

March 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)	)	

**ANSWER OF FLORIDA POWER & LIGHT COMPANY  
OPPOSING SACE MOTION TO STAY RESTART OF ST. LUCIE UNIT 2**

**I. INTRODUCTION**

Pursuant to the Commission’s Order dated March 11, 2014, Florida Power & Light Company (“FPL”) hereby answers and opposes the 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 (“Motion to Stay”), which the Southern Alliance for Clean Energy (“SACE”) filed with the Secretary on March 10, 2014.<sup>1</sup> Along with the Motion to Stay, SACE also submitted a request for hearing<sup>2</sup> and a supporting declaration.<sup>3</sup>

As discussed below, the Motion to Stay is without merit and should be denied. First, there is no proceeding involving St. Lucie Unit 2 to which SACE is a party, nor is there a “decision or action of a presiding officer” to stay.<sup>4</sup> SACE thus has no procedural right to request a stay. Second, SACE has made the weakest of showings on each of the four criteria for evaluating whether a stay should be granted, even if a stay were somehow procedurally proper.

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<sup>1</sup> SACE styles its submission as a “motion to stay,” purporting to file it as an application for a stay of a decision or action of a presiding officer pursuant to 10 C.F.R. § 2.342.

<sup>2</sup> Southern Alliance for Clean Energy’s Hearing Request Regarding *De Facto* Amendment of St. Lucie Unit 2 Operating License (Mar. 10, 2014) (“Request for Hearing”).

<sup>3</sup> Declaration of Arnold Gundersen (Mar. 9, 2014), Attachment 1 to Request for Hearing (“Gundersen Decl.”).

<sup>4</sup> 10 C.F.R. § 2.342(a).

The accompanying Request for Hearing should also be summarily denied or treated as a petition pursuant to 10 C.F.R. § 2.206.<sup>5</sup> SACE asserts the right to a hearing based on the “NRC Staff’s ongoing process for *de facto* approval of” the St. Lucie Unit 2 replacement steam generators (“RSGs”) installed in 2007.<sup>6</sup> As is the common industry practice, the change-out at St. Lucie Unit 2 was properly made pursuant to 10 C.F.R. § 50.59, and there is no ongoing *de facto* license amendment process.<sup>7</sup>

Furthermore, after installing the RSGs, FPL sought and obtained a license amendment to operate St. Lucie Unit 2 with the RSGs at an extended power uprate (“EPU”). SACE did not seek to intervene and request a hearing in that license amendment proceeding, although it had the opportunity to do so.<sup>8</sup> The EPU license amendment was approved after the unique tube-to-tube wear was observed at the San Onofre Nuclear Generating Station (“SONGS”) Unit 3, as discussed in some detail in the Request for Hearing. In connection with its review of the EPU license amendment request, the NRC Staff and the Advisory Committee on Reactor Safeguards (“ACRS”) specifically considered the conditions affecting SONGS Unit 3 as compared to those leading to the wear observed at St. Lucie Unit 2. In recommending approval of the license amendment, the ACRS concluded that “the forms of degradation reported to have occurred at [SONGS Unit 3] are less likely to occur at St. Lucie 2” and that “[t]hese considerations and the licensee’s action plan adequately address concerns about [steam generator] tube integrity.”<sup>9</sup> Accordingly, the Commission should not afford SACE a hearing in the absence of a current

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<sup>5</sup> FPL reserves the right to respond to the Request for Hearing at the direction of the Commission, or otherwise pursuant to the schedule set forth in 10 C.F.R. § 2.309(i).

<sup>6</sup> Motion to Stay at 5.

<sup>7</sup> Declaration of Mr. William A. Cross in Support of FPL’s Answer Opposing SACE’s Motion to Stay Restart, Attachment 1 hereto (“Cross Decl.”) at ¶ 4.

<sup>8</sup> *Id.* at ¶ 7.

