

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

Before Administrative Judges:
E. Roy Hawkens, Chairman
Dr. Anthony J. Baratta
Dr. Gary S. Arnold

In the Matter of) Docket Nos. 50-361-CAL,
) 50-362-CAL
SOUTHERN CALIFORNIA EDISON CO.)
)
(San Onofre Nuclear Generating Station, Units)
2 and 3) December 11, 2012
)

**OBJECTION BY CITIZENS OVERSIGHT TO THE USE OF NONDISCLOSURE
AGREEMENTS TO WITHHOLD INFORMATION FROM THE PUBLIC BY
SOUTHERN CALIFORNIA EDISON**

I. SUMMARY

On December 7, 2012, the Atomic Safety and Licensing Board in ASLBP No. 13-924-01-CAL-BD01 directed the use of nondisclosure agreements by Southern California Edison (SCE) for tube-to-tube and tube-to-support wear data which is clearly not proprietary in nature and must not be suppressed from public review.

Citizens Oversight objects to this ruling and requests that the information be reviewed on a case-by-case basis and allow it to be suppressed from public review only if the licensee can show that actual, and not hypothetical, injury will occur if the information is released to the general public.

II. INTRODUCTION

Citizens Oversight, Inc. is a nonprofit (501(c)3) organization incorporated in Delaware, and with primary offices in California. Among its missions, Citizens Oversight (or Citizens Oversight Projects, "COPS") seeks to ensure the public has an opportunity to influence the outcome of government and corporate decisions that affect the lives of many people.

President Obama, on January 21, 2009, the first day of his administration, issued the memo entitled "Transparency and Open Government"¹ which promoted that (paraphrased):

Government should be transparent. Government should be collaborative. Government should be participatory. Public engagement enhances the Government's effectiveness and improves the quality of its decisions. Knowledge is widely dispersed in society, and public officials benefit from having access to that dispersed knowledge.

Subsequent to that initial action, the President issued Executive Order 13579 on July 14, 2011², which explicitly provided for members of the public to participate in independent agencies, such as the NRC:

"Wise regulatory decisions depend on public participation and on careful analysis of the likely consequences of regulation. Such decisions are informed and improved by allowing interested members of the public to have a meaningful opportunity to participate in rulemaking."

Indeed, the NRC states that it embraces the concepts of openness and transparency on its website³:

The U.S. Nuclear Regulatory Commission (NRC) has a long-standing practice of conducting its regulatory responsibilities in an open and transparent manner, consistent with The NRC Approach to Open Government. In that way, the NRC

1 <http://www.gpo.gov/fdsys/pkg/FR-2009-01-26/pdf/E9-1777.pdf>

2 <http://www.gpo.gov/fdsys/pkg/FR-2011-07-14/pdf/2011-17953.pdf>

3 <http://www.nrc.gov/public-involve/open/transparency.html>

keeps the public informed of the agency's regulatory, licensing, and oversight activities.

COPS also has submitted a separate petition to intervene and request a hearing under Docket Nos. San Onofre 50-361 and 50-362-LA regarding the License Amendment Request (LAR) for San Onofre Nuclear Generating Station (SONGS), Units 2 and 3, dated July 29, 2011. That is a separate matter but it also addresses a trend in the industry to avoid public scrutiny by a) making hearings very difficult and rare, b) reducing information in the technical specifications so the licensee can change these specs without NRC approval or public review, and c) very liberal interpretation of 10 C.F.R. 50.59, which is the primary issue in the case submitted by Friends of the Earth (FOE), Docket Nos. 50-361-CAL, 50-362-CAL. (Any question of standing can be addressed as we do in Docket Nos. San Onofre 50-361 and 50-362-LA regarding our proximity and interest in the San Onofre Nuclear Generating Station.)

Unfortunately, we also are seeing a trend to run the ASLBP proceedings as a semi-closed session by allowing the SCE to withhold nonproprietary information from the public.

On November 8, 2012, the Commission in CLI-12-20 referred to the Atomic Licensing Board Panel a portion of Friends of the Earth's June 18, 2012 intervention petition challenging a Confirmatory Action Letter (CAL) issued by the NRC to Southern California Edison Company (SCE) on March 27, 2012. In particular, the Commission directed a duly constituted Licensing Board to "consider whether: (1) the [CAL] issued to SCE constitutes a de facto license amendment that would be subject

to a hearing opportunity under [s]ection 189a [of the Atomic Energy Act]; and, if so, (2) whether the petition meets the standing and contention admissibility requirements of 10 C.F.R. § 2.309.” CLI-12-20, slip op. at 5.

