

December 15, 2015

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of)	
)	Docket No. 50-250-LA
Florida Power & Light Company)	50-251-LA
)	
(Turkey Point Units 3 and 4))	ASLBP No. 15-935-02-LA-BD01

**FLORIDA POWER & LIGHT COMPANY’S ANSWER
TO CASE’S SECOND MOTION REQUESTING SUBPOENAS
FOR EXPERT TESTIMONY FOR EVIDENTIARY HEARING**

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), Florida Power & Light Company hereby answers and opposes Citizens Allied for Safe Energy, Inc. (“CASE”)’s “Second Motion Requesting Subpoenas for Expert Testimony for January, 2016,” (“Motion”) dated December 9, 2015. In its Motion, filed two months after CASE’s initial written testimony was due and eight days after CASE’s Rebuttal testimony was due, CASE asks the Board to issue subpoenas compelling the testimony of five federal and local government officials to serve as expert witnesses on CASE’s behalf. This request is without basis and prejudicial and should be denied.

This is CASE’s third time to ask the Board to subpoena expert witnesses on its behalf.¹ CASE’s first motion requested that the Board subpoena two employees of Biscayne National Park, two employees of Miami-Dade County, and Dr. Phillip

¹ See Email Exchange between Barry White and ASLB regarding Subpoena Request, dated September 21, 2015 (ADAMS Accession No. ML15265A500); CASE’s “Motion Requesting Subpoenas for Expert Testimony for January, 2016 Evidentiary Hearing ,” dated November 3, 2015; Order (Denying CASE’s Application for Subpoenas) (Nov. 12, 2015) (“First Subpoena Order”).

Stoddard. Now that Dr. Stoddard has apparently voluntarily provided rebuttal testimony, CASE adds a new requested witness, Mr. Jonathan Shaw of the South Florida Water Management District. CASE wants these officials to testify at the upcoming hearing in January without having filed any initial or rebuttal written testimony. The Motion is without precedent, without legal basis, in conflict with the Board’s Initial Scheduling Order, and irredeemably late. Further, the Motion does not include the certification of consultation required by 10 C.F.R. § 2.323 and the Board’s Initial Scheduling Order. It should be rejected.

II. ARGUMENT

A. Compelled Expert Testimony is Unprecedented in Subpart L Cases

This proceeding is governed by the informal hearing procedures in Part 2, Subpart L.² Subpart L does not contain a provision authorizing subpoenas.³ While the Board has general authority to issue subpoenas under 10 C.F.R. § 2.319, that authority should be understood in light of the multi-track framework the Commission has established for its hearings—where Subpart G authorizes subpoenas and Subpart L does not.⁴

In its earlier order denying CASE’s initial Motion for Subpoenas, the Board noted that the issuance of a subpoena in a Subpart L case is an “extraordinary remedy” and that it had found only one case under the current version of subpart L in which a subpoena

² See Initial Scheduling Order at 2; 10 C.F.R. § 2.310(a).

³ In contrast to the informal Subpart L procedures, the Commission’s formal Subpart G procedures allow expanded discovery and cross examination and contains section 2.702, which authorizes presiding officers to issue subpoenas. 10 C.F.R. §§ 2.702, 2.705-2.709; see also Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2,182 (January 14, 2004).

⁴ 69 Fed. Reg. at 2,195 (“The Commission believes that public access to NRC documents afforded by § 2.390, mandatory disclosure for parties other than the NRC staff, and maintenance of either a hearing file or an electronic docket, will be sufficient in most proceedings to provide a party with adequate information to prepare its position *and presentations at hearing* (whether in written or oral form), such that the discovery under Subpart G (e.g., depositions, interrogatories, and subpoenas) is unnecessary.”) (emphasis added).

had been issued.⁵ But even that case, an operator licensing case that involved factual testimony, is readily distinguishable from this one.⁶ Here, CASE seeks experts to make its entire case, and does so after the deadline for its initial and rebuttal testimony. The Commission has explained that an intervenor should not be allowed to use “discovery or cross-examination as a fishing expedition which might produce relevant supporting facts.”⁷ CASE’s attempt to outsource its entire case to officials from Miami-Dade County, the National Park Service, and now the South Florida Water Management District is just this sort of fishing expedition.

While there is scant Commission caselaw addressing the question of whether unretained experts can be compelled to testify in Subpart L proceedings, the Federal Rules of Evidence and the Federal Rules of Civil Procedure provide helpful guidance on the question. Fed. R. Evid. 706(a) allows courts to appoint expert witnesses, but explains that a “court may only appoint someone who consents to the act.” And, as the Board noted in its First Subpoena Order, Fed. R. Civ. P. 45(d)(3)(B)(ii) allows courts to quash a subpoena if it requires the disclosure of an unretained expert’s opinion.⁸ The notes to this rule describe the practice of subpoenaing unretained experts as a “growing problem” and explain that while an expert is not exempt from the duty to give evidence, they “cannot be compelled to prepare themselves to give effective testimony.”⁹ Thus, even if the Board determines that it can subpoena experts to testify in a Subpart L proceeding, it

⁵ First Subpoena Order at 3, n. 12.

