

**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,)	March 11, 2013
Units 2 and 3))	
)	

**SOUTHERN CALIFORNIA EDISON COMPANY’S ANSWER OPPOSING FRIENDS
OF THE EARTH’S MOTION TO BAR BOARD NOTIFICATIONS**

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.323, Southern California Edison Company (“SCE”) files this Answer opposing the “Motion by Friends of the Earth [(“FOE”)] to Bar Southern California Edison Company’s Submissions After the Close of Briefing” (“Motion”), dated March 4, 2013. Specifically, the Motion requests that the Atomic Safety and Licensing Board (“Board”) disregard the information in any notifications from SCE to the Board after the close of briefing in this proceeding. This includes two past notifications in which SCE notified the Board of SCE’s responses to Requests for Additional Information (“RAIs”) regarding the October 3, 2012 “Restart Report”¹ for San Onofre Nuclear Generating Station (“SONGS”) Unit 2, as well as any future notifications. Alternatively, FOE requests that it be given the opportunity to submit additional written briefing to respond to the notifications.

As demonstrated below, the Motion should be rejected. Although SCE believes that the Restart Report and the related RAI responses are outside the scope of this proceeding, they are

¹ 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.

directly related to information that the Board has requested to be briefed and issues that have been raised by other participants. Therefore, governing U.S. Nuclear Regulatory Commission (“NRC”) precedent mandates that SCE submit notifications related to the RAI responses. Additionally, the notifications are not supplements to SCE’s brief, because SCE has not provided any additional arguments regarding the RAI responses, but has merely transmitted them to the Board. Finally, FOE’s alternative relief of submitting additional written briefs regarding the RAI responses should be rejected. FOE provides no legal basis for additional briefing, FOE already has briefed many of these issues, and these topics can be discussed at the upcoming oral argument on March 22, 2013.

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, which argued that the March 27, 2012 Confirmatory Action Letter (“CAL”) issued by the NRC to SCE requires a license amendment.² On December 7, 2012, the Board issued an order for the briefing of the issues referred by the Commission, and additional issues identified by the Board.³ The December 7 order also required SCE to make complete proprietary copies of the October 3, 2012 Restart Report available to FOE subject to a protective order.⁴ On December 20, 2012, the Board issued another order clarifying the schedule and document disclosure requirements of the participants.⁵

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

³ Order (Conference Call Summary and Directives Relating to Briefing) at 5 (Dec. 7, 2012) (“Dec. 7, 2012 Order”) (unpublished).

⁴ *Id.* at 4.

⁵ Order (Granting in Part and Denying in Part Petitioner’s Motion for Clarification and Extension) at 5 (Dec. 20, 2012) (“Dec. 20, 2012 Order”) (unpublished).

Following these orders, FOE filed its Opening Brief on January 11, 2013.⁶ The Natural Resources Defense Council (“NRDC”) then filed its amicus brief on January 18, 2013.⁷ On January 30, 2013, SCE and the NRC Staff filed their answering briefs, demonstrating that the CAL is not a *de facto* license amendment and FOE’s petition to intervene should be rejected.⁸ Thereafter, the Board granted FOE’s request for an extension to file its Reply Brief.⁹ FOE filed its Reply Brief on February 13, 2013.¹⁰

SCE and the NRC Staff have taken the position in their briefs that the Board should only consider the terms of the CAL in determining whether the CAL constitutes a *de facto* license amendment, and need not evaluate the activities presented in SCE’s October 3, 2012 Restart Report.¹¹ In contrast, FOE and NRDC have taken the position that the Board should consider SCE’s restart actions. In particular, they have pointed to RAI 32 and claimed that SCE needs a license amendment in order to comply with Technical Specification 5.5.2.11, because SCE had not provided an Operational Assessment at 100% power for all types of wear.¹²

On December 26, 2012, the NRC Staff issued a first set of 32 RAIs to SCE regarding the Restart Report.¹³ SCE has provided responses to all of these RAIs throughout January and February 2013. SCE has submitted four notifications to the Board as part of this proceeding,

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

⁷ Natural Resources Defense Council’s Amicus Response in Support of Friends of the Earth (Jan. 18, 2013) (“NRDC Brief”).

