

December 1, 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
WITH SECOND SUPPLEMENTAL DECLARATION OF ARNOLD GUNDERSEN

INTRODUCTION

The U.S. Nuclear Regulatory Commission (NRC) staff (Staff) hereby files an answer¹ opposing the November 6, 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

¹ According to 10 C.F.R. § 2.309(i)(1), the Staff may file an answer to a motion for leave to file amended or new contentions filed after the deadline in 10 C.F.R. § 2.309(b) within 25 days after service of the motion. However, the deadline in 10 C.F.R. § 2.309(b) does not apply in this instance because this deadline is based on the existence of a "proceeding" and Southern Alliance for Clean Energy (SACE) has not demonstrated the existence of either an actual or *de facto* license amendment proceeding. Therefore, SACE's motion is not contemplated by the Commission's regulations and thus 10 C.F.R. § 2.309(i)(1) does not necessarily apply to it. However, if 10 C.F.R. § 2.309(i)(1) did apply, then this Staff answer would be timely filed.

² Southern Alliance for Clean Energy's Motion for Leave to Amend Hearing Request with Second Supplemental Declaration of Arnold Gundersen (Nov. 6, 2014) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML14310A811) (Motion). Included with the Motion was the Second Supplemental Declaration of Arnold Gundersen (Nov. 6, 2014) (Second Supplemental Gundersen Declaration).

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.

below and in the Staff's answer⁴ to a similar SACE motion to amend its Hearing Request,⁵ the Staff opposes the Motion because it is not contemplated by the Commission's regulations or the Commission's briefing schedule in CLI-14-04.⁶ Moreover, SACE's Motion should be denied because it does not meet the Commission's 10 C.F.R. § 2.309(c) requirements for new or amended contentions and the Commission's 10 C.F.R. § 2.309(f)(1) requirements for admissible contentions.

BACKGROUND

The background for this proceeding is discussed fully in the Staff's answer to SACE's Hearing Request (Staff Answer)⁷ and the Staff's answer to SACE's April 25, 2014 motion to amend its Hearing Request.⁸ Essentially, on March 10, 2014, SACE requested a hearing regarding the 2007 replacement of two steam generators at St. Lucie Plant, Unit No. 2, which Florida Power & Light Company (FPL) had conducted without a license amendment pursuant to the provisions of 10 C.F.R. § 50.59.⁹ SACE's Hearing Request argued that "the NRC should

⁴ See 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 (May 20, 2014) (ADAMS Accession No. ML14140A388).

⁵ [SACE's] Motion for Leave to Amend Hearing Request Regarding *De Facto* Amendment of St. Lucie Unit 2 Operating License (Apr. 25, 2014) (ADAMS Accession No. ML14115A457). Included with this motion was [SACE's] Amended Hearing Request Regarding *De Facto* Amendment of St. Lucie Unit 2 Operating License (Apr. 25, 2014) (ADAMS Accession No. ML14115A458) (Amended Hearing Request) and Supplemental Declaration of Arnold Gundersen (Apr. 25, 2014) (Supplemental Gundersen Declaration). See Amended Hearing Request at Exhibit 1.

⁶ *Florida Power & Light Co.* (St. Lucie Plant, Unit 2), CLI-14-04, 79 NRC ___, ___ (Apr. 1, 2014) (slip op. at 5).

⁷ NRC Staff Answer to Southern Alliance for Clean Energy's Hearing Request Regarding *De Facto* Amendment of St. Lucie Unit 2 Operating License, 3-7 (Apr. 28, 2014) (ADAMS Accession No. ML14118A290) (Staff Answer)

⁸ 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, 2-4 (May 20, 2014).

⁹ 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

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.”¹⁰ SACE argued in support of this Hearing Request that there are four differences between the St. Lucie Plant, Unit No. 2, original steam generators (OSGs) and replacement steam generators (RSGs) and that, because of these differences, the RSGs fail to comply with the NRC’s safety regulations.¹¹

On March 20, 2014, the Staff participated in a conference call with FPL regarding the preliminary results of FPL’s then-ongoing RSG inspection activities at St. Lucie Plant, Unit No. 2. On August 8, 2014, the Staff memorialized this conference call and included, as part of the conference call record, FPL documents providing preliminary data and summary information concerning RSG tube integrity, changes in wear rate, the effects of a power uprate, and anticipated tube plugging.¹² This conference call report was made public through ADAMS on August 12, 2014. On September 18, 2014, as required by its Technical Specifications (TS),¹³ FPL submitted to the NRC its final steam generator tube inspection report for the FPL inspection

the eight criteria in 10 C.F.R. § 50.59(c)(2). See *also* St. Lucie Nuclear Plant - NRC Integrated Inspection Report 05000335/2007005, 05000389/2007005, § 4OA5.3 "Unit 2 Steam Generator Replacement Inspection (IP 50001)," 27-33 (Feb. 1, 2008) (ADAMS Accession No. ML080350408) (demonstrating that the Staff reviewed the steam generator replacement, including FPL’s 10 C.F.R. § 50.59 evaluation, and identified no findings of significance).

