

December 15, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
FLORIDA POWER & LIGHT COMPANY) Docket Nos. 50-250-LA
) 50-251-LA
(Turkey Point Nuclear Generating,)
Units 3 and 4))

NRC STAFF'S ANSWER OPPOSING CASE MOTION REQUESTING SUBPOENAS FOR
EXPERT WITNESSES FOR JANUARY 2016 EVIDENTIARY HEARING

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323 and the Atomic Safety and Licensing Board's ("Board") Initial Scheduling Order ("ISO"),¹ the staff of the Nuclear Regulatory Commission ("Staff") files its answer opposing Citizens Allied for Safe Energy's ("CASE") Second Motion Requesting Subpoenas for Expert Witnesses ("Motion").²

As discussed below, CASE's Motion should be denied. First, CASE did not consult with the parties prior to filing its motion or certify its consultation. Second, CASE's request, if granted, would disrupt the current schedule for the hearing and would introduce unfairness to the other parties. Third, CASE has not indicated why its request to subpoena witnesses is warranted. Therefore, the Staff respectfully submits that CASE's Motion should be denied.

DISCUSSION

I. Legal Standards Governing Requests for Subpoenas

The Commission's regulations regarding subpoenas are found in 10 C.F.R. Part 2, Subpart G, "Rules for Formal Adjudications." The formal requirements in Subpart G only apply

¹ See Licensing Board Order (Initial Scheduling Order) (May 8, 2015) (unpublished) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML15128A369) ("ISO").

² "CASE Second Motion Requesting Subpoenas for Expert Witnesses for January, 2016" ("Motion"), dated December 9, 2015.

to certain proceedings and circumstances.³ Further, the Commission's rules contemplate the use of subpoenas in a limited number of proceedings and in limited circumstances. 10 C.F.R. § 2.700. The requirements governing the issuance and procedural protections provided persons subject to subpoena are provided in 10 C.F.R. § 2.702.

II. CASE Did Not Consult With the Other Parties or Certify Its Consultation

CASE's Motion should be denied because CASE did not consult with the other parties prior to filing its motion or certify its consultation as required by the Board's ISO. Both the Commission's regulations and the Board's ISO require consultation before a motion is filed. Specifically, 10 C.F.R. § 2.323(b) provides that "[a] motion must be rejected if it does not include a certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant's efforts to resolve the issue(s) have been unsuccessful." Likewise, the Board's ISO states that "an opposed motion will be rejected if it does not include the following certification by the attorney or representative of the moving party: 'I certify that I have made a sincere effort to contact the other parties in this proceeding'"⁴ CASE did not consult with the Staff prior to filing its motion or certify that it made an effort to do so. Therefore, CASE's Motion should be denied.

III. CASE's Request Would Disrupt This Proceeding and Result in Substantial Procedural Unfairness to the Other Parties

CASE's Motion should also be denied because if granted, the proceeding would be disrupted and the other parties would be subject to substantial procedural unfairness. The

³ See 10 C.F.R. § 2.310 (selection of hearing procedures). See also 10 C.F.R. § 2.310 (d) (providing that if the Board finds that the "credibility of an eyewitness may reasonably be expected to be at issue, and/or issues of motive or intent of the party or eyewitness material to the resolution of the contested matter," than subpart G applies in certain proceedings, including licensee-initiated amendment of a nuclear power plant license).

⁴ ISO at 12.

Board's ISO set out an orderly and detailed schedule for the parties. CASE's instant Motion is another example of CASE ignoring the procedural and timing requirements for providing timely testimony.⁵ In effect, CASE's Motion seeks to extend the deadline for filing its expert testimony until the hearing. The other parties will have no opportunity to evaluate the witnesses professed expertise, fully examine their opinions, or adequately prepare to respond to theories first raised at the hearing.

Further, if CASE's Motion is granted, the hearing schedule would likely be impacted and substantially delayed to allow for service, motions, and potentially discovery. The Board has set the hearing for January 11 – 12, 2016. Thus, even assuming the issuance of subpoenas on December 22, 2015, there would be less than one month from the hearing, with intervening holidays, for service, etc. Service would have to be done by a non-party and "made by delivery of a copy of the subpoena to the person named in it and tendering that person the fees for one day's attendance and the mileage allowed by law."⁶ *Id.* CASE has already indicated that it is unable to tender per diem or mileage for these witnesses.⁷ As such, CASE would be unable to effect service on the individuals. Further, subpoenaed expert witnesses are entitled to a reasonable expert fee.⁸ Subpoenaing expert witnesses, when CASE is unable to pay their expert fee, mileage, and per diem, would impose substantial hardship on these persons.

