

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

Before Administrative Judges:

E. Roy Hawken, Chairman
Dr. Anthony J. Baratta
Dr. Gary S. Arnold

In the Matter of

SOUTHERN CALIFORNIA EDISON CO.

(San Onofre Nuclear Generating Station, Units
2 and 3)

Docket Nos. 50-361-CAL, 50-362-CAL

ASLBP No. 13-924-01-CAL-BD01

February 8, 2013

ORDER

(Denying SCE's Motion for Sanctions Against Friends of the Earth
for Violating the Protective Order, but Imposing an Enhanced Document-Review Requirement)

I. BACKGROUND

On November 8, 2012, the Commission in CLI-12-20 referred to the Atomic Safety and Licensing Board Panel (ASLBP) two issues from the June 18, 2012 intervention petition filed by Friends of the Earth (Petitioner) challenging a Confirmatory Action Letter (CAL) issued by the NRC to Southern California Edison Company (SCE) on March 27, 2012.¹

Following its establishment on November 19, 2012,² this Licensing Board held a conference call to discuss the procedural path forward.³ On December 7, 2012, we issued an

¹ See Southern Cal. Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-12-20, 76 NRC ___, slip op. at 5 (Nov. 8, 2012). The Commission referred the following two issues to the ASLBP: (1) whether the CAL issued to SCE constitutes a de facto license amendment that is subject to a hearing opportunity; and (2) whether Petitioner's hearing request meets the agency's standing and contention admissibility requirements. See id.

² See Southern Cal. Edison Co.; Establishment of Atomic Safety and Licensing Board, 77 Fed. Reg. 70,487 (Nov. 26, 2012).

³ See Licensing Board Order (Scheduling Conference Call) (Nov. 26, 2012) (unpublished).

Order that, inter alia, directed SCE, in coordination with Petitioner, to submit a proposed Protective Order and Non-Disclosure Agreement regarding proprietary documents that appear to be relevant to the issue of whether the CAL constitutes a de facto license amendment.⁴

On December 10, 2012, we granted a joint motion from SCE and Petitioner for entry of a Protective Order and Non-Disclosure Agreement,⁵ and on December 12, 2012, SCE transmitted the specified proprietary documents to Petitioner and this Board.⁶

Pursuant to the briefing schedule in this Board's December 20, 2012 Order,⁷ Petitioner filed its opening brief with attachments on January 11, 2013. Petitioner filed two versions of its brief -- a redacted version from which Petitioner purported to have removed all references to proprietary information from the brief and attachments, and an unredacted version. Consistent with standard adjudicative practice, the NRC posted the redacted version of the pleading to the publicly accessible Agency Documents Access and Management System (ADAMS) database; Petitioner also posted the redacted version on its website. Petitioner provided the unredacted version of its pleading only to the Board and SCE.

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

⁵ See Licensing Board Order (Granting Joint Motion for Entry of a Protective Order and Non-Disclosure Agreement) (Dec. 10, 2012) (unpublished) [hereinafter Protective Order]. As relevant here, the Protective Order (and the Non-Disclosure Agreement, which effectively incorporates the terms of the Protective Order) includes the following provisions: (1) only persons who execute a Non-Disclosure Affidavit shall be authorized access to information designated by SCE as proprietary (id. at 1, 2); (2) Petitioner "shall not provide [proprietary information] to anyone not authorized to receive it" and "shall take all reasonable precautions to ensure that [proprietary information] is not distributed to unauthorized persons" (id. at 2); and (3) "[a]ny violation of the Protective Order or any Non-Disclosure Affidavit executed hereunder may result in the imposition of sanctions as the [Licensing Board] or the Commission may deem to be appropriate." Id. at 4.

⁶ See Letter from Steven P. Frantz, SCE counsel, to Board, Transmittal of Proprietary Documents per Licensing Board's December 7, 2012 Order (Dec. 12, 2012).

⁷ See Licensing Board Order (Granting in Part and Denying in Part Petitioner's Motion for Clarification and Extension) (Dec. 20, 2012) (unpublished).

