

February 28, 2013

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)
Units 2 and 3)
)

NRC STAFF'S ANSWER OPPOSING SCE'S MOTION TO STRIKE
PORTIONS OF THE DECLARATION OF JOHN LARGE

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the Staff of the Nuclear Regulatory Commission (Staff) hereby files its answer to Southern California Edison Company's (SCE) Motion to Strike Portions of Declaration of John Large (Motion to Strike).¹ SCE requests that the Atomic Safety and Licensing Board (Board) strike Sections 13 and 14 of Comments on the NRC and SCE Responses of January 30, 2013, Declaration of John Large (Large Declaration).² The Large Declaration supports the reply brief filed by Friends of the Earth (FOE) in this proceeding.³ SCE contends that Sections 13 and 14 of the Large Declaration violate Commission precedent by introducing new arguments in a reply that were not raised in earlier briefs.⁴ While the Staff does not agree with the content of the Large Declaration, Sections 13 and 14 of that declaration

¹ Southern California Edison Company's (SCE) Motion to Strike Portions of Declaration of John Large (Feb. 22, 2013) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML13038A185) (Motion to Strike).

²*Id.* at 1 (*citing* Comments on the NRC and SCE Responses of January 30, 2013, Declaration of John Large (Feb. 13, 2013) (ADAMS Accession No. ML13044A840) (Large Declaration)).

³ Reply Brief of Petitioner Friends of the Earth (Feb. 13, 2013) (ADAMS Accession No. ML13044A840) (FOE Reply Brief).

⁴ Motion to Strike at 3-5.

respond to arguments advanced by the Staff and SCE and restate FOE's previous arguments. As a result, Sections 13 and 14 comport with Commission precedent, and the Staff opposes SCE's Motion to Strike.

BACKGROUND

On November 8, 2012, the Commission referred to the Board the questions of "whether: (1) [the March 27, 2012 Confirmatory Action Letter (CAL)] issued to SCE constitutes a *de facto* license amendment that would be subject to a hearing opportunity under Section 189a [of the Atomic Energy Act]; and, if so, (2) whether [FOE's Petition to Intervene] meets the standing and contention admissibility requirements of 10 C.F.R. § 2.309."⁵ To help resolve these questions, the Board asked the parties to file briefs on these topics.⁶ FOE filed an initial brief on January 11, 2013, which was supported by an affidavit from John H. Large, among other documents.⁷ On January 30, 2013, the Staff filed its answering brief, which was supported by an affidavit from Mr. Kenneth J. Karwoski (Karwoski Affidavit).⁸ On February 13, 2013, FOE filed its reply brief and the accompanying Large Declaration.⁹ On February 22, 2013, SCE moved to strike

⁵ *Southern California Edison* (San Onofre Nuclear Generating Station Units 2 and 3), CLI-12-20, 76 NRC __ (2012) (slip op. at 5). See also Letter from Elmo E. Collins, Regional Administrator, Region IV, USNRC, to Peter T. Dietrich, Senior Vice President and Chief Nuclear Officer, Southern California Edison Company, subject: *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) (March 27, 2012 CAL); *Petition to Intervene and Request for Hearing by Friends of the Earth* (June 18, 2012) (ADAMS Accession No. ML12171A409) (FOE Petition to Intervene).

⁶ Order (Conference Call Summary and Directives Relating to Briefing) (Dec. 7, 2012) (ADAMS Accession No. ML12342A328).

⁷ Opening Brief of Petitioner Friends of the Earth (Non-Proprietary) (Jan. 11, 2013) (ADAMS Accession No. ML13011A308) (FOE's Opening Brief); Corrected Response to Atomic Safety and Licensing Board's Factual Issues, 1st Affidavit of John H. Large (Jan. 22, 2013) (ADAMS Accession No. ML13023A137) (Jan. 22, 2013 Large Affidavit).

⁸ NRC Staff's Answering Brief in the San Onofre Nuclear Generating Station CAL Proceeding (Jan. 30, 2013) (ADAMS Accession No. ML13030A496) (Staff's January 30, 2013 Answer); Affidavit of Mr. Kenneth J. Karwoski Concerning FOE's Claims Regarding Staff's March 27, 2012 CAL Issued to SCE (Jan. 30, 2012) (ADAMS Accession No. ML13030A495) (Karwoski Affidavit). SCE also filed its answering brief on January 30, 2013. See *Southern California Edison Company's Brief on Issues Referred by the Commission* (Jan. 30, 2013) (ADAMS Accession No. ML13030A441).

