April 28, 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)	)	

NUCLEAR ENERGY INSTITUTE MOTION
FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323, the Nuclear Energy Institute, Inc. ("NEI") moves for leave to file the attached brief as *amicus curiae* on the issue of whether the request for a hearing by Southern Alliance for Clean Energy ("SACE")[1] should be granted. NEI's brief addresses the process established in 10 C.F.R. § 50.59 for licensees to make changes to a facility or procedures without prior NRC approval, the precedent for resolving challenges to licensee changes made under Section 50.59, and whether use of the Section 50.59 process for replacement of the steam generators at the St. Lucie Plant in 2007 constitutes a *de facto* license amendment that creates a right to a hearing. NEI believes that the attached brief complements the parties' filings and would assist the Commission in determining whether a hearing should be granted.[2]

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1 "Southern Alliance for Clean Energy's Hearing Request Regarding De Facto Amendment of St. Lucie Unit 2 Operating License," March 10, 2014.

2 In accordance with 10 C.F.R. § 2.323(b), counsel for NEI certifies that he made a sincere effort to contact counsel for the other parties in the proceeding, explain to them the issues raised in this motion, and seek their consent to the submittal of an NEI *amicus* brief. Counsel for Florida Power & Light Company ("FPL") has authorized NEI to state that FPL supports NEI's motion. Counsel for the NRC Staff and counsel for SACE each indicated that they take no position on NEI's motion, but reserve the right to respond.

NEI seeks leave to participate as *amicus curiae* because SACE's request has generic implications on the efficiency and stability of the NRC regulatory process. The NRC and its licensees have long used 10 C.F.R. § 50.59 as an essential means to control and appropriately change the licensing bases of nuclear plants. Specifically, Section 50.59 establishes conditions under which licensees are authorized to make safe and appropriate changes to their facilities and procedures without prior NRC approval in the form of a license amendment. Under Commission precedent, challenges to licensee changes made under Section 50.59 are treated as potential enforcement issues and handled in that context rather than as licensing matters involving hearing opportunities. SACE's hearing request implicitly asks that the Commission abandon this precedent and now consider challenges to changes made under Section 50.59 in the hearing process. The regulatory implications of SACE's hearing request are not unique to the St. Lucie steam generator replacement or even steam generator replacements as a class of plant or procedure changes. Rather, the Commission's decision on this issue could affect all reactor licensees with respect to many future plant and procedure modifications, including and extending beyond steam generator replacements.

NEI is the Washington-based policy organization responsible for representing the commercial nuclear energy industry on generic regulatory, legal, and technical issues.[3] NEI is in a unique position to address the policy and practical implications of the issues presented, and has a clear and direct interest in ensuring that the Commission continues to use its established enforcement process to address claims involving Section 50.59 violations. The suggested approach that a change made in accordance with Section 50.59 constitutes a *de facto* license

[3] NEI's members include all entities licensed by the NRC to operate commercial nuclear power plants, as well as nuclear plant designers, major architect-engineer firms, fuel cycle facilities, nuclear materials licensees, universities, and other organizations and entities involved in the nuclear industry.

amendment, and must be adjudicated in the hearing process rather than, as now, through the agency's enforcement process, would create significant regulatory uncertainty. Additional regulatory uncertainty would result from the fact that, unlike for license amendments, changes made under Section 50.59 are reported under the regulations after the fact. There would be an open-ended period of regulatory limbo after a change is made during which the change could still become the subject of a *de facto* license amendment hearing request.

Accepting NEI's perspective on the issues presented through its participation in this matter as *amicus curiae* will not prejudice or unduly burden any other participant or delay the proceeding. As an *amicus*, NEI necessarily takes the proceeding as it finds it and does not propose to inject any new issues into the proceeding. For the foregoing reasons, NEI respectfully requests that the Commission accept its accompanying brief *amicus curiae*.

Respectfully submitted,

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ENERGY INSTITUTE, INC.

Dated in Washington, D.C.
this 28th day of April 2014

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INTRODUCTION

On March 10, 2014, the Southern Alliance for Clean Energy ("SACE") requested a hearing related to installation in 2007 of replacement steam generators by Florida Power and Light Company ("FPL") at the St. Lucie Plant, Unit 2.[1] SACE contends that the steam generator replacement required a license amendment and that the NRC improperly granted a *de facto* license amendment. SACE also filed a motion requesting that the Commission stay restart of St. Lucie Unit 2 after a refueling outage. The Commission denied the motion to stay restart but allowed FPL and the NRC Staff to file answers to SACE's Hearing Request.[2]

The Nuclear Energy Institute, Inc. ("NEI") believes that the Hearing Request and the *de facto* license amendment argument raise substantial legal and policy issues related to the NRC's regulatory processes. The Commission's decision on the issue has the potential to create significant regulatory uncertainty for reactor licensees with respect to the many facility and

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

[2] CLI-14-04, slip op. at 4-5 (Apr. 1, 2014).

procedure changes that are made without prior NRC approval under 10 C.F.R. § 50.59. NEI therefore submits this brief as *amicus curiae* in response to the Commission's order allowing answers to the Hearing Request.