⁶ *Id.* (citing *Charlissa C. Smith* (Reactor Operator License for Vogtle Electric Generating Plant), LBP-13-03, 77 NRC 82, 98 (2013)).

⁷ Final Rule, “Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process,” 54 Fed. Reg. 33,168, 33,171 (August 11, 1989).

⁸ Fed. R. Civ. P. 45(d)(3)(B)(ii).

⁹ Fed. R. Civ. P. 45 advisory committee note (citing *Carter-Wallace, Inc. v. Otte*, 474 F.2d 529 (2d Cir. 1972)).

would be unable to require employees of other governmental agencies to take the time and effort necessary to prepare to provide effective and accurate testimony that would be useful to the Board.

B. CASE's Motion is Exceptionally Late

Wholly separate from the question of whether subpoenas are even available in this proceeding is the timeliness of CASE's request. In Subpart L proceedings, such as this, parties are to submit prefiled written testimony.¹⁰ But CASE has presented no relevant testimony upon which to rest its case. It comes now, two months after its initial testimony was due and eight days after its rebuttal testimony was due, and asks the Board to bail it out. The hearing is scheduled to occur in in less than a month. Issuance of the requested subpoenas at this point in the proceeding would upset the hearing process and the schedule with which FPL and the NRC Staff have carefully complied. The Board should not allow CASE to sandbag the other parties by conjuring new expert testimony at the last minute. CASE's request would fundamentally change the course of this proceeding, a manifest unfairness, after FPL and the NRC Staff filed what was supposed to be their initial and rebuttal testimony over a month ago.¹¹

Even assuming CASE's Motion is procedurally viable, it should have been filed well in advance of its October 9 testimony deadline, or at the very least, before the December 1 rebuttal testimony deadline. A motion must be made no later than ten days after the occurrence or circumstance from which the motion arises.¹² CASE has been

¹⁰ 10 C.F.R. §§ 2.1206, 2.1207; *see also* Initial Scheduling Order at 7-8.

¹¹ Though FPL and the NRC Staff did not desire a hearing on this license amendment, they have complied with the requirements set forth in the NRC's regulations and the Board's Initial Scheduling Order. It was CASE who requested a hearing but it has apparently done nothing to advance its case over the course of the past year and now comes to the Board seeking extraordinary relief at the eleventh hour.

¹² 10 C.F.R. § 2.323(a).

expressly on notice of its duty to provide, at its own expense and effort, its witnesses at the hearing in person for questioning by the Board since the issuance of the Initial Scheduling Order on May 8, 2015.¹³ Waiting until now to file the Motion is unjustifiable. After the Board's First Subpoena Order, CASE had several weeks to comply with the Board's instructions and try to obtain the subpoenas before the deadline for rebuttal testimony was due. It did not. This delay is prejudicial to the other parties and unjustifiable. Even CASE's first Subpoena Motion was exceptionally late as it was filed nearly a month after CASE's initial testimony was due. CASE had clearly been contemplating that request for well over a month, as demonstrated by Barry White's September 19 *ex parte* email to the Board in which he sought legal advice on this very topic. But CASE took no action then, and now seeks extraordinary last-minute relief.

C. CASE Has Not Demonstrated the Relevance of the Testimony

Even under 10 C.F.R. § 2.702, a request for subpoenas must be accompanied by a showing of general relevance, as the Board explained in its First Subpoena Order. CASE has not met that burden. It simply notes that they have been involved with oversight or review of the Cooling Canal System or nearby areas and thus would be familiar with the issues. But CASE does not indicate whether any of these proffered experts have even read the NRC's Environmental Assessment, much less have any opinions as to its adequacy. As a result, it is not apparent that CASE's requested testimony would be of any material benefit to the Board, especially in light of the fact that they would not have prepared any written testimony.

¹³ Initial Scheduling Order at 10.

III. CONCLUSION

For all of these reasons, CASE's Motion should be denied.

IV. CERTIFICATION

I hereby certify that I am unaware of any attempt by CASE to contact FPL to consult regarding this Motion.

Respectfully Submitted,

Signed (electronically) by Steven Hamrick

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FLORIDA POWER & LIGHT COMPANY

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing “Florida Power & Light Company’s Answer to CASE’s Second Motion Requesting Subpoenas for Expert Testimony for Evidentiary Hearing,” were provided to the E-Filing system for service to those individuals on the service list in this proceeding.

Signed (electronically) by,

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Dated at Washington, DC
this 15th day of December, 2015