<sup>9</sup> Letter from J. Sam Armijo, Chairman, ACRS, to R.W. Borchardt, NRC Executive Director of Operations (Jul. 23, 2012), at 4 (ADAMS Accession No. ML12198A202), Exhibit A to Cross Decl. (“ACRS Letter”).

proceeding, or on the basis of concerns that (1) the NRC Staff and ACRS have addressed in a previous license amendment proceeding; and (2) the NRC Staff has addressed through ongoing reactor oversight.<sup>10</sup>

## **II. BACKGROUND**

In 2007, FPL replaced the original two steam generators at St. Lucie Unit 2 with two RSGs manufactured by AREVA NP. In accordance with 10 C.F.R. § 50.59, FPL prepared an evaluation demonstrating that the RSGs satisfied the existing Updated Final Safety Analysis Report (“UFSAR”) acceptance criteria and Technical Specification Limits.<sup>11</sup> In addition, the Section 50.59 evaluation found that none of the criteria warranting a license amendment, as specified in 10 C.F.R. § 50.59(c)(2), applied to the RSGs for St. Lucie Unit 2.<sup>12</sup>

In November 2009, following the first cycle of operation of the St. Lucie Unit 2 RSGs, an inspection identified a number of tube-anti-vibration bar (“AVB”) wear indications.<sup>13</sup>

On February 25, 2011, FPL requested a license amendment to permit an EPU at St. Lucie Unit 2.<sup>14</sup> On September 1, 2011, the Commission published a notice of the license amendment request and of an opportunity to request a hearing.<sup>15</sup> No hearing requests or petitions to

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<sup>10</sup> FPL’s Answer is supported by the Declarations of Rudy Gil, William Cross and Rene Silva.

<sup>11</sup> 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).

<sup>12</sup> The licensing actions relating to steam generator replacement and extended power uprate are described in the Cross Decl. at ¶¶ 4-9. The NRC Staff inspection included verification that replacement of Unit 2 steam generators was “properly evaluated in accordance with 10 CFR 50.59.” St. Lucie Nuclear Plant – NRC Integrated Inspection Report 05000335/2007005, 05000389/2007005 (Feb. 1, 2008) (ADAMS Accession No. ML080350408), Enclosure at 28.

<sup>13</sup> The extent and root cause of the wear, and actions taken by FPL to ensure safe operation of St. Lucie Unit 2, are described in the Declaration of Mr. Rudy Gil in Support of FPL’s Answer Opposing SACE’s Motion to Stay Restart, Attachment 2 hereto (“Gil Decl.”).

<sup>14</sup> See Letter from Richard L. Anderson, Site Vice President, St. Lucie Plant, to NRC, L-2011-021 (Feb. 25, 2011) (ADAMS Accession No. ML110730116).

<sup>15</sup> See 76 Fed. Reg. 54,503 (Sept. 1, 2011).

intervene were submitted.<sup>16</sup> In reviewing the EPU request, both the NRC Staff and the ACRS evaluated the steam generator tube wear in the St. Lucie Unit 2 RSGs in light of the unique tube-to-tube wear observed at SONGS Unit 3. The ACRS commented on pertinent differences between the types and extent of steam generator wear observed at the two plants and concluded that “[t]hese considerations and the licensee’s action plan adequately address concerns about [steam generator] tube integrity.”<sup>17</sup> The Commission issued the requested license amendment on September 24, 2012.<sup>18</sup>

### **III. DISCUSSION**

#### **A. The Motion to Stay and Request for Hearing Are Procedurally Improper**

Invoking the right under 10 C.F.R. § 2.342(a) of a party to a proceeding to file an application for a stay of the effectiveness of a “decision or action of a presiding officer,” SACE requests that the Commission “suspend the restart of St. Lucie Unit 2” pending completion of certain regular inspections and resolution of SACE’s Request for Hearing.<sup>19</sup> However, SACE lacks any procedural grounding for its Motion to Stay, as there is no “decision or action of a presiding officer” which could be stayed. Nor is there even a “proceeding” with respect to St. Lucie Unit 2 in which SACE would qualify as a “party” under Section 2.342(a).<sup>20</sup> Thus, SACE has neither the procedural basis nor the standing to seek a stay of St. Lucie Unit 2’s restart. Similarly, in the absence of an application for a license or license amendment or any notice of a

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<sup>16</sup> Cross Decl. at ¶ 7.

<sup>17</sup> ACRS Letter at 4.

<sup>18</sup> See 77 Fed. Reg. 63,343, 63,354-55 (Oct. 16, 2012).

<sup>19</sup> Motion to Stay at 1-2.

