May 20, 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	)	
	)	
Florida Power & Light Company	)	Docket No. 50-389
	)	
(St. Lucie Plant, Unit 2)	)	

FLORIDA POWER & LIGHT COMPANY'S ANSWER OPPOSING SOUTHERN ALLIANCE FOR CLEAN ENERGY'S MOTION FOR LEAVE TO AMEND HEARING REQUEST

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(i)(1),[1] Florida Power & Light Company ("FPL") hereby submits this answer ("Answer") opposing the Southern Alliance for Clean Energy's ("SACE") April 25, 2014 Motion for Leave to Amend Hearing Request Regarding *De Facto* License Amendment of St. Lucie Unit 2 Operating License ("Motion").[2] SACE's Motion requests that the Nuclear Regulatory Commission ("Commission" or "NRC") permit SACE to amend its previously filed hearing request[3] to include additional supporting information set forth in Amendment 18 to St. Lucie Unit 2's Updated Final Safety Analysis Report dated January 2008 ("UFSAR Amendment 18"). Motion at 1.

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[1] FPL is submitting this Answer under Section 2.309(i)(1) because SACE cites Section 2.309(c) as the procedural basis for its pleading.

[2] Along with the Motion, SACE also submitted an amended hearing request and a supplemental declaration. *See* Southern Alliance for Clean Energy's Amended Hearing Request Regarding *De Facto* Amendment of St. Lucie Unit 2 Operating License (Apr. 25, 2014) ("Amended Hearing Request"); Supplemental Declaration of Arnold Gundersen (Apr. 25, 2014), Exhibit 1 to Amended Hearing Request ("Supplemental Gundersen Decl.*").*

[3] Southern Alliance for Clean Energy's Hearing Request Regarding *De Facto* License Amendment of St. Lucie Unit 2 Operating License (Mar. 10, 2014) ("Hearing Request").

The Commission should deny SACE's Motion because: (1) the Motion is untimely; and (2) the Contentions in SACE's original Hearing Request, even if supplemented by the information set forth in its Amended Hearing Request, fail to meet the NRC's standards for admissibility. The Commission should also find that SACE cannot, in an earlier pleading, rely on any information the Commission finds inadmissible here.

II. BACKGROUND

On March 10, 2014, SACE filed its original Hearing Request.[4] The Hearing Request proffered two Contentions claiming that FPL's installation of replacement steam generators ("RSGs") at St. Lucie Unit 2 in 2007 constituted a *de facto* license amendment. On April 25, 2014, before the parties filed answers to SACE's original Hearing Request, SACE filed the Motion and Amended Hearing Request at issue here.

On April 28, 2014, FPL and the NRC Staff filed answers to SACE's original Hearing Request.[5] SACE replied to those answers on May 5, 2014.[6] As the basis for certain arguments, SACE's Reply relied upon information that it first presented to the Commission in its pending Amended Hearing Request.

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[4] On that same date, SACE filed a Motion to Stay Restart of St. Lucie Unit 2 Pending Conclusion of Hearing Regarding *De Facto* Amendment of Operating License and Request for Expedited Consideration (Mar. 10, 2014), which the Commission denied on April 1, 2014. *See Florida Power & Light Co.* (St. Lucie Plant, Unit 2), CLI-14-04, 79 NRC __ (Apr. 1, 2014) (slip op.).

[5] Florida Power & Light Company's Answer Opposing Southern Alliance for Clean Energy's Hearing Request Regarding *De Facto* License Amendment of St. Lucie Unit 2 Operating License (Apr. 28, 2014) ("FPL's April 28 Answer"); NRC Staff Answer to Southern Alliance for Clean Energy's Hearing Request Regarding *De Facto* Amendment of St. Lucie Unit 2 Operating License (Apr. 28, 2014). On April 28, 2014, the Nuclear Energy Institute filed a motion for leave to file an *amicus curiae* brief.

