

May 20, 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
FLORIDA POWER & LIGHT CO.)	Docket No. 50-389
)	
(St. Lucie Plant, Unit 2))	
)	

NRC STAFF ANSWER TO SOUTHERN ALLIANCE FOR CLEAN
ENERGY'S MOTION FOR LEAVE TO AMEND HEARING REQUEST
REGARDING *DE FACTO* AMENDMENT OF ST. LUCIE UNIT 2 OPERATING LICENSE

INTRODUCTION

The U.S. Nuclear Regulatory Commission (NRC) staff (Staff) hereby files an answer¹ opposing the April 25, 2014 motion (Motion)² by Southern Alliance for Clean Energy (SACE) to amend its March 10, 2014 request for a hearing (Hearing Request).³ As discussed below, the

¹ 10 C.F.R. § 2.309(i)(1) does not apply in this instance because Southern Alliance For Clean Energy's (SACE's) motion for leave to amend is filed outside of any proceeding and was not contemplated by the Commission's briefing schedule in CLI-14-04. However, this Staff answer would be timely filed if 10 C.F.R. § 2.309 did apply.

² [SACE's] Motion for Leave to Amend Hearing Request Regarding *De Facto* Amendment of St. Lucie Unit 2 Operating License (Apr. 25, 2014) (Motion) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML14115A457). Included with the motion was [SACE's] Amended Hearing Request Regarding *De Facto* Amendment of St. Lucie Unit 2 Operating License (Apr. 25, 2014) (Amended Hearing Request) (ADAMS Accession No. ML14115A458) and Supplemental Declaration of Arnold Gundersen (Apr. 25, 2014) (Supplemental Gundersen Declaration). See Amended Hearing Request at Exhibit 1.

³ [SACE's] Hearing Request Regarding *De Facto* Amendment of St. Lucie Unit 2 Operating License (Mar. 10, 2014) (Hearing Request). SACE's Hearing Request included [SACE's] 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) (Motion to Stay Restart), Declaration of Arnold Gundersen (Mar. 9, 2014) (Gundersen Declaration), and eight declarations of standing. The filing is in a single document available at ADAMS Accession No. ML14071A431.

Staff opposes the Motion because it is not contemplated by the regulations or the Commission's briefing schedule in CLI-14-04.⁴

Moreover, SACE's Motion should be denied because it does not meet the Commission's requirements for new or amended contentions. Specifically, SACE has not demonstrated that its Motion is timely filed based on new and materially different information than information previously available pursuant to 10 C.F.R. § 2.309(c). Instead, SACE repeats arguments made in its March 10, 2014 Hearing Request and does not indicate how any information related to steam nozzle venturis is new and materially different information. Additionally, SACE's Motion does not meet the contention admissibility requirements in 10 C.F.R. § 2.309(f) because it amounts to a challenge to a licensee's 10 C.F.R. § 50.59 analysis, which is not cognizable under 10 C.F.R. § 2.309. For these reasons, SACE's Motion should be denied.

BACKGROUND

On March 10, 2014, SACE e-mailed the Commission a Motion to Stay Restart and a Hearing Request related to St. Lucie Plant, Unit No. 2. SACE's Hearing Request was filed outside of any proceeding⁵ and contained two claims labeled as contentions.⁶ The Hearing Request arose from the replacement of two steam generators at St. Lucie Plant, Unit No. 2 in 2007 which Florida Power & Light Company (FPL) had conducted without a license amendment pursuant to the provisions of 10 C.F.R. § 50.59.⁷ SACE's Hearing Request argued that "the

⁴ *Florida Power & Light Co.* (St. Lucie Plant, Unit 2), CLI-14-04, 79 NRC __, __ (Apr. 1, 2014) (slip op. at 5).

⁵ See Hearing Request at 3 (noting the fact that the NRC has not formally announced the issuance or consideration of a license amendment).

⁶ *Id.* at 5-6, 17 (providing two "contentions").

