

March 20, 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'S ANSWER TO SOUTHERN ALLIANCE FOR CLEAN ENERGY'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

INTRODUCTION

Pursuant to the Secretary's Order,¹ the Staff of the Nuclear Regulatory Commission (Staff) files its answer with supporting affidavit² to "Southern Alliance For Clean Energy's [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" (Motion).³ SACE asks the Commission to suspend the licensee's planned restart of St. Lucie Plant, Unit No. 2 from its current refueling outage pending: 1) a 100% inspection of the steam generator tubes by Florida Power & Light Co. (FPL) and publication of the results; 2) publication

¹ *Florida Power & Light Co.* (St. Lucie Plant, Unit 2) (Mar. 11, 2014) (unpublished) (Agencywide Documents and Access Management System (ADAMS) Accession No. ML14070A580).

² Affidavit of Omar R. López-Santiago Concerning SACE's Claims Regarding Staff's Steam Generator Inservice Inspection (Mar. 20, 2014) (Staff Affidavit). Mr. López-Santiago's branch is responsible for the NRC's Inservice Inspection Activities currently underway at St. Lucie. *Id.* at 1-2.

³ SACE's filing included "Southern Alliance For Clean Energy's Hearing Request Regarding De Facto Amendment Of St. Lucie Unit 2 Operating License" (Mar. 10, 2014) (Hearing Request), "Declaration of Arnold Gundersen" (Mar. 9, 2014) (Gundersen Declaration) with Exhibits 1 - 4, and declarations of standing. (ADAMS Accession No. ML14071A431).

of the results of the inservice inspection (ISI) assessment planned by the NRC Staff during the refueling outage; and 3) completion of the adjudicatory proceeding requested by SACE in its Hearing Request.⁴

The Staff opposes SACE's Motion. SACE asserts that the Staff's continuing safety inspection role constitutes a *de facto* license amendment. There is no action or decision of a presiding officer related to the restart of St. Lucie Plant, Unit No. 2 to stay under 10 C.F.R. § 2.342, and SACE does not meet the equitable standards for a stay. In particular, SACE has not shown likelihood of success on the merits of its assertions that the NRC Staff has and is conducting a "*de facto*" and "continuing" license amendment;⁵ these claims are unsupported and reflect a misunderstanding of the purpose and effect of Staff's inspection and enforcement activities. Additionally, SACE has not shown how it will be irreparably injured by restart of St. Lucie Plant, Unit No. 2. Thus, the Commission should deny and dismiss SACE's request to stay the licensee's restart of St. Lucie Plant, Unit 2.

BACKGROUND

In the fall of 2007, FPL replaced St. Lucie Plant, Unit No. 2's two steam generators with two AREVA steam generators.⁶ The Commission reviewed the 2007 Unit 2 steam generator replacement project, including the 10 C.F.R. § 50.59 evaluations used by FPL to decide if the changes to the plant required a license amendment; the NRC inspectors identified no findings of significance.⁷ Thus, no license amendment was submitted or identified by the NRC as being required.

⁴ Motion at 1-2.

⁵ Hearing Request at 1 (asserting in Contention 1 that the Staff has conducted and is conducting a *de facto* license amendment proceeding), *id.* 17 (asserting in Contention 2 that the Staff's continuing amendment of the Unit 2 license should be enjoined).

⁶ Attachment 5 to Letter L-2011-021, St. Lucie Unit 2 EPU Licensing Report, § 2.2.2.5 "Steam Generators and Supports" at § 2.2.2.1 "Introduction," page 2.2.2-57 (ADAMS Accession No. ML110730299).

⁷ St. Lucie Nuclear Plant - NRC Integrated Inspection Report 05000335/2007005, 05000389/2007005, § 4OA5.3 "Unit 2 Steam Generator Replacement Inspection (IP 50001)" (Feb. 1,

On February 25, 2011, FPL submitted a license amendment request for an extended power uprate (EPU-LAR) to increase the licensed core power level of Unit 2 from 2700 megawatts (thermal) MWt to 3020 MWt.⁸ The EPU-LAR evaluated the two AREVA replacement steam generators at the proposed power level with respect to issues like thermal-hydraulics, structural integrity, and tube wear.⁹ FPL also described the impact of the EPU on the renewed plant operating license, including aging management and time-limited aging analyses,¹⁰ and included proposed changes to its renewed facility operating license and technical specifications (TS).¹¹ The Commission published a notice of opportunity to request a hearing on this LAR and to access documents which were otherwise non-public.¹² No requests for a hearing or access to documents were received.