[6] Southern Alliance for Clean Energy's Reply to Oppositions to SACE's Hearing Request Regarding *De Facto* License Amendment of St. Lucie Unit 2 Operating License (May 5, 2014) ("SACE Reply").

III. SACE'S MOTION IS NOT TIMELY

A. The Commission Should Apply the Criteria in 10 C.F.R. § 2.309(c) to Determine Whether SACE's Motion Is Timely

SACE claims that its Motion is not subject to 10 C.F.R. § 2.309(c), which governs the consideration of new and amended contentions filed after the deadlines specified in 10 C.F.R. § 2.309(b). Motion at 5. According to SACE, Section 2.309(c) applies only to amended contentions that are submitted after the deadline for filing timely contentions. SACE implies that, because there was no deadline here for filing timely contentions, its Motion and Amended Hearing Request cannot be deemed untimely. *See id.*

The statement on page 5 of its Motion that "[Section] 2.309(c) does not apply" (*id.)* is inconsistent with the Motion's earlier claim that it is being filed "[p]ursuant to" that very Section. *Id.* at 1. It is also inconsistent with SACE's other claims in this proceeding that SACE is "entitled to a hearing on the license amendment under…10 C.F.R. § 2.309" (Hearing Request at 6), and that Section 2.309(b) "governs the timeliness" of its Hearing Request. *Id.* at 21.

In addition, given that SACE filed its Motion pursuant to Section 2.309(c), the Commission should apply the criteria in that Section to determine whether the Motion is timely. Moreover, if the Commission were to accept SACE's argument, SACE could amend its Hearing Request at any time while it is pending before the Commission. Such a result would be contrary to the intent of the Commission's regulations, which recognize the importance of establishing deadlines for submitting amended filings. *See, e.g.*, 10 C.F.R. §§ 2.307(a); 2.309(c); 2.323; 2.326.

B. SACE Fails to Satisfy the 10 C.F.R. § 2.309(c) Criteria

SACE also claims that, even if 10 C.F.R. § 2.309(c) applies, SACE meets the criteria for untimely filing set forth in that regulation. Motion at 5-6. Section 2.309(c)(1) provides that

amended contentions, like late-filed hearing requests, "will not be entertained" unless the following criteria have been met:

> (i) The information upon which the filing is based was not previously available;
>
> (ii) The information upon which the filing is based is materially different from information previously available; and
>
> (iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.

10 C.F.R. § 2.309(c)(1). Failure to meet any one of these criteria is sufficient to deny SACE's Motion. SACE fails to satisfy them all.

SACE's Motion does not satisfy Section 2.309(c)(1)(i). The information set forth in UFSAR Amendment 18 dated 2008 (on which the Motion is based) was previously available to SACE and other potential intervenors during the 2011-2012 proceeding in which the Commission considered and approved a license amendment for an extended power uprate ("EPU") incorporating the RSGs at St. Lucie Unit 2. SACE could have, but did not, request access to the relevant Chapter (Chapter 5) of UFSAR Amendment 18 during that proceeding.[7] Indeed, SACE concedes that it did not request Chapter 5 until early March 2014. Motion at 3.[8]

SACE's Motion also fails to satisfy Section 2.309(c)(1)(ii). Assuming for the sake of argument that the information set forth in UFSAR Amendment 18 was not previously available, SACE still does not meet the applicable criteria because the data at issue in Amendment 18 are not materially different from other previously available information. Indeed, similar information

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[7] *See* 76 Fed. Reg. 54,503 (Sept. 1, 2011) (permitting requests for hearing to be filed by October 31, 2011, and requests for access to sensitive unclassified non-safeguards information ("SUNSI") to be filed by September 12, 2011). As SACE notes, under the Commission's SUNSI policy, a licensee's UFSAR is generally releasable upon request. *See* Motion at 6.