On January 22, 2013, SCE moved for sanctions against Petitioner, stating that Petitioner violated the Protective Order and Non-Disclosure Agreement by improperly including proprietary information in an affidavit attached to the redacted version of its brief, which was made accessible to the public on the NRC ADAMS database and on Petitioner's website.⁸ SCE urges this Board to strike all protected information from Petitioner's pleadings and to prohibit the further use of protected information by Petitioner.⁹

On January 25, 2012, Petitioner filed an opposition to SCE's motion, arguing that its violation of the Protective Order and Non-Disclosure Agreement was unintentional and, in the totality of the circumstances, does not warrant the severe sanctions sought by SCE.¹⁰ The NRC Staff filed an answer in which it declined to take a position with respect to what sanctions, if any, the Board should impose on Petitioner.¹¹

⁸ See [SCE's] Motion for Sanctions Against Friends of the Earth for Violating the Protective Order (Jan. 22, 2013) [hereinafter Motion for Sanctions].

Several days earlier, on January 18, 2013, Petitioner's counsel, Richard Ayres, filed a letter with this Board in which he acknowledged that Petitioner's expert, John Large, had "inadvertently described and/or included proprietary information" in his affidavit attached to the publicly disclosed copy of Petitioner's opening brief. See Letter from Richard Ayres, Petitioner's Counsel, to Board (Jan. 18, 2013) [hereinafter Ayres Jan. 18 Letter]. As corrective action, Mr. Ayres (1) took prompt steps to have the offending affidavit removed from the NRC ADAMS database and Petitioner's website, and (2) promptly provided the Board and SCE with a corrected (i.e., properly redacted) affidavit. See id.; infra Part II.B.1.

⁹ See Motion for Sanctions at 7. SCE states (id. at 5) that Petitioner made unauthorized disclosures of proprietary information in four separate places in the Affidavit of John Large (Large Affidavit). To minimize the risk of contributing further to the dissemination of protected information, we will only refer to the disclosures generally.

¹⁰ See Friends of the Earth's Answer to [SCE's] Motion for Sanctions Against Friends of the Earth (Jan. 25, 2013) [hereinafter Petitioner's Answer].

¹¹ See NRC Staff's Answer to SCE's Motion for Sanctions (Jan. 28, 2013).

II. ANALYSIS

A. Petitioner Violated the Protective Order and Thus Committed a Potentially Sanctionable Offense

As the party moving for sanctions, SCE has the burden of establishing by a preponderance of the evidence that Petitioner violated the Protective Order. See 10 C.F.R. § 2.325. That burden has been satisfied here, because Petitioner concedes it inadvertently disclosed proprietary information in derogation of the Protective Order. See Petitioner's Answer at 2; Ayres Jan. 18 Letter at 1.

The violation of any adjudicative order is a serious, and potentially sanctionable, offense. As the Commission has stated, every participant in an NRC adjudicative proceeding has the duty to "fulfill the obligations imposed by and in accordance with applicable law," and "[w]hen a participant fails to meet its obligations, a [licensing] board should consider the imposition of sanctions against the offending party." Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 453, 454 (1981).¹²

Consistent with the above principle, SCE asks this Board to impose the following sanctions (Motion for Sanctions at 7): (1) strike all protected information in Petitioner's pleadings; (2) require all individuals who signed Non-Disclosure Agreements to return or destroy all protected information; and (3) modify the Protective Order to prohibit further use by Petitioner of protected information in this proceeding. SCE acknowledges that these sanctions are "strict," but it claims they are necessary to protect against future harm to its proprietary interests as well as to safeguard the integrity of the NRC adjudicatory process. Id.¹³

¹² The regulatory authority for imposing the type of sanctions sought by SCE is 10 C.F.R. § 2.319, which confers on Licensing Boards "all the powers necessary" to perform its duties (id.), including the powers to "regulate the . . . conduct of the participants" (id. § 2.310(g)), and to "issue orders necessary to carry out [its] duties and responsibilities" (id. § 2.310(q)).

