

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	Docket Nos. 50-361-CAL
)	& 50-362-CAL
SOUTHERN CALIFORNIA EDISON CO.)	
)	ASLBP No. 13-924-01-CAL-BD01
(San Onofre Nuclear Generating Station,)	
Units 2 and 3))	March 4, 2013
)	

**MOTION BY FRIENDS OF THE EARTH TO BAR SOUTHERN CALIFORNIA
EDISON COMPANY’S SUBMISSIONS AFTER THE CLOSE OF BRIEFING**

I. INTRODUCTION

Friends of the Earth (FoE) moves to bar from this proceeding Southern California Edison Company’s (SCE) Responses to Staff Requests for Additional Information (RAIs) submitted to the Atomic Safety and Licensing Board (Board) after the close of briefing in this proceeding on February 13, 2013.¹ To date this includes SCE’s February 25, 2013 “Third Notification of Responses to RAIs”² and February 26, 2013 “Fourth Notification of Responses to RAIs,”³ but this motion encompasses any forthcoming responses as well. In the interests of fairness, FoE requests that the Board exclude SCE’s post-briefing responses from the record or from consideration in this proceeding.⁴ In the alternative, FoE must be given the opportunity to respond to any such submissions.

¹ The argument could be made that SCE’s last opportunity to submit additional responses without receiving leave to do so from the Board was at the close of SCE’s briefing on January 30, 2013, and that anything beyond this date would have unfairly truncated FoE’s time to respond. For the purposes of this Motion, however, FoE asks the Board to exclude only SCE’s responses submitted after the close of FoE’s briefing on February 13, 2013.

² SCE, Third Notification of Responses to RAIs (Feb. 25, 2013).

³ SCE, Fourth Notification of Responses to RAIs (Feb. 26, 2013).

⁴ Counsel for FoE certifies under 10 C.F.R. § 2.323(b) that it has contacted representatives of SCE and the NRC Staff and made a sincere effort to resolve the issues set forth in this Motion, and that the efforts to resolve the issues have been unsuccessful. Counsel for SCE stated that SCE opposes the Motion. Counsel for the NRC Staff stated

II. BACKGROUND

On June 18, 2012, FoE filed a Petition to Intervene and Application for a Stay. On November 8, 2012, the Commission referred a portion of FoE's Petition to the Board concerning whether the process initiated by the March 27, 2012 Confirmatory Action Letter (CAL) is a *de facto* license amendment proceeding.⁵

FoE filed its Opening Brief on January 11, 2013.⁶ Natural Resources Defense Council (NRDC) filed an amicus brief supporting Petitioner on January 18, 2013.⁷ On January 30, 2013, SCE and NRC Staff filed Answering Briefs,⁸ and the Nuclear Energy Institute, amicus for Respondents, filed an amicus brief.⁹ Briefing closed on February 13, 2013 when FoE filed its Reply Brief.¹⁰ SCE then offered its third and fourth RAI responses on February 25 and 26, 2013, respectively.

III. MATERIAL SUPPLEMENTING SCE'S BRIEF OR OFFERING NEW FACTUAL MATERIAL AFTER THE CLOSE OF BRIEFING MAY NOT BE PLACED BEFORE THE BOARD SINCE THE BOARD HAS NOT GRANTED LEAVE TO SUPPLEMENT

SCE's third and fourth RAI responses submitted to the Board through the e-filing system on February 25 and 26, 2013, respectively, constitute supplementary briefing, supplementary information, or both.¹¹ Pursuant to the Board's Order of February 1, 2013, briefing concluded

that Staff takes no position on FoE's Motion at this time but reserves its right to respond to the actual contents of the Motion.

⁵ *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).

⁶ Opening Brief of Petitioner Friends of the Earth (Jan. 11, 2013).

⁷ Natural Resources Defense Council's Amicus Response in Support of Friends of the Earth (Jan. 18, 2013).

⁸ Southern California Edison Company's Brief on Issues Referred by the Commission (Jan. 30, 2013); NRC Staff's Answering Brief in the San Onofre Nuclear Generating Station CAL Proceeding (Jan. 30, 2013).

⁹ Nuclear Energy Institute, Inc.'s *Amicus Curiae* Brief In Response to the NRC Atomic Safety and Licensing Board's Briefing Orders (Jan. 30, 2013).

¹⁰ Reply Brief of Petitioner Friends of the Earth (Feb. 13, 2013).