[8] In addition, since UFSAR Amendment 18 was available to SACE in 2011, SACE's complaint regarding "the NRC's lengthy delay" in producing that document in response to SACE's recent request (Motion at 6) is irrelevant.

regarding the RSGs has been available and has undergone NRC Staff review in multiple contexts since as early as FPL's 2006 license amendment request. That request addressed design changes associated with the RSGs that were scheduled to be installed in the fall of 2007.[9] In March 2007, the St. Lucie Unit 2 Aging Management Program ("AMP") was revised to reflect the removal of the stay cylinders as well as the replacement of lattice tube supports with support plates and anti-vibration bars.[10] FPL's 10 C.F.R. § 50.59 analysis showing that the RSGs satisfied UFSAR acceptance criteria and Technical Specification Limits has been publicly available since 2008.[11] Therefore, information materially similar to UFSAR Amendment 18 – as well as the Amendment itself – has been available for several years.

SACE's Motion also fails to satisfy Section 2.309(c)(1)(iii). The Motion was not submitted in a timely fashion based on when the information at issue became available. As set forth above, UFSAR Amendment 18 and the information it contains were available for many years before SACE filed its original Hearing Request. SACE posits that its Motion is timely because it was filed within ten days of receiving the text of UFSAR Amendment 18 on April 15, 2014. Motion at 6. However, filing its Hearing Request in March 2014 did not relieve SACE of its prior obligation in other proceedings to "diligently uncover and apply all publicly available information to the prompt formulation of contentions." *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1048 (1983). The timeliness of SACE's Motion is judged not by the date of the NRC's response to SACE's request for a document supporting its contentions, but by the date the relevant information was available in the first

[9] *See* Letter from Gordon L. Johnston, Acting Vice President, St. Lucie Plant, to NRC, L-2006-094 (May 25, 2006) (ADAMS Accession No. ML061510346), Attachment 1 at 2.

[10] FPL's April 28 Answer at 19; Declaration of Mr. William A. Cross in Support of FPL's Answer Opposing SACE Request for Hearing, Attachment 1 to FPL's April 28 Answer ("Cross Decl.") at ¶ 10.

[11] *See* Letter from Gordon L. Johnston, Site Vice President, St. Lucie Plant, to NRC, L-2008-148 (June 26, 2008), at 8 (ADAMS Accession No. ML081840111).

instance. *See id.* ("[U]navailability of a licensing-related document does not establish good cause for filing a contention late if information was available early enough to provide the basis for the timely filing of that contention.").

For these reasons, the Commission should deny SACE's Motion as untimely.

IV. SACE'S CONTENTIONS REMAIN INADMISSIBLE

Even if the Commission were to find that the Motion is timely, SACE's original contentions, as supplemented by the information set forth in the Amended Hearing Request, remain inadmissible because they: (1) are outside of the scope of any proceeding; (2) do not raise any material issues; and (3) fail to raise any genuine dispute of material fact. 10 C.F.R. § 2.309(f)(1)(iii), (iv) and (vi).

According to SACE, UFSAR Amendment 18 supports the claims in SACE's Contentions 1 and 2 that FPL's installation of RSGs in 2007 involved "major design changes that exceed the reactor's design basis as described in the original 1980 Final Safety Analysis Report." Amended Hearing Request at 1. However, as discussed in FPL's April 28 Answer, SACE's Amended Hearing Request fails to meet 10 C.F.R. § 2.309(f)(1)(iii) because there is still no actual or *de facto* license amendment proceeding applicable to St. Lucie Unit 2, and because the Contentions impermissibly challenge St Lucie Unit 2's current licensing basis. *See* FPL's April 28 Answer at 17-21, 24.

Contrary to SACE's allegations, the RSGs did not depart from St Lucie Unit 2's design basis. They were installed in conformity with an amended license FPL obtained in 2007 and a Section 50.59 evaluation reviewed by the NRC Staff. The RSGs did not further modify the operating license or afford FPL any greater operating authority. *See* Cross Decl. at ¶ 8. SACE's

Amended Hearing Request, including UFSAR Amendment 18, provides no information to the contrary.

