

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before the Licensing Board:

Emily I. Krause, Chair
Dr. Sue H. Abreu
Dr. Michael F. Kennedy

In the Matter of:

FLORIDA POWER & LIGHT COMPANY

(Turkey Point Nuclear Generating Units 3
and 4)

Docket Nos. 50-250-SLR-2
50-251-SLR-2

ASLBP No. 24-981-01-SLR-BD01

January 31, 2024

MEMORANDUM

(Certifying Question to the Commission Regarding
Timing of Notice of Opportunity for Hearing)

This proceeding commenced with the Nuclear Regulatory Commission Staff's issuance of a notice in the Federal Register announcing an opportunity for members of the public to request a hearing on the Staff's Draft Supplemental Environmental Impact Statement (Draft SEIS) for the subsequent license renewal of Turkey Point Nuclear Generating Units 3 and 4.¹ In response to that notice, Miami Waterkeeper filed a timely hearing request with five proposed contentions challenging the Draft SEIS.²

¹ See Florida Power & Light Company; Turkey Point Nuclear Generating Unit Nos. 3 and 4, 88 Fed. Reg. 62,110 (Sept. 8, 2023) (Draft SEIS Notice); 10 C.F.R. § 2.318.

² Request for Hearing and Petition to Intervene Submitted by Miami Waterkeeper (Nov. 27, 2023) (Hearing Request).

Prior to filing its hearing request, Miami Waterkeeper requested that the Secretary of the Commission withdraw the Staff's notice of opportunity for hearing.³ Miami Waterkeeper argued that the notice was premature because it did not follow the Commission's direction in CLI-22-3, which instructed the Staff to issue the notice "[a]fter each site-specific review is complete."⁴ Miami Waterkeeper asserted that the Staff should have waited to provide the hearing notice until after the Staff had completed its site-specific environmental review for Turkey Point—that is, after public comments had been considered and upon the issuance of a Final Supplemental Environmental Impact Statement (Final SEIS)—rather than providing the hearing notice upon the issuance of a draft.⁵ In the alternative, Miami Waterkeeper requested a sixty-day extension of time to file its hearing request.⁶ Florida Power & Light Company opposed the extension request.⁷

The Secretary granted Miami Waterkeeper a partial extension of an additional twenty days to file a hearing request.⁸ With respect to Miami Waterkeeper's request to withdraw the notice of opportunity for hearing, however, the Secretary denied the request.⁹ The Secretary

³ E-mail from Sydnei Cartwright, Environmental Policy Specialist, Miami Waterkeeper, to the Secretary of the Commission (Oct. 30, 2023) at 1, attaching Letter from Sydnei Cartwright, Environmental Policy Specialist, Miami Waterkeeper, to the Secretary of the Commission (Oct. 27, 2023). Because the email and attachment are combined in one portable document format (PDF) file, we refer to the page numbers in the PDF.

⁴ Id. at 4 (quoting Duke Energy Carolinas, LLC (Oconee Nuclear Station, Units 1, 2, and 3), CLI-22-3, 95 NRC 40, 42 (2022)).

⁵ Id. (citing Oconee, CLI-22-3, 95 NRC at 42).

⁶ Id. at 4–5.

⁷ Florida Power & Light Company Answer in Opposition to Miami Waterkeeper Extension Request (Nov. 2, 2023).

⁸ Order of the Secretary (Nov. 6, 2023) at 4.