On September 24, 2012, after making the appropriate regulatory findings, the NRC approved the EPU-LAR. This amendment incorporated requirements on the use, inspection,

2008) at 27-33 (ADAMS Accession No. ML080350408); Staff Affidavit at 2-3. A "finding" is "A performance deficiency of More-than-Minor significance." NRC Inspection Manual IMC 0612, "Power Reactor Inspection Reports," at 1 (Jan. 24, 2103) (ADAMS ML12244A483). A "Performance Deficiency" is "An issue that is the result of a licensee not meeting a requirement or self-imposed standard where the cause was reasonably within the licensee's ability to foresee and correct, and therefore should have been prevented." *Id.* at 2.

⁸ Letter L-2011-021 from R. L. Anderson, Site Vice President, St. Lucie Plant, to NRC, at 1 (Feb. 25, 2011) (ADAMS Accession No. ML110730116). The complete LAR is available in ADAMS Package ML110730268. Some portions are proprietary, and thus not publicly-available.

⁹ Attachment 5 to Letter L-2011-021, St. Lucie Unit 2 EPU Licensing Report, § 2.2.2.5 "Steam Generators and Supports" at § 2.2.2.5.1 "Introduction," page 2.2.2-57 (ADAMS Accession No. ML110730299).

¹⁰ *Id.* at § 2.14 "Impact of EPU on the Renewed Plant Operating License," § 2.14.1 "Impact of EPU on Aging Management," and § 2.14.2 "Impact of EPU on Time-Limited Aging Analyses," pages 2.14-1 to 2.14-12 (ADAMS Accession No. ML110730299).

¹¹ Attachment 1 to Letter L-2011-021, "Descriptions and Technical Justifications for the Renewed Facility Operating License, Technical Specifications, and Licensing Basis Changes" (ADAMS Accession No. ML110730283), Attachment 3 to Letter L-2011-021, "Renewed Facility Operating License and Technical Specifications Markups and Clean Pages" (ADAMS Accession No. ML110730284), Attachment 4 to Letter L-201[1]-021, "Technical Specifications Bases Markups" (ADAMS Accession No. ML110730298).

¹² Florida Power & Light Company, St. Lucie Plant, Unit 2 License Amendment Request; Opportunity To Request a Hearing and To Petition for Leave To Intervene, and Commission Order Imposing Procedures for Document Access, 76 Fed. Reg. 54,503 (Sept. 1, 2011).

and reporting of inspection results for the replacement steam generators (SG) at the higher power into FPL's license.¹³

Almost two years later, on March 3, 2014, FPL shut down St. Lucie Plant, Unit No. 2 for a scheduled refueling outage (RFO21). During the outage, and in accordance with its existing license requirements, FPL will inspect and verify SG tube integrity in accordance with its Steam Generator Program,¹⁴ and, pursuant to TS 6.9.1.12 "Steam Generator Tube Inspection Report," submit the inspection results to the NRC "within 180 days after the initial entry into HOT SHUTDOWN following completion of an inspection of the replacement SGs."¹⁵ From March 17 to March 21, 2014, the NRC is performing NRC Inspection Procedure 71111.08 to "assess the effectiveness of the licensee's program for monitoring degradation of the reactor coolant system boundary, risk-significant piping system boundaries, and the containment boundary."¹⁶

¹³ See Biweekly Notice: Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations, 77 Fed. Reg. 63,343, 63,354-63,355 (Oct. 16, 2012).

¹⁴ With respect to "inservice inspection," TS 6.8.4.I.1.a requires, among other things, FPL's SG Program to provide for condition monitoring assessments to evaluate the "as found" condition of the tubing as determined from the inservice inspection results or by other means prior to plugging tubes. Docket No. 50-389, St. Lucie Plant, Unit No. 2, Renewed Facility Operating License No. NPF-16 with Technical Specifications (ADAMS Accession No. ML052800077).

