, Licensing Board Memorandum and Order (Requesting Filing on Petitions under 10 C.F.R. § 2.206) (May 17, 2012).

²⁹ Licensing Board Memorandum and Order (Directing Staff to Amend Filing on 10 C.F.R. § 2.206) (June 19, 2012) at 2.

The Staff continues to maintain that it has granted at least some substantive relief in 142 cases,³⁰ but the Board has rejected that categorization, stating:

[I]t is plain that the Staff did not comply with the Board's directive. Rather than, as instructed, identifying solely those petitions in which substantive relief was provided to the petitioner, the Staff elected to supply the Board with each and every petition in response to which some action was taken by it. The most cursory examination of the Staff response reveals that in many, if not the majority, of the instances that action was patently not substantive in character.³¹

The precise figure aside, it is clear that the vast majority of § 2.206 petitions suffer a quiet death before the Staff. Thus, the refrain in the NRC Staff's Answer to FOE's Petition – that “the correct course of action is to file a petition under 10 C.F.R. § 2.206” – is, in reality, a proposal to consign Petitioner's concerns to eternal regulatory purgatory. Filing a § 2.206 petition is not a truly viable alternative, as the ASLB's current inquiry makes clear.

B. NRC Staff Does Not Have Immunity In Its Safety Review

To date, there has been no Staff safety review of SCE's license amendment application for the complete steam generator replacement, as SCE has failed to submit this application. As such, Petitioner alleges is that the NRC erred in failing to follow its own regulations as to when a license amendment is required; this is distinct from challenging the Staff's substantive safety review in a licensing adjudication, which is what SCE contends is barred.³² At this stage, Petitioner is not making an argument about the adequacy of the Staff's safety review in a licensing adjudication, but it is arguing that the Staff knew enough to understand that a license amendment covering the major changes in the replacement steam generators was necessary under 10 CFR § 50.59.

³⁰ NRC Staff Response to the Board Order Directing Staff to Amend Filing on 10 C.F.R. §2.206 (June 26, 2012) at 3.

³¹ Board Order of June 19, 2012, at 2.

³² SCE Answer at 15.

To the extent, however, that SCE is arguing that the Staff's safety review is immune from challenge,³³ the Commission has previously stated that "the Commission itself has the authority to vacate licensing actions or ask for further Staff review, and has exercised that authority on appropriate occasions."³⁴ This is, of course, to say nothing of review in a court of law, in which there would be no Staff immunity under the general administrative law principles of the Administrative Procedure Act or the United States Constitution.

C. Petitioner Has Shown Materiality

Here, again, SCE argues that because there is no ongoing licensing proceeding, it asserts, FOE's contention cannot be material. This argument merely restates Respondents' "no proceeding" defense, which fails to engage FOE's argument in the alternative that such a proceeding should and can be instituted under the Commission's discretion, nor to respond to the specific merits of FOE's materiality argument. Whether SCE was, and continues to be, required to apply for a license amendment for the full suite of changes it made during the steam generator replacements is indeed "material" under the definition cited by SCE ("[t]he dispute is 'material' if its resolution would 'make a difference in the outcome of the proceeding.'")³⁵. Whether a license amendment is required is clearly material to the outcome of a proceeding concerning the same.

D. SCE Inaccurately Characterizes FOE's Expert Report

SCE's argument that FOE failed to provide adequate support for its contention is premised on an inaccurate characterization of the Declaration supplied by FOE's nuclear

³³ *Id.* at 15 (quoting the NRC *AmerGen* Order CLI-08-23, 18 that "[t]he NRC has not, and will not, litigate claims about the adequacy of the Staff's safety review in licensing adjudications."). This statement was issued in the context of a petition challenging the adequacy of Staff review generally, outside of a specific licensing adjudication, and is accordingly not applicable to the present case.

³⁴ *In the Matter of The Curators of the University of Missouri*, 41 N.R.C. 71, 122, (1995) (internal citations omitted).

³⁵ SCE Answer at 15 (internal citations omitted).

engineering expert, Mr. Gundersen.³⁶ SCE argues that Mr. Gundersen’s Declaration is “not an evaluation of whether a license amendment should have been obtained.”³⁷ This is patently false. In fact, Mr. Gunderson’s Declaration contains an explicit section on this point, entitled “Significance of Design Modifications on Safety,” that explains how the design changes made by SCE trigger the license amendment process under the NRC’s regulations.³⁸

Regarding SCE’s assertion that Mr. Gundersen provides no support for the “yes” or “no” entries in the table (Table 1) used to summarize the 39 separate instances in which the major design changes made by SCE meet the Section 50.59 criteria requiring an amendment to the license, SCE fails to appreciate that Table 1 and its corresponding Footnotes A and B are a summary of the explanations Mr. Gundersen details throughout the rest of his report. SCE does concede that “Note B of this table identifies changes alleged by Mr. Gundersen,” but concludes that Mr. Gundersen failed to explain how these changes meet the Section 50.59 criteria, and that as such, his statements are “unsupported” and “conclusory.” In fact, every one of the numbers associated with the design changes on the horizontal axis of Table 1 is explained by Mr. Gundersen in narrative discussion throughout the report, as the following corresponding paragraphs show:

B 1	Paragraphs 22, 23
B 2	Paragraph 40
B 3	Paragraphs 17, 18
B 4	Paragraph 12, 13
B 5	Paragraph 23.1-23.3
B 6	Paragraph 23.4
B 7	Paragraph 23.5
B 8	Paragraph 33-38

³⁶ *Id.* at 16-17.

³⁷ *Id.* at 16.

³⁸ Petition at 7-11.