⁹ FOE Reply Brief; Large Declaration.

portions of the Large Declaration on the grounds that those portions inappropriately supplemented FOE's reply by raising arguments not discussed in the previous filings.¹⁰

LEGAL STANDARDS

In the context of Hearing Requests, the Commission has frequently stated that "replies must focus narrowly on the legal or factual arguments first presented in the original petition or raised in the answers to it."¹¹ Replies that contained new arguments would "unfairly deprive other participants of an opportunity to rebut the new claims."¹² The Commission has also applied this principle in other contexts and held that "[a] reply may not contain new information that was not raised in either the petition or answers."¹³ But, the Commission has "not precluded arguments that respond to the petition or answers, whether they are offered in rebuttal or in support."¹⁴ Thus, the Commission has declined to strike arguments in a reply brief that amplified and elaborated on issues presented in an answer but has struck arguments in a reply brief that provided an entirely new basis for a party's position.¹⁵

ARGUMENT

SCE's Motion to Strike requests that the Board strike Sections 13 and 14 of the Large Declaration in their entirety.¹⁶ Because these Sections respond to arguments advanced by the

¹⁰ Motion to Strike.

¹¹ *E.g. Nuclear Management Company, LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006).

¹² *Id.*

¹³ *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-11-14, 74 NRC __, __ (slip op. at 10) (2011).

¹⁴ *Id.* at 10-11.

¹⁵ *Id.*

¹⁶ Motion to Strike at 5.

Staff and SCE and restate FOE's previous arguments, the Staff opposes SCE's Motion to Strike.

I. Section 13 of the Large Declaration Restates Positions Already Advanced by FOE

SCE moves to strike Section 13 of the Large Declaration in its entirety.¹⁷ Section 13 of the Large Declaration responds to the reference to 10 C.F.R. Part 50, Appendix B, Criterion XVI, "Corrective Action" (Criterion XVI) in Attachment 1 of the Karwoski Affidavit.¹⁸ SCE contends that the "Large Declaration uses Attachment 1 of the Karwoski Affidavit as an inappropriate basis for launching into a lengthy discussion of matters that are irrelevant to the Karwoski Affidavit."¹⁹ Specifically, SCE claims that the Large Declaration improperly discusses 10 C.F.R. Part 50, Appendix B, Criteria III, "Design Control" and VI, "Document Control," because none of the prior filings in this proceeding reference those criteria.²⁰

But, in discussing these criteria, the Large Declaration only restates FOE's previous arguments. Section 13 of the Large Declaration claims that SCE's replacement steam generators had significant problems with fluid elastic instability and the lack of anti-vibration bars.²¹ It also states that operating SONGS with those replacement steam generators will be risky in light of uncertainties regarding the zero-gap/zero preload strategy.²² However, Mr. Large already advanced these arguments regarding fluid elastic instability, the lack of anti-

¹⁷ *Id.* at 4.

¹⁸ Karwoski Affidavit, Attachment 1 (listing 10 C.F.R. Part 50, Appendix B, Criterion XVI, "Corrective Action" as an example of an existing source of authority under the steam generator program for the actions listed in the March 27, 2012 CAL).

¹⁹ Motion to Strike at 4.

²⁰ *Id.*

²¹ Large Declaration at ¶¶ 13.3.1-13.3.5

²² *Id.* at ¶¶ 13.4.-13.4.2.

vibration bars, and the zero-gap/zero preload strategy in support of FOE's initial brief.²³ Thus, while these arguments do not respond to the Karwoski Affidavit, they are appropriate subjects for a reply because they essentially restate material from earlier filings.²⁴

SCE further asserts that "although the Large Declaration briefly discusses Criterion XVI," it does not respond to the Karwoski Affidavit's claim that Criterion XVI authorizes part of the March 27, 2012 CAL and instead "discusses whether SCE has complied with Criterion XVI."²⁵ Thus, SCE offers this discrepancy as another reason to strike section 13.²⁶ While the arguments regarding Criterion XVI in the Large Declaration do not respond to the Karwoski Affidavit, they too were raised by FOE in previous filings, and so are appropriate subjects for a reply.