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

⁹ Order (Granting Petitioner’s Motion for Extension of Time) (Feb. 1, 2013) (unpublished).

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

¹¹ See, e.g., SCE Brief at 18-30; Staff Brief at 15, 22-23, 33, 67, 74.

¹² See, e.g., FOE Reply Brief at 3-7; NRDC Brief at 6-12.

¹³ Letter from J. Hall, NRC, to P. Dietrich, SCE, San Onofre Nuclear Generating Station, Unit 2 – Request for Additional Information Regarding Response to Confirmatory Action Letter (TAC No. ME9727) (Dec. 26, 2012) (provided as Attachment 2 to the FOE Reply Brief).

transmitting these RAI responses on January 28, 2013, February 8, 2013, February 25, 2013, and February 26, 2013.¹⁴ The last two notifications to the Board were submitted after FOE's Reply Brief.

FOE's Motion appears to be particularly concerned about SCE notifying the Board of SCE's response to RAI 32.¹⁵ That response demonstrates that SCE will comply with Technical Specification 5.5.2.11 without the need for a license amendment.¹⁶ Specifically, SCE has formally committed to operate SONGS Unit 2 at 70% of Rated Thermal Power ("RTP"). That commitment modifies the licensing basis for Unit 2. As a result, under the Current Licensing Basis for Unit 2, full power is 70% of RTP.¹⁷ Since the Operational Assessments have all been performed for 70% or greater power, the Operational Assessments have been performed at full power as defined in the Current Licensing Basis for Unit 2, and consequently Technical Specification 5.5.2.11 is satisfied.¹⁸ In any event, SCE will be providing an Operational Assessment at 100% power to the NRC by March 15, 2013. That Operational Assessment will satisfy Technical Specification 5.5.2.11, even if full power is interpreted as 100% of RTP.¹⁹

¹⁴ See Letter from S. Burdick, SCE Counsel, to Board, Notification of Responses to RAIs (Jan. 28, 2013); Letter from S. Burdick, SCE Counsel, to Board, Second Notification of Responses to RAIs (Feb. 8, 2013); Letter from S. Burdick, SCE Counsel, to Board, Third Notification of Responses to RAIs (Feb. 25, 2013); Letter from S. Burdick, SCE Counsel, to Board, Fourth Notification of Responses to RAIs (Feb. 26, 2013).

¹⁵ See Motion at 3-6.

¹⁶ See Letter from R. St. Onge, SCE, to NRC, Response to Request for Additional Information (RAI 32) Regarding Confirmatory Action Letter Response (TAC No. ME 9727), Enclosure 2, at 5-7 (Feb. 25, 2013) (provided as an enclosure to Third Notification of Responses to RAIs).

¹⁷ *Id.* at 6.

¹⁸ *Id.*

¹⁹ *Id.* at 6-7.

III. FOE'S MOTION SHOULD BE REJECTED

A. **SCE's Board Notifications Are Required and Are Not Supplements to SCE's Brief**

FOE argues in its Motion that SCE's notifications to the Board of SCE's responses to the NRC Staff's RAIs regarding the Restart Report are inappropriate and should be barred from any consideration.²⁰ FOE states:

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.²¹

Contrary to FOE's arguments, SCE was required to submit the notifications to the Board and the other participants in this proceeding. There was no need to seek leave from the Board to submit them, and SCE did not submit them as supplements to its brief. Therefore, FOE's Motion should be rejected.

