UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Allison M. Macfarlane, Chairman
Kristine L. Svinicki
William C. Ostendorff
Jeff Baran
Stephen G. Burns

In the Matter of	)	
FLORIDA POWER & LIGHT COMPANY	)	Docket No. 50-389
(St. Lucie Plant, Unit 2)	)	

CLI-14-11

MEMORANDUM AND ORDER

We rule today on the hearing request of the Southern Alliance for Clean Energy (SACE) on what SACE characterizes as the *de facto* amendment of the operating license held by Florida Power & Light (FPL) for St. Lucie Unit 2 concerning design changes associated with the installation of replacement steam generators.[1] This decision follows our denial of SACE's accompanying request to stay restart of St. Lucie Unit 2 from a refueling outage pending resolution of the hearing request.[2] We deny SACE's hearing request for the reasons discussed

[1] *Southern Alliance for Clean Energy's Hearing Request Regarding* De Facto *Amendment of St. Lucie Unit 2 Operating License* (Mar. 10, 2014) (Hearing Request).

[2] *Florida Power & Light Co.* (St. Lucie Plant, Unit 2), CLI-14-4, 79 NRC 249 (2014); *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* (Mar. 10, 2014) (Stay Request).

below but refer SACE's safety concerns to the Executive Director for Operations for disposition pursuant to 10 C.F.R. § 2.206.

I. BACKGROUND

SACE's hearing request arises from the replacement of two steam generators at St. Lucie Unit 2 in 2007. FPL replaced the steam generators in accordance with the provisions of 10 C.F.R. § 50.59, which allows licensees to (among other things) make changes to a facility without obtaining a license amendment if certain criteria are satisfied.[3] FPL prepared an evaluation pursuant to 10 C.F.R. § 50.59 and concluded that the replacement could be accomplished without a license amendment.[4] The NRC Staff's subsequent review of the steam generator replacement, including FPL's section 50.59 evaluation, identified no findings of significance.[5]

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[3] Section 50.59 sets forth the circumstances under which a licensee may make changes to the facility as described in its Updated Final Safety Analysis Report (UFSAR), make changes in the procedures described in the UFSAR, and conduct tests or experiments not otherwise described in the UFSAR without obtaining a license amendment under 10 C.F.R. § 50.90. *See* 10 C.F.R. § 50.59(c)(1).

[4] *See Declaration of William A. Cross* (Apr. 28, 2014) ¶¶ 4-9 (Attachment 1 to *Florida Power & Light Company's Answer Opposing Southern Alliance for Clean Energy's Hearing Request Regarding De Facto License Amendment of St. Lucie Unit 2 Operating License* (Apr. 28, 2014) (FPL Answer)); Johnston, Gordon L., Site Vice President, St. Lucie Plant, letter to NRC, L-2008-148, "Report of 10 CFR 50.59 Plant Changes" (June 26, 2008), at 8 (ADAMS Accession No. ML081840111). 10 C.F.R. § 50.59(d)(1) requires that the licensee maintain records of changes in the facility made pursuant to section 50.59(c)(1) that include "a written evaluation which provides the bases for the determination that the change . . . does not require a license amendment pursuant to" section 50.59(c)(2).

[5] *See 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 (Mar. 20, 2014), at 2; *Affidavit of Omar R. López-Santiago Concerning SACE's Claims Regarding Staff's Steam Generator Inservice Inspection* (Mar. 20, 2014) ¶¶ 7-10 (Attachment 2 to the FPL Answer); St. Lucie Nuclear Plant – NRC Integrated Inspection Report 05000335/2007005, 05000389/2007005, "Unit 2 Steam Generator Replacement Inspection (IP 50001)" (Feb. 1, 2008), § 4OA5.3, at 27-33 (ML080350408).

