

April 17, 2015

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

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

**FLORIDA POWER & LIGHT COMPANY’S
MOTION TO STAY HEARING
PENDING COMMISSION REVIEW OF ITS APPEAL**

Pursuant to 10 C.F.R. § 2.323, Florida Power & Light Company hereby moves the Atomic Safety and Licensing Board (“Board”) to stay adjudication of the instant case and Citizens Allied for Safe Energy, Inc. (“CASE”) Contention 1 pending Commission consideration of appeals of LBP-15-13 filed by FPL and the NRC Staff on April 17, 2015. On April 13, 2015, four days before the timely appeal deadline of the Board’s March 23, 2015, Order granting CASE’s petition to intervene and admitting a modified contention for hearing,¹ the Board issued a tentative scheduling order. This order calls for a hearing to be held as early as this summer, with Initial Statements of Position and Written Testimony to be filed by June 22, 2015. Order (Providing Tentative Schedule and Case Management Information) (April 13, 2015) at 7. In light of this scheduling Order and the appeals filed today by FPL and the NRC Staff, FPL respectfully requests the Board to stay the now rapidly-approaching hearing pending Commission review of the appeals, because, in addition to affording very little time for discovery and general

¹ LBP-15-13, 81 NRC __, __ (slip op. at 2) (Mar 23, 2015).

hearing preparation,² the Board's expedited schedule would moot any potential relief otherwise available to FPL or the NRC Staff under 10 C.F.R. § 2.311.

Because 10 C.F.R. § 2.323 contains no standards by which to decide stay motions, FPL turns instead for guidance to the general stay standards in subsection (e) of section 2.342 ("Stays of decisions"), which governs requests for stays of initial decisions. *Sequoyah Fuels Corporation and General Atomics* (Gore, Oklahoma Site) CLI-94-9, 40 NRC 1, 6 (1994). Under that standard, a party must make four showings to obtain a stay: likelihood of success on the merits, irreparable harm, absence of harm to others, and the public interest. 10 C.F.R. § 2.342(e). Irreparable harm is the most important of the four standards — the *sine qua non* of obtaining a stay. *Entergy Nuclear Vermont Yankee LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station) CLI-06-08, 63 NRC 235, 238 (2006) (citing *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1295 (2d Cir. 1995)).

As is more fully described in the brief accompanying its appeal, FPL does not believe that a hearing is warranted in this case. Contrary to the established requirements of judicial standing, the Board in LBP-15-13 found that CASE demonstrated standing even though it offered no connection between the contested license amendment and the alleged injuries from FPL's water withdrawals or identified any withdrawal that may either reduce freshwater in the surficial aquifer or exacerbate saltwater intrusion. *See* FPL Appeal at 8-18. Further, the Board impermissibly reformulated CASE's contention from an out-of-scope challenge to FPL's previous extended power uprate into a challenge

² Discovery in this case may involve a significant number of documents and the Board's proposed schedule provides very little time to produce those documents and even less time for the parties to evaluate and incorporate them prior to submitting their initial positions and testimony.

to the NRC Staff's consideration of saltwater intrusion in its Environmental Assessment. *Id.* at 20-22. Further, CASE Contention 1 is not supported by either facts or expert opinion, does not demonstrate a genuine dispute with the NRC's Environmental Assessment, and does not show that the issues it raises are material. *Id.* at 22-27. For all of these reasons, described more fully in our brief before the Commission, FPL is likely to succeed in its appeal of LBP-15-13. And FPL is not alone in concluding that the Board's Order was in error, as the NRC Staff has also filed an appeal.

However, even though FPL is likely to succeed on the merits, its appeal will be fruitless absent some action to stay the hearing. Normally in the case of an appeal under 10 C.F.R. § 2.311, there are many months or even years remaining before the NRC Staff's review documents are complete and a hearing can be scheduled. In such circumstances, there is sufficient time for the Commission to consider an appeal prior to a hearing being scheduled. In this case, however, the NRC's licensing action has already occurred and the Board's expedited schedule calls for a hearing beginning in less than three months. It is likely in this case that an improperly granted hearing could be completed prior to the Commission issuing a decision on FPL's appeal. This outcome would irreparably harm FPL by depriving it of the procedural right to obtain meaningful interlocutory review of the Board's decision granting CASE's hearing request.