The NRC Staff's RAIs are a normal and expected part of the Staff's review process.²² The Restart Report consists of hundreds of pages of technical information. It should be no surprise that the Staff has issued RAIs about this information. FOE appears to believe that these RAIs and their responses must be conducted according to the Board's briefing schedule. That is not the case. The Staff's review of the Restart Report is separate from this proceeding, and is not dependent on the briefing schedule. Indeed, the Staff is looking at a much broader

²⁰ Motion at 1-4.

²¹ *Id.* at 4.

²² *See, e.g., Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 & 3), CLI-99-11, 49 NRC 328, 336-37 (1999) (stating that RAIs are a standard part of NRC licensing reviews).

set of issues (*e.g.*, safety of restart), while this proceeding is focused on a much narrower question (*i.e.*, whether the CAL is a *de facto* license amendment).

SCE was required to submit the notifications to the Board regarding the RAI responses. Long-standing NRC precedent requires participants to an adjudicatory proceeding to notify the licensing board of potentially relevant developments and new information.²³ For example, the Commission concluded in *Rancho Seco* that participants must notify the licensing board of “relevant and material new information.”²⁴ Similarly, in *McGuire*, the Appeal Board ruled that “parties must inform the presiding board and other parties of new information which is relevant and material to the matters being adjudicated,” and this requirement “goes to the very heart of the adjudicatory process.”²⁵ The Appeal Board further explained that this requirement is necessary “to keep the board abreast of changing circumstances bearing on their cases,” and “any developments which may conceivably affect an outcome” of an adjudication should be disclosed to the licensing board.²⁶ The Appeal Board also has stated that if a participant has a reasonable doubt concerning the need to disclose information, it should disclose the information for the licensing board to evaluate its worth.²⁷

Although SCE has consistently taken the position that the Restart Report and SCE’s restart activities are outside the scope of this proceeding, the Board has directed the participants to brief related issues. For example, in the Board’s December 7 order, the Board required SCE to make complete proprietary copies of the October 3, 2012 Restart Report

²³ FOE implies that notifications are only appropriate if they are “courtesy notification of tangentially related material.” Motion at 3. As discussed below, this is not the correct standard for notifications.

²⁴ *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generation Station), CLI-93-5, 37 NRC 168, 170 (1993).

²⁵ *Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-143, 6 AEC 623, 625-26 (1973).

²⁶ *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-355, 4 NRC 397, 406 n.26 (1976).

²⁷ *See, e.g., Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-774, 19 NRC 1350, 1358 (1984).

available to FOE, and requested briefing on portions of the Restart Report.²⁸ In its December 20 order, the Board further explained that the Restart Report “provides sufficient information for the parties to brief this issue [on whether the CAL is a *de facto* license amendment] and for the Board to resolve it.”²⁹ Furthermore, both FOE and NRDC have briefed issues related to RAI 32.³⁰ In that regard, RAI 32 is the basis for the sole issue raised by NRDC and one of the primary issues raised by FOE in its Reply Brief. Because SCE’s RAI responses relate to the NRC Staff’s questions about the Restart Report, which relates to topics raised by the Board and other participants, NRC precedent required SCE to submit the notifications. In particular, because RAI 32 is the basis for one of the primary issues raised by FOE and NRDC, SCE was obligated to notify the Board and the participants of the response to RAI 32.

FOE cites absolutely no case law to support its position that the notifications were inappropriate and should be barred from consideration in this proceeding. Additionally, there is no legal basis (and FOE cites none) for the proposition that SCE has forfeited its right to notify the Board and participants of RAI responses submitted after the briefs. SCE has been routinely supplying the Board and participants with RAI responses, including RAI responses submitted prior to SCE’s brief.

FOE makes the unsupported argument that “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.”³¹ This argument is incorrect. SCE does not concede that the Restart Report and related RAI responses are relevant, and has consistently taken the position that the Restart

²⁸ See Dec. 7, 2012 Order at 4, 6-7.

²⁹ Dec. 20, 2012 Order at 4.

