

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Michael M. Gibson, Chairman
Dr. Michael F. Kennedy
Dr. William W. Sager

In the Matter of

FLORIDA POWER & LIGHT COMPANY

(Turkey Point Nuclear Generating, Units 3 and 4)

Docket Nos. 50-250-LA and 50-251-LA

ASLBP No. 15-935-02-LA-BD01

November 12, 2015

ORDER

(Denying CASE's Application for Subpoenas)

On November 3, 2015, Citizens Allied for Safe Energy, Inc. (CASE) applied for Board-issued subpoenas for five witnesses to testify in this license amendment proceeding.¹ CASE requests that Sarah Bellmund, Brian Carlstrom, Craig Grossenbacher, Lee N. Hefty, and Dr. Philip Stoddard be required to provide "expert"² testimony in response to written questions and to appear at the evidentiary hearing in January 2016.³

Although the Board has the power to issue subpoenas,⁴ CASE has not demonstrated

¹ CASE Motion Requesting Subpoenas for Expert Witnesses for January, 2016 Evidentiary Hearing (Nov. 3, 2015) ["Application for Subpoenas"]. This request for subpoenas appears to be in response to a motion to strike CASE's initial evidence for lack of an expert sponsor. See Florida Power & Light Company's Motion to Strike Portions of CASE's "Initial Statement of Position, Testimony, Affidavits and Exhibits" or, In the Alternative, Motion in Limine to Exclude it and its Cited Documents from Evidence (Oct. 19, 2015) ["FPL's Motion to Strike"].

² While CASE characterizes these five witnesses as "experts," it is not clear whether CASE actually seeks expert testimony (that is, expert opinion based on specialized knowledge in a particular subject) or is only seeking testimony that relates to factual matters, e.g., authenticating a particular document.

³ Application for Subpoenas at 2–3.

⁴ 10 C.F.R. § 2.319(b) (granting the presiding officer the power to "[i]ssue subpoenas authorized by law, including subpoenas requested by a participant for the attendance and testimony of witnesses or the production of evidence upon the requestor's showing of general relevance and

that it is appropriate for the Board to compel these five witnesses to provide testimony. In the first instance, it is unclear what efforts, if any, CASE has taken to obtain testimony voluntarily from these witnesses. Likewise, while CASE has described the area of expertise of each such witness,⁵ CASE has not described what testimony it seeks from each witness, and so the Board cannot assess whether the evidence CASE seeks to obtain is reasonable in scope.⁶ Finally, at this late date in the proceeding, any testimony CASE obtains may only be offered in rebuttal to the statements of position, exhibits, and pre-filed testimony of Florida Power & Light Company (“FPL”) or of the NRC Staff that were filed on November 10, 2015.⁷ Accordingly, the Board denies CASE’s application for subpoenas.

As a practical matter, insofar as these five witnesses are willing to provide affidavits⁸ or declarations⁹ on matters related to the one admitted contention that are within each witness’s area of expertise or personal knowledge, no subpoena is required. However, in the event these five witnesses refuse to cooperate with CASE on providing affidavits or declarations needed to rebut the statements of position, exhibits, and pre-filed testimony that FPL and the NRC Staff

reasonable scope of the evidence sought”); see also 10 C.F.R. § 2.702 (providing power to issue subpoenas in Subpart G proceedings); Pac. Gas & Electric Co. (Stanislaus Nuclear Project, Unit 1), ALAB-550, 9 NRC 683, 703 (1979) (explaining that subpoenas may be used “to obtain discovery of non-parties (who could not be reached other than by subpoena)”).

⁵ Application for Subpoenas at 2–3.

⁶ See 10 C.F.R. § 2.319(b).

⁷ See Licensing Board Order (Granting Request for Extension of Time) (Oct. 19, 2015) at 2 (unpublished) (setting December 1, 2015, as deadline for CASE’s Rebuttal Statement of Position and Written Testimony).

⁸ An affidavit is a written statement of facts that are numbered individually. An affidavit is signed under penalty of perjury before a notary public, or another official authorized to administer an oath. See Black’s Law Dictionary (10th ed. 2014).

