

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
SOUTHERN CALIFORNIA EDISON COMPANY)	Docket Nos. 50-361-CAL & 50-362-CAL
)	
(San Onofre Nuclear Generating Station,)	January 22, 2013
Units 2 and 3))	
)	

**SOUTHERN CALIFORNIA EDISON COMPANY’S MOTION FOR SANCTIONS
AGAINST FRIENDS OF THE EARTH FOR VIOLATING THE PROTECTIVE ORDER**

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.323 and the Atomic Safety and Licensing Board’s (“Board’s”) December 10, 2012 Protective Order,¹ Southern California Edison Company (“SCE”) moves for sanctions against Friends of the Earth (“FOE”) for disclosing SCE’s proprietary information in violation of the Protective Order. Specifically, the redacted version of the Affidavit of John Large (“Large Affidavit”)² that FOE filed as an attachment to its January 11, 2013 Opening Brief contains proprietary information from SCE’s October 3, 2012 Restart Report.³ Pursuant to the Protective Order, such disclosure of “Protected Information constitutes immediate and irreparable harm,” and is subject to sanctions by the Board.⁴ This is particularly true here because FOE publicly posted the proprietary information on its website for at least a week.

¹ Order (Granting Joint Motion for Entry of a Protective Order and Non-Disclosure Agreement) (Dec. 10, 2012) (unpublished) (“Protective Order”).

² Affidavit of John Large (Jan. 10, 2013) (filed as Attachment 1 to FOE’s Opening Brief). FOE filed both a proprietary version and a redacted version of the Large Affidavit.

³ SCE uses the phrase “Restart Report” to refer to SCE’s October 3, 2012 response to the NRC regarding SONGS Unit 2 and the fulfillment of the corresponding actions identified in the March 27, 2012 Confirmatory Action Letter, including all of the enclosures and attachments. Public versions of these documents are provided in ADAMS Package No. ML122850320.

⁴ Protective Order ¶ 13.

SCE requests that the Board sanction FOE by eliminating any further use of Protected Information in this proceeding. To do this, SCE requests that the Board take the following actions: (1) Strike all Protected Information from FOE's documents; (2) Require FOE and all individuals that signed Non-Disclosure Affidavits to return or destroy all Protected Information; and (3) Modify the Protective Order to prohibit further use of Protected Information in this proceeding. Only these actions will ensure that Protected Information will not be improperly disclosed again.⁵

II. BACKGROUND

On November 8, 2012, the Commission issued decision CLI-12-20 referring to the Board a portion of FOE's June 18, 2012 intervention petition related to the March 27, 2012 Confirmatory Action Letter ("CAL") issued by the Nuclear Regulatory Commission ("NRC") to SCE.⁶ On December 7, 2012, the Board ordered SCE and FOE to coordinate to prepare a proposed non-disclosure agreement to allow disclosure of the proprietary versions of documents in SCE's October 3, 2012 Restart Report.⁷ In response to the Board's Order, SCE and FOE prepared and filed a joint motion and proposed protective order.⁸ Shortly thereafter, on December 10, 2012, the Board issued the Protective Order.

Once FOE filed the first Non-Disclosure Affidavits required by the Protective Order, SCE transmitted all of the proprietary documents in the Restart Report to FOE and the Board on

⁵ 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. Staff counsel stated that the Staff does not believe that Protected Information is necessary to resolve the issues before the Board.

⁶ *Southern Cal. Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-12-20, 76 NRC ___, slip op. at 4-5 (Nov. 8, 2012).

⁷ See Order (Conference Call Summary and Directives Relating to Briefing), at 4 (Dec. 7, 2012) (unpublished).

⁸ Joint Motion for Entry of a Protective Order (Dec. 7, 2012).

December 12, 2012.⁹ This included an Operational Assessment prepared by AREVA (“AREVA OA”), which included proprietary information.¹⁰ FOE filed a total of 12 Non-Disclosure Affidavits, indicating that FOE has provided relatively broad access to the Protected Information.