STATEMENT OF THE CASE

As the Commission explained in CLI-14-04, FPL replaced the St. Lucie Unit 2 steam generators in 2007, relying, in part, on the process established in Section 50.59. Section 50.59 specifically allows licensees to make changes to plant structures, systems, and components ("SSCs"), and procedures, as described in the Final Safety Analysis Report ("FSAR"), without prior NRC approval, if the criteria in the regulation are satisfied. The licensee must document the proposed change in a written Section 50.59 evaluation and describe the change in a report periodically provided to the NRC.[3] Conversely, if the written evaluation demonstrates that the permissive criteria of the regulation are not met, or if the proposed change involves a change to the plant's Technical Specifications (part of the NRC Operating License), NRC approval in the form of a license amendment is required.[4] License amendments are subject to the hearing opportunity requirement of Section 189.a of the Atomic Energy Act ("AEA").

The St. Lucie steam generator replacement was included in FPL's 2008 report to the NRC of plant changes made under Section 50.59.[5] FPL also submitted a license amendment application related to the steam generators on May 25, 2006. That amendment addressed Technical Specifications for the replacement steam generator tubing material and the program for monitoring and maintaining steam generator tube integrity. The NRC issued the license

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3 10 C.F.R. § 50.59(d).

4 10 C.F.R. §§ 50.90-50.92.

5 St. Lucie Unit 2, Docket No. 50-389, "Report of 10 C.F.R 50.59 Plant Changes," June 26, 2008 (ADAMS Accession No. ML081840111) ("FPL's 2008 Section 50.59 Report").

amendment on May 29, 2007.[6] In addition, in 2011 FPL applied for, and in 2012 received, a license amendment to increase the licensed core thermal power level for St. Lucie, Unit 2, as part of an extended power uprate ("EPU").[7] SACE did not seek a hearing on either license amendment request.

Restart of the St. Lucie unit following the plant's 2014 refueling outage does not require an NRC approval. Operation is authorized by the Unit 2 Operating License, as limited by the terms and conditions of the license, including the Technical Specifications. SACE's Hearing Request, therefore, is not tied to any specific, pending licensing action or any published notice of opportunity for hearing. Rather, it is based entirely on alleged alterations to the original design of the steam generator that the licensee implemented under Section 50.59 in 2007, the NRC's acceptance of those changes, and the argument that the NRC Staff has thereby approved a *de facto* license amendment. SACE offers two contentions for hearing. Contention 1 is essentially the assertion of a *de facto* license amendment and an entitlement to a hearing. Contention 2 is an assertion that design changes involved in the replacement steam generators do not comply with NRC regulations. NEI's focus here is on the generic legal and policy issues associated with the *de facto* license amendment argument and the inherent challenge to the Section 50.59 process. NEI does not address the technical merits of the steam generator design changes or FPL's Section 50.59 evaluation for those changes.

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6 B. L. Mozafari (NRC) to J. A. Stall (FPL), "St. Lucie Plant, Unit No. 2 – Issuance of Amendment Regarding Steam Generator Tube Integrity (TAC No. MD2322)," May 29, 2007 (ADAMS Accession No. ML071490483).

7 R. L. Anderson (FPL) to NRC, "License Amendment Request for Extended Power Uprate," February 25, 2011 (ADAMS Accession No. ML110730116); "Biweekly Notice: Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations," 77 Fed. Reg. 63,343, 63,354-55 (Oct. 16, 2012).

DISCUSSION

A. A Modification Under 10 C.F.R. § 50.59 Is Not A De Facto License Amendment

The NRC has long used Section 50.59 as an essential element of the regulatory process for controlling the licensing basis of nuclear plants. The regulation establishes the conditions under which licensees may make changes to facility SSCs and procedures described in the FSAR without prior NRC approval.[8] Under Section 50.59, a licensee must determine if a Section 50.59 evaluation is required and if so, apply the Section 50.59(c)(2) criteria to evaluate whether a license amendment is needed before undertaking an activity. The regulation is permissive: a licensee may make the changes if no NRC approval is required, subject only to the record-keeping and reporting requirements under Section 50.59(d) and the requirements for FSAR updates under Section 50.71(e). The licensee's licensing basis control and configuration management programs, as well as the written evaluations for specific changes made under Section 50.59, are all subject to the NRC's inspection and enforcement programs.