¹⁵ Docket No. 50-389, St. Lucie Plant, Unit No. 2, Renewed Facility Operating License No. NPF-16 with Technical Specifications, at 6-20f (ADAMS Accession No. ML052800077). FPL informed the NRC that the current refueling outage (RFO21) inspection includes, among other steam generator inspections, 100% bobbin probe examination. Letter L-2013-325 from E. S. Katzman, Licensing Manager, St. Lucie Plant to NRC (Nov. 26, 2013), "SL2-20 Steam Generator Tube Inspection Report RAI Reply" Attachment at 4 (ADAMS Accession No. ML13338A582). FPL's last report was dated May 6, 2013 and is available in ADAMS at Accession No. ML13141A479.

¹⁶ Letter from O.R. López-Santiago, NRC, to M. Nazar, Executive Vice President and Chief Nuclear Officer, FPL, St. Lucie Nuclear Plant, Unit 2 – Notification of Inspection and Request for Information, at 1 (Feb. 24, 2014) (ADAMS Accession No. ML14056A110); Staff Affidavit at 2-3; IP Attachment 71111.08, Inservice Inspection Activities, at 1 (Nov. 23, 2011) (ADAMS Accession No. ML11262A023).

ARGUMENT

I. Legal Standards

A. Standards for a Stay Application

Under 10 C.F.R § 2.342(a), any party to a proceeding¹⁷ may file an application for a stay of the effectiveness of a decision or action of a presiding officer pending the filing and resolution of a petition for review. To decide upon a stay request, the Commission considers four equitable standards: (1) likelihood of success on the merits, (2) irreparable harm, (3) absence of harm to others, and (4) the public interest.¹⁸ The Commission has noted that irreparable injury is the most important stay factor, and without a showing of irreparable injury, a movant must make "an overwhelming showing" of likely success on the merits.¹⁹ If a movant fails to make a showing on the first two factors, then the Commission need not consider the other factors.²⁰

B. De Facto License Amendment Proceedings

A Commission action²¹ not formally labeled a license amendment can be a *de facto* license amendment that triggers section 189a. hearing rights. Specifically, a Commission action

¹⁷ Per 10 C.F.R. § 2.318(a), "A proceeding commences when a notice of hearing or a notice of proposed action under § 2.105 is issued." To be a "party" to a proceeding, the intervenor must establish standing. However, SACE incorrectly utilizes a 50-mile proximity basis in establishing standing for an alleged license amendment proceeding.

¹⁸ See 10 C.F.R. § 2.342(e). The Commission has stated that these standards are technically not applicable to a request for a stay of NRC Staff action, but considers these four standards as commonplace principles of equity universally followed when judicial or quasi-judicial bodies consider stays or other forms of temporary injunctive relief. See *Entergy Vermont Yankee Nuclear LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237 n.4 (2006).

¹⁹ See e.g., *Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4)*, CLI-12-11, 75 NRC 523, 529 (2012) (Vogtle). (citing *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-13, 67 NRC 396, 400 (2008); *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 7 (1994); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-8, 29 NRC 399, 412 (1989).).

²⁰ *Id.* at 529.

²¹ A *de facto* licensing action presumes an action of the agency, as opposed to an action of the licensee. *Citizens Awareness Network, Inc. v. NRC*, 59 F.3d 284 (1st Cir. 1995).

that changes a licensee's authority under its license without formally amending the license is effectively a license amendment.²²

II. SACE's Motion to Stay Restart of St. Lucie Should Be Denied

A. There Is No Action or Decision That Can Be Stayed

Section 2.342 presumes an action or decision of a presiding officer in a proceeding. There is currently no licensing proceeding associated with the Unit 2 SGs or restart of St. Lucie Plant, Unit No. 2 as FPL has not submitted a license amendment request and the Staff has not instituted any proceeding to modify, suspend, or revoke FPL's license. SACE claims that Staff repeatedly took regulatory actions that constituted a *de facto* amendment of Unit 2's license and that this "ongoing" amendment should be revoked before restart.²³ In effect, SACE wants a stay of the Staff's inspection activities and/or FPL's actions taken under the authority in its existing license. But 10 C.F.R. § 2.342 does not contemplate a stay of these actions. Thus, SACE's Motion should be denied.