⁹ A declaration has the same evidentiary value and formatting as an affidavit, but it does not need to include a notary public’s signature. See 28 U.S.C § 1746 (explaining that a declaration must include the following statement at the end: “I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature).”).

filed on November 10, 2015, CASE may renew its request for the issuance of such subpoenas. If all CASE is seeking is fact testimony unrelated to each person's area of expertise (e.g., the authentication of documents, such as whether that person sent or received particular emails), CASE should make that clear in any future application for subpoenas. In assessing whether to issue any such subpoena compelling this factual testimony, the Board will consider whether CASE has made a "showing of general relevance and reasonable scope of the evidence sought."¹⁰ The Board notes that expert testimony, by contrast, may be compelled only in very limited circumstances.¹¹ In any event, however, it must be emphasized that a subpoena in a Subchapter L proceeding represents an extraordinary remedy,¹² and absent a strong showing,¹³ one will not be issued.

If CASE seeks expert testimony regarding the meaning or significance of previously filed

¹⁰ 10 C.F.R. § 2.319(b).

¹¹ See Kaufman v. Edelstein, 539 F.2d 811, 822 (2d Cir. 1976) (explaining that subpoenas for expert testimony are assessed based on "the degree to which the expert is being called because of his [or her] knowledge of facts relevant to the case rather than in order to give opinion testimony; the difference between testifying to a previously formed or expressed opinion and forming a new one; the possibility that, for other reasons, the witness is a unique expert; the extent to which the calling party is able to show the unlikelihood that any comparable witness will willingly testify; the degree to which the witness is able to show that he [or she] has been oppressed by having continually to testify . . ."). Likewise, the Federal Rules of Civil Procedure, to which the Commission has instructed Licensing Boards to turn for guidance, see Tenn. Valley Auth. (Watts Bar Nuclear Plant, Unit 1), CLI-4-24, 60 NRC 160, 194 (2004), provides discretion to deny a subpoena seeking "an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party." Fed. R. Civ. P. 45(d)(3)(B)(ii); see United States v. Olhovsky, 562 F.3d 530, 544 & n.12 (3d Cir. 2009) (noting that subpoenas for expert testimony are available in limited circumstances).

¹² In fact, a subpoena represents such an extraordinary remedy that this Board was able to find only one instance in the eleven years since the Commission adopted rules for Subpart L proceedings in which a subpoena was issued in a Subpart L proceeding. Charlissa C. Smith (Reactor Operator License for Vogtle Electric Generating Plant), LBP-13-03, 77 NRC 82, 98 (2013); Request [for] a Modification to Subpoena, Charlissa C. Smith (Reactor Operator License for Vogtle Electric Generating Plant), No. 55-23694-SP (Jul. 1, 2013).

¹³ The Board has the power to issue subpoenas to the extent necessary "to conduct a fair and impartial hearing according to law, to take appropriate action to control the prehearing and hearing process, to avoid delay and to maintain order." 10 C.F.R. § 2.319.

exhibits authored or received by the five identified witnesses, it will be necessary for CASE to submit such rebuttal testimony. Whether any such evidence is required for the admission of these previously filed exhibits is a matter still pending before the Board.¹⁴

In addition, the Board denies CASE's request for expert witness fees.¹⁵ Although the Commission did at one time provide public funding for expert witness fees in limited circumstances,¹⁶ in the face of Congressional disapproval, the Commission no longer authorizes providing financial assistance to intervenors.¹⁷ The Board will, however, provide CASE's witnesses the opportunity to appear at the January 2016 hearing by phone or videoconference to minimize CASE's costs.¹⁸

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Michael M. Gibson, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 12, 2015

¹⁴ See FPL's Motion to Strike.

¹⁵ Application for Subpoenas at 3.

¹⁶ See Nuclear Regulatory Comm'n (Financial Assistance to Participants in Commission Proceedings), CLI-76-23, 4 NRC 494, 512-14 (1976).

¹⁷ See Metro. Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-80-19, 11 NRC 700, 702-03 (1980); Rochester Gas & Electric Corp. (R.E. Ginna Nuclear Plant, Unit 1), LBP-83-73, 18 NRC 1231, 1239 (1983).

¹⁸ Expert witnesses are entitled to a reasonable expert fee. See Fed. R. Civ. Pro. 26(b)(4)(E)(i). Witnesses on purely factual matters are entitled to travel costs and a per diem. See 10 C.F.R. § 2.702(d) ("Witnesses summoned by subpoena must be paid the fees and mileage paid to witnesses in the district courts of the United States by the party at whose instance they appear."); 28 U.S.C. § 1821(b) ("A witness shall be paid an attendance fee of \$40 per day for each day's attendance.").

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **ORDER (Denying CASE's Application for Subpoenas)** have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Herald M. Speiser]
Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 12th day of November, 2015