⁹ Id. at 3.

determined that withdrawal of the notice was beyond the scope of her delegated authority under 10 C.F.R. § 2.346.¹⁰

On November 27, 2023, in accordance with the Secretary's order, Miami Waterkeeper filed its hearing request. Miami Waterkeeper reserved "the right to challenge the premature timing of the hearing notice on the ground that it is inconsistent with CLI-22-03."¹¹ The Secretary referred Miami Waterkeeper's hearing request to the Chief Administrative Judge for appropriate action, and this Licensing Board was established to preside over the proceeding.¹²

A presiding officer—here, this Licensing Board—"has the duty to conduct a fair and impartial hearing according to law," with "all the powers necessary to those ends," including the power to "certify questions to the Commission."¹³ The Commission may review a certified question that raises "significant and novel legal or policy issues, or [if] resolution of the issues would materially advance the orderly disposition of the proceeding."¹⁴ In the Board's view, this proceeding presents an important question involving the Staff's compliance with the Commission's order in CLI-22-3 with regard to the proper timing of the notice of opportunity for hearing.¹⁵ The Board therefore seeks the Commission's direction on the following certified question:

¹⁰ Id.

¹¹ Hearing Request at 10 n.31; see also Tr. at 10.

¹² See Memorandum from Carrie M. Safford, Secretary of the Commission, to E. Roy Hawken, Chief Administrative Judge, Atomic Safety and Licensing Board Panel (Nov. 28, 2023); Florida Power & Light Company; Establishment of Atomic Safety and Licensing Board, 88 Fed. Reg. 84,835 (Dec. 6, 2023).

¹³ 10 C.F.R. § 2.319(l).

¹⁴ Id. § 2.341(f)(1).

¹⁵ See Oconee, CLI-22-3, 95 NRC at 42 ("After each site-specific review is complete, a new notice of opportunity for hearing—limited to contentions based on new information in the site-specific environmental impact statement—will be issued.").

Should the NRC Staff have waited to issue the notice of opportunity for hearing until it completed the Final SEIS, and if so, how does that impact the conduct of this proceeding?

The Board respectfully submits that this question meets the Commission's standard for interlocutory review of certified questions.¹⁶

First, this question is significant. The notice of opportunity for hearing served as the initiating event for this adjudicatory proceeding.¹⁷ If it turns out that the Staff has issued the notice prematurely, Miami Waterkeeper will not receive the full benefit of a fresh opportunity to challenge the adequacy of the Staff's environmental review. With the Commission's decision, and the new notice, petitioners were relieved of the requirement to meet the heightened pleading standards for new and amended contentions.¹⁸ Starting the proceeding at the Draft SEIS stage, however, means that petitioners will have to meet the heightened, "good cause" standard for any new or amended contentions filed after the Staff completes its review and issues the Final SEIS.¹⁹ In other words, a premature notice of hearing arguably frustrates the

¹⁶ See 10 C.F.R. § 2.341(f)(1).

¹⁷ See id. § 2.318(a).

¹⁸ See Oconee, CLI-22-3, 95 NRC at 42 ("This approach will not require [petitioners] to meet heightened pleading standards in 10 C.F.R. § 2.309(c) for newly filed or refiled contentions.").

¹⁹ See 10 C.F.R. § 2.309(c). In this memorandum, we make no determination on the viability of Miami Waterkeeper's hearing request. In the event a licensing board were to deny a hearing request and terminate a proceeding at the Draft SEIS stage and before the issuance of a Final SEIS, a petitioner would face the additional burden of meeting the Commission's reopening standards if it wished to raise contentions challenging the Final SEIS. See id. § 2.326; Interim Storage Partners LLC (WCS Consolidated Interim Storage Facility), CLI-21-9, 93 NRC 244, 246-47 (2021) (explaining that, together, the reopening requirements, the showing of good cause for new and amended contentions, and the contention admissibility requirements "impose a higher standard for admitting a new contention after the Board has terminated a proceeding than would otherwise apply"). Moreover, a petitioner's appellate rights may differ. The Commission's rules grant a petitioner an appeal as-of-right on the issue whether a hearing request should have been granted. 10 C.F.R. § 2.311(c). A petitioner seeking review of other contention admissibility-related decisions, however, must persuade the Commission to exercise its discretionary authority. See id. § 2.341(a)-(b); Interim Storage Partners, CLI-21-9, 93 NRC at 246 (citing Luminant Generation Co., LLC (Comanche Peak Nuclear Power Plant, Units 3 and 4), CLI-12-7, 75 NRC 379, 385 (2012)).