³⁰ See, e.g., FOE Reply Brief at 3-7; NRDC Brief at 6-12.

³¹ Motion at 2 n.11.

Report is outside the scope of this proceeding. For example, SCE argued in its brief that “matters related to RAI 32 are outside the scope of this proceeding.”³² FOE’s argument also is contrary to NRC precedent, which holds that the mere fact that a participant has informed the licensing board and the other participants of new information which is of questionable relevance to the proceeding “does not carry with it any presumption that the [participant] thereby concedes in litigation that the information is relevant and material.”³³ Therefore, SCE’s notifications to the Board do not concede relevance in any manner whatsoever.

SCE also has not supplemented its earlier brief with the Board notifications. SCE’s notifications do not provide any argument whatsoever, but instead merely transmit the RAI responses to the Board. FOE’s arguments that SCE has somehow supplemented its brief are without merit.

For these reasons, SCE’s notifications to the Board of the RAI responses were appropriate and did not supplement SCE’s brief. Additionally, the NRC Staff has issued other RAIs to SCE regarding the Restart Report, and it is possible that the Staff will issue additional RAIs in the future. Given that SCE believes that it was required to submit the Board notifications, it plans to continue to do so, unless instructed by the Board otherwise or unless the Board rules that the scope of this proceeding is limited to the terms of the CAL itself.

B. FOE’s Motion Is Inconsistent with Its Briefing Position

FOE’s Motion also is inconsistent with its position in its Opening Brief and Reply Brief. FOE has taken the position that the Board must look at the CAL “process,” not just at the CAL itself. As discussed above, RAIs and RAI responses are a normal part of the NRC

³² SCE Brief at 50.

³³ *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, & 4), LBP-78-2, 7 NRC 83, 88 (1978).

Staff's review process. The NRC Staff review process under the CAL does not stop merely because the participants have provided briefs to the Board.

Under FOE's view of the case, it should be appropriate for the Board to consider the RAI responses, because they are part of the NRC Staff review process. FOE cannot have it both ways—it cannot state that the Board needs to consider the CAL process, and then state that the Board should not consider the documents submitted to the NRC Staff as part of that process. There is nothing in case law (and FOE cites to nothing) that indicates that the Board is foreclosed from considering developments that occur after filing of briefs. To the contrary, as discussed above, there is an ongoing obligation to notify the Board of additional developments related to the proceeding.

C. If the Board Limits the Scope of the Proceeding to the Terms of the CAL, then the RAI Responses Need Not Be Considered

If the Board accepts the position of SCE and the NRC Staff that the scope of this proceeding does not encompass review of the Restart Report or restart activities, then the Board does not need to consider the RAI responses. In that event, SCE would have no objection to granting FOE's Motion to the extent it requests that the Board disregard the RAI responses.

In that regard, the circumstances surrounding RAI 32 indicate that the Board should limit the scope of this proceeding to the terms of the CAL. SCE will be submitting responses to numerous additional RAIs in the future. SCE's restart actions will not be final until the NRC Staff issues its restart approval. Under FOE's view of the case and its Motion, the Board would not be able to issue its decision until after the Staff issues its restart approval and SCE has restarted Unit 2. As SCE discussed in its brief, there is no indication that the Commission

intended such an approach.³⁴ The only reasonable course of action is for the Board to render its decision based upon the terms of the CAL, and not the restart actions and RAI responses.

D. FOE's Alternative Relief Should Be Denied

If the Board decides to consider SCE's responses to the NRC's RAIs on the Restart Report, then FOE argues that "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."³⁵ This alternative relief should be rejected.