<sup>20</sup> See *Ameren Missouri, et al.* (Callaway Plant, Unit 2), CLI-11-5, 74 NRC 141, 158 (2011) (a stay application under 10 C.F.R. § 2.342 “is available only to parties to adjudicatory proceedings seeking stays of decisions or actions of a presiding officer pending the filing and resolution of a petition for review”).

proceeding, SACE has no right to seek intervention and request a hearing.<sup>21</sup>

The Motion to Stay and Request for Hearing are an impermissible challenge to the current licensing basis for St. Lucie Unit 2 and a collateral attack on the Commission's reactor oversight program.<sup>22</sup> Allowing SACE to challenge restart of St. Lucie Unit 2 on the premise of generalized concerns with steam generator replacement would open the door to stay applications from any person with respect to almost every operating reactor based upon challenges to licensee actions under 10 C.F.R. § 50.59. This would unduly hinder ongoing NRC oversight and create a nearly unbounded right to a hearing at any time due to generalized grievances with the Commission's oversight of reactor licensees.<sup>23</sup>

In the absence of any adjudicatory proceeding with respect to St. Lucie Unit 2, the proper avenue for relief available to SACE (including challenges to licensee actions under 10 C.F.R. § 50.59) is a petition to institute a proceeding pursuant to 10 C.F.R. § 2.206(a).<sup>24</sup> Accordingly, the Commission should not sanction SACE's attempted circumvention of the Section 2.206 process. Instead, the Commission should reject the Motion to Stay, and should reject the Request for Hearing or treat it as a Section 2.206 petition.<sup>25</sup>

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<sup>21</sup> See *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-12, 59 NRC 237, 239 (2004) ("It is axiomatic that a person cannot intervene in a proceeding before the proceeding actually exists."), *reconsideration denied*, May 18, 2004.

<sup>22</sup> A petitioner is not entitled to an adjudicatory hearing to attack generic NRC requirements or regulations. *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 NRC 328, 334 (1999).

<sup>23</sup> Section 189a of the Atomic Energy Act of 1954, as amended, provides an opportunity for hearing only under the limited circumstances specified therein. See *Kelley v. Selin*, 42 F.3d 1501, 1514 (6th Cir. 1995) ("If . . . public participation were automatically required for any agency action, the public would be entitled to an unrestrained platform that would disable the Commission and effectively prevent it from taking any action."), *cert. denied*, 515 U.S. 1159 (1995).

<sup>24</sup> See *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-12-20, 76 NRC 437, 439 n.10 (2012); *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.").

<sup>25</sup> See *San Onofre*, CLI-12-20, 76 NRC at 439-40 (referring licensee's asserted violation of 10 C.F.R. § 50.59 to the Executive Director for Operations as a Section 2.206 petition).

## **B. The Motion to Stay Fails to Meet Applicable Criteria for Granting a Stay**

Under 10 C.F.R. § 2.342(e), the Commission considers the following four factors in determining whether to issue a stay:

- (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
- (2) Whether the party will be irreparably injured unless a stay is granted;
- (3) Whether the granting of a stay would harm other parties; and
- (4) Where the public interest lies.

Irreparable injury is the most important of the four factors governing stay requests.<sup>26</sup> In particular, “a party seeking a stay must show it faces imminent, irreparable harm that is both certain and great.”<sup>27</sup> Absent a showing of irreparable injury, a party seeking a stay “must make an overwhelming showing of likely success on the merits.”<sup>28</sup> A party’s failure to satisfy the first two factors obviates the need to consider the remaining factors.<sup>29</sup> Here, SACE’s Motion to Stay meets none of the applicable criteria for granting a stay.

### **1. SACE Has Not Made and Cannot Make a Showing That It Is Likely to Prevail on the Merits**

For the reasons discussed above, SACE’s Motion to Stay and Request for Hearing are procedurally unfounded. SACE seeks to evade the proper avenue for NRC consideration under 10 C.F.R. § 2.206(a). SACE also could have requested a hearing in the context of St. Lucie Unit 2’s EPU, which the NRC Staff considered and approved in 2012 following a public notice and opportunity for hearing. SACE cannot now create a new proceeding out of whole cloth for its

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<sup>26</sup> *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-12-11, 75 NRC 523, 529 (2012).

<sup>27</sup> *Id.* (quoting *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237 (2006)) (internal quotations omitted).

<sup>28</sup> *Id.*

<sup>29</sup> *See id.*

own convenience.