¹¹ Setting aside the timing, SCE's submittal of its RAI responses to the Board evidences that SCE indeed regards their content to be relevant to the issues before the Board. Given that the RAIs address SCE's Restart Plan, SCE's act of submitting them to the Board belies the position SCE has taken throughout this proceeding, namely, that the Restart Plan is not relevant to the Board's determination of the issues before it.

with FoE's Reply Brief on February 13, 2013.¹² SCE has not sought leave from the Board to supplement its brief, filed on January 30, 2013, or to otherwise supplement the record in this proceeding. SCE instead uses the tactic of terming its responses "Notifications" in an attempt to avoid having to petition the Board for leave to supplement its brief. Were the Board to permit this maneuver by SCE, the result would be to deny FoE and the Staff the opportunity to respond to a properly filed motion by SCE and deny the Board the opportunity to hear all sides of the argument.

Far from being a courtesy notification of tangentially related material, SCE's third and fourth RAI responses contain new arguments and/or information that directly supplement the briefing it provided to the Board. These submissions thus flout the briefing schedule established by the Board and will, if accepted, deprive the other parties to this proceeding of an opportunity to respond.

For example, in the third notification of RAI responses, SCE introduces for the first time its argument that "normal steady state full power" is 70% of the full Rated Thermal Power for the proposed interim operating period "[a]s a result of SCE's formal commitment established in the CAL response."¹³ As FoE expressly argued in its Reply Brief at Part C.III, SCE forfeited the opportunity to provide a response on this question (how it can show compliance with Technical Specification 5.5.2.11.b. of its current license while operating at 70% power) by failing to respond to this issue in its brief, which was raised by both Petitioner in its Opening Brief¹⁴ and NRDC in its Amicus Brief.¹⁵ As Petitioner argued at length in its Reply Brief, SCE may not subsequently cure this deficiency by submitting a response in this case after FoE has filed its

¹² Atomic Safety and Licensing Board, Order Granting Petitioner's Motion for Extension of Time (Feb. 1, 2012).

¹³ SCE, Third Notification of Responses to RAIs (Feb. 25, 2013) p. 6 of 7.

¹⁴ FoE Opening Brief at 8, 23–24.

¹⁵ NRDC Amicus Brief at 6–12.

Reply Brief and thereby deprive FoE of the opportunity to respond to its substantive argument—precisely as SCE attempts to do here.

SCE’s fourth RAI notification, dated February 26, 2013, attempts improperly to supplement the factual information before the Board. For example, SCE’s response to RAI 4 supplements its explanation on the predictions of tube-to-tube wear initiation and wear rates, including whether SCE’s approach to these projections is conservative.¹⁶ This material is directly relevant to the questions the Board asked the parties to brief and to the information SCE provided regarding the assumptions and modeling underlying its proposed Restart Plan in the context of whether the proposal exceeds the authority granted in its current operating license.¹⁷

SCE’s fourth notification also inserts new factual conclusions into the ASLB proceeding after the close of briefing. After listing a series of assumptions made in its “wear rate model,” for example, SCE offers the conclusory statement that “the Unit 2 growth rate model for 70% power operation was determined to be reasonable and conservative.”¹⁸

In sum, these “Notifications” amount to an attempt by SCE to introduce new arguments and material into the case after briefing has concluded in contravention of the briefing schedule established by the Board and fairness to other parties. SCE may not augment its brief with the third and fourth RAI responses, or with any forthcoming responses, without obtaining the permission of the Board to supplement. Since SCE has made no such motion, the Board should bar this material from the record or from any further consideration in this proceeding.

¹⁶ SCE, Fourth Notification of Responses to RAIs (Feb. 26, 2013) p. 12 of 18.

¹⁷ See, e.g., questions vi and vii of the Board’s December 7, 2012 Order and SCE’s Brief at 90–99.

¹⁸ SCE, Fourth Notification of Responses to RAIs (Feb. 26, 2013) p. 3 of 18.