¹³ SCE correctly notes that other, 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." Motion for Sanctions at 7; see also 10 C.F.R. § 2.314(c) (authorizing Licensing Boards to impose on contumacious parties or their representatives reprimands,

Determining whether to impose a sanction, and determining what sanction is appropriate, are issues that require this Board to consider the totality of circumstances in accordance with the following multi-factor sanction test announced by the Commission:

In selecting a sanction, boards should consider [1] the relative importance of the unmet obligation, [2] its potential for harm to other parties or the orderly conduct of the proceeding, [3] whether its occurrence is an isolated incident or a part of a pattern of behavior, [4] the importance of the safety or environmental concerns raised by the party, and [5] all of the circumstances.

Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC at 454. “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.” Id.

B. Applying the Commission’s Multi-Factor Sanction Test, We Conclude that the Severe Sanctions Requested by SCE Are Not Warranted

We now proceed to apply the Commission’s multi-factor sanction test, and for the reasons given below, we conclude that, in the totality of the circumstances presented, the severe sanctions sought by SCE are not warranted. In reaching this conclusion, we do not mean to minimize the seriousness of Petitioner’s offense. Petitioner unquestionably should have had a more effective review process in place to avoid violating this Board’s Order and improperly disclosing SCE’s proprietary information. Accordingly, consistent with our responsibility to endeavor to “bring about improved future compliance” with the Protective Order (CLI-81-8, 13 NRC at 454), we direct Petitioner to comply with the enhanced document-review process described infra Part III.

1. The Relative Importance of Petitioner’s Unmet Obligation

Petitioner’s violation of the Protective Order is a serious offense. The Protective Order imposed an explicit and unambiguous obligation on Petitioner to prevent the disclosure of proprietary information to unauthorized persons. Moreover, Petitioner executed an affidavit that acknowledged and accepted that obligation. Petitioner’s failure to comply with the obligation

censures, or suspensions from proceedings). SCE seeks none of these harsher sanctions, nor would they be warranted in the present circumstances in any event.

embedded in this Board's Protective Order was misconduct that exposed SCE to potential economic harm and that undermined the integrity of this adjudicative proceeding. Such misconduct is rightly deserving of objurgation.¹⁴

Although we view Petitioner's violation of the Protective Order as significant misconduct, we conclude that the significance of Petitioner's misconduct is alleviated to some degree by the immediate corrective action taken by Petitioner. SCE notified Petitioner about the wrongful disclosure of proprietary information contained in the Large Affidavit on the morning of January 18, 2013. See Motion for Sanctions at 3. That same day, in compliance with paragraph 8 of the Protective Order, Petitioner's counsel notified the Board about the disclosures (see Ayres Jan. 18 Letter at 1), and he represented that (1) the Large Affidavit would be removed from the NRC ADAMS database, and (2) Mr. Large was reviewing the offending affidavit to assure that all proprietary information would be redacted. See id. at 1-2.¹⁵ Additionally, Petitioner represents (and SCE does not dispute) that it removed the Large Affidavit from Petitioner's website within four hours of being notified. See Petitioner's Answer at 4. Petitioner states that these corrective actions "demonstrate the seriousness with which [it] views its obligations under the Protective

¹⁴ Throughout this decision, we refer to Petitioner's misconduct, when in fact, it was Petitioner's expert and Petitioner's counsel who are blameworthy -- the former because he negligently failed to redact all proprietary information from the public version of his affidavit, and the latter because they should have had more effective review systems in place to avoid the wrongful disclosures of proprietary information. Nevertheless, as the Supreme Court has explained, in our system of representative litigation, to the extent that Petitioner's counsel is blameworthy, Petitioner may be held accountable:

Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent

Link v. Wabash R. Co., 370 U.S. 626, 633-34 (1962).

¹⁵ On January 23, 2012, Petitioner filed a correctly redacted version of the Large Affidavit on the NRC ADAMS database. See Petitioner's Answer at 3.