Moreover, contrary to SACE's argument, neither FPL's replacement of St. Lucie Unit 2 steam generators in accordance with 10 C.F.R. § 50.59, nor the NRC Staff's authorization and ongoing oversight of FPL's actions, have resulted in a *de facto* license amendment.<sup>30</sup> Section 189a(1)(A) of the Atomic Energy Act of 1954, as amended, provides an opportunity for hearing only for certain categories of actions, including the "amending of any license."<sup>31</sup> In determining whether NRC actions constitute a *de facto* license amendment, the Commission is guided by the following factors: "did the challenged approval grant the licensee any 'greater operating authority,' or otherwise 'alter the original terms of a license'?"<sup>32</sup> Here, FPL's replacement of St. Lucie Unit 2's steam generators in accordance with 10 C.F.R. § 50.59 did not modify the license or afford FPL any greater operating authority. Although the replacement entailed minor amendments to the UFSAR, it did not involve a change to the license's Technical Specifications.<sup>33</sup>

Finally, in light of the subsequent formal evaluation of the design and performance of the RSGs by the NRC Staff and the ACRS, there is no basis for SACE's contention that the NRC has not conducted a safety analysis of these components. SACE's attempt to liken the condition

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<sup>30</sup> SACE relies on *Citizens Awareness Network, Inc. v. NRC*, 59 F.3d 284 (1st. Cir. 1995), for the proposition that the NRC's authorization of changes to St. Lucie Unit 2 associated with FPL's RSGs "has effectively amended FPL's license." Motion to Stay at 5. However, *Citizens Awareness Network* involved the Commission's approval of licensee action which departed from prior NRC policy and "substantially enlarged the authority of an extant licensee . . . retroactively." 59 F.3d at 294. FPL's replacement of steam generators in accordance with the established process set forth in 10 C.F.R. § 50.59 entailed no such enlargement of operating authority or departure from the terms of the existing operating license.

<sup>31</sup> 42 U.S.C. § 2239(a)(1)(A). "If a form of Commission action does not fall within the limited categories enumerated in section 189a, the Commission need not grant a hearing." *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant), CLI-96-13, 44 NRC 315, 326 (1996).

<sup>32</sup> *Perry*, CLI-96-13, 44 NRC at 326-27 (1996) (citations omitted).

<sup>33</sup> Cross Decl. at ¶ 4. See *Perry*, CLI-96-13, 44 NRC at 320 (the UFSAR "can be modified without a license amendment, so long as the modifications do not involve a change to the technical specifications or an unreviewed safety question").

of the St. Lucie Unit 2 RSGs to the situation affecting the steam generators at SONGS Unit 3 is unavailing.

In the SONGS proceeding, the Atomic Safety and Licensing Board (“ASLB”), in a decision which was later vacated by the Commission, deemed the confirmatory action letter (“CAL”) process between the NRC Staff and the licensee to constitute a *de facto* license amendment.<sup>34</sup> Here, in contrast, the NRC Staff has not initiated a CAL or other extraordinary process conditioning restart on certain actions or calling into question the continued safe operation of the reactor. Further, the SONGS steam generator tube issues involved unprecedented causes and extent of damage which are not present at St. Lucie Unit 2. Indeed, in the SONGS proceeding, the Commission declined to grant a hearing based on a licensee’s replacement of steam generators pursuant to 10 C.F.R. § 50.59, instead referring the issue for consideration as a petition under 10 C.F.R. § 2.206.<sup>35</sup> Particularly in view of the detailed safety evaluation conducted by the NRC Staff and the ACRS prior to granting the St. Lucie Unit 2 EPU license amendment, SACE’s claim that the NRC Staff “has repeatedly amended FPL’s operating license to allow significant alterations to the original and renewed design basis of the reactor” and “without affording the public an opportunity for hearing”<sup>36</sup> is unfounded.

## **2. SACE Has Not Demonstrated Irreparable Injury**

SACE contends that it “will suffer injury that is certain and great if the NRC allows a dangerous nuclear reactor to operate, without having conducted the basic safety analysis that is

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<sup>34</sup> See *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-13-7, 77 NRC 307, 345 (2013), *vacated*, CLI-13-09, 78 NRC \_\_ (slip op.) (Dec. 5, 2013). The ASLB stated unequivocally that the unprecedented decision to find the CAL relating to SONGS a *de facto* license amendment was due to the unique rapid wear from tube-to-tube contact in an eleven-month period never before encountered in a nuclear steam generator. Inspection results at St. Lucie Unit 2 have not demonstrated any wear from tube-to-tube contact. Gil Decl. at ¶ 9. Indeed, the SONGS and St. Lucie Unit 2 steam generators were designed and constructed by different vendors and have significant design differences. *Id.* at ¶ 16.