remedy the Commission fashioned when it found the Staff's original environmental analysis incomplete and, in the interests of fairness and efficiency, ordered the Staff to issue a new notice of hearing when it had completed its review.²⁰

Second, this question is novel. This case presents the first test of the Staff's implementation of the Commission's direction in CLI-22-3 regarding the Staff's site-specific environmental reviews of subsequent license renewal applications. As the Staff acknowledged at oral argument, the posture of this proceeding is out of the ordinary;²¹ in other licensing cases, hearing notices generally are timed closely with the Staff's docketing of a license application,²² and contentions must be filed at the earliest opportunity, which for environmental contentions means that petitioners must challenge an applicant's environmental report.²³ But the Commission has issued an order governing this proceeding and four other subsequent license renewal proceedings that addresses the timing for issuing hearing opportunity notices.²⁴ Thus, the Staff's usual practice arguably does not apply here.²⁵

²⁰ See Oconee, CLI-22-3, 95 NRC at 41–42; cf. Florida Power & Light Co. (Turkey Point Nuclear Generating Units 3 and 4), CLI-22-2, 95 NRC 26, 33, 36 (2022) (describing and giving significant weight to the interest of meaningful public participation in agency decision-making, including the Staff's subsequent license renewal environmental reviews).

²¹ See Tr. at 25, 35.

²² See generally 10 C.F.R. §§ 2.101, 2.104, 2.105; see also Tr. at 32–34.

²³ See id. § 2.309(f)(2).

²⁴ See Oconee, CLI-22-3, 95 NRC at 40, 42–43. In CLI-22-3, the Commission does not appear to set Turkey Point apart from the other four cases. The Commission mentions plural “site-specific environmental impact statements.” Id. at 42. Additionally, the next line in the decision describes “each site-specific review.” Id. (emphasis added). And throughout the decision, when the Commission provides instructions for specific proceedings, rather than for all five captioned proceedings, it does so expressly. See id. at 42–43.

²⁵ Because a plant may continue to operate during a subsequent license renewal review, having the Staff wait to issue the notice of opportunity for hearing until after the Final SEIS is complete in these five cases would not add the undue delay that might be a concern in a proceeding relating to new plant construction. See 10 C.F.R. § 2.109(b); cf. id. § 2.104(a) (For applications

The Commission directed that the new notice of opportunity for hearing be issued “[a]fter each site-specific review is complete.”²⁶ This direction seems clear on its face: complete means complete, not “substantially complete.”²⁷ Other language in the Commission’s order supports that conclusion. In particular, the sentence immediately preceding the Commission’s direction on the timing of the hearing request contemplates that the public comment period would occur “during the development of the site-specific environmental impact statements.”²⁸ The process of developing an environmental impact statement is distinct from its completion. One must precede the other. But here, the Staff issued the notice of opportunity for hearing simultaneously with the opportunity to comment on the Draft SEIS—during the development process—calling into question whether the site-specific review was complete.²⁹

Finally, as an alternative ground for Commission review, the Commission’s resolution of the Board’s certified question would materially advance the orderly disposition of this proceeding, as well as other subsequent license renewal proceedings.³⁰ Briefing on Miami Waterkeeper’s hearing request is complete, and the Board will issue its decision on standing

for a limited work authorization, construction permit, early site permit, or combined license, “the notice must be issued as soon as practicable after the NRC has docketed the application.”).

²⁶ Oconee, CLI-22-3, 95 NRC at 42.

²⁷ See Tr. at 32–33.

²⁸ Oconee, CLI-22-3, 95 NRC at 42.

²⁹ See Draft SEIS Notice, 88 Fed. Reg. at 62,110.