Moreover, because there is no proceeding and thus no findings that the NRC must make to support continued operation pursuant to FPL's license, SACE's continued dispute with the RSGs' licensing basis fails to raise a material issue. *See* 10 C.F.R. § 2.309(f)(1)(iv). Even were there such a proceeding, as explained above the departures from the original steam generators' design basis that are alleged by SACE have been approved by the Commission in licensing proceedings. The design differences from the original steam generators were duly considered and approved in connection with the 2007 license amendment, the Section 50.59 evaluation, and the 2012 EPU license amendment. Nothing in UFSAR Amendment 18 changes that.

Finally, SACE's reliance on UFSAR Amendment 18 to assert safety concerns with the St. Lucie Unit 2 RSG rests upon faulty assumptions, and therefore, fails to raise a genuine dispute with St. Lucie Unit 2's licensing basis. *See* 10 C.F.R. § 2.309(f)(1)(vi). SACE implies, without support, that the RSGs' incorporation of tube support plates increases the risk of tube denting because the original steam generators used an egg crate support system rather than support plates as a means to reduce the potential for tube denting. Amended Hearing Request at 4. In fact, the portion of UFSAR Amendment 18 quoted by SACE indicates that the RSGs' new configuration utilizes a specific combination of tube support plates and an anti-vibration bar system that "eliminates the potential for denting." UFSAR Amendment 18 at 5.4-13 (ADAMS Accession No. ML14104B631). In addition, SACE's claim that using tube support plates increases the risk of denting is inadmissible because it is based entirely on speculative assumptions, not facts or expert opinions. *See Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-

03-13, 58 NRC 195, 203 (2003). And, the RSGs' applicable operating experience shows no indication of tube denting.

SACE's contention that the RSGs' incorporation of "steam nozzle venturis indicates that an important safety parameter has been changed between the OSG and RSG, resulting in reanalysis and modification from the original design" (Amended Hearing Request at 5) is likewise inadmissible. Not only does SACE introduce a new argument that it was required to raise earlier (given the availability of UFSAR Amendment 18), but SACE also has not shown how incorporation of the steam nozzle venturis was in any way inconsistent with St. Lucie Unit 2's licensing basis or raises a safety concern.

V. SACE CANNOT RELY ON NEW INFORMATION IN ITS AMENDED HEARING REQUEST TO SUPPORT ITS REPLY

SACE incorporated into its May 5, 2014 Reply certain arguments regarding the asserted risk of tube denting and incorporation of steam nozzle venturis that rely upon information introduced for the first time in SACE's Amended Hearing Request. *See* SACE Reply at 2-3, 6-7, 15-17. SACE argues that it included the information in order to "mak[e] a complete record." *Id.* at 2 n.3.

The NRC's pleading rules, however, "do not allow . . . using reply briefs to provide, for the first time, the necessary threshold support for contentions; such a practice would effectively bypass and eviscerate our rules governing timely filing, contention amendment, and submission of late-filed contentions." *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 623 (2004). *See also Nuclear Management Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006) ("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.") (footnote omitted).

Permitting SACE to support its Reply with arguments based on new information that is not admitted here would allow SACE to improperly "bypass" the Commission's rules governing the timely filing of contentions. Accordingly, the Commission should find that SACE's Reply cannot rely on such information.

VI. CONCLUSION

For the reasons discussed above, FPL respectfully requests that the Commission deny SACE's Motion and find that SACE's Reply cannot utilize information first presented in its Amended Hearing Request.

Respectfully submitted,

/Signed electronically by Michael G. Lepre/

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Florida Power & Light Company's Answer Opposing Southern Alliance for Clean Energy's Motion for Leave to Amend Hearing Request was provided to the NRC's Electronic Information Exchange for service to those individuals on the service list in this proceeding as of this 20th day of May 2014.

/Signed electronically by Michael G. Lepre/