<sup>35</sup> See *San Onofre*, CLI-12-20, 76 NRC at 440.

<sup>36</sup> Motion to Stay at 6-7.



necessary to ensure it will not pose an undue risk to public health and safety.”<sup>37</sup> As noted above, on ample recent occasions, the NRC Staff has examined the replacement steam generators at St. Lucie Unit 2 and has consistently concluded that they could operate safely. SACE has not provided any evidence that, despite the careful safety analysis by the Staff and the ACRS, the steam generator issues affecting SONGS Unit 3 are likely to occur at St. Lucie Unit 2. SACE’s speculative and unsupported allegations of harm do not make the required showing of “imminent, irreparable harm that is both certain and great.”<sup>38</sup>

### 3. **Granting a Stay Would Harm FPL, Its Co-owners and Its Customers**

In support of its Motion to Stay, SACE asserts that staying restart of St. Lucie Unit 2 “will not negatively impact FPL’s ability to continue to reliably provide power to its customers” in light of St. Lucie Unit 2’s proportionate share of FPL’s total electric generating capacity.<sup>39</sup> In fact, any delay in the return to service of the St. Lucie Unit 2 reactor would irreparably harm FPL, its co-owners<sup>40</sup> and its customers because it would increase the cost that FPL’s customers would pay for electricity.<sup>41</sup> In the absence of St. Lucie Unit 2’s generation, other more costly sources of electricity such as gas generating units, coal generating units and oil generating units would have to produce more electricity to make up for the loss.<sup>42</sup> A delay in the return to service of St. Lucie Unit 2 would also irreparably harm FPL, its co-owners and its customers because it would negatively affect FPL’s ability to reliably provide electricity to its customers when unplanned (but regularly recurring) conditions regarding load, generator outages and fuel

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<sup>37</sup> *Id.* at 7.

<sup>38</sup> *Vogtle*, CLI-12-11, 75 NRC at 529.

<sup>39</sup> Motion to Stay at 7-8.

<sup>40</sup> SACE has not addressed potential harm to the Orlando Utilities Commission and the Florida Municipal Power Agency, each of which hold minority ownership interests in St. Lucie Unit 2.

<sup>41</sup> Declaration of Mr. Rene Silva in Support of FPL’s Answer Opposing SACE’s Motion to Stay Restart, Attachment 3 hereto (“Silva Decl.”) at ¶ 6.

<sup>42</sup> *Id.*

deliveries develop.<sup>43</sup>

#### 4. **The Public Interest Favors Denying the Motion to Stay**

Contrary to SACE's assertions, a delay in the return to service of St. Lucie Unit 2 would also irreparably harm the public interest, not only because it would result in higher costs and lower reliability of electricity on the grid, but also because it would result in an increase in air emissions such as sulfur dioxide ("SO<sub>2</sub>"), nitrogen oxide ("NO<sub>x</sub>") and carbon dioxide ("CO<sub>2</sub>").<sup>44</sup> In the absence of St. Lucie Unit 2's generation without these emissions, other sources of electricity, such as gas generating units, coal generating units and oil generating units would have to produce more electricity to make up for the loss, thereby causing a significant increase in the emission of air pollutants.<sup>45</sup>

#### **IV. CONCLUSION**

For the reasons discussed above, SACE's Motion to Stay should be denied, and its Request for Hearing should be denied or treated as a petition under 10 C.F.R. § 2.206.

Respectfully submitted,

/Signed electronically by Michael G. Lepre/

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March 20, 2014

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<sup>43</sup> *Id.* at ¶¶ 7-9.

<sup>44</sup> *Id.* at ¶ 10.

<sup>45</sup> *Id.*

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Answer of Florida Power & Light Company Opposing SACE Motion to Stay Restart were provided to the Electronic Information Exchange for service to those individuals listed below and others on the service list in this proceeding, this 20th day of March, 2014.

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