IV. IF THE BOARD DECIDES TO RECEIVE SCE'S RESPONSES, FOE MUST BE GIVEN THE OPPORTUNITY TO RESPOND

A. NRC Regulations and Fundamental Fairness Require that FoE and Its Experts be Given an Opportunity to Respond to SCE's New Legal and Factual Arguments

If, contrary to the position urged above, the Board decides after the close of briefing to receive into this proceeding the RAI responses filed with the Board by SCE, 10 C.F.R. § 2.323(c) and fundamental notions of fairness require that FoE and its experts be given an opportunity to review and respond to the points raised in these post-briefing submissions. Denominating these attempts to supplement after the close of briefing as “Notifications” is merely a tactic designed to deny Petitioner the right to respond, and to prevent the Board from hearing Petitioner’s response. In other circumstances, SCE itself has condemned filings that prevent a response (“the tactic deprives the other parties of an opportunity to respond directly to the substantive arguments in the reply brief” as well as “the Board and Commission of those responses”¹⁹).

As noted above, SCE’s post-briefing “Notifications” to the Board, enclosing the company’s responses to the RAIs posed by the NRC Staff, seek to inform the Board of facts not in the record in this matter and to supplement the legal arguments in SCE’s Answering Brief. As noted above, SCE’s February 25, 2013 “Third Notification of Responses to RAIs” makes the entirely new legal argument that Unit 2 complies with the technical specifications of its license because, in light of SCE’s commitment to operate at 70% of Rated Thermal Power, SCE proposes to abruptly redefine the term “full power operation” in the technical specifications to mean 70% power.²⁰ This remarkable argument is entirely invented since the filing of SCE’s

¹⁹ Southern California Edison Company’s Motion to Strike Portions of Declaration of John Large (February 22, 2013) at 3.

²⁰ SCE, Third Notification of Responses to RAIs (Feb. 25, 2013) p. 6 of 7.

brief to the Board; if the Board is prepared to consider it, then Petitioner must be given an opportunity to respond to it.

Denominating as a “Notification” an attempt to submit supplemental briefing and factual material after the close of briefing is merely a tactic designed to deny Petitioner the right to respond, and to prevent the Board from hearing Petitioner’s response. SCE itself has condemned filings that prevent a response. Regardless of the label SCE has chosen to attach to its post-briefing submissions, the tender of these documents to the Board after the close of briefing is an attempt to supplement the record and the arguments in SCE’s Brief. If the Board wishes to consider allowing such supplementation, then the other parties must be given an opportunity to respond under NRC regulation 10 C.F.R. § 2.323(c).

B. The Board’s Acceptance of SCE’s Submissions Could Result in Delaying the Restart of Unit 2

SCE has already said it will submit another response to RAI 32 on March 15 regarding a substantive point SCE declined to answer in its brief on January 30, 2013 and in its answer to RAI 32. It is not unlikely that, as part of the ongoing response to the CAL, the Staff would issue further RAIs to which SCE will be asked to respond. Assuming SCE continues to share its answers with the Board, the Commission’s regulations and basic fairness require that FoE be given an opportunity to respond to the legal and technical points in SCE’s answers.

If the Board permits SCE to continue to lodge supplements to its brief as well as new technical submissions, and provides the opportunity for response required by 10 C.F.R. § 2.323(c), this proceeding will inevitably be lengthened. For example, further briefing on SCE’s third and fourth submissions could make it difficult to hold oral argument on March 22.

From the beginning of this proceeding, SCE has protested vehemently against granting Petitioner any additional time on the grounds that it might delay the restart of San Onofre Unit

2²¹; yet now SCE seems so intent upon throwing a few punches after the bell that it is willing to risk substantial delay in the plant's restart.

V. CONCLUSION

For the reasons presented above, FoE urges the Board to exclude SCE's responses to Requests for Additional Information or other materials that further extend or elucidate legal arguments made by SCE to the Board; or that introduce new legal arguments; or that supplement the administrative and technical record before the Board, unless authorized by the Board pursuant to a Motion to Supplement. In the alternative, FoE urges that if such submissions are accepted by the Board, Petitioner be accorded an opportunity to respond pursuant to 10 C.F.R. § 2.323(c).

Respectfully submitted,

/Signed (electronically) by/

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Dated in Washington, D.C.
this 4th day of March 2013

²¹ See, e.g., SCE's Answer Opposing Petitioner's Motion to Amend the Board's December 7, 2012 Order at 2, 10, 13 (Dec. 13, 2012); and SCE's Answer Opposing Petitioner's Extension Request at 4–5 (Dec. 20, 2012).

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, the “Motion by Friends of the Earth to Bar Southern California Edison Company’s Submissions After the Close of Briefing” was filed through the E-Filing system.

Signed (electronically) by Richard Ayres

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