Even assuming that CASE was able to effect proper service of the individuals prior to the hearing, the witnesses and their employers would not have sufficient time to review and respond

⁵ As explained below, CASE has sat on its rights regarding subpoenas because it first discussed obtaining subpoenas with the parties and in ex-parte communications with the Board in September 2015.

⁶ For example, CASE has requested that the subpoenas be sent by registered mail.⁶ Service by registered mail, however, is available only when "issued on behalf of the Commission" 10 § 2.702(c). Here, if issued, the subpoenas would be issued on behalf of CASE.

⁷ CASE Motion Requesting Subpoenas for Expert Witnesses for January, 2016 Evidentiary Hearing (Nov. 3, 2015).

⁸ Order (Denying CASE's Application for Subpoenas) at 4 n. 18 (Nov. 12, 2015).

to the subpoenas as appropriate.⁹ Thus, if CASE's request is granted, it is likely that the hearing would be delayed, imposing delays on the parties to this proceeding due to CASE's lack of diligence in preparing its case. While some allowance is made for *pro se* intervenors, CASE is expected to comply with the Board's orders and the Commission's regulations. CASE's failure to do so should not prejudice other parties. Therefore, CASE's Motion should be denied.

IV. CASE's Request to Issue Subpoenas is Unsupported

CASE's Motion should be denied because CASE's request for the Board to issue subpoenas is unsupported.¹⁰ CASE's Motion asks the Board to issue subpoenas to five witnesses "to provide sworn written testimony and to appear in person" at the January 2016 hearing.¹¹ In the instant motion, CASE has sought to add an additional witness, Mr. Johnathan Shaw, not previously disclosed to the parties. While CASE provided some additional information regarding contacts with various federal, state, and local agencies, the motion remains silent as to what efforts CASE utilized to find other experts that could have testified willingly on these issues. CASE has not demonstrated why these particular individuals are uniquely needed. As the Board noted, compelling expert testimony is available in very limited

⁹ It is highly likely that the subpoena individuals and/or their employers would move to quash the subpoenas.

¹⁰ CASE's request also appears to be untimely. In the previous order regarding subpoenas, the Board noted that that CASE appears to have sought subpoenas in response to a motion to strike. Order (Denying CASE's Application for Subpoenas) at 1 n. 1 (Nov. 12, 2015). CASE, however, had been discussing subpoenas for months with the parties and in ex-parte communications with the Board. See, e.g., E-mail from Barry White, Representative, CASE, to Brian G. Harris, Counsel, NRC (Sept. 3, 2015 1822 EST) (Attachment A); E-mail from Barry White, Representative, CASE, to Michael Gibson, Chairman, ASLB Panel for Turkey Point Units 3 and 4, (Sept. 20, 2015, 0931 EST) (Attachment B); E-mail from Barry White, Representative, CASE, to Brian G. Harris, Counsel, NRC (October 31, 2015 0928 EST) (Attachment C). It is clear that CASE slept on any procedural right it may have had. Thus, this motion could be denied as untimely.

¹¹ Motion at 1-2.

circumstances.¹² CASE's Motion does not address why its request fits within the very limited circumstances outlined by the Board. Thus, this unsupported request should be denied.

CONCLUSION

For the reasons discussed above, CASE's Motion should be denied.

Respectfully submitted,

/Signed (electronically) by/

Brian G. Harris
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Dated at Rockville, MD
this 15th day of December 2015

¹² Order (Denying CASE's Application for Subpoenas) at 3 (Nov. 12, 2015).

CERTIFICATION OF COUNSEL

I certify that I am unaware of any attempt by CASE to contact the Staff regarding the instant motion.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 15th day of December 2015

Harris, Brian

From: Barry White <bwtamia@bellsouth.net>
Sent: Thursday, September 03, 2015 6:22 PM
To: Harris, Brian; Zogby, Matthew
Subject: [External_Sender] Fw: Automatic reply: Subpoenas

Answer please. Thank you, Barry

On Thursday, September 3, 2015 6:19 PM, "Roth(OGC), David" <David.Roth@nrc.gov> wrote:

You have reached David E. Roth in the Office of the General Counsel (OGC). I am out of the office until Tuesday Sept. 15. To contact another attorney in my division, please call (301) 415-1143. For case-specific issues, please contact another attorney who has filed a Notice of Appearance in that proceeding.