On January 11, 2013, FOE filed its Opening Brief in this proceeding, including the Large Affidavit. FOE filed proprietary versions of the Opening Brief and Large Affidavit through the Non-Public Submission portion of the NRC’s E-filing system and redacted versions of these documents through the public portion. While reviewing the Large Affidavit late on January 17, 2013, SCE counsel concluded that the redacted version of the Large Affidavit inappropriately included proprietary information from the AREVA OA. SCE counsel contacted FOE counsel on the morning of January 18, 2013 to discuss this inappropriate disclosure. After reviewing the information, FOE agreed that proprietary information had been disclosed contrary to the Protective Order. FOE then notified the Board of this in accordance with Protective Order ¶ 8.¹¹

III. LEGAL STANDARDS

Pursuant to 10 C.F.R. § 2.319, “[a] presiding officer has the duty to conduct a fair and impartial hearing according to law, to take appropriate action to control the prehearing and hearing process, to avoid delay and to maintain order.” Licensing boards may impose sanctions to remedy the harm resulting from a party’s violation of a protective order, and to prevent future violations of the order.¹² Licensing boards act “under the assumption that protective orders will

⁹ Letter from S. Frantz, SCE counsel, to Board, Transmittal of Proprietary Documents per Licensing Board’s December 7, 2012 Order (Dec. 12, 2012). The NRC Staff had already obtained the proprietary documents in the Restart Report under 10 C.F.R. § 2.390.

¹⁰ SONGS U2C17 Steam Generator Operational Assessment for Tube-to-Tube Wear (Rev. 0, Oct. 3, 2012) (provided as Restart Report, Enclosure 2, Attachment 6, Appendix B).

¹¹ Letter from R. Ayres, FOE Counsel, to Board (Jan. 18, 2013) (distributed to Board and parties by e-mail) (“FOE Notification”).

¹² *See Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 and 2), LBP-88-28, 28 NRC 537, 541 (1988).

be obeyed.”¹³ Based on that assumption, licensing boards “have permitted the disclosure to parties of a wide variety of sensitive information.”¹⁴ Thus, a party that violates a protective order risks “serious sanction.”¹⁵ Regardless of the actual harm caused, the justification for sanctions is to protect against future harm to an applicant’s proprietary interest and harm to their position in the case as well as to safeguard the integrity of the NRC adjudicatory process.¹⁶

The Commission has recommended to boards a broad range of sanctions for parties who fail to meet their obligations.¹⁷ Sanctions range from minor to severe and can be structured to remedy harm done, or may be prospective, to prevent future harm.¹⁸ In selecting a sanction, boards should consider “the relative importance of the unmet obligation, its potential for harm to other parties or the orderly conduct of the proceeding, . . . and all of the circumstances.”¹⁹ Licensing boards should “attempt to tailor sanctions to mitigate the harm caused by the failure of a party to fulfill its obligations and bring about improved future compliance.”²⁰

IV. THE BOARD SHOULD SANCTION FOE FOR VIOLATING THE PROTECTIVE ORDER

A. There Is No Dispute that FOE Violated the Protective Order

In relevant part, the Protective Order governs a “recipient’s use of all Protected Information produced by, or on behalf of, SCE (and its third-party vendors, contractors, and

¹³ *Id.*; *Commonwealth Edison Co.* (Byron Nuclear Power Station, Units 1 and 2), ALAB-735, 18 NRC 19, 25 (1983).

¹⁴ *Byron*, ALAB-735, 18 NRC at 25.

¹⁵ *See Consumers Power Co.* (Midland Plant, Units 1 and 2), LBP-83-64, 18 NRC 766, 769 (1983).

¹⁶ *See Seabrook*, LBP-88-28, 28 NRC at 541.

¹⁷ *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 454 (1981).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

consultants).”²¹ “Protected Information” includes information designated by SCE (and its third-party vendors, contractors, and consultants) as proprietary information under 10 C.F.R. § 2.390(a)(4).²² Furthermore, the Protective Order states that Protected Information “shall not be disclosed to any third party without the express written consent of the participant that produced the Protected Information.”²³

FOE violated the Protective Order in four separate places in the Large Affidavit. First, in direct contravention of the Protective Order, the redacted, public version of the Large Affidavit directly reproduces a proprietary AREVA figure.²⁴ This figure, Figure 8-3, is clearly marked as proprietary in the proprietary version of the AREVA OA and, accordingly, is redacted in the public version of the AREVA OA.²⁵ Second, at page 25, the Large Affidavit reproduces information about an MHI Model from a proprietary paragraph of the AREVA OA.²⁶ Third, at page 23, the Large Affidavit summarizes a proprietary paragraph of the AREVA OA.²⁷ Finally, at page 24, the Large Affidavit again summarizes a proprietary paragraph of the AREVA OA.²⁸

FOE conceded in its notification to the Board that it violated the Protective Order. FOE stated that the non-proprietary version of the Large Affidavit “inadvertently described and/or included proprietary information.”²⁹ FOE also agreed that “[t]his information is subject to the

²¹ Protective Order ¶ 1.