At bottom, SACE belatedly challenges § 50.59 analyses done in support of the 2007 Unit 2 SG replacements and the ability of the plant to safely operate given a 2012 license amendment associated with an EPU. But FPL's § 50.59 analysis is not an amendment, and the EPU proceeding was not contested. Nor does the Staff's ISI inspection role in assuring compliance with FPL's existing license constitute a license amendment.

Notably, this does not leave SACE without relief, as SACE could file a 10 C.F.R. § 2.206 petition. The Commission has made clear that § 2.206 is the proper way to challenge § 50.59 analyses and the safe operation of a plant.²⁴ In fact, SACE's request for pre-startup submission

²² See, e.g., *id.* at 294-95.

²³ Motion at 5-6.

²⁴ Section 2.206 provides that "[a]ny person may file a request to institute a proceeding . . . to modify, suspend, or revoke a license, or for any other action as may be proper." *Southern California Edison Co.* (San Onofre Nuclear Generating Station Units 2 and 3), CLI-12-20, 76 NRC 437, 439 n. 10. (2012) (noting that section 2.206 provides the means to challenge licensee actions under 10 C.F.R. § 50.59). See also *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 101

of the FPL's Steam Generator Tube Inspection Report appears to be a § 2.206 request, asking the NRC to modify the schedule set forth in TS 6.9.1.12.

B. SACE's Motion Does Not Meet Any of the Stay Factors

SACE's Motion should also be denied because it does not meet any of the equitable stay factors. In particular, SACE has not shown a likelihood of success on the merits of its "*de facto*" license amendment claims or that restart would result in irreparable injury.

1. SACE Has Not Made a Strong Showing of Success On The Merits

SACE's Motion and Hearing Request is premised on the idea that there is an "ongoing" and "continuing" *de facto* license amendment proceeding related to the St. Lucie Plant, Unit No. 2 steam generators that must be revoked before restart can safely occur. For example, SACE alleges that the NRC repeatedly amended FPL's license to allow significant alterations to the design basis of the reactor.²⁵ But as discussed below and in the attached affidavit, SACE's claims are not supported by fact and misconstrue Staff's routine inspection and enforcement role as some type of licensing approval or action. Thus, SACE has not made a strong showing of success on the merits of these claims.

Importantly, and contrary to SACE's claims, the past and future routine steam generator ISIs do not amount to ongoing amendment proceedings that change the license.²⁶ Instead, the inspections verify compliance with the existing license.²⁷ SACE's attempt to compare St. Lucie

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."); *FirstEnergy Nuclear Operating Co.* (David-Besse Nuclear Power Station, Unit 1), LBP-13-11, ___ NRC ___, ___ (Aug. 12, 2013) (slip op. at 5) (The "Commission has prohibited Licensing Boards from hearing challenges to actions taken under 10 C.F.R. § 50.59.").

²⁵ Motion at 6. The Motion and incorporated Hearing Request allege that the Staff's baseline ISI is used to "approv[e] the operation of Unit 2 outside its design basis," Gundersen Declaration at ¶ 57, or otherwise "constitute a licensing action." Motion at ¶ 18.

²⁶ Staff Affidavit at 3-4.

²⁷ *Id.*

to SONGS²⁸ is likewise unavailing. In SONGS, Unit 3 had indications of a SG tube leak which prompted a manual shut down, augmented inspections, and the Staff's issuance of a Confirmatory Action Letter (CAL) related to restart of both Units 2 and 3. Moreover in SONGS, the licensee agreed not to restart until they had addressed the Staff's CAL. In contrast, St. Lucie is in a scheduled refueling outage and the Staff has issued no CAL or taken any action that could serve as the basis for an argument that a *de facto* license amendment has been granted.

Thus, unlike in SONGS, where there was a CAL related to restart, there is no Staff action associated with restart of St. Lucie Plant, Unit No. 2 that can be challenged as a *de facto* license amendment. Instead, there are only routine inspections by the Staff and routine reports required by the existing license.

