

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of)	
)	
SOUTHERN CALIFORNIA EDISON CO.)	Docket Nos.
)	50-361-CAL & 50-362-CAL
(San Onofre Nuclear Generating Station,)	
Units 2 and 3))	
)	

CLI-12-20

MEMORANDUM AND ORDER

Friends of the Earth has filed an intervention petition and hearing request,¹ as well as an application for stay,² in relation to the restart of San Onofre Nuclear Generating Station (SONGS) Units 2 and 3. As described below, we refer a portion of the petition to the Atomic Safety and Licensing Board Panel, as well as a portion to the Nuclear Regulatory Commission Staff. Additionally, we deny, without prejudice, Friends of the Earth's stay application and its request that we exercise our supervisory authority to order a discretionary hearing.

¹ *Petition to Intervene and Request for Hearing by Friends of the Earth* (June 18, 2012) (Friends of the Earth Petition).

² *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) (Friends of the Earth Stay Request).

I. BACKGROUND

SONGS Units 2 and 3 are currently shut down as Southern California Edison (SCE) evaluates the cause of a steam generator tube leak that led to the rapid shutdown of Unit 3. The NRC Staff issued a “Confirmatory Action Letter” (CAL) to SCE, which provides that SCE is to take certain actions prior to restarting the reactors.³

Friends of the Earth seeks a hearing on the restart and a stay of any decision to authorize restart pending the conclusion of the requested hearing.⁴ Friends of the Earth also maintains that SCE’s replacement of its steam generators in 2010 and 2011 pursuant to 10 C.F.R. § 50.59, without first obtaining NRC approval via a license amendment, was unlawful.⁵ The Natural Resources Defense Council (NRDC) supports Friends of the Earth’s hearing request.⁶ The NRC Staff and SCE oppose both the petition to intervene and request for hearing,⁷ as well as the stay request.⁸

³ See Elmo E. Collins, Regional Administrator, Region IV, US NRC, letter to Peter T. Dietrich, Senior Vice President and Chief Nuclear Officer, Southern California Edison Company, *Confirmatory Action Letter – San Onofre Nuclear Generating Station, Units 2 and 3, Commitments to Address Steam Generator Tube Degradation* (Mar. 27, 2012) (ADAMS accession no. ML12087A323) (Confirmatory Action Letter); Peter T. Dietrich, Senior Vice President & Chief Nuclear Officer, SCE, letter to Elmo E. Collins, Regional Administrator, Region IV, US NRC, *Docket Nos. 50-361 and 50-362, Steam Generator Return-to-Service Action Plan, San Onofre Nuclear Generating Station* (Mar. 23, 2012) (ML12086A182) (Action Plan).

⁴ Friends of the Earth Petition at 1.

⁵ See *id.* at 2. Section 50.59 sets forth the circumstances under which a licensee may make changes to the facility as described in its Updated Final Safety Analysis Report (UFSAR), make changes in the procedures described in the UFSAR, and conduct tests or experiments not otherwise described in the UFSAR, without obtaining a license amendment under 10 C.F.R. § 50.90. See 10 C.F.R. § 50.59 (c)(1).

⁶ *Natural Resource Defense Council’s (NRDC) Response in Support of Friends of the Earth Petition to Intervene and NRDC’s Notice of Intent to Participate* (June 27, 2012).

⁷ *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); *Southern California Edison Company’s Answer Opposing Friends of the Earth’s Hearing Request and the Natural* (Continued...)

II. DISCUSSION

Friends of the Earth makes several different requests. We address each of them in turn below.

A. 10 C.F.R. § 50.59 Violation

Friends of the Earth argues that SCE violated 10 C.F.R. § 50.59 when the steam generators for Units 2 and 3 were replaced in 2010 and 2011 without a license amendment.⁹

Friends of the Earth requests a hearing on its 50.59 claim, and asks that its petition not be construed as a request for enforcement relief under 10 C.F.R. § 2.206.¹⁰

Friends of the Earth states in its reply that the section 2.206 process is not a “viable alternative” for obtaining relief.¹¹ **We disagree.** The 2.206 process provides stakeholders a

Resources Defense Council Response Regarding San Onofre Nuclear Generating Station Units 2 and 3 (July 13, 2012).

⁸ *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); *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). Friends of the Earth replied to SCE and the Staff's answers. *Reply to SCE's and NRC Staff's Answer to Petition to Intervene and Request for Hearing by Friends of the Earth* (July 20, 2012) (Friends of the Earth Reply).