No party will be harmed by a stay of this proceeding. If CASE is ultimately successful in reformulated Contention 1 and the Board determines that the NRC's Environmental Assessment ("EA") is inadequate, the relief available to CASE would involve supplementation of the NRC's EA. Nine months have passed since the NRC issued the license amendment. And at least six more will pass before the Board

concludes a hearing, even under its proposed expedited schedule. CASE would not be harmed by waiting an additional few months for potential retroactive supplementation of the NRC's EA.

Finally, the public interest counsels in favor of a stay. There is no public interest in holding an unnecessary hearing. Moreover, FPL is participating in numerous hearings on related matters at the Florida Department of Environmental Protection ("FDEP") and the South Florida Water Management District ("SFWMD") this summer on many of the substantive issues related to CASE's concern. There are obvious resource constraints caused by participating in several hearings on related subject matter at the same time.³ But, more importantly, final adjudication of issues at the state and local level can clarify many issues prior to an NRC hearing. For instance, the FDEP will hold a hearing on a Site Certification modification that would allow construction and operation of new Floridan aquifer wells. Without this modification, these new wells cannot be operated. The FDEP will also hold a hearing on a third party challenge to the 2014 Administrative Order that requires FPL to mitigate salinity in the Cooling Canals. Similarly, the SFWMD has provided an opportunity for a hearing on FPL's recent request for authorization to permanently utilize excess surface water from the L-31 E canal. All of these challenges are expected to be heard this summer. It makes little sense for the NRC to hold a hearing speculating on FPL's potential water withdrawals and salinity mitigation measures, while, at the very same time the relevant jurisdictional regulators are holding hearings on the authority of FPL to carry out many of those same actions. In the event the Board ultimately rules that the EA requires supplementation, having final

³ For instance, though FPL has not yet identified experts to participate in this proceeding, there will likely be substantial overlap between those called to testify before the Board, and those participating in the three Florida hearings this summer.

adjudicatory decisions from the state and local regulators delineating FPL's authority for future water withdrawals will greatly simplify any required supplementation.

For the foregoing reasons, FPL requests that the Board stay the hearing on CASE Contention 1 until the Commission has ruled on the appeals.

CERTIFICATION

I certify that I have made a sincere effort to contact the other parties in this proceeding, to explain to them the factual and legal issues raised in this motion, and to resolve those issues, and I certify that my efforts have been unsuccessful.

Respectfully Submitted,

Signed (electronically) by Steven Hamrick

Steven C. Hamrick
Florida Power & Light Company
801 Pennsylvania Avenue, N.W. Suite 220
Washington, DC 20004
steven.hamrick@fpl.com
202-349-3496

William S. Blair
Florida Power & Light Company
700 Universe Blvd.
Juno Beach, Florida 33408
william.blair@fpl.com
561-304-5238

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COUNSEL FOR
FLORIDA POWER & LIGHT COMPANY

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Florida Power & Light Company's Motion To Stay Hearing Pending Commission Review of Its Appeal," were provided to the Electronic Information Exchange for service to those individuals listed below and others on the service list in this proceeding, and via e-mail to those marked with an asterisk.

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
Washington, DC 20555-0001
Michael M. Gibson, Chair
Dr. William W. Sager
Dr. Michael F. Kennedy

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop: O-15D21
Washington, DC 20555-0001
Brian Harris, Esq.
David Roth, Esq.
Christina England, Esq.

U.S. Nuclear Regulatory Commission
Office of Commission Appellate Adjudication
Mail Stop: O-16C1
Washington, DC 20555-0001
OCAA Mail Center
E-mail: ocaamail@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop: O-16C1
Washington, DC 20555-0001
Hearing Docket
E-mail: hearingdocket@nrc.gov

Barry White*
Citizens Allied for Safe Energy, Inc.
1001 SW 129 Terrace
Miami, FL 33176

Signed (electronically) by,

Steven C. Hamrick
Florida Power & Light Company
801 Pennsylvania Avenue, N.W. Suite 220
Washington, DC 20004
steven.hamrick@fpl.com
202-349-3496

Dated at Washington, DC
this 17th day of April, 2015