⁷ See *St. Lucie*, CLI-14-04, 79 NRC at __ (slip op. at 2). Pursuant to 10 C.F.R. § 50.59(c)(1), licensees may make changes in their licensed facilities as described in the Updated Final Safety Analysis Report (UFSAR) without obtaining a license amendment pursuant to 10 C.F.R. § 50.90 if a change to the technical specifications incorporated in the license is not required, and the change does not meet any of the eight criteria in 10 C.F.R. § 50.59(c)(2). See *St. Lucie Nuclear Plant - NRC Integrated Inspection Report 05000335/2007005, 05000389/2007005, § 4OA5.3 "Unit 2 Steam Generator Replacement Inspection (IP 50001)"* (Feb. 1, 2008) at 27-33 (ADAMS Accession No. ML080350408) (demonstrating

NRC should have required a license amendment to permit the 2007 steam generator replacement and, in not doing so, has implicitly and improperly granted a *de facto* license amendment.”⁸

Specifically, the Hearing Request asserted that (1) there are four differences between the St. Lucie Plant, Unit No. 2 original steam generators (OSGs) and replacement steam generators (RSGs), (2) because of these differences, the RSGs fail to comply with the NRC’s safety regulations, and (3) by allowing FPL to continue to operate St. Lucie Plant, Unit No. 2 with these RSGs, the NRC has conducted and is continuing to conduct a *de facto* license amendment proceeding.⁹ SACE’s Motion to Stay Restart requested that the Commission suspend the restart of St. Lucie Plant, Unit No. 2 pending resolution of the Hearing Request.¹⁰

In CLI-14-04, the Commission denied SACE’s Motion to Stay Restart and set a schedule for further briefing with respect to SACE’s Hearing Request.¹¹ Specifically, CLI-14-04 provided FPL and the Staff the opportunity to answer SACE’s Hearing Request by April 28, 2014, and provided SACE an opportunity to file a reply within 7 days of service of the answers.¹² CLI-14-04 did not provide an opportunity to file a motion for new or amended contentions or surreplies.

(footnotes continued . . .)

that the Staff reviewed the steam generator replacement, including FPL’s 10 C.F.R. § 50.59 evaluation, and identified no findings of significance).

⁸ *St. Lucie*, CLI-14-04, 79 NRC at ___ (slip op. at 4) (citing Motion to Stay Restart at 4-5).

⁹ Hearing Request at 5-6, 17. The specific differences asserted by SACE were that the RSGs, as compared to the OSGs, do not include a stay cylinder, include perforations of the central region of the tubesheet, include 588 tubes in the central region of the tubesheet, and use broached trefoil plates instead of a lattice or egg crate support system. *Id.* at 17, Gundersen Declaration at 28.

¹⁰ Motion to Stay Restart at 1.

¹¹ *St. Lucie*, CLI-14-04, 79 NRC at ___ (slip op. at 2).

¹² *Id.* at ___ (slip op. at 5).

Pursuant to CLI-14-04, FPL¹³ and the Staff¹⁴ timely filed answers opposing SACE's Hearing Request. The Staff's Answer explained that (1) a licensee's actions under 10 C.F.R. § 50.59 cannot constitute a *de facto* license amendment, (2) no Staff action or inaction related to St. Lucie Plant, Unit No. 2 constituted an actual or *de facto* license amendment, and (3) challenges to 10 C.F.R. § 50.59 analyses are not cognizable in a 10 C.F.R. § 2.309 hearing and can only be brought by a 10 C.F.R. § 2.206 petition.¹⁵ Pursuant to CLI-14-04, SACE timely filed a reply to the FPL and Staff answers.¹⁶

However, on April 25, 2014, SACE also filed the instant Motion to amend its March 10, 2014 Hearing Request. SACE's Motion is based on allegedly new and materially different information contained in Amendment 18 to the FPL Updated Final Safety Analysis Report (UFSAR Amendment 18),¹⁷ which SACE received from the NRC on April 15, 2014.¹⁸ For the reasons discussed below, this Motion should be denied.

DISCUSSION

I. The Motion Should be Denied Because it is Not Contemplated By the Regulations or CLI-14-04

SACE filed its Motion to amend its March 10, 2014 Hearing Request pursuant to 10 C.F.R. § 2.309(c).¹⁹ However, SACE recognizes that 10 C.F.R. § 2.309(c) does not apply in

¹³ 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 Answer) (ADAMS Accession No. ML14118A499).

¹⁴ 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) (Staff Answer) (ADAMS Accession No. ML14118A290).

¹⁵ *Id.* at 9-18, 22.

¹⁶ [SACE's] Reply to Oppositions to SACE's Hearing Request Regarding *De Facto* Amendment of St. Lucie Unit 2 Operating License (May 5, 2014) (ADAMS Accession No. ML14125A514).