The AEA Section 189.a hearing requirement applies only to license amendments—and therefore does not apply to changes allowed to be made without a license amendment under Section 50.59.[9] The Court of Appeals in *Kelley v. Selin*, 42 F.3d 1501, 1515 (6th Cir. 1995), expressly declined to extend hearing rights to petitioners where, under NRC's rules, no licensing action was necessary. In that case, the licensee implemented its decisions regarding dry cask storage designs under NRC regulations allowing the licensee to invoke a generic approval process whereby no plant-specific license amendment or approval was required. The Court of

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[8] *See, e.g.*, Regulatory Guide 1.187, "Guidance for Implementation of 10 CFR 50.59, 'Changes, Tests and Experiments,'" November 2000; NEI 96-07, Rev. 1, "Guidelines for 10 CFR 50.59 Evaluations," November 2000.

[9] 42 U.S.C. § 2239(a).

Appeals specifically acknowledged Section 50.59 and "the NRC's historical method of regulation, which has long allowed licensees to make initial determinations about changes to their facilities and has enabled the agency to retain its enforcement power" as a means to verify the effectiveness of the licensee's programs. *Id.* The Court of Appeals therefore implicitly endorsed the Commission's decision to monitor licensee's use of Section 50.59 process through its inspection and enforcement authority, rather than through the licensing process.[10]

Consistent with oversight of Section 50.59 implementation through inspection and enforcement, the Commission has long maintained that a member of the public may challenge an action taken under Section 50.59 only by means of a petition for enforcement action under 10 C.F.R. § 2.206.[11] In *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-12-20, 76 NRC 437, 439-40 (2012), the Commission reiterated that Section 2.206 is the appropriate method to challenge licensee changes made under Section 50.59 and reaffirmed the Section 2.206 petition as a viable method for obtaining relief from an alleged Section 50.59 violation. That precedent was recently cited by the Licensing Board in *First Energy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), LBP-13-11, 78 NRC 177, 180 (2013). The Licensing Board in that case also distinguished physical changes to replace steam generators made under Section 50.59, which are not subject to a hearing, from changes to Technical Specifications (license amendments) that are necessary to operate with the replacement steam generators and that could be the subject of a hearing. *Id.* at 180-81.

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[10] Other courts have made similar distinctions between enforcement and licensing actions. For example, the Court of Appeals in *Massachusetts v. NRC*, 878 F.2d 1516, 1522 (1st Cir. 1989), noted that granting an exemption from a generic requirement, which is form of enforcement discretion, is not a license amendment that would trigger hearing rights.

[11] *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 101 n.7 (1994).

In the present case, SACE did not timely seek a hearing on the St. Lucie Technical Specification changes approved by the NRC in May 2007 or the later EPU license amendment. Now, years later, SACE argues (Hearing Request, at 3) that "FPL's claim to be excused from the license amendment process was baseless." This on its face is a challenge to the merits of the licensee's Section 50.59 evaluation for the replacement steam generators. SACE is raising an enforcement issue—one that under the NRC's regulations and precedent can only be asserted under Section 2.206.[12] If the NRC determines, in the course of exercising its oversight responsibilities, that the licensee's Section 50.59 evaluation was in error, enforcement action may be appropriate. In addition, the licensee would need to apply for the necessary license amendment if the licensee seeks to maintain the change. Hearing rights would then attach to that licensing action. But SACE cannot convert an enforcement issue into a license amendment simply by alleging inadequacies in the licensee's Section 50.59 evaluation.

Further, plant and procedure changes made under Section 50.59 without prior NRC approval do not, under the regulation's express terms, involve a license amendment. They also do not involve Technical Specification (license) changes. SACE's Hearing Request therefore lacks the necessary prerequisite of a license amendment. SACE instead seeks to create hearing rights that would extend to any plant or procedure modification that otherwise is authorized by the regulations without prior NRC approval. The AEA provides for no such hearing. Affording hearing rights premised only on a desire to challenge the merits of Section 50.59 evaluations would defeat the very purposes of the regulation: (1) to facilitate operational flexibility; and (2) to avoid unnecessary regulatory reviews for changes that do not alter the original terms of a

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[12] *See Public Service Company of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-89-28, 30 NRC 271, 276-277 (1989) ("Licensing boards do not have the authority to become involved in an enforcement matter.").

license, do not expand operating authority, and that therefore do not require an approval. The administrative process that would result from such an approach would delay modifications that do not impact either the license or safety (*e.g.*, modifications desirable for reliable and efficient operations) and would unnecessarily consume substantial NRC and licensee resources.[13] Additional regulatory uncertainty also would result from the fact that, unlike license amendments, changes made under Section 50.59 are reported under the regulations after the fact. There would be an open-ended period of regulatory limbo after a change is made during which the change could still become the subject of a hearing request, such as the present one.

