

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Michael M. Gibson, Chairman
Dr. Michael F. Kennedy
Dr. William W. Sager

In the Matter of

FLORIDA POWER & LIGHT COMPANY

(Turkey Point Nuclear Generating,
Units 3 and 4)

Docket Nos. 50-250-LA and 50-251-LA

ASLBP No. 15-935-02-LA-BD01

May 8, 2015

ORDER
(Denying FPL's Motion to Stay Hearing)

On April 17, 2015, the Florida Power & Light Company (FPL) moved to stay a hearing on Citizens Allied for Safe Energy, Inc.'s (CASE) admitted contention.¹ FPL argues that a stay is justified due to pending Commission review of appeals filed by FPL and the NRC Staff challenging the Board's admission of CASE's contention, and the "expedited schedule" for conduct of the evidentiary hearing FPL claims the Board established in its tentative scheduling order of April 13, 2015.² In light of the Board's issuance today of an initial scheduling order for this proceeding,³ FPL's motion to stay the hearing is denied.

I. Background

The Board admitted CASE's contention on March 23, 2015.⁴ On March 30, 2015, the Board set May 22, 2015 as the deadline for the parties to provide initial mandatory disclosures.⁵

¹ Florida Power & Light Company's Motion to Stay Hearing Pending Commission Review of Its Appeal (Apr. 17, 2015) [hereinafter Stay Motion].

² Stay Motion at 1-2.

³ Licensing Board Initial Scheduling Order (May 8, 2015) (unpublished).

⁴ See LBP-15-13, 81 NRC __, __ (slip op. at 2) (Mar. 23, 2015).

On April 13, 2015, the Board issued a tentative scheduling and case management order, which (1) detailed disclosure requirements that incorporated many of the parties proposed changes, (2) established a tentative schedule for the proceeding, and (3) informed the parties that they would have the opportunity, on a conference call later scheduled for April 29, 2015,⁶ “to review the schedule and discuss any changes the parties wish to seek prior to issuance.”⁷

On April 17, 2015, the NRC Staff and FPL appealed the Board’s decision to admit CASE’s contention.⁸ On the same day, FPL moved to stay the hearing on CASE’s contention.⁹ On April 27, 2015, the NRC Staff responded to FPL’s stay motion, arguing that it should be denied as premature because the schedule issued by the Board at that point was tentative.¹⁰ Following the April 29 scheduling conference, the Board issued an initial scheduling order, laying out a schedule for the filing of briefs, testimony, and exhibits leading up to an evidentiary hearing in January 2016.¹¹

II. Legal Standards

A party seeking a stay must file a motion requesting a stay from the Commission or the presiding officer.¹² Such “an application for a stay of the effectiveness of the decision or action

⁵ Licensing Board Order (Extending the Deadline for Submittal of Initial Disclosures) at 2 (Mar. 30, 2015) (unpublished) [hereinafter Disclosure Extension Order]. Absent this order, initial disclosures would have been due April 22, 2015, pursuant to 10 C.F.R. § 2.336.

⁶ Licensing Board Order (Scheduling Conference Call) at 1 (Apr. 14, 2015) (unpublished).

⁷ See Licensing Board Order (Providing Tentative Schedule and Case Management Information) at 1 (Apr. 13, 2015) (unpublished).

⁸ See NRC Staff’s Notice of Appeal of LBP-15-13 (Apr. 17, 2015); Florida Power & Light Company’s Notice of Appeal of LBP-15-13 (Apr. 17, 2015).

⁹ Stay Motion at 1.

¹⁰ NRC Staff Answer to Florida Power & Light Company’s Motion to Stay Hearing Pending Commission Review of Its Appeal at 3 (Apr. 27, 2015) [hereinafter NRC Staff Stay Motion Answer].

¹¹ Licensing Board Initial Scheduling Order at attach. A (May 8, 2015) (unpublished).

¹² 10 C.F.R. § 2.342(a).

pending filing of and a decision on a petition for review” must be filed with 10 days of service of the decision.¹³ When determining whether the granting of a stay motion is justified, the presiding officer must consider

- (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
- (2) Whether the party will be irreparably injured unless a stay is granted;
- (3) Whether the granting of a stay would harm other parties; and
- (4) Where the public interest lies.¹⁴

Irreparable harm is the most important of these factors.¹⁵ Where irreparable harm cannot be shown, a movant’s showing of likelihood to succeed on the merits must be “overwhelming” or a “virtual certainty.”¹⁶

It is important to note that “[i]nterlocutory appeals or petitions to the Commission are not devices for delaying or halting licensing board decision.”¹⁷ It is for that reason that the filing of a petition for review with the Commission does not, on its own, “stay[] the proceeding or extend[] the time for the performance of any act.”¹⁸ Rather the standard set by section 2.342(e) is “stringent” and “only in unusual cases should the normal discovery and other processes be delayed pending the outcome of an appeal or petition to the Commission.”¹⁹

¹³ Id. Should a motion for a stay be based upon some occurrence subsequent to the decision that is the subject of appeal, then the stay motion must be filed within 10 days of that occurrence. 10 C.F.R. § 2.323(b).

¹⁴ 10 C.F.R. § 2.342(e).

