

March 14, 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 IN PART AND SUPPORTING IN PART FOE'S MOTION
TO BAR FROM THE PROCEEDING SCE'S RESPONSES TO STAFF REQUESTS FOR
ADDITIONAL INFORMATION

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the Staff of the Nuclear Regulatory Commission (Staff) hereby files its answer to the "Motion by Friends of the Earth to Bar Southern California Edison Company's [SCE] Submissions after the Close of Briefing" (Motion to Bar).¹ The Staff opposes in part and supports in part the Motion to Bar as explained below.

BACKGROUND

On November 8, 2012, the Commission referred to the Atomic Safety and Licensing Board (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 June 18, 2012 Petition to Intervene] meets the standing and contention admissibility

¹ Motion by Friends of the Earth to Bar Southern California Edison Company's Submissions after the Close of Briefing (Mar. 4, 2013) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML13063A572) (Motion to Bar).

requirements of 10 C.F.R. § 2.309.”² With regard to the first question, the Board stated that whether the CAL constitutes a license amendment is dependent upon whether it granted SCE any “greater operating authority” or whether the activities authorized in the CAL extended “beyond the ambit of the prescriptive authority granted under the license.”³ In order to make this determination, the Board required, in addition to the CAL, disclosure and review of the proprietary versions of SCE’s October 3, 2012 Return to Service Plan submitted to the NRC in response to the CAL.⁴ In a subsequent order clarifying this requirement, the Board stated that the CAL and the Return to Service Plan “provide[] sufficient information for the parties to brief this issue and for the Board to resolve it.”⁵

Separate from this proceeding, as part of the Staff’s review of the adequacy of SCE’s October 3, 2012 Return to Service Plan, the Staff issued to SCE 32 requests for additional information (RAIs) on December 26, 2012.⁶ Subsequently, SCE has served notifications to the

² *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, *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) (CAL); Petition to Intervene and Request for Hearing by Friends of the Earth (June 18, 2012) (ADAMS Accession No. ML12171A409) (FOE Petition to Intervene). The CAL Board was established on November 19, 2012. See Order, Establishment of Atomic Safety and Licensing Board at 1 (Nov. 19, 2012) (ADAMS Accession No. ML12324A267).

³ Order (Conference Call Summary and Directives Relating to Briefing), at 3 (Dec. 7, 2012) (ADAMS Accession No. ML12342A328) *quoting Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315, 327 (1996).

⁴ *Id.* at 4. The Board referred to this as SCE’s “Restart Plan.” Public versions of these documents are provided in ADAMS Package No. ML122850320.

⁵ Order (Granting in Part and Denying in Part Petitioner’s Motion for Clarification and Extension), at 4 (Dec. 20, 2012) (ADAMS Accession No. ML12355A452).

⁶ Letter from James R. Hall, USNRC, to Peter T. Dietrich, Senior Vice President and Chief Nuclear Officer, Southern California Edison Company, *San Onofre Nuclear Generating Station, Unit 2 – Request for Additional Information Regarding Response to Confirmatory Action Letter* (Dec. 26, 2012).

Also, the Staff has held, and FOE has participated in, public meetings discussing additional RAIs regarding the October 3, 2012 Return to Service Plan that the Staff intends to issue to SCE in the near future. See <http://www.nrc.gov/info-finder/reactor/songs/tube-degradation.html#video>.

Board when it has submitted responses to these RAIs. To date, four notifications have been served.⁷ FOE argues that the Third and Fourth Notifications, which were filed after FOE's February 13, 2013 reply brief, as well as any future notifications, should be excluded from consideration in this proceeding because they are equivalent to "post-briefing responses."⁸ In the alternative, if these notifications are considered, FOE requests that they be treated as motions and that FOE and the Staff be granted the opportunity to answer pursuant to 10 C.F.R. § 2.323(c).⁹

ARGUMENT

Parties to a Board proceeding "clearly have an obligation to keep the Licensing Board and [the other parties] apprised of any relevant and material new information."¹⁰ Despite Staff arguments to the contrary,¹¹ the Board has determined that SCE's October 3, 2012 Return to Service Plan is relevant and material to this proceeding.¹² Since SCE's responses to the RAIs