In its discussion of Criterion XVI, "Corrective Action," the Large Declaration questions whether SCE's plan to operate SONGS Unit 2 at 70% of rated thermal power, as stated in its October 3, 2012 Return to Service Plan, would correct the identified problems with the replacement steam generators.²⁷ The Karwoski Affidavit did not discuss SCE's plan to operate SONGS Unit 2 at 70% of rated thermal power. Rather, the Staff has consistently argued that the plan, generated by the licensee in response to the March 27, 2012 CAL, is not relevant to

²³ *E.g.* Jan. 22, 2013 Large Affidavit, at ¶¶ 9.11, 5.5.2, 5.5.14-5.5.28, 10.6; *see also* FOE Petition to Intervene at 16-22 (arguing that SCE should have concluded that the replacement steam generators constituted a design change).

²⁴ *Indian Point*, CLI-11-14, 74 NRC at ___ (slip op. at 10-11). To the extent that FOE alleges that SCE violated 10 C.F.R. Part 50, Appendix B Criteria III and VI, that claim would be outside the scope of previous filings, and therefore an appropriate focus for a motion to strike. *Id.* In any event, such a claim for enforcement action would be appropriately brought under 10 C.F.R. § 2.206 and would therefore be outside the scope of this proceeding. *See San Onofre*, CLI-12-20, 76 NRC at ___ (slip op. at 4-5) (referring FOE's claims that SCE violated NRC regulations to the Staff under 10 C.F.R. § 2.206).

²⁵ Motion to Strike at 4.

²⁶ *Id.*

²⁷ Large Declaration at ¶¶ 13.5.1 – 13.5.4; 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, [CAL] – Actions to Address Steam Generator Tube Degradation [SONGS], Unit 2 (Oct. 3, 2012) (ADAMS Accession No. ML122850320) (October 3, 2012 Return to Service Plan).

the question of whether the March 27, 2012 CAL “constitutes a *de facto* license amendment that would be subject to a hearing.”²⁸ Nonetheless, FOE has argued that SCE’s plan to operate SONGS Unit 2 at 70% of rated thermal power is a relevant inquiry in this proceeding and claimed that the plan is not adequate to address the problems FOE identified in the replacement steam generators.²⁹ Therefore, the portion of Section 13 of the Large Declaration that discusses Criterion XVI simply restates FOE’s previous arguments and the Board should decline to strike it.³⁰

II. Section 14 of the Large Declaration Responds to Arguments Advanced By the Staff and Restates FOE’s Previous Arguments

In addition, SCE argues that the Board should strike Section 14, which also focuses on Attachment 1 of the Karwoski Affidavit.³¹ SCE accurately notes that Attachment 1 of the Karwoski Affidavit was offered by the Staff as evidence that “the statements in the March 27 CAL are encompassed within the [existing] provisions of the [SONGS] Technical Specifications.”³² SCE argues that Section 14’s references to Attachment 1 impermissibly raise new issues concerning SCE’s compliance with the San Onofre Technical Specifications and “whether all of the restart activities require a license amendment.”³³ SCE claims that because the Karwoski Affidavit does not address those issues, the Board should strike these portions of the Large Declaration.³⁴

²⁸ *San Onofre*, CLI-12-20, 76 NRC at ___ (slip op. at 5); e.g. Staff’s January 30, 2013 Answer at 19-20, 36, 46-47, 57-60.

²⁹ E.g., FOE’s Opening Brief at 9-11, 14-17; January 22, 2012 Large Affidavit at ¶¶ 5.6.1, 10.6.

³⁰ *Indian Point*, CLI-11-14, 74 NRC at ___ (slip op. at 10-11).