For the reasons above, SACE's Hearing Request should be rejected as inconsistent with the NRC's long-established regulatory processes and incompatible with effective and efficient regulation. Requiring licensees to devote resources to address tardy *de facto* license amendment claims for changes made under Section 50.59 would distort the NRC's established processes and regulatory framework, create an unnecessary burden, and greatly increase regulatory uncertainty. Any hearing request disputing a change made under Section 50.59 should be summarily denied. Consistent with Commission precedent, a challenge to a 50.59 evaluation must be brought under Section 2.206.

B. The St. Lucie Unit 2 Steam Generator Replacement Did Not Involve An NRC Approval or *De Facto* License Amendment

The SACE Petition also relies upon the vacated decision of the Licensing Board in *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-13-07, 77 NRC 307 (2013), *vacated* CLI-13-09, __ NRC __ (slip op. Dec. 5, 2013) ("*SONGS*").

[13] Based on a review of Section 50.59(d)(2) reports filed with the NRC, a typical plant makes between 5-10 changes per year under the Section 50.59 process. If each of these were subject to challenge, there could be as many as 1000 additional hearing opportunities industry-wide *each year*.

However, even assuming that decision had precedential value (it does not, because it was vacated), the present case is clearly distinguishable. At St. Lucie, there was no NRC approval required at the time of the steam generator replacement and there is no approval necessary for restart from a refueling outage in 2014. There is also no other pending NRC action—whether a licensing action or an enforcement action such as the Confirmatory Action Letter ("CAL") in *SONGS*—that could be construed as a *de facto* license amendment.

In *SONGS*, the NRC Staff issued a CAL to the licensee as an enforcement mechanism to confirm the licensee's commitments to support safe restart by limiting operations with degraded steam generators as specified in the CAL. The petitioner, and ultimately the Licensing Board, viewed the CAL process as a *de facto* license amendment proceeding. While NEI strongly disagrees with that view, the regulatory nature and significance of the CAL are irrelevant to the St. Lucie circumstances. In the present case there is no NRC enforcement action involved and no modification of operating authority. As discussed above, a change made following a Section 50.59 evaluation is <u>not</u> a license amendment. There also is no order, CAL, or written confirmation of a licensee commitment at issue that could be construed as a license amendment. A restart from an outage with operation subject to unchanged license terms also is <u>not</u> an amendment and does not require NRC approval. As in *Kelley v. Selin*, 42 F.3d at 1515, "[t]here is no licensing decision being made here." Therefore, there is nothing that could be construed as an amendment, *de facto* or otherwise.

The concept of a *de facto* amendment frequently is attributed to the Commission's decision in *Cleveland Electric Illumination Company* (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315, 326 (1996) (citations omitted):

> In evaluating whether challenged NRC authorizations effected license amendments within the meaning of Section 189a, courts repeatedly have considered the same key factors: did the challenged approval grant the licensee any "greater operating authority," or otherwise "alter the original terms of a license"? If so, hearing rights likely were implicated.

Where a change is implemented under Section 50.59, there is no NRC approval involved or required. And, in the present case, the plant and procedure changes made by FPL under Section 50.59 without prior NRC approval could not, by definition, increase operating authority or alter the terms of the license, including Technical Specifications.[14] The plant will operate with replacement steam generators subject to the terms and conditions of an unchanged Operating License and Technical Specifications. To the extent Technical Specifications changes were made at the time of the steam generator replacement, or as part of the subsequent EPU, petitioners missed their opportunity to request a hearing on those changes.[15]

SACE's proposed approach would increase regulatory uncertainty and frustrate the NRC's ability to effectively and efficiently monitor licensees and enforce regulations by potentially subjecting every compliance review to a hearing opportunity. SACE asserts (Hearing Request, at 4) that, after FPL discovered significant tube wear, the NRC Staff "repeatedly made safety findings that no regulatory action was required" and that "[t]hese regulatory actions constituted the *de facto* amendment of Unit 2's operating license." But not all safety assessments are license amendments. Many NRC technical reviews and inspections are conducted specifically for the purpose of assessing compliance with regulatory and licensing requirements.