³⁰ A motion similar to Miami Waterkeeper’s withdrawal request has been filed in response to the notice of opportunity for hearing in the North Anna subsequent license renewal proceeding, which is opposed by the Staff and the applicant in that case. See Motion by Beyond Nuclear and Sierra Club for Withdrawal of Premature Hearing Notice (Jan. 18, 2024; corrected Jan. 22, 2024); NRC Staff’s Answer to Beyond Nuclear and Sierra Club’s “Motion for Withdrawal of Premature Hearing Notice” (Jan. 29, 2024); Applicant’s Answer Opposing Beyond Nuclear’s and Sierra Club’s Motion for Withdrawal of Hearing Notice (Jan. 29, 2024).

and contention admissibility in accordance with 10 C.F.R. § 2.309(j)(1).³¹ But a decision from the Commission addressing the Board's certified question would give the Board clear direction as to (1) whether this proceeding either should be suspended or terminated to await the issuance of the Final SEIS or a new hearing opportunity notice; or (2) if the proceeding remains ongoing, whether Miami Waterkeeper must meet heightened standards for new and amended contentions if it seeks to challenge the Final SEIS.³²

In other cases, the Commission has instructed presiding officers to seek immediate Commission direction when questions arise regarding the scope of a presiding officer's delegated authority.³³ Similarly, we are seeking the Commission's direction on a question that falls squarely within the bounds of the Commission's inherent supervisory authority over the conduct of adjudicatory proceedings.³⁴ Only the Commission can answer it.³⁵

³¹ At oral argument, Miami Waterkeeper expressed an interest in the Board's resolution of its contentions, notwithstanding its challenge to the timing of the Staff's notice of opportunity for hearing. See Tr. at 10–11.

³² The Staff stated at oral argument that it plans to issue the Final SEIS at the end of March 2024. Id. at 31. As discussed in note 19 above, the timing of the notice of opportunity for hearing also may impact the application of the standards for motions to reopen and a petitioner's appellate rights.

³³ See Aerotest Operations, Inc. (Aerotest Radiography and Research Reactor), CLI-14-5, 79 NRC 254, 264 (2014); see also Energys Nuclear Operations, Inc. (Palisades Nuclear Plant and Big Rock Point Site), CLI-22-8, 96 NRC 1, 103 (2022); Carolina Power and Light Company (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-80-12, 11 NRC 514, 517 (1980).

³⁴ See Oklo Power LLC (Aurora Reactor), CLI-20-17, 92 NRC 521, 523 (2020); North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-98-18, 48 NRC 129, 130 (1998); Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-15, 48 NRC 45, 51–53 (1998); Shearon Harris, CLI-80-12, 11 NRC at 516–17.

³⁵ See Shearon Harris, CLI-80-12, 11 NRC at 516 (“It is . . . clear that the Boards do not direct the staff in performance of their administrative functions. The Commission does have authority to do so, however, as part of its inherent supervisory authority even over matters in adjudication.”); see also Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-04-28, 60 NRC 412, 414 (2004) (reserving, for the Commission's consideration, a question regarding the adequacy of a notice of opportunity for hearing). Although the Commission has delegated authority to the Secretary to act in agency proceedings, that authority is limited to the powers expressly delineated in 10 C.F.R. § 2.346 and is not applicable here. See Order of the

For the foregoing reasons, we respectfully request direction from the Commission on the Board's certified question.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Emily I. Krause, Chair
ADMINISTRATIVE JUDGE

/RA/

Dr. Sue H. Abreu
ADMINISTRATIVE JUDGE

/RA/

Dr. Michael F. Kennedy
ADMINISTRATIVE JUDGE

Rockville, Maryland
January 31, 2024

Secretary at 3 (acknowledging that the request to withdraw the hearing notice was not within the authority delegated to the Secretary by the Commission in section 2.346).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
FLORIDA POWER & LIGHT COMPANY) Docket Nos. 50-250-SLR-2
) 50-251-SLR-2
(Turkey Point Nuclear Generating)
Units 3 & 4))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM (Certifying Question to the Commission Regarding Timing of Notice of Opportunity for Hearing) (LBP-24-01)** have been served upon the following persons by Electronic Information Exchange.

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Dated at Rockville, Maryland,
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