First, FOE has provided no legal justification for additional written briefing. As discussed above, the notifications were required and SCE did not supplement its briefing with the notifications. The only legal support provided by FOE for additional briefing is 10 C.F.R. § 2.323(c). Section 2.323(c) states:

Answers to motions. Within ten (10) days after service of a written motion, or other period as determined by the Secretary, the Assistant Secretary, or the presiding officer, a party may file an answer in support of or in opposition to the motion, accompanied by affidavits or other evidence. The moving party has no right to reply, except as permitted by the Secretary, the Assistant Secretary, or the presiding officer. Permission may be granted only in compelling circumstances, such as where the moving party demonstrates that it could not reasonably have anticipated the arguments to which it seeks leave to reply.

Section 2.323(c) has no apparent applicability to the circumstances under consideration here, and FOE has provided no such connection. No participant has filed a motion to which another participant seeks to reply.

Additionally, FOE already has briefed issues related to RAI 32. The NRC Staff issued RAI 32 to SCE on December 26, 2012, well before FOE's Opening Brief and Reply Brief were

³⁴ See SCE Brief at 18-23, 104-05.

³⁵ Motion at 5.

submitted. Although FOE does not directly mention RAI 32 in its Opening Brief, it discusses Technical Specification 5.5.2.11.³⁶ In its Reply Brief, FOE discusses RAI 32 directly, including whether a license amendment is needed for the restart actions based on Technical Specification 5.5.2.11.³⁷ Indeed, FOE even submitted a copy of the December 26 RAIs as Attachment 2 to its Reply Brief. Thus, FOE has already briefed issues involving RAI 32.

Furthermore, the upcoming oral argument obviates the need for additional written briefing on this topic. The participants, including FOE, will have an opportunity to address SCE's response to RAI 32 and any related issues during the upcoming oral argument scheduled for March 22, 2013. Therefore, there is no need for additional filings in order to brief this issue. In that regard, SCE's notifications of its response to RAI 32 and all of the other RAI responses contained no arguments—they merely notified the Board and the other participants of the responses. For all of these reasons, the Board should deny FOE's requested alternative relief for leave to file a written brief on the RAI responses.³⁸

Nonetheless, if the Board would like to receive written briefs on SCE's response to RAI 32 or any of the other RAI responses, then SCE requests that the briefs be due before the scheduled oral argument and have a page limit. Therefore, if additional briefing is desired by

³⁶ FOE Opening Brief at 23-24.

³⁷ See FOE Reply Brief at 6, 9-10, 17.

³⁸ FOE also argues that if SCE continues to share RAI responses with the Board, then "this proceeding will inevitably be lengthened," and "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." Motion at 6-7. Contrary to FOE's allegations, SCE is not attempting to lengthen this proceeding. SCE is required to submit the RAI responses to the NRC Staff and to notify the Board and participants of those responses. If anything, it is FOE that appears intent on lengthening this proceeding by requesting leave to file a supplemental brief every time that SCE submits an RAI response. In any event, these statements do not support the relief requested in FOE's Motion, because they do not relate to whether supplemental briefing is necessary. Moreover, FOE has had an opportunity to fully brief any issues related to the Restart Report, and so the Board can rule on the issues in this proceeding as soon as it is ready. Furthermore, as discussed in SCE's and the NRC Staff's briefs, the Board need not consider any of the restart actions, but can instead rule purely on the CAL itself.

the Board, SCE suggests that the Board request that all participants submit simultaneous briefs prior to oral argument (*e.g.*, by March 20, 2013), and that the briefs be limited to ten pages.

IV. CONCLUSION

For the foregoing reasons, the Board should reject FOE's Motion. Additionally, the Board should reject SCE's request for additional written briefing regarding SCE's notifications to the Board. Any additional discussion on these topics can take place at the upcoming oral argument in this proceeding.

Respectfully submitted,

Executed in Accord with 10 C.F.R. § 2.304(d)

/s/ Steven P. Frantz

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Dated in Washington, D.C.
this 11th day of March 2013

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, a copy of “Southern California Edison Company’s Answer Opposing Friends of the Earth’s Motion to Bar Board Notifications” was filed through the E-Filing system.

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