Moreover, SACE fails to demonstrate that it will prevail on the other claims raised in its hearing request. For example, SACE fails to demonstrate that the SG design changes made by FPL do not comply with NRC safety regulations.²⁹ SACE also fails to demonstrate that it will prevail on its claim that a "hearing will, for the first time, ensure that all relevant information is disclosed and fully considered before operation of Unit 2 resumes."³⁰ As the Commission stated in *Rancho Seco*, "Mere speculation that [a] hearing might develop facts indicating the need for further enforcement action does not suffice to warrant a prohibition on restart of the facility."³¹

²⁸ Motion at 4-5 (claiming that Staff continues to make regulatory decisions that give its *imprimatur* to the design changes at Unit 2).

²⁹ See Hearing Request at 18 ¶ 2 (stating more information is needed to adequately analyze the design changes.)

³⁰ Hearing Request at 25.

³¹ *Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station)*, CLI-79-7, 9 NRC 680, 681 (1979), motion to stay denied, *Friends of the Earth, Inc. v. U.S.*, 600 F. 2nd 753 (9th Circ. 1979).

2. SACE Has Not Shown Irreparable Harm

SACE's Motion also fails to show any harm related to restart of St. Lucie, much less imminent or irreparable harm. SACE asserts in conclusory fashion that restart will cause "certain and great" injury.³² But as SACE is aware, FPL has operated for many years, up to the current scheduled outage, without causing injury to SACE or any of its members. Thus, it cannot be said that restart is "certain" to cause injury. SACE's expert, Mr. Gundersen, gives his opinion that unanalyzed conditions exist and pose an unacceptable risk related to various accidents.³³ But he does not allege, let alone show, that an accident causing irreparable harm will result from restart.³⁴ Likewise, SACE's standing declarations only raise the specter of a nuclear accident and fail to indicate how restart would cause an accident or any associated harm.³⁵ These speculative assertions do not meet the irreparable injury standard.³⁶

Because SACE has not made a showing on the first two stay factors, the Commission need not consider the remaining factors.³⁷ But as discussed below, SACE also fails to meet the third and fourth stay factor.

3. SACE Fails to Show that a Stay of Restart is Harmless to Other Parties.

Because there is no proceeding, *de facto* or otherwise, there are no parties.³⁸ However, SACE briefly argues that FPL is not harmed because FPL can provide electricity to its customers by buying it elsewhere or by using other facilities.³⁹ Missing from SACE's arguments

³² Motion at 7.

³³ Gundersen Declaration at ¶ 59, 60-62.

³⁴ See *e.g.*, *Vogtle*, CLI-12-11, 75 NRC at 529.

³⁵ See, *e.g.* Declaration of Standing of Mary Jo Aagerstoun, at ¶ 5 (March 3, 2013) (ADAMS Accession No. ML14071A431).

³⁶ See *Vermont Yankee*, CLI-06-8, 63 NRC at 237-238 (quoting *Massachusetts Coalition of Citizens with Disabilities v. Civil Defense Agency*, 649 F.2d 71, 75 (1st Cir. 1981)).

³⁷ *Vogtle*, CLI-12-11, 75 NRC at 529.

³⁸ If SACE had filed its request for hearing or petition to intervene in response to a notice of hearing or opportunity for hearing, FPL would be a party. 10 C.F.R. § 2.309(a).

³⁹ Motion at 7-8.

is any realistic discussion of the harm to FPL by being unable to resume power operation under its existing license. Simply put, staying restart has the immediate and unavoidable effect of denying FPL the benefits of its duly authorized license to operate. Thus, SACE's bare assertion of no harm to others does not tip the balance in SACE's favor and does not justify staying restart pending completion of SACE's requested hearing.

4. SACE Does Not Show That a Stay is in the Public Interest

SACE argues that a stay is in the public interest and required for safety and to comply with the law.⁴⁰ But SACE's arguments do not show that a stay of restart is in a public interest. The NRC recognizes the public's interest in the proper and safe regulation of nuclear activities and provides opportunities for citizens to be heard.⁴¹ Those opportunities are provided through 10 C.F.R. § 2.206 petitions for enforcement, and hearing opportunities on license amendments such as the one offered in 2011 for the St. Lucie uprate amendment.⁴²

CONCLUSION

Accordingly, the Staff opposes the Motion and requests that the Commission deny and dismiss the Motion.

Signed (electronically) by

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⁴⁰ Motion at 8-9.

⁴¹ *Firstenergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station Unit 1), DD-11-2, 73 NRC 323, 329 (2011).

⁴² See 76 Fed. Reg. at 54,503.