²² *Id.*

²³ *Id.* ¶12.

²⁴ Large Affidavit ¶ 5.8.18.

²⁵ Compare AREVA OA (Proprietary) at 110 with AREVA OA (Public) at 110.

²⁶ Large Affidavit ¶ 5.7.46; compare AREVA OA (Proprietary) at 56 with AREVA OA (Public) at 56.

²⁷ Large Affidavit ¶ 5.7.38; compare AREVA OA (Proprietary) at 19 with AREVA OA (Public) at 19.

²⁸ Large Affidavit ¶ 5.7.42; compare AREVA OA (Proprietary) at 44 with AREVA OA (Public) at 44.

²⁹ FOE Notification at 1.

Protective Order and Non-Disclosure Agreement filed jointly by the parties and incorporated into the Board's Order of December 10, 2012."³⁰

For these reasons, there is no dispute that FOE violated the Protective Order by disclosing SCE's Protected Information.

B. The Board Should Impose the Sanctions Requested by SCE

The Protective Order makes clear that any violation of its provisions "may result in the imposition of sanctions as the ASLB or the Commission may deem to be appropriate."³¹

FOE's disclosure of the proprietary information was improper for a number of reasons. First, the Protective Order, which was agreed to by FOE, states that "any actual or anticipated unauthorized disclosure of Protected Information constitutes immediate and irreparable harm."³² Additionally, FOE not only filed the proprietary information on the NRC's E-Filing system (which was posted on the NRC's public website), but it also posted the information on its own public website. Numerous personnel could have downloaded the proprietary information before it was removed, and it will not be possible to retrieve or destroy those copies. Moreover, despite the clear marking by SCE of the disclosed information as proprietary, FOE "inadvertently" disclosed such information. The inadvertence of the disclosures suggests that FOE cannot be relied upon by this Board or by SCE to effectively prevent future inadvertent disclosures of proprietary information.

For these reasons, and given the potential for future disclosure of Protected Information, SCE requests the Board sanction FOE by eliminating any further use of Protected Information in this proceeding. To do this, SCE requests the Board take the following actions:

³⁰ *Id.*

³¹ Protective Order ¶ 13.

³² *Id.*

- (1) The Board should strike all of the Protected Information identified in FOE's Opening Brief and the Large Affidavit;
- (2) The Board should require that FOE and all individuals that signed Non-Disclosure Affidavits return or destroy all Protected Information within 15 days of the Board's order, and execute an affidavit confirming that they have done so (*i.e.*, take actions similar to those required by Protective Order ¶ 7 when the proceeding terminates); and
- (3) The Board should modify the Protective Order to prohibit any further disclosure or use of Protected Information by FOE in this proceeding.

These sanctions are the only effective way to ensure that FOE does not disclose any Protected Information in the future. As discussed above, the justification for sanctions is to protect against future harm to an applicant's proprietary interest and harm to their position in the case as well as to safeguard the integrity of the NRC adjudicatory process.³³ SCE acknowledges that this sanction is strict, but the Commission has recognized that much more severe sanctions can be appropriate for failing to comply with orders, such as dismissing contentions, sanctioning counsel, or dismissing a party from a proceeding.³⁴

V. CONCLUSION

For the foregoing reasons, FOE's public disclosure of SCE's Protected Information is a serious offense and the Board should impose sanctions against FOE. SCE requests that the Board sanction FOE by eliminating any further use of Protected Information in this proceeding. This sanction is appropriate and will not affect the Board's ability to resolve the issues in this proceeding.

³³ See *Seabrook*, LBP-88-28, 28 NRC at 541.

³⁴ See *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC at 454.

Respectfully submitted,

Signed (electronically) by Stephen J. Burdick

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Dated in Washington, D.C.
this 22nd day of January 2013

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, a copy of “Southern California Edison Company’s Motion for Sanctions Against Friends of the Earth for Violating the Protective Order” was filed through the E-Filing system.

Signed (electronically) by Stephen J. Burdick
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