III. COPS OBJECTS TO SUPPRESSING INFORMATION FROM THE PUBLIC DURING ASLBP PROCEEDINGS

On December 3, 2012, this Board held a conference call with the participants to discuss the adjudicative path forward in this case, which resulted in the order ASLBP No. 13-924-01-CAL-BD01 (Conference Call Summary and Directives Relating to Briefing). During that call, Judge Hawkins referred to a number of documents which SCE claims are "proprietary":

Examples of those documents include the steam generator tube wear analysis for Units 2 and 3, the SONGS Unit 2 return-to-service report, the SONGS steam generator operational assessment for tube-to-tube wear and the tube-to-TSP wear depth diagram for Units 2 and 3.

COPS believes the proceedings on this matter, which of intense interest to the public, should remain open, transparent, and completely public, unless the licensee can demonstrate that they will be actually injured by the release of specific information, and then only that specific information can be covered with a nondisclosure agreement (NDA).

Although the licensee may be embarrassed to release this information due to the poor design of the steam generators which was under its control, embarrassment is not sufficient rationale to allow the information to be classified as proprietary, then resulting in requiring a NDA to review it, and thereby eliminating it from the public

record of your proceeding.

The "tube-to-TSP wear depth diagram for Units 2 and 3" for example, is test data that has nothing to do with any patents or intellectual property related to the design of the steam generators, but instead is important test data to characterize the steam generator failure and radioactive steam release on January 31, 2012, to help everyone understand the similarity between Unit 2 and Unit 3, and to understand the risks involved in the proposed restart of Unit 2. Although some of those questions are beyond the scope of your proceeding, these questions are before the public and COPS believes the public has the right to review this nonproprietary test data, as well as probably most -- if not all -- of the documents the SCE is claiming are proprietary.

The concept that competitors will want to copy the design of the failed steam generators has no connection with reality. Any proprietary design information now has no value and therefore, SCE cannot be injured by releasing it, except perhaps to have to admit that the design changes under its control were the ultimate cause of the excessive vibration and untimely wear. If anything, this information should be promulgated widely to inform the industry about how it can avoid similar design mistakes.

In 10 C.F.R. 73 "PHYSICAL PROTECTION OF PLANTS AND MATERIALS", specific requirements are established for the maintenance of a physical protection system. Licensees sometimes point to these requirements as rationale for confidentiality. However, the wear data of the steam generators does not provide any information that could be used for radiological sabotage or theft. Furthermore, 10 C.F.R. 73.5 "Specific Exemptions" says:

The Commission may, upon application of any interested person or upon its own initiative, grant such exemptions from the requirements of the regulations in this part as it determines are authorized by law and will not endanger life or property or the common defense and security, and are otherwise in the public interest.

COPS, therefore, as an "interested person" is hereby applying for an exemption of any requirements that the steam generator wear data and other nonproprietary data be withheld from public review by a nondisclosure agreement.

COPS suggests that a rigorous review of these documents occur, so as to justify the classification by the licensee that they are "confidential and proprietary" and that, similar to a petitioner claiming standing, they should have to show "(1) an actual or threatened, concrete and particularized injury [(injury-in-fact)], that (2) is fairly traceable to the (release of the claimed proprietary information).

Otherwise, it is possible for the licensee to claim that almost all information is proprietary, resulting in closed rather than open ASLBP proceedings. This outcome is unacceptable, particularly in light of Executive Order 13579, which directs independent agencies such as the NRC to become more open.

Respectfully submitted,

Ray Lutz

National Coordinator

Citizens Oversight Project

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document "**OBJECTION BY CITIZENS OVERSIGHT TO THE USE OF NONDISCLOSURE AGREEMENTS TO WITHHOLD INFORMATION FROM THE PUBLIC BY SOUTHERN CALIFORNIA EDISON**" have been served upon the parties by the Electronic Information Exchange.

Respectfully submitted,

/s/ Raymond Lutz

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