¹⁷ Motion at 5.

¹⁸ *Id.* at 1. See also Exhibit 1 (providing a link to the relevant UFSAR Amendment 18 chapter) and Exhibit 2 (SACE's April 9, 2014 Freedom of Information Act (FOIA) request for this information).

¹⁹ Motion at 1, 5.

this instance.²⁰ As explained in the Staff's Answer, there is no actual or *de facto* license amendment proceeding related to the steam generators or restart of St. Lucie Plant, Unit No. 2.²¹ Thus, there is no hearing opportunity or deadline by which to file a 10 C.F.R. § 2.309 hearing request or a new or amended contention under 10 C.F.R. § 2.309(c).²² SACE's Motion points to no actual or *de facto* license amendment proceeding which could trigger a hearing opportunity and the associated 10 C.F.R. § 2.309 criteria. Therefore, SACE's Motion is not contemplated or governed by 10 C.F.R. § 2.309(c).

Instead, the Commission's order in CLI-14-04 provides for filings related to SACE's March 10, 2014 Hearing Request.²³ This order provided a briefing schedule which allowed FPL and the Staff to file answers to SACE's Hearing Request by April 28, 2014²⁴ and provided SACE the opportunity to file a reply seven days thereafter.²⁵ Notably, the Commission did not provide SACE the opportunity to amend its Hearing Request pursuant to 10 C.F.R. § 2.309(c). Thus, SACE's Motion is contrary to CLI-14-04 and should be denied.

II. Even if 10 C.F.R. § 2.309(c) Was Applicable, SACE's Motion Should Be Denied Because It Does Not Demonstrate Good Cause or Present an Admissible Argument

Moreover, SACE's Motion should be denied because it does not meet the Commission's requirements for new or amended contentions. To be admissible under 10 C.F.R. § 2.309(c), a new or amended contention must demonstrate good cause and meet the contention

²⁰ *Id.* at 5.

²¹ Staff Answer at 7-18.

²² This regulation presumes the existence of a proceeding. Specifically, 10 C.F.R. § 2.309(c) requires a movant to demonstrate "good cause" before the presiding officer will entertain amended contentions "filed after the deadline in [10 C.F.R. § 2.309(b)]" which deadline is premised in all cases on the existence of a "proceeding." See 10 C.F.R. § 2.309(b)(1) ("In proceedings . . ."); 10 C.F.R. § 2.309(b)(2) ("In proceedings . . ."); 10 C.F.R. § 2.309(b)(3) ("In proceedings . . ."); 10 C.F.R. § 2.309(b)(4) ("In proceedings . . ."). As noted in the Staff's Answer to SACE's Hearing Request, the Staff assumes that in a *de facto* licensing proceeding, the triggering date would be the date on which the Staff took the action claimed to be a *de facto* license amendment. Staff Answer at 22 n.103.

²³ *St. Lucie*, CLI-14-04, 79 NRC at __ (slip op. at 2, 5).

²⁴ As noted, both FPL and the Staff timely answered SACE's Hearing Request on April 28, 2014.

²⁵ As noted, SACE timely filed a reply on May 5, 2014.

admissibility requirements in 10 C.F.R. § 2.309(f).²⁶ As explained below, SACE's Motion does not meet either of these requirements and should therefore be denied.

A. SACE's Motion Does Not Demonstrate Good Cause

Section 2.309(c)(1) provides that the presiding officer will not entertain motions for leave to file new or amended contentions filed after the deadline²⁷ unless the petitioner has demonstrated good cause by showing that:

- (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.²⁸

The Commission has made clear that a petitioner has an "iron-clad obligation to examine the publicly available documentary material . . . with sufficient care to enable it to uncover any information that could serve as a foundation for a specific contention."²⁹ Thus, petitioners may not delay filing a contention until a document becomes available that collects, summarizes, and places into context the facts supporting the contention, because doing so "would turn on its head the regulatory requirement that new contentions be based on 'information . . . *not previously available*.'"³⁰ Further, new and materially different information must support the

²⁶ 10 C.F.R. § 2.309(c)(1), (4).

²⁷ Again, one would have to presume that a 10 C.F.R. § 2.309(b) deadline existed in this instance based on an actual or *de facto* license amendment.

²⁸ 10 C.F.R. § 2.309(c)(i)-(iii).