⁷ Letter from Stephen J. Burdick, Counsel for SCE, to E. Roy Hawkens, Anthony J. Baratta, Gary S. Arnold, Atomic Safety and Licensing Board Members, *Notification of Responses to RAIs* (Jan. 28, 2013) (ADAMS Accession No. ML13028A295) (First Notification); Letter from Stephen J. Burdick, Counsel for SCE, to E. Roy Hawkens, Anthony J. Baratta, Gary S. Arnold, Atomic Safety and Licensing Board Members, *Second Notification of Responses to RAIs* (Feb. 8, 2013) (ADAMS Accession No. ML13043A178) (Second Notification); Letter from Stephen J. Burdick, Counsel for SCE, to E. Roy Hawkens, Anthony J. Baratta, Gary S. Arnold, Atomic Safety and Licensing Board Members, *Third Notification of Responses to RAIs* (Feb. 25, 2013) (ADAMS Accession No. ML13056A604) (Third Notification); Letter from Stephen J. Burdick, Counsel for SCE, to E. Roy Hawkens, Anthony J. Baratta, Gary S. Arnold, Atomic Safety and Licensing Board Members, *Fourth Notification of Responses to RAIs* (Feb. 26, 2013) (ADAMS Accession No. ML13057A985) (Fourth Notification).

⁸ Motion to Bar at 1.

⁹ *Id.* at 3.

¹⁰ *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 152 n.46 (1993) *citing* *Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-143, 6 AEC 623, 626 (1973); *Tennessee Valley Authority* (Browns Ferry Nuclear Plant, Units 1, 2, and 3), ALAB-677, 15 NRC 1387, 1394 (1982); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-765, 19 NRC 645, 656-57 (1984).

¹¹ The Staff continues to maintain the position that the Commission intended the Board to review only whether the CAL constitutes a *de facto* license amendment and not whether the CAL and after-generated information, such as SCE's October 3, 2012 Return to Service Plan, constitute a *de facto* license amendment. See, e.g., NRC Staff's Answering Brief in the San Onofre Nuclear Generating Station CAL Proceeding at 74 (Jan. 30, 2013) (ADAMS Accession No. ML13030A496).

serve to explain its October 3, 2012 Return to Service Plan, these responses may be relevant and material to the issues that the Board has determined are relevant and material to this proceeding. Therefore, SCE is justified in considering these RAI responses to be new relevant and material information in this proceeding and, consequently, in providing the Board and parties notifications of these RAI responses.

However, there is a difference between keeping the Board and parties apprised of new relevant and material information and actively promoting arguments in a proceeding.¹³ This difference is illustrated by comparing the First, Second, and Fourth Notifications with the Third Notification. In the First, Second, and Fourth notifications, the SCE letter accompanying its RAI responses simply states that the purpose of the submission is to “provide notification to the Licensing Board.”¹⁴ However, the Third Notification letter crosses the line from notification to advocacy. It explicitly refers to arguments in this proceeding, stating that “[t]he ‘Reply Brief of Petitioner Friends of the Earth’ (Feb. 13, 2013) and ‘Natural Resources Defense Council’s Amicus Response in Support of Friends of the Earth’ (Jan. 18, 2013) both heavily rely upon RAI 32 as a basis for their arguments that SCE needs a license amendment in order to comply with Technical Specification 5.5.2.11.”¹⁵ It then provides excerpts from the attached response to RAI 32 apparently in an attempt to rebut this argument.¹⁶ Therefore, the Staff agrees in part with FOE’s Motion to Bar in that, to the extent that it presents an argument, the letter accompanying

¹² Order (Conference Call Summary and Directives Relating to Briefing), at 4 (Dec. 7, 2012) (ADAMS Accession No. ML12342A328); Order (Granting in Part and Denying in Part Petitioner’s Motion for Clarification and Extension), at 4 (Dec. 20, 2012) (ADAMS Accession No. ML12355A452).

¹³ See *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 676 n.74) (refusing to consider as part of the record a letter and attachment submitted by the Petitioner in an apparent attempt to bolster its contention after the fact).

¹⁴ First Notification at 1; Second Notification at 1; Fourth Notification at 1.

¹⁵ Third Notification at 1.

¹⁶ *Id.* at 1-2.

the Third Notification, but not the RAI response attached to the Third Notification, should be excluded from consideration in this proceeding.

CONCLUSION

Accordingly, the Staff supports FOE's Motion to Bar to the extent that it requests the Board to exclude from consideration the improperly argumentative portions of the letter accompanying the Third Notification. The Staff opposes the remainder of FOE's Motion to Bar.

Respectfully submitted,

/Signed (electronically) by/

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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 IN PART AND SUPPORTING IN PART FOE'S MOTION TO BAR FROM THE PROCEEDING SCE'S RESPONSES TO STAFF REQUESTS FOR ADDITIONAL INFORMATION dated March 14, 2013 have been served upon the Electronic Information Exchange, the NRC's E-Filing System, in the above captioned proceeding, this 14th day of March, 2013.

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 14th day of March, 2013