

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

December 20, 2012

1

Pursuant to 10 C.F.R. § 2.323, SCE moves to strike the Reply because it is an unauthorized filing, impermissibly attempts to expand FOE's earlier arguments, and attempts to delay this proceeding.³

II. THE REPLY SHOULD BE STRICKEN

A. The Reply Is Unauthorized by the Regulations

FOE's December 11, 2012 filing was a "motion." Indeed, the title of this filing states that it was a "Motion."⁴ Motions are governed by 10 C.F.R. § 2.323.⁵ That regulation prohibits replies in response to answers to a motion in a proceeding. Section 2.323(c) states that "[t]he moving party has no right to reply." The only exception is when the presiding officer grants a right to reply for "compelling circumstances."⁶ FOE has not sought leave from the presiding officer to file the Reply, much less demonstrated compelling circumstances. Therefore, FOE's Reply is unauthorized and should be stricken.⁷

B. The Reply Impermissibly Attempts to Expand FOE's Earlier Arguments

Even assuming that the Reply was authorized, it impermissibly attempts to expand FOE's arguments in the Motion. A reply is intended to give the moving party an opportunity to address

³ SCE certifies that it contacted representatives for FOE and the NRC Staff pursuant to 10 C.F.R. § 2.323(b) and has made a sincere effort to resolve the issues raised in this motion, and that SCE's efforts to resolve the issues have been unsuccessful. FOE opposes the motion. The NRC Staff stated that it does not oppose SCE filing this motion, and noted that FOE has not received permission nor demonstrated compelling circumstances under 10 C.F.R. § 2.323(c) to file the Reply.

⁴ Motion at 1.

⁵ FOE takes the extraordinary position in its Reply that 10 C.F.R. Part 2, Subpart C, does not apply to this proceeding. *See* Reply at 3. FOE may therefore claim that 10 C.F.R. § 2.323 does not apply because it is in Subpart C. FOE's position is untenable because Subpart C provides rules of general applicability and the provisions of Subpart C "apply to all adjudications conducted under the authority of the Atomic Energy Act." 10 C.F.R. § 2.300. Subpart C clearly applies here.

⁶ 10 C.F.R. § 2.323(c).

⁷ On December 12, 2012, the Board issued an Order directing SCE and the NRC Staff to file expedited answers to the Motion. Consistent with 10 C.F.R. § 2.323(c), that Order does not provide any opportunity for FOE to file its Reply. *See* Order (Directing SCE and NRC Staff to File Expedited Answers to Petitioner's Extension and Clarification Request) (Dec. 12, 2012) (unpublished).

arguments raised in the opposing parties' answers. A reply may not be used as a vehicle to introduce for the first time new arguments or support and may not expand the scope of arguments set forth in the original filing.⁸ As the Commission has stated with respect to hearing requests:

It is well established in NRC proceedings that a reply cannot expand the scope of the arguments set forth in the original hearing request. Replies must focus narrowly on the legal or factual arguments first presented in the original petition or raised in the answers to it.⁹

The Commission's prohibition on new arguments and support in replies is rooted in the Commission's interest in conducting adjudicatory hearings efficiently. The Commission has recognized that "[a]s we face an increasing adjudicatory docket, the need for parties to adhere to our pleading standards and for the Board to enforce those standards are paramount."¹⁰ Moreover, because NRC regulations do not allow the licensee to respond to a petitioner's reply,¹¹ principles of fairness mandate that a reply be restricted to addressing issues raised in the licensee's or NRC Staff's answers. "In Commission practice, and in litigation practice generally, new arguments may not be raised for the first time in a reply brief."¹² Any improper arguments should be stricken.¹³

⁸ See, e.g., *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), CLI-11-14, 74 NRC ___, slip op. at 10 (Dec. 22, 2011) (stating that the Commission has "long held that a reply may not contain new information that was not raised in either the petition or answers"); *Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), LBP-06-10, 63 NRC 314, 351-63 (refusing to consider references to various documents identified in a petitioner's reply that were not included in the original petition), *aff'd*, CLI-06-17, 63 NRC 727 (2006).

⁹ *Palisades*, CLI-06-17, 63 NRC at 732 (citation omitted).

¹⁰ *La. Energy Servs., L.P.* (Nat'l Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004).

¹¹ See 10 C.F.R. § 2.323.

¹² *Nat'l Enrichment Facility*, CLI-04-25, 60 NRC at 225; see also *Changes to the Adjudicatory Process*, 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004).

¹³ A licensing board has the authority to strike pleadings. See, e.g., 10 C.F.R. § 2.319 (stating that the presiding officer has all the powers necessary "to take appropriate action to control the prehearing . . . process").

The Reply runs afoul of these long-standing requirements. Section IV of the Reply raises new arguments for why additional documents beyond those identified in the Motion must be disclosed.¹⁴ Specifically, FOE refers to two sets of Requests for Additional Information (“RAIs”) issued by the NRC Staff to SCE, and requests that the Board require “that the proprietary versions of the answers [to the RAIs], and supporting documentation, be posted to the non-public docket as they become available.”¹⁵ These are new arguments and a new document request from FOE. In addition to being unauthorized as explained in SCE’s answer to the Motion, these arguments inappropriately attempt to expand the scope of FOE’s arguments in its Motion. Therefore, these new arguments and requests in the Reply should be stricken.

C. The Reply Attempts to Delay this Proceeding

The Reply seeks to delay this proceeding. On December 4, 2012, FOE submitted a document request to SCE for 60 items.¹⁶ In its December 11, 2012 Motion, FOE expanded this request to 126 items.¹⁷ FOE now seeks additional future responses to RAIs issued by the NRC Staff.¹⁸ It is apparent that FOE will continue to request numerous documents related to the replacement steam generators, including documents that have yet to be generated (such as SCE’s RAI responses), and to seek delay in this proceeding until it receives and reviews those documents. As SCE explained in its answer to FOE’s Motion, any delay in this proceeding

¹⁴ Reply at 8-9.

¹⁵ *Id.* at 9.

¹⁶ See Letter from R. Ayres, FOE Counsel, to SCE Counsel, Proposed Briefing Schedule and Request for Documents (Dec. 4, 2012). FOE provided the Board members with copies of this letter via e-mail.

¹⁷ See Motion, Attachments 1 and 2.

¹⁸ See Reply at 8-9.

could result in significant harm to SCE.¹⁹ FOE's attempts to delay this proceeding should be rejected.

III. CONCLUSIONS

As demonstrated above, FOE's Reply is an unauthorized filing, impermissibly attempts to expand FOE's earlier arguments, and attempts to delay this proceeding. Therefore, the Reply should be stricken.

Respectfully submitted,

Signed (electronically) by Stephen J. Burdick

Stephen J. Burdick

Steven P. Frantz

Morgan, Lewis & Bockius LLP

1111 Pennsylvania Avenue, N.W.

Washington, D.C. 20004

Phone: 202-739-5059

E-mail: sburdick@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

Counsel for Southern California Edison Company

Dated in Washington, D.C.
this 20th day of December 2012

¹⁹ SCE Answer at 13.

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

December 20, 2012

DB1/ 72563297.1