²⁹ *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 496 (2010).

³⁰ *Id.* (emphasis in original).

proposed contention, and articulate a “reasonably apparent” foundation for the contention.³¹

Information is material if it impacts the Staff’s decision on an application.³²

SACE bases its Motion on information contained in FPL’s UFSAR Amendment 18.³³

SACE claims that this information satisfies 10 C.F.R. § 2.309(c)³⁴ and supports Contentions 1 and 2³⁵ because it “confirms” that FPL “has made major design changes to the St. Lucie Unit 2 steam generators that increase the risk of steam generator failure.”³⁶ But SACE does not indicate how this information is new and materially different information than information previously available or that its Motion is timely filed.

1. SACE Does Not Show That UFSAR Amendment 18 Contains New Information or That Its Motion is Timely Filed

SACE claims that the information in UFSAR Amendment 18 was not previously available because the NRC only made UFSAR Amendment 18 public on April 15, 2014, in response to a Freedom of Information Act (FOIA) request.³⁷ Thus, SACE asserts that its Motion is timely filed.³⁸ But SACE indicates that it was aware of the existence of UFSAR Amendment 18, and its relevance to SACE’s claims.³⁹ Thus, it is not known why SACE waited until March 2014 to

³¹ See *id.* at 494.

³² See *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), LBP-12-27, 76 NRC 583, 594 (2012).

³³ See Motion at 1 (“The purpose of this amendment is to provide additional relevant information that is contained in [UFSAR Amendment 18].”).

³⁴ *Id.* at 5.

³⁵ Amended Hearing Request at 1.

³⁶ Motion at 5.

³⁷ *Id.* at 1.

³⁸ *Id.* at 6 (noting that the Motion was filed within ten days of receiving UFSAR Amendment 18).

³⁹ *Id.* at 2 (“On June 26, 2008, at the same time that FPL submitted the 50.59 Summary to the NRC, it also submitted UFSAR Amendment 18, which updated the original Final Safety Analysis Report (“OFSAR”) to reflect the changes made by FPL under 10 C.F.R. § 50.59.”).

request UFSAR Amendment 18 from the NRC's Public Document Room.⁴⁰ SACE appears to argue that UFSAR Amendment 18 placed into context facts supporting SACE's contentions because it "provides such a comprehensive accounting of the changes to [the] reactor's design."⁴¹ But SACE cannot delay filing a motion to amend until a document is available that summarizes and places into context information upon which it relies.⁴²

Moreover, while SACE may have received UFSAR Amendment 18 on April 15, 2014, in response to its FOIA request, information on all five of the differences between the St. Lucie Plant, Unit No. 2 OSGs and RSGs that are claimed to be new information in SACE's Motion were publicly available earlier. In fact, SACE's March 10, 2014 Hearing Request discussed four of the five asserted differences.⁴³ Thus, contrary to SACE's claim, the information from UFSAR Amendment 18 is not new and is not only available in UFSAR Amendment 18.⁴⁴

Likewise, SACE has not demonstrated that information regarding steam nozzle venturis is new. SACE argues that the information in UFSAR Amendment 18 related to this component is new because the component was not previously identified in the original FSAR or described in the 10 C.F.R. § 50.59 summary supporting the 2007 steam generator replacement.⁴⁵ However, information on the steam nozzle venturis was publicly available before April 15, 2014.

⁴⁰ *Id.* at 3. SACE argues that it would not have been necessary for it to file this amended hearing request if the Staff had "complied with its own policy in a timely way" related to releasing UFSARs. *Id.* at 6-7. However, regardless of when SACE received UFSAR Amendment 18, SACE's Motion should be denied because SACE uses the information in it to raise challenges to a licensee's 10 C.F.R. § 50.59 analysis, which are not cognizable in a 10 C.F.R. § 2.309 hearing.

⁴¹ *Id.* at 5.

⁴² *Prairie Island*, CLI-10-27, 72 NRC at 496.

⁴³ See Hearing Request at 1-2 (noting that the RSGs do not include a stay cylinder, have perforations in the central region of their tubesheet, have 588 tubes in the central region of their tubesheet, and use broached trefoil plates instead of a lattice or egg crate support system). See also *id.* at 2 n.1 (stating that this information was gathered from "various St. Lucie licensing and enforcement documents and information provided by the NRC during the San Onofre Confirmatory Action Letter Proceedings").