¹⁰ *St. Lucie*, CLI-14-04, 79 NRC at __ (slip op. at 4) (citing Motion to Stay Restart at 4-5).

¹¹ Hearing Request at 5-6, 17.

¹² See Letter from NRC to Florida Power & Light Co., Summary of March 20, 2014, Conference Call with Florida Power & Light Company Regarding the Spring 2014 Steam Generator Inspections at St. Lucie Unit 2 (Aug. 8, 2014, released publicly in ADAMS on Aug. 12, 2014) (ADAMS Accession No. ML14189A090). As noted in attachment 1 to the conference call report, as of March 20, 2014, certain examinations were approximately 95% complete.

¹³ Florida Power and Light Company, Orlando Utilities Commission of the City of Orlando, Florida, and Florida Municipal Power Agency, Docket No. 50-389, St. Lucie Plant, Unit No. 2, Renewed Facility Operating License No. NPF-16, Appendix A, TS 6.9.1.12 (“A report shall be submitted within 180 days after the initial entry into HOT SHUTDOWN following completion of an inspection of the replacement SGs . . .”).

conducted March 17-23, 2014 during the St. Lucie Plant, Unit No. 2, spring 2014 refueling outage (SL2-21 SG Report).¹⁴

On November 6, 2014, based on the SL2-21 SG Report, SACE filed the instant Motion to amend its Hearing Request by adding a second supplemental declaration by Arnold Gundersen. The Second Supplemental Gundersen Declaration concedes that the SL2-21 SG Report demonstrates that the rate of steam generator tube deterioration has decreased.¹⁵ However, Mr. Gundersen states that he “continue[s] to believe the unprecedented and extraordinarily high level of steam generator tube degradation that has occurred in the St. Lucie Unit 2 RSGs since they were installed is directly attributable to the design changes that FPL made in 2007 and NRC Staff approved without a license amendment.”¹⁶

DISCUSSION

I. SACE’s Motion Should be Denied Because it is Not Contemplated by the Commission’s Regulations or CLI-14-04

SACE filed the instant Motion to amend its Hearing Request pursuant to 10 C.F.R. § 2.309(c)(1)(i)-(iii).¹⁷ However, as SACE itself recognizes,¹⁸ 10 C.F.R. § 2.309(c) does not apply in this instance. As explained in the Staff Answer to SACE’s Hearing Request, there is no actual or *de facto* license amendment proceeding related to the steam generators or restart of St. Lucie Plant, Unit No. 2.¹⁹ Thus, there is no hearing opportunity or deadline by which to file a

¹⁴ Letter from Eric S. Katzman, Licensing Manager, St. Lucie Plant, to NRC, St. Lucie Unit 2, Docket No. 50-389, Refueling Outage SL2-21, Steam Generator Tube Inspection Report, Attachment 1 (Sept. 18, 2014) (ADAMS Accession No. ML14279A237) (SL2-21 SG Report). This report was released publicly through ADAMS on October 7, 2014, and, in response to an inquiry by counsel for SACE, counsel for the Staff promptly notified counsel for SACE of its availability in ADAMS.

¹⁵ Second Supplemental Gundersen Declaration at 6.

¹⁶ *Id.*

¹⁷ Motion at 1.

¹⁸ See Motion at 2 (“To the extent that 10 C.F.R. § 2.309(c)(1)(i)-(iii) may be applicable to this proceeding . . .”).

¹⁹ Staff Answer at 7-18.

10 C.F.R. § 2.309 hearing request or a new or amended contention under 10 C.F.R. § 2.309(c).²⁰ 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 the only filings related to SACE's Hearing Request.²¹ The Commission order provided a briefing schedule which allowed FPL and the Staff to file answers to SACE's Hearing Request by April 28, 2014, and provided SACE the opportunity to file a reply seven days thereafter. Notably, the Commission order did not provide SACE the opportunity to amend its Hearing Request. Thus, SACE's Motion is not authorized under either 10 C.F.R. § 2.309(c) or the governing Commission order and, therefore, should be denied.