⁹ See Friends of the Earth Petition at 16.

¹⁰ Section 2.206 provides that “[a]ny person may file a request to institute a proceeding . . . to modify, suspend, or revoke a license, or for any other action as may be proper.” Except where the Commission determines that a discretionary hearing is warranted, section 2.206 provides the means to challenge licensee actions under 10 C.F.R. § 50.59. *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 101 n.7 (1994) (“A member of the public may challenge an action taken under 10 C.F.R. § 50.59 only by means of a petition under 10 C.F.R. § 2.206.”).

¹¹ See Friends of the Earth Reply at 11-12; see also Friends of the Earth Petition at 13 n.11. Friends of the Earth points chiefly to Administrative Judge Rosenthal’s pointed criticism of NRC’s 2.206 process in a recent “additional opinion” he issued in *All Operating Boiling Water Reactor Licensees with Mark I and Mark II Containments: Order Modifying Licenses with Regard to Reliable Hardened Containment Vents (Effective Immediately)*, LBP-12-14, 76 NRC ___ (July 10, 2012) (slip op.) (appeal pending). Notably, the Board majority in the *All Boiling Water* case did not subscribe to Judge Rosenthal’s view. They found that “the record before the (Continued...)”

forum to advance their concerns and to obtain full or partial relief, or written reasons why the requested relief is not warranted. We may then review the NRC Staff's findings on our own motion.¹² **If Friends of the Earth prevails on its 2.206 argument that SCE needed a license amendment to replace the SONGS steam generators, then it may be able to obtain the adjudicatory hearing it seeks.** Section 189a of the Atomic Energy Act (AEA) grants an opportunity for a hearing on (among other things) license amendments. Moreover, the NRC staff is already evaluating whether these SCE actions required a license amendment. We therefore deny Friends of the Earth's request and refer this portion of Friends of the Earth's petition to the EDO for consideration as a petition under 10 C.F.R. § 2.206.¹³

B. The Confirmatory Action Letter

Friends of the Earth contends that the "Confirmatory Action Letter" issued to SCE, including the process for resolving the issues raised in the Letter, constitutes a *de facto* license amendment proceeding within the hearing provision of Section 189a of the AEA, and therefore an adjudicatory hearing is required pursuant to 10 C.F.R. § 2.309.¹⁴ **We refer this portion of the**

Board falls far short of rebutting the presumption that 10 C.F.R. § 2.206 is a meaningful avenue for seeking administrative relief." *Id.* at ___ n.36 (slip op. at 9 n.36).

¹² See 10 C.F.R. § 2.206(a), (b), (c).

¹³ Such a referral is consistent with agency practice:

[Referrals] may be made when a petition does not satisfy the legal requirements for a hearing or intervention and [it is determined] that referral to the 10 CFR 2.206 process is appropriate. For these referrals, the substantive issues in the request for a hearing or intervention will be read as an implicit request for enforcement-related action, thus satisfying the criteria for treatment under the 10 CFR 2.206 review process.

Management Directive 8.11, *Review Process for 10 C.F.R. 2.206 Petitions*, Handbook Part III.C (Oct. 25, 2000). See also *Sequoyah Fuels Corp.* (Gore, Oklahoma), LBP-03-24, 58 NRC 383 (2003) (dismissing hearing requests as untimely and referring them to the EDO for consideration under § 2.206), *aff'd*, CLI-04-2, 59 NRC 5 (2004).

¹⁴ See Friends of the Earth Petition at 2.

petition to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel for appropriate action consistent with Section 189a of the AEA and 10 C.F.R. § 2.309. Specifically, we direct the Board to consider whether: (1) the Confirmatory Action Letter issued to SCE constitutes a *de facto* license amendment that would be subject to a hearing opportunity under Section 189a; and, if so, (2) whether the petition meets the standing and contention admissibility requirements of 10 C.F.R. § 2.309.¹⁵

C. Discretionary Hearing Request

Alternatively, Friends of the Earth has requested that we initiate a discretionary adjudicatory public hearing as an exercise of our inherent supervisory authority.¹⁶ However, our referral to the Licensing Board Panel (to consider the Confirmatory Action Letter claim) could result in a determination that a license amendment is necessary. Such a determination would require the NRC to publish a *Federal Register* notice providing an opportunity to seek a public hearing that Friends of the Earth seeks, and would render the request for a discretionary hearing moot. We therefore deny that request, without prejudice to Friends of the Earth's right to renew the request.