Please see <http://www.nrc.gov/about-nrc/contactus.html> for additional ways to contact the NRC.

Harris, Brian

From: Barry White <bwtamia@bellsouth.net>
Sent: Monday, September 21, 2015 11:57 AM
To: Pepperl, Nicole
Cc: OCAAMAIL Resource; Docket, Hearing; Harris, Brian; Roth(OGC), David; Williamson, Edward; Kanatas, Catherine; England, Christina; Straus, Daniel; Tibbetts, John; steven.hamrick@fpl.com; william.blair@fpl.com; Gibson, Michael; Kennedy, Michael; Sager, William
Subject: [External_Sender] Re: Subpoena Request

Nicole, thank you for the clarification.

Barry

On Monday, September 21, 2015 11:36 AM, "Pepperl, Nicole" <Nicole.Pepperl@nrc.gov> wrote:

Dear Mr. White,

Any request for the Board to act must come in the form of a motion. Also, please remember to copy all of the other parties on your emails in this proceeding. I have cc'ed the parties to this email.

Sincerely,
Nicole

Nicole Pepperl, Law Clerk
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
(301) 415-6626 | Nicole.Pepperl@nrc.gov

From: Barry White [<mailto:bwtamia@bellsouth.net>]
Sent: Sunday, September 20, 2015 9:31 AM
To: Gibson, Michael <Michael.Gibson@nrc.gov>
Cc: Kennedy, Michael <Michael.Kennedy@nrc.gov>
Subject: [External_Sender] Fw: Subpoena Request

Judge Gibson, I believe this should have been sent to you.

Thank you,

Barry J. White

On Saturday, September 19, 2015 12:51 PM, Barry White <bwtamia@bellsouth.net> wrote:

REF: LBP-15-13
(FLORIDA POWER & LIGHT COMPANY) Docket Nos. 50-250-LA and
50-251-LA

(Turkey Point Nuclear Generating) ASLBP No. 15-935-02-LA-BD01
Units 3 & 4)

And Initial Scheduling Order, May 8, 2015, at 6, Witnesses.

Judge Kennedy, 10 CFR 2.702 states:

§ 2.702 Subpoenas.

(a) On application by any party, the designated presiding officer or, if he or she is not available, the Chief Administrative Judge, or other designated officer will issue subpoenas requiring the attendance and testimony of witnesses or the production of evidence.

In this regard, should I submit the required information directly to you or would you prefer a motion requesting the issuance of subpoenas.

Thank you,

Barry J. White
Authorized Representative
Citizens Allied for Safe Energy, Inc.
10001 SW 129 Terrace
Miami, FL 33176
305-251-1960
bwtamia@bellsouth.net

Harris, Brian

From: Barry White <bwtamia@bellsouth.net>
Sent: Saturday, October 31, 2015 9:28 AM
To: Harris, Brian; Steven Hamrick
Cc: William Blair; Roth(OGC), David; Kanatas, Catherine; Erin Walkowiak
Subject: [External_Sender] Consultation Regarding Subpoena of Witnesses

Mr. Harris and Mr. Hamrick,

CASE is considering filing a motion requesting the Board to issue subpoenas for expert witnesses to provide sworn testimony for the evidentiary hearing scheduled for January. Please advise us if you would support or oppose such a motion or if it raises any issues you would like to discuss. Please call me if you like to discuss this.

Thank you,

Barry

Barry J. White
Authorized Representative
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305-251-1960
bwtamia@bellsouth.net

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
FLORIDA POWER & LIGHT CO.) Docket No. 50-250-LA
) 50-251-LA
(Turkey Point Nuclear Generating)
Unit Nos. 3 and 4))

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305 (revised), I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER OPPOSING CASE MOTION REQUESTING SUBPOENAS FOR EXPERT WITNESSES FOR JANUARY 2016 EVIDENTIARY HEARING" and Attachments A-C have been served upon the following persons by the Electronic Information Exchange, the NRC's E-Filing System, in the above-captioned proceeding, this 15th day of December, 2015.

U.S. Nuclear Regulatory Commission
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Michael M. Gibson, Chair
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/Signed (electronically) by/

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