Order,” and it declares that such disclosures “will not happen in the future.” Id. at 5.¹⁶

In our view, Petitioner’s prompt and seemingly good faith remedial actions mitigate the significance of its misconduct and militate against a severe sanction.

2. Potential for Harm to SCE or to the Orderly Conduct of the Proceeding

This factor has two components, requiring us to consider the potential harm to SCE and the potential harm to this proceeding. Regarding the former, there can be no serious question that the unauthorized disclosure of SCE’s proprietary information exposes SCE to potential harm. The Protective Order put Petitioner on notice of this fact by stating that “any actual or anticipated unauthorized disclosure of [proprietary information] constitutes immediate and irreparable harm.” Protective Order at 5.

We stress that we do not read the above sentence from the Protective Order as establishing at this juncture that SCE suffered actual economic injury, much less irreparable harm; rather, this sentence, when read in its entirety, is designed to provide SCE with an uncontested basis for seeking “an injunction and other equitable remedies” if it encounters “actual or anticipated unauthorized disclosure of [proprietary information].” Protective Order at 5. Nor does SCE assert that it has suffered, or is at imminent risk of suffering, particularized harm due to Petitioner’s unauthorized disclosures. Under these circumstances, and especially in light of Petitioner’s immediate corrective actions (supra Part II.B.1), we conclude that the first component of this factor -- i.e., the potential harm of Petitioner’s misconduct on SCE -- does not weigh in favor of the severe sanctions sought by SCE.¹⁷

¹⁶ In its Answer, Petitioner included a memorandum from Mr. Large in which he “apologi[z]ed to the [Licensing Board] for any inconvenience that this quite unintentional error on [his] part may have caused.” See Attachment 1 to Petitioner’s Answer. We view Mr. Large’s apology, coupled with Petitioner’s prompt corrective actions and its representation that no wrongful disclosures will recur, as indicators in support of Petitioner’s claim that its violation was inadvertent. See infra Part II.B.3.

¹⁷ Should the potential harm to SCE ripen into actual economic injury, the Protective Order provides that the parties agree that the “participant effectuating the actual . . . unauthorized disclosure shall be liable . . . for legal damages.” Protective Order at 5. Of course, our action

Regarding the second component of this factor -- i.e., the potential harm of Petitioner's misconduct on this proceeding -- it cannot be gainsaid that a party's failure to fulfill the legal obligations imposed by an adjudicative order casts a pall on the integrity, fairness, and orderly conduct of the adjudicative proceeding. Cf. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC at 454 ("Fairness to all involved in NRC's adjudicatory procedures requires that every participant fulfill the obligations imposed by and in accordance with applicable law and Commission regulations."). Nevertheless, Petitioner's prompt remedial actions and its representation that similar disclosures will not occur in the future minimize the risk of harm to the orderly conduct of this proceeding, which allays the need for a severe sanction. See supra Part II.B.1 & n.16.

3. Whether the Disclosure Was an Isolated Incident or Part of a Pattern of Behavior

Petitioner represents that its wrongful disclosure of SCE's proprietary information was an isolated and unintentional incident that will not recur. See Petitioner's Answer at 3-4. We accept this representation for the following reasons.

As Petitioner states (Petitioner's Answer at 3, 4), the "four pieces of [improperly disclosed] proprietary information" were in the Large Affidavit, which was a "highly technical expert affidavit, a 62-page attachment" to Petitioner's opening brief. Mr. Large represents that his failure to redact that information was an "unintentional error on [his] part" (Attachment 1 to Petitioner's Answer), and he apologized for his oversight. See id. Counsel for Petitioner likewise represents that the wrongful disclosure was "unintentional" (Petitioner's Answer at 1), as evidenced by the fact that (1) Petitioner did nothing to highlight the existence of these pieces of proprietary information (see id. at 4),¹⁸ (2) as soon as Petitioner became aware of the

here does not impinge on the ability of any party to take appropriate action under this provision.