D. Stay Request

Friends of the Earth requests that we grant a "stay of any authorization for restart" of SONGS Units 2 and 3 pending the conclusion of its requested license amendment proceeding.¹⁷ In the Confirmatory Action Letter, the NRC confirmed the various commitments contained within SCE's Action Plan, and confirmed that SCE would not restart Units 2 and 3

¹⁵ Boards have previously considered such issues. See generally *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-89-28, 30 NRC 271 (1989) *aff'd*, ALAB-940, 32 NRC 225 (1990); *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant), LBP-95-17, 42 NRC 137 (1995), *rev'd and vacated*, CLI-96-13, 44 NRC 315 (1996).

¹⁶ See Friends of the Earth Petition at 15.

¹⁷ Friends of the Earth Stay Request at 1.

prior to the NRC's reviewing the appropriate actions and issuing formal written permission to resume power production.¹⁸ On July 18, 2012, the NRC issued an inspection report identifying ten "unresolved" items which SCE must address "before the resumption of operations in both SONGS Units 2 and 3."¹⁹ On October 3, 2012, SCE submitted a letter indicating that the issues identified in the Confirmatory Action Letter had been completed for Unit 2, and included a proposed action plan for restart of Unit 2.²⁰ The NRC is currently analyzing the SONGS steam generator tube degradation issue.²¹

Because restart of SONGS is not imminent, we deny the stay request without prejudice to its renewal should there be an indication that a restart of SONGS Units 2 or 3 appears imminent.

¹⁸ See Confirmatory Action Letter at 2.

¹⁹ See Elmo E. Collins, Regional Administrator, Region IV, US NRC, letter to Peter T. Dietrich, Senior Vice President and Chief Nuclear Officer, SCE, *San Onofre Nuclear Generating Station – NRC Augmented Inspection Team Report 05000361/2012007 and 05000362/2012007* (July 18, 2012) (ML12188A748).

²⁰ See Peter T. Dietrich, Senior Vice President & Chief Nuclear Officer, SCE, letter to Elmo E. Collins, Regional Administrator, Region IV, US NRC, *Docket No. 50-361, Confirmatory Action Letter – Actions to Address Steam Generator Tube Degradation San Onofre Nuclear Generating Station, Unit 2* (Oct. 3, 2012) (ML12285A263). Additionally, Friends of the Earth submitted a letter to the Commission reiterating its earlier requests. See Friends of the Earth letter to U.S. NRC, *NRC Proceeding San Onofre 50-361-CAL and 50-362-CAL. Request that the NRC Decide Petition to Intervene and Application by Friends of the Earth to Stay Any Decision to Restart Units 2 or 3 at the San Onofre Nuclear Generating Station* (Oct. 16, 2012) (ML12290A049). SCE responded to this letter on October 23, 2012 and the NRC staff responded on October 25, 2012. See Southern California Edison Company's Response to Request that the NRC Decide Petition to Intervene and Application by Friends of the Earth to Stay any Decision to Restart Units 2 or 3 at the San Onofre Nuclear Generating Station (ML12297A487); NRC Staff's Response to Request that the NRC Decide Petition to Intervene and Application to Stay Restart Decision (ML12299A513).

²¹ The NRC will continue to keep the public informed of its review process through various methods, such as posting information on the agency's public website and through public meetings.

III. CONCLUSION

For the reasons given in the decision, we (1) *refer* the asserted 10 C.F.R. § 50.59 violation to the EDO, (2) *refer* the “Confirmatory Action Letter” argument to the Board for consideration under 42 U.S.C. § 2239(a) and 10 C.F.R. § 2.309, and (3) *deny* the discretionary hearing and stay requests without prejudice.

IT IS SO ORDERED.

For the Commission

NRC SEAL

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland
this 8th day of November, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
SOUTHERN CALIFORNIA EDISON CO.)
)
) Docket Nos. 50-361-CAL
(San Onofre Nuclear Generating Station -) 50-362-CAL
Units 2 and 3))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (CLI-12-20)** have been served upon the following persons by Electronic Information Exchange and by electronic mail as indicated by an asterisk*.

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San Onofre Nuclear Generating Station, Units 2 and 3, Docket Nos. 50-361 and 50-362-CAL
MEMORANDUM AND ORDER (CLI-12-20)

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[Original signed by Herald M. Speiser ____]
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Dated at Rockville, Maryland
this 8th day of November, 2012