³¹ Motion to Strike at 4.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

While the Staff does not agree with the statements made in Section 14 of the Large Declaration, those statements respond to arguments made in the NRC Staff's January 30, 2013 Answer and the Karwoski Affidavit or restate FOE's previous arguments.³⁵ Therefore, the Staff opposes SCE's Motion to Strike Section 14 because the arguments in that section are within the proper scope of a reply brief.³⁶

As SCE correctly summarizes, the Staff's January 30, 2013 Answer, including the Karwoski Affidavit and associated attachments, argued that the NRC's March 27, 2012 CAL was not a *de facto* license amendment.³⁷ Additionally, the NRC's January 30, 2012 Answer argued that the question of whether SCE's October 3, 2012 Return to Service Plan requires a license amendment was outside the limited scope of this proceeding and was being separately reviewed.³⁸

Section 14 of the Large Declaration provides Mr. Large's response to these arguments. Specifically, Mr. Large disagrees with Mr. Karwoski that "no change in the technical specifications is needed to perform the steps outlined in the CAL."³⁹ Instead, Mr. Large asserts that "the CAL would 'modify the existing license' and thus become a legal entity in the licensing process."⁴⁰ The Large Declaration also provides Mr. Large's opinion that the statements made in the Karwoski Affidavit are "somewhat premature" because the "NRC Staff have yet to

³⁵ See Motion to Strike at 4 (outlining SCE's claim that Section 14 of the Large Declaration is not focused on the legal or logical arguments presented in the briefs of SCE and NRC Staff).

³⁶ *Indian Point*, CLI-11-14, 74 NRC at __ (slip op. at 10).

³⁷ Motion to Strike at 2 and 4. The Staff agrees with SCE's statement that the purpose of the Karwoski Affidavit was to discuss how "the statements in the March 27[, 2012] CAL are encompassed within the [existing] provisions of the [SONGS] Technical Specifications." *Id.* at 4.

³⁸ See, e.g., Staff's January 30, 2013 Answer at 35, 60.

³⁹ Large Declaration at ¶ 14.3 (citing Karwoski Affidavit at ¶ 9).

⁴⁰ Large Declaration at ¶ 14.12. FOE initially raised the claim that the CAL constituted a *de facto* license amendment in its June 18, 2012 Petition to Intervene.

complete the CAL submission and review processes.”⁴¹ Mr. Large also makes statements in Section 14 related to 10 C.F.R. § 50.59 that are discussed in his earlier affidavit offered in support of FOE’s Opening Brief.⁴²

Mr. Large disagrees with the Staff on a number of issues, including (1) whether the NRC’s March 27, 2012 CAL is a *de facto* license amendment, (2) whether the Staff’s review of SCE’s October 3, 2012 Return to Service Plan is relevant to this determination and (3) whether the scope of this proceeding includes the question of whether a license amendment is needed in order to restart Unit 2. But Mr. Large’s statements in Section 14 are offered to rebut arguments raised by the NRC Staff or restate arguments previously made by FOE and so are properly within the scope of a reply.⁴³ Therefore, the Staff opposes SCE’s Motion to Strike, which is based on the faulty premise that Section 14 of the Large Declaration is not “focused on the legal or logical arguments presented in the briefs of SCE and the NRC Staff.”⁴⁴

CONCLUSION

Accordingly, the Board should deny SCE’s Motion to Strike Sections 13 and 14 of the Large Declaration because those sections only restate earlier arguments or respond to the Staff’s arguments.

Respectfully submitted,

/Signed (electronically) by/

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⁴¹ *Id.* at ¶ 14.13. See also *id.* at ¶ 14.6 – 14.12.

⁴² Large Declaration at ¶ 14.5 (citing Jan. 22, 2013 Large Affidavit at ¶¶ 11.15 *et seq.*).

⁴³ See *Indian Point*, CLI-11-14 (slip op. at 10 and n. 46). For example, FOE’s Opening Brief argued that the CAL process, including the October 3, 2012 Return to Service Plan, was a *de facto* license amendment. FOE’s Opening Brief at 6.

⁴⁴ Motion to Strike at 4.

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R § 2.305, I hereby certify that copies of the foregoing NRC STAFF'S ANSWER OPPOSING SCE'S MOTION TO STRIKE PORTIONS OF THE DECLARATION OF JOHN LARGE dated February 28, 2013 have been served upon the Electronic Information Exchange, the NRC's E-Filing System, in the above captioned proceeding, this 28th day of February, 2013:

/Signed (electronically) by/
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Dated at Rockville, Maryland
this 28th day of February, 2013