II. **Even if it were Contemplated by the Commission's Regulations or Order, SACE's Motion Should Be Denied Because it Does Not Demonstrate the Requisite Good Cause to Amend or Present an Admissible Argument**

In order to be admissible under 10 C.F.R. § 2.309(c), a new or amended contention must demonstrate good cause and meet the contention admissibility requirements in 10 C.F.R. § 2.309(f).²² However, SACE's Motion does not meet either of these requirements and, therefore, should be denied.

²⁰ 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 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.

²¹ *St. Lucie*, CLI-14-04, 79 NRC at __ (slip op. at 2, 5).

²² 10 C.F.R. § 2.309(c)(1), (4).

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 deadline²³ 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.^[24]

SACE's Motion does not satisfy 10 C.F.R. § 2.309(c)(1)(ii) because SACE has not demonstrated that the information upon which its filing is based is materially different from information previously available. SACE bases its Motion on the SL2-21 SG Report.²⁵ SACE asserts that the information in this report is "different from all other publicly available information, because it constitutes the only report that documents the results of the March 2014 St. Lucie Unit 2 steam generator inspection in any detail."²⁶ This argument fails for two reasons.

First, by SACE's own admission, the information in the SL2-21 SG Report is not materially different from the information previously available to SACE. For instance, SACE states that "[t]he purpose" of its Motion is to explain why the report has "not altered" its original Hearing Request and to explain that the "opinions Mr. Gundersen expressed in his March 9, 2014 declarations have not changed."²⁷ Thus, instead of explaining how the SL2-21 SG Report is materially different from information previously available to SACE, SACE's Motion repeats the

²³ Again, one would have to presume that a 10 C.F.R. § 2.309(b) deadline existed in this instance based on SACE demonstrating the existence of either an actual or *de facto* license amendment proceeding.

²⁴ 10 C.F.R. § 2.309(c)(1).

²⁵ Motion at 1.

²⁶ Motion at 2.

²⁷ Motion at 1-2.

arguments of SACE's Hearing Request and asserts that the report does not change these arguments.

Second, the preliminary results of the SL2-21 SG Report were publicly available as of August 12, 2014 as part of an NRC conference call report²⁸ and SACE does not explain how the final results are materially different from these preliminary results. 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 the 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 Therefore, absent an explanation that SACE's argument is dependent upon the final results as opposed to the preliminary results, SACE has not demonstrated good cause.

Even if SACE's Motion did satisfy the good cause requirement of 10 C.F.R. § 2.309(c), it is still inadmissible because it does not address any of the 10 C.F.R. § 2.309(f)(1) factors.³¹ Instead, at its heart, SACE's Motion is a repeat of SACE's challenges in its Hearing Request to FPL's 10 C.F.R. § 50.59 analysis done in support of its 2007 steam generator replacement at St. Lucie Plant, Unit No. 2. As explained in the Staff Answer to SACE's Hearing Request, challenges to a licensee's 10 C.F.R. § 50.59 analysis are not cognizable under 10 C.F.R.

²⁸ See Letter from NRC to Florida Power & Light Co., Summary of March 20, 2014, Conference Call with Florida Power & Light Company Regarding the Spring 2014 Steam Generator Inspections at St. Lucie Unit 2 (Aug. 8, 2014, released publicly in ADAMS on Aug. 12, 2014) (ADAMS Accession No. ML14189A090) (including at the end of the NRC's conference call summary two FPL documents containing preliminary results data for FPL's March 2014 RSG inspection).

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

³⁰ *Id.* (internal quotations and emphasis omitted).

³¹ See 10 C.F.R. § 2.309(c)(4) (providing that new or amended contentions must meet § 2.309(f)).

§ 2.309(f) and may only be made by means of a petition under 10 C.F.R. § 2.206.³² 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/

Jeremy L. Wachutka
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O15-D21
Washington, DC 20555
Telephone: (301) 415-1571
E-mail: Jeremy.Wachutka@nrc.gov

Dated at Rockville, Maryland
this 1st day of December, 2014

³² *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").

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))
)

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 WITH SECOND SUPPLEMENTAL DECLARATION OF ARNOLD GUNDERSEN dated December 1, 2014 have been served upon the Electronic Information Exchange, the NRC's E-Filing System, in the above captioned matter, this 1st day of December, 2014.

/Signed (electronically) by/

Jeremy L. Wachutka
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O15-D21
Washington, DC 20555
Telephone: (301) 415-1571
E-mail: Jeremy.Wachutka@nrc.gov

Dated at Rockville, Maryland
this 1st day of December, 2014