⁴⁴ See Motion at 6.

⁴⁵ *Id.* at 5; Amended Hearing Request at 5.

For example, the steam nozzle venturis were discussed in the publicly available documents associated with the 2011 St. Lucie Plant, Unit No. 2 extended power uprate (EPU) license amendment request.⁴⁶ SACE is aware of this EPU amendment, as it is referenced in SACE's March 10, 2014 Hearing Request.⁴⁷ Thus, SACE does not demonstrate that the information contained in UFSAR Amendment 18 was not previously available or that its Motion is timely filed.

2. SACE Does Not Show that UFSAR Amendment 18 Contains Materially Different Information

SACE also does not demonstrate that the information contained in UFSAR Amendment 18 is materially different than information previously available. As noted, to be materially different, the new information must support an admissible contention. SACE claims that the information in UFSAR Amendment 18 is "unique" because it "provides such a comprehensive accounting of the changes to [the] reactor design."⁴⁸ But the steam generator differences SACE points to are all related to changes made by the licensee under 10 C.F.R. § 50.59. These changes are not material to any finding that the Staff must make on a license application. Further, this information does not support an admissible contention because, as discussed below, challenges to 10 C.F.R. § 50.59 are not cognizable in a 10 C.F.R. § 2.309 hearing.

B. SACE's Motion Does Not Present An Admissible Argument

SACE's Motion should also be denied because it does not meet the contention admissibility requirements in 10 C.F.R. § 2.309(f).⁴⁹ Instead, SACE's Motion simply repeats the Hearing Request's challenges to FPL's 10 C.F.R. § 50.59 analysis done in support of the 2007

⁴⁶ See FPL License Amendment Request for Extended Power Uprate (Feb. 25, 2011) (ADAMS Accession Package No. ML110730268), Attachment 5, at 2.2.2-79-80 (ADAMS Accession No. ML110730299) (identifying the existence and purpose of venturis located in the steam outlet nozzle of the steam generators).

⁴⁷ See Hearing Request at 9-10, 15-16, 21.

⁴⁸ Motion at 5.

⁴⁹ See 10 C.F.R. § 2.309(c)(4) (providing that new or amended contentions must meet § 2.309(f)).

steam generator replacement and adds an additional challenge to that analysis (*i.e.*, that the RSGs include steam nozzle venturis while the OSGs supposedly did not and that this change should have required a license amendment).⁵⁰ As explained in the Staff's Answer, challenges to a licensee's 10 C.F.R. § 50.59 analysis are not cognizable under 10 C.F.R. § 2.309(f) and may only be made by means of a petition under 10 C.F.R. § 2.206.⁵¹ Thus, SACE's Motion should be denied.

CONCLUSION

SACE's Motion to amend its Hearing Request is both procedurally and substantively improper; as a result, the Commission should deny it.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 20th day of May, 2014

⁵⁰ Motion at 1-2, 6; *Id.* at 5 (arguing that the presence of steam nozzle venturis in the RSGs but not the OSGs would require FPL to perform a new and different accident analysis for the RSGs).

⁵¹ *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 101 n.7 (1994) ("A member of the public may challenge an action taken under 10 C.F.R. § 50.59 only by means of a petition under 10 C.F.R. § 2.206); *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-12-20 76 NRC 437, 440, n.13 (referring a petitioner's challenges to a licensee's 10 C.F.R. § 50.59 analyses to the EDO for consideration as a 10 C.F.R. § 2.206 petition). See also *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), LBP-13-11, 77 NRC __, __ (Aug. 12, 2013) (slip op. at 4-5) (holding that "a challenge to [the licensee's] analysis under 10 C.F.R. § 50.59 of its proposed steam generator replacement is not the proper subject of an adjudicatory hearing" and that "the Commission has prohibited Licensing Boards from hearing challenges to actions taken under 10 C.F.R. § 50.59").

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing NRC STAFF ANSWER TO SOUTHERN ALLIANCE FOR CLEAN ENERGY'S MOTION FOR LEAVE TO AMEND HEARING REQUEST REGARDING *DE FACTO* AMENDMENT OF ST. LUCIE UNIT 2 OPERATING LICENSE dated May 20, 2014 have been served upon the Electronic Information Exchange, the NRC's E-Filing System, in the above captioned matter, this 20th day of May, 2014.

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 20th day of May, 2014