¹⁵ See Sequoyah Fuels Corp. & General Atomics (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 7 (1994).

¹⁶ Sequoyah Fuels Corp., CLI-94-9, 40 NRC at 7; see also Amergen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-08-13, 67 NRC 396, 399 (2008); Shieldalloy Metallurgical Corp. (Decommissioning of the Newfield, N.J. Site), CLI-10-8, 71 NRC 142, 154 (2010).

¹⁷ Sequoyah Fuels Corp., CLI-94-9, 40 NRC at 6.

¹⁸ 10 C.F.R. § 2.323(g).

¹⁹ Sequoyah Fuels Corp., CLI-94-9, 40 NRC at 6.

III. Discussion

The initial scheduling order for this proceeding, which was issued today after prior consultation with the parties, establishes a schedule leading up to a January 2016 evidentiary hearing, in lieu of the September 2015 hearing initially envisioned. The NRC Staff opposes FPL's motion for a stay, arguing that it is premature given the tentative nature of the Board's April 13 tentative scheduling order.²⁰ The Board agrees. In light of the new schedule's delayed briefing schedule, as well as the reasons set forth below, the Board denies FPL's motion to stay the proceeding.

First, the Board disagrees with FPL's characterization of the tentative hearing schedule as "expedited." The Board used the Model Milestones for Subpart L proceedings contained in 10 C.F.R. Part 2, Appendix B as the "starting point" for developing a hearing schedule.²¹ The milestones establish timeframes proceeding from issuance of the NRC Staff's review documents, typically well after a licensing board's decision on the initial intervention petition and the admission of any contentions. Here, by contrast, the NRC issued its safety evaluation report and environmental assessment last summer, prior to issuance of the subject license amendments, and prior to CASE's petition to intervene. Although the milestones call for an evidentiary hearing "[w]ithin 175 days of issuance of [the] SER and NEPA document,"²² those dates were infeasible having predated CASE's opportunity to request a hearing. Accordingly, the Board chose to target the tentative hearing date for 175 days following the Board's decision granting CASE's intervention petition (i.e., September 14, 2015).

Second, FPL argues that, should an evidentiary hearing on the admitted contention be completed prior to Commission action on its appeal, it "would irreparably harm FPL by depriving it of the procedural right to obtain meaningful interlocutory review of the Board's decision granting

²⁰ NRC Staff Stay Motion Answer at 3.

²¹ See 10 C.F.R. Part 2, App. B(II).

²² Id.

CASE's hearing request."²³ This statement fails to show that FPL will suffer irreparable harm in the absence of a stay. There is no reason to assume that the Commission will fail to act on FPL's appeal prior to September 2015. And, even were the Commission not to act prior to the start of an evidentiary hearing, the only injury FPL could claim would be the forced expenditure of time and resources devoted to discovery and hearing preparation. This does not constitute irreparable harm. "The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough."²⁴

Third, FPL argues that its appeal is likely to succeed because the Board erred in granting CASE standing in this proceeding and admitting CASE's contention.²⁵ FPL points to the NRC Staff's appeal to bolster its conclusion that the Board's decision is flawed.²⁶ The Board obviously does not share FPL's or the NRC Staff's positions on CASE's standing and the admissibility of the subject contention—as evidenced by the fact that it has accorded CASE standing and admitted that contention. Mere conclusory arguments that the Board has erred are scarcely sufficient to meet FPL's required showing,²⁷ especially in light of the absence of demonstrated irreparable harm. FPL cannot show overwhelming likelihood of success on the merits, much less virtual certainty.

In the absence of a strong showing as to the first two factors, little need be said about the final two factors.²⁸ FPL claims that a stay would have little impact upon the relief available to

²³ Stay Motion at 3.

²⁴ Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958).

²⁵ See Stay Motion at 2-3.

²⁶ Id. at 3.

²⁷ See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804-05 (1984).

²⁸ See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-810, 21 NRC 1616, 1620 (1985).

CASE and that “[t]here is no public interest in holding an unnecessary hearing.”²⁹ But, FPL fails to acknowledge the damage to the public interest that would be done by delaying a necessary hearing. Moreover, FPL’s claims that ongoing state proceedings create resource constraints may speak to FPL’s private interest, but they are unrelated to the public interest, and so do not weigh in favor of granting a stay.³⁰ In fact, the Board extends the filing deadlines in the initial scheduling order to allow for additional fact-finding that may result from these very same state proceedings.

IV. Conclusion

In light of the foregoing, FPL’s motion for a stay of the evidentiary hearing in this proceeding pending Commission action on its appeal of the admitted contention is denied.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Michael M. Gibson, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Michael F. Kennedy
ADMINISTRATIVE JUDGE

/RA/

Dr. William W. Sager
ADMINISTRATIVE JUDGE

Rockville, Maryland
May 8, 2015

²⁹ Stay Motion at 3-4.

³⁰ See Va. Petroleum Jobbers Ass’n, 259 F.2d at 925.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **ORDER (Denying FPL's Motion to Stay Hearing)** have been served upon the following persons by Electronic Information Exchange or via electronic mail as indicated by an asterisk.

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Turkey Point, Units 3 & 4, Docket Nos. 50-250 and 50-251-LA
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[Original signed by Herald M. Speiser]
Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 8th day of May, 2015