¹⁸ In the publicly accessible version of its opening brief, Petitioner made no argument that referenced the wrongfully disclosed proprietary information. See Petitioner's Answer at 3.

Petitioner seemingly attempts to blame SCE for allegedly casting a public spotlight on the

accidental disclosures, it took prompt steps to notify this Board and to remove the Large Affidavit from the public domain (see id.; Ayres Jan. 18 Letter at 1-2), and (3) Mr. Large promptly reviewed his redacted affidavit to assure that all proprietary information was properly expunged. See Ayres Jan. 18 Letter at 1; Attachment 1 to Petitioner's Answer. Finally, Petitioner's counsel represents that Petitioner is acutely mindful of its obligations under the Protective Order and "assures the Board that [Petitioner] will take steps to ensure that . . . inadvertent disclosures will not happen in the future." Petitioner's Answer at 5.

The above circumstances support a conclusion that Petitioner's disclosure of SCE's proprietary information was an isolated incident that will not recur, which militates against a severe sanction.

4. Importance of the Safety or Environmental Concerns Raised by Petitioner

Finally, we have no difficulty concluding that the issue advanced by Petitioner and referred to us by the Commission in CLI-12-20 raises important concerns related to the safety of the steam generators at San Onofre Nuclear Generating Station -- namely, whether the CAL issued to SCE constitutes a de facto license amendment that should be subject to a hearing opportunity. As Petitioner states (Petitioner's Answer at 5), "[w]hat is at stake in this case is whether the health and safety risks to millions of people will be fully vetted in a proper license amendment proceeding." We agree with Petitioner that this important concern will "best [be] served by continuing to allow all relevant information to be used in arguments before the Board, including SCE's [relevant] proprietary information." Id. Our determination in this regard counsels against the severe sanctions sought by SCE.

proprietary information, asserting that, whereas Petitioner "did not . . . spotlight the accidental disclosures" (Petitioner's Answer at 1 n.1), "SCE has made the proprietary information inadvertently disclosed more available to the public by highlighting in its Motion exactly which proprietary information was disclosed." Id. at 4. Contrary to Petitioner's intimation, SCE is not to be faulted for explaining to this Board with specificity the scope of Petitioner's misconduct.

III. CONCLUSION

After considering the totality of the circumstances in the framework of the Commission's multi-factor sanction test, we conclude that SCE's motion for sanctions must be denied. Nevertheless, in light of the seriousness of Petitioner's misconduct (supra Part II.B.1), and in furtherance of our responsibility to enhance future compliance with the Protective Order (see CLI-81-8, 13 NRC at 454), we impose on Petitioner the following document-review requirement. For any future document filed by Petitioner that uses SCE's proprietary information, Petitioner shall initially file its redacted version as a proprietary filing, and SCE will have one week to review the document to verify that it contains no proprietary information. If SCE verifies that the redacted version contains no proprietary information, Petitioner shall promptly coordinate with the NRC Office of the Secretary (SECY) to have the document re-filed as non-proprietary. On the other hand, if, upon review, SCE and Petitioner determine that a revised version of the redacted document must be filed, Petitioner will coordinate with SECY to remove the previously filed redacted document from the docket, and Petitioner will promptly file the revised (i.e., properly redacted) version in the public docket.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD
/RA/

E. Roy Hawkens, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Anthony J. Baratta
ADMINISTRATIVE JUDGE

/RA/

Dr. Gary S. Arnold
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 8, 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **ORDER (Denying SCE's Motion for Sanctions Against Friends of the Earth for Violating the Protective Order, but Imposing an Enhanced Document-Review Requirement)** 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
**ORDER (Denying SCE's Motion for Sanctions Against Friends of the Earth for Violating
the Protective Order, but Imposing an Enhanced Document-Review Requirement)**

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Dated at Rockville, Maryland
this 8th day of February, 2013

[Original signed by Herald M. Speiser _____]
Office of the Secretary of the Commission