To the extent that SCE is attempting to criticize the substance, rather than presentation, of the information contained in Mr. Gundersen's report, its attempt founders on the AIT report, which substantially confirmed Mr. Gundersen's assessment of the mechanism that is prematurely degrading the replacement steam generators.

E. A Genuine Dispute of Law Exists as to Whether Further License Amendments Were Required

SCE's position – that because it did not submit a license amendment application on the major changes in the replacement steam generator as required, no-one can dispute specific portions of any such application – is untenable. As discussed previously, this type of circular reasoning ignores the real issue here. SCE erred in its Section 50.59 analysis and evaded more intensive review by the NRC and the public of its design changes, and consequently the replacement steam generators failed and now present serious public health and safety risks. The Commission cannot allow SCE to circumvent review of its Section 50.59 process – including the genuine dispute of law raised by FOE regarding its conclusions – by allowing SCE to rely on the argument that, because SCE chose not to submit an application several years ago, a license amendment proceeding is now precluded.³⁹ In effect, SCE is asking the Commission to hand over the keys to its regulatory authority to the licensee, who may then insulate itself from public scrutiny simply by not applying for a license amendment.⁴⁰

More directly, statements issued by the NRC thus far in the investigation into the failures at San Onofre indicate that a genuine dispute exists over whether a license amendment should

³⁹ *Id.* at 17 (“Because there is no application to challenge, the proposed contention fails to show the requisite genuine dispute.”).

⁴⁰ The NRC Staff appears to endorse just such a position. NRC Staff Answer at 18 (“FOE cannot meet the requirement of 10 C.F.R. §2.309(f)(1)(vi) to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact because the licensee has submitted no information to dispute”).

have been required, as discussed above.⁴¹ Further review by the Commission in the form of a license amendment proceeding is required.⁴²

CONCLUSION

By filing its Petition, FOE has asked the Commission to allow the public, including FOE, the opportunity to participate in an adjudicatory public hearing regarding the root causes for the premature degradation of the replacement steam generators at San Onofre Units 2 & 3, and the appropriate measures to assure the integrity of any replacement steam generators at San Onofre and the safety of the citizens of Southern California.

SCE was obliged to seek a license amendment when it installed replacement steam generators that, because of their design, created new and previously unexamined safety considerations. These safety considerations have now become painfully apparent in the unprecedented premature wear and rupture of the steam generator tubes. Before Units 2 & 3 can be restarted, therefore, SCE's license must be amended to provide assurance that there will not be continued risk to public safety owing to the degradation of the steam generators.

After failing to examine whether a license amendment was required at the time SCE began the steam generator replacement project, the NRC staff has now begun the investigation that should have occurred in a license amendment proceeding before the replacement steam

⁴¹ See *supra* at 4.

⁴² Even the AIT, while properly disclaiming responsibility for determining SCE's compliance with NRC regulations, identified an unresolved item "for which additional information is required to determine if performance deficiencies [by SCE] exist or if the issues constitute violations" of NRC's requirements. AIT REPORT at 64. Specifically, the AIT Report states: "The NRR technical specialist reviewed SCE's 10 CFR 50.59 evaluation and found two instances that failed to adequately address whether the change involved a departure of the method of evaluation described in the updated final safety analysis report." [...] "Additional review and followup will be required to review the departure of the method of evaluation used during the stress analysis calculations associated with the replacement steam generators." *Id.* at 65.

generators were built. But the staff continues to use regulatory labels to avoid providing the public hearing required in such a proceeding.

Petitioner therefore asks that the Commission act now, by instructing the Staff to issue the requisite public notice of a license amendment proceeding in the Federal Register, so that Petitioner and others may participate in a public hearing, as required under Section 189(a) of the Atomic Energy Act.

Respectfully submitted,

/s/ Richard E. Ayres

Richard E. Ayres
Kristin L. Hines
Jessica L. Olson
Ayres Law Group
1707 L Street, NW, Ste. 850
Washington, DC 20036
Phone: 202-452-9200
E-mail: ayresr@ayreslawgroup.com

Counsel for Friends of the Earth

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, copies of “Reply to SCE’s and NRC Staff’s Answer to Petition to Intervene and Request for Hearing by Friends of the Earth” in the above-captioned matter have been served on the following by Electronic Information Exchange and on the parties or counsel marked with an asterisk by electronic mail today, July 20, 2012.

Paul M. Bessette
William E. Baer, Jr.*
Stephen J. Burdick
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Phone: 202-739-5796
E-mail: pbessette@morganlewis.com

Douglas Porter*
Director and Managing Attorney
Generation Policy and Resources Law Department
Southern California Edison Company
2244 Walnut Grove Avenue
GO1, Q3B, 335C
Rosemead, CA 91770
Phone: 626-302-3964
E-mail: Douglas.Porter@sce.com

Office of the Secretary
U.S. Nuclear Regulatory Commission
Rulemakings and Adjudications Staff
Washington, DC 20555-0001

E-mail: hearingdocket@nrc.gov

Office of the General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop O-15D21
Washington, DC 20555-0001
David E. Roth
Catherine E. Kanatas
Lauren Woodall
E-mail: david.roth@nrc.gov;
Catherine.Kanatas@nrc.gov;
Lauren.Woodall@nrc.gov

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, DC 20555-0001
E-mail: ocaamail.resource@nrc.gov

Geoffrey H. Fettus
Senior Attorney
Natural Resources Defense Council
1152 15th St. NW
Washington, DC 20005
E-mail: gfettus@nrdc.org

/s/ Richard E. Ayres

Richard E. Ayres
Ayres Law Group
1707 L Street, NW, Ste. 850
Washington, DC 20036
Phone: 202-452-9200
E-mail: ayresr@ayreslawgroup.com

Counsel for Friends of the Earth