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[14] Although the Court of Appeals in *Massachusetts v. NRC*, 878 F.2d at 1521-22, said that "labels" alone will not determine the nature of a licensing or enforcement action, the present case is not one of labeling. For changes made under Section 50.59 there is no NRC authorization or approval to be labeled.

[15] SACE could have filed a Section 2.206 petition after the steam generator replacement in 2007 or, at the latest, after FPL's 2008 Section 50.59 Report. The Hearing Request thus certainly challenges any fair notion of timeliness.

As noted in *Perry*, CLI-96-13, 44 NRC at 328-29, by merely ensuring that required technical standards have been met, the NRC Staff "does not alter the terms of the license, and does not grant the Licensee greater operating authority." Instead, as the Commission explained, such a review *enforces* license requirements. *Id.* So too here, where the NRC's inspection activities and its acceptance (whether tacit or explicit) of the licensee's changes made under Section 50.59 implicates the NRC's inspection and enforcement functions, not its licensing authority.

The AEA Section 189.a hearing requirement also does not require a hearing opportunity for every alleged non-compliance. Assuming a non-compliance exists, licensees are obligated to take corrective actions in accordance with guiding principles such as 10 C.F.R. Part 50, Appendix B, Criterion XVI, as well as plant Technical Specifications and NRC Inspection Manual Part 9900 guidance on operability.[16] Corrective actions that involve plant or procedure changes will be evaluated in accordance with Section 50.59 to determine whether an NRC approval is required (in which case, hearing rights would attach). If the NRC determines that design changes are necessary at any time to assure adequate protection of safety, it also has the authority to issue an order suspending the license or requiring specific changes. But, in any event, regulatory *inaction*, as here, cannot be equated to a required, affirmative approval, such as a license amendment. Even assuming a noncompliance with the license or Section 50.59, an NRC decision not to take enforcement action is discretionary[17] and does not supplement the licensee's existing operating authority.

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[16] NRC Inspection Manual, Part 9900: Technical Guidance, "Operability Determinations & Functionality Assessments for Resolution of Degraded or Nonconforming Conditions Adverse to Quality," April 16, 2008.

[17] *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *Safe Energy Coalition v. NRC*, 866 F.2d 1473, 1478 (D.C. Cir. 1989); *Massachusetts v. NRC*, 878 F.2d at 1520-21; *Lorion v. NRC*, 785 F.2d 1038 (D.C. Cir. 1986); *Arnow v. NRC*, 868 F.2d 223 (7th Cir. 1989); *Riverkeeper, Inc. v. Collins*, 359 F.3d 156, 170-71 (2d Cir. 2004).

At bottom, petitioners should not be permitted to manufacture a hearing opportunity or second-guess the NRC's exercise of its enforcement responsibilities merely by alleging a failure to follow the Section 50.59 process or asserting a *de facto* amendment based on tacit NRC acceptance or supplemental inspections. The NRC's existing processes assure safety, including through NRC review and approval of license changes where appropriate, and provide adequate opportunities for stakeholder participation.

CONCLUSION

For the foregoing reasons, the Request for Hearing should be denied. Given the potential for future hearing requests related to licensees' application of the Section 50.59 process, NEI also urges the Commission to take this opportunity to provide clear direction discouraging future *de facto* license amendment arguments as a means to circumvent the Section 2.206 process.

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ENERGY INSTITUTE, INC.

Dated in Washington, D.C.
this 28th day of April 2014

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NOTICES OF APPEARANCE

Notice is given that the following attorneys enter an appearance in the captioned matter on behalf of the Nuclear Energy Institute, Inc. Each attorney is duly authorized, has been admitted to practice in the jurisdiction noted, and is in good standing. In accordance with 10 C.F.R. § 2.314(b), the following information is provided:

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Dated in Washington, D.C.
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CERTIFICATE OF SERVICE

I certify that copies of the "NUCLEAR ENERGY INSTITUTE MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF," "*AMICUS CURIAE* BRIEF OF THE NUCLEAR ENERGY INSTITUTE IN RESPONSE TO SOUTHERN ALLIANCE FOR CLEAN ENERGY HEARING REQUEST," and "NOTICES OF APPEARANCE" have been served on this 28th day of April 2014 by Electronic Information Exchange.

Respectfully submitted,

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Dated in Washington, D.C.
this 28th day of April 2014