

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

March 11, 2013

ORDER

(Denying SCE's Motion to Strike Portions of Declaration of John Large)

I. BACKGROUND

On November 8, 2012, the Commission in CLI-12-20 referred to the Atomic Safety and Licensing Board Panel (ASLBP) a portion of 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

As relevant here, Petitioner filed its opening brief with attachments on January 11, 2013;² SCE filed an answering brief with attachments on January 30, 2013;³ the NRC Staff also filed an answering brief with attachments on January 30, 2013, including an affidavit from Mr.

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). Specifically, the Commission directed a duly constituted Licensing Board to “consider whether: (1) the [CAL] issued to SCE constitutes a de facto license amendment that would be subject to a hearing opportunity under [s]ection 189a [of the Atomic Energy Act]; and, if so, (2) whether the petition meets the standing and contention admissibility requirements of 10 C.F.R. § 2.309.” CLI-12-20, slip op. at 5.

² See Opening Brief of Petitioner Friends of the Earth (Jan. 11, 2013).

³ See [SCE's] Brief on Issues Referred by the Commission (Jan. 30, 2013).

Kenneth J. Karwoski (Karwoski Affidavit);⁴ and Petitioner filed a reply brief on February 13, 2013, which included a declaration from its expert, Mr. John Large (Large Declaration).⁵

On February 22, 2013, SCE filed a motion to strike Sections 13 and 14 of the Large Declaration, arguing that those sections improperly advance arguments for the first time that were beyond the scope of arguments previously raised.⁶

On February 28, 2013, Petitioner and the NRC Staff each filed an answer urging this Board to deny SCE's motion to strike.⁷

II. ANALYSIS

"It is well established in NRC proceedings that a reply cannot expand the scope of the arguments set forth in the original hearing request. Replies must focus narrowly on the legal or factual arguments first presented in the original petition or raised in the answers to it."⁸ SCE argues that Sections 13 and 14 of the Large Declaration violate this established rule and, accordingly, must be struck.

Specifically, SCE argues that Section 13 should be struck because it "uses Attachment 1 of the Karwoski Affidavit [submitted by the NRC Staff] as an inappropriate basis for launching into a lengthy discussion of . . . SCE's compliance with Criteria III and VI of Appendix B -- criteria that are nowhere addressed in the Karwoski Affidavit." SCE's Motion to Strike at 4.

⁴ See NRC Staff's Answering Brief in the [SONGS] CAL Proceeding (Jan. 30, 2013); Affidavit of Mr. Kenneth J. Karwoski Concerning FOE's Claims Regarding Staff's March 27, 2012 CAL Issued to SCE (Jan. 30, 2013).

⁵ See Reply Brief of Petitioner Friends of the Earth (Feb. 13, 2013); Reply Brief, Att. 1, Declaration of John Large – Comments on the NRC and SCE Responses of January 30, 2013.

⁶ See [SCE's] Motion to Strike Portions of Declaration of John Large (Feb. 22, 2013) [hereinafter SCE's Motion to Strike].

⁷ See [Petitioner's] Answer to [SCE's] Motion to Strike Portions of Declaration of John Large (Feb. 28, 2013) [hereinafter Petitioner's Answer]; NRC Staff's Answer Opposing SCE's Motion to Strike Portions of the Declaration of John Large (Feb. 28, 2013) [hereinafter NRC Staff's Answer].

⁸ Nuclear Management Co., LLC (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006) (footnotes omitted).

Additionally, argues SCE, Section 13 should be struck because although the Karwoski Affidavit addresses whether the statements in the March 27 CAL are authorized by Criterion XVI, Section 13 “discusses whether SCE has complied with Criterion XVI -- an issue that is not addressed in the Karwoski Affidavit.” Id. Finally, SCE argues that Section 14 of the Large Declaration should be struck, because it references Attachment 1 as a basis for arguing that restart activities require a license amendment, but “Attachment 1 . . . does not address that issue.” Id.

For the reasons fully discussed by Petitioner and the NRC Staff (see Petitioner’s Answer at 2-4; NRC Staff’s Answer at 3-8), we conclude that SCE’s arguments lack merit.

Briefly, concerning SCE’s assertion that Section 13 of the Large Declaration uses the Karwoski Affidavit as an inappropriate basis for launching into a lengthy discussion of SCE’s compliance with Criteria III and VI of Appendix B (see SCE’s Motion to Strike at 4), SCE fails to recognize that the discussion in the Large Declaration “only restates [Petitioner’s] previous arguments. . . . regarding fluid elastic instability, the lack of anti-vibration bars, and the zero-gap/zero preload strategy in support of [Petitioner’s] initial brief. 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.” NRC Staff’s Answering Brief at 4-5; see also Petitioner’s Answer at 4 (arguing that Section 13 “merely walks through the door opened by Karwoski’s assertion and applies the Appendix B criteria to . . . the Restart Plan”).

Concerning SCE’s alternative attack on Section 13 of the Large Declaration -- i.e., SCE’s claim that the arguments in Section 13 regarding Criterion XVI do not respond to the Karwoski Affidavit (see SCE’s Motion to Strike at 4) -- SCE again fails to recognize that these arguments “too were raised by [Petitioner] in previous filings, and so are appropriate subjects for a reply.” NRC Staff’s Answering Brief at 5; see also id. at 5-6; Petitioner’s Answer at 4.

Finally, concerning SCE’s claim that Section 14 of the Large Declaration should be struck because it incorrectly references Attachment 1 as a basis for arguing that restart activities require a license amendment (see SCE’s Motion to Strike at 4), SCE ignores that the

statements in Section 14 “respond to arguments made in the NRC Staff’s January 30, 2013 Answer and the Karwoski Affidavit or restate [Petitioner’s] previous arguments.” NRC Staff’s Answering Brief at 7; see also id. at 7-8; Petitioner’s Answer at 3-4.

In short, we reject SCE’s claim that Sections 13 and 14 of the Large Declaration reach beyond the acceptable boundaries of a reply brief, because those sections do not “expand the scope of the arguments set forth in [Petitioner’s original brief; rather, they] . . . focus narrowly on the legal or factual arguments first presented in [that brief] or raised in the answers to it.” Palisades Nuclear Plant, CLI-06-17, 63 NRC at 732. SCE’s motion to strike portions of the Large Declaration is therefore denied.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

E. Roy Hawkens, Chairman
ADMINISTRATIVE JUDGE

Issued at Rockville, Maryland
this 11th day of March 2013.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)	
)	
SOUTHERN CALIFORNIA EDISON CO.)	
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(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 to Strike Portions of Declaration of John Large)** 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 to Strike Portions of Declaration of John Large)

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Dated at Rockville, Maryland
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[Original signed by Herald M. Speiser _____]
Office of the Secretary of the Commission