In February 2011, FPL requested a license amendment to increase the licensed core power level of Unit 2 from 2700 megawatts thermal to 3020 megawatts thermal—a so-called "extended power uprate" representing a net increase in core thermal power of approximately 11.85 percent.[6] Among other things, FPL's amendment request included an evaluation of the impact of the proposed extended power uprate on the replacement steam generators and associated supports.[7] No hearing requests were submitted.[8] The NRC Staff reviewed the request and prepared a safety evaluation report, and the license amendment was issued on September 24, 2012.[9]

FPL shut down Unit 2 for a scheduled refueling outage on March 3, 2014. The Unit 2 operating license requires FPL to inspect and verify steam generator tube integrity in accordance with its Steam Generator Program and to submit the inspection results to the NRC.[10] FPL notified the Staff that steam generator inspection activities would be performed

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[6] Anderson, Richard L., FPL, letter to NRC Document Control Desk, "License Amendment Request for Extended Power Uprate" (Feb. 25, 2011), at 1 (ML110730116). The complete license amendment request is available in ADAMS package ML110730268. Some portions are proprietary and thus not publicly available.

[7] Licensing Report, § 2.2.2.5, "Steam Generators and Supports" (Attachment 5 to the license amendment request) (ML110730299) (public).

[8] *NRC Staff Answer to Southern Alliance for Clean Energy's Hearing Request Regarding* De Facto *Amendment of St Lucie Unit 2 Operating License* (Apr. 28, 2014), at 5 (Staff Answer). *See generally* 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).

[9] Orf, Tracy, NRC letter to Mano Nazar, FPL, "St. Lucie Plant, Unit 2 – Issuance of Amendment Regarding Extended Power Uprate" (Sept. 24, 2012), Enclosure 2, "Safety Evaluation by the Office of Nuclear Reactor Regulation Related to Amendment No. 163 to Facility Operating License No. NPF-16 Florida Power and Light Company St. Lucie Plant, Unit 2 Docket No. 50-389" (ML12235A463).

[10] Docket No. 50-389, St. Lucie Plant, Unit No. 2, Renewed Facility Operating License No. NPF-16 with Technical Specifications at 6.8.4.l.1.a (revised Feb. 7, 2014) (ML052800077).

during the 2014 refueling outage.[11] The Staff completed an inspection that included steam generator tube examinations on March 1, 2014.[12]

SACE now seeks an adjudicatory hearing to challenge the "NRC Staff's ongoing process for *de facto* approval of significant changes that FPL made to the safety design of the Unit 2 steam generators when it installed replacement steam generators (RSGs) in 2007."[13] According to SACE, the steam generator installation caused design alterations that required a license amendment. SACE further claims that the Staff, by permitting FPL to operate with those alterations, has effectively approved an amendment of FPL's license.[14]

SACE claims that its hearing request is timely because it was filed within sixty days of the most recent Staff "regulatory actions" permitting operation with the replacement steam generators.[15] Alternatively, SACE asks that we grant its hearing request on the ground that it has satisfied the standard for admitting untimely filings. In the event that it is not granted a hearing as of right, SACE asks that we grant a discretionary hearing to ensure the airing and resolution of the issues it raises.[16] SACE claims that it has no other means of protecting its

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[11] *Id.* at 6-20f. FPL informed the NRC that the inspection performed during this refueling outage (RFO21) included, among other steam generator inspections, a bobbin probe examination of 100 percent of unplugged tubes. Katzman, E.S., FPL, letter to NRC Document Control Desk, "SL2-20 Steam Generator Tube Inspection Report RAI Reply" (Nov. 26, 2013), Attachment at 4 (ML13338A582).

[12] Inspection Report 05000389/2014008 (May 2, 2014), at 509 (enclosed in López-Santiago, Omar, letter to Mano Nazar, FPL, "St Lucie Plant Unit 2 – NRC Inspection Report 05000389/2014008" (May 2, 2014) (ML14122A091)).

[13] Hearing Request at 1.

[14] *Id.* at 2.

[15] *Id.* at 21-22 (relying upon correspondence from the NRC Staff dated January 27 and February 24, 2014); *see also Declaration of Arnold Gundersen* (Mar. 9, 2014), ¶¶ 56-57 (Attachment 1 to the Hearing Request) (Gundersen Decl.).

[16] Hearing Request at 1.

interests because a petition under 10 C.F.R. § 2.206 offers no meaningful recourse given that it is the Staff's actions that SACE challenges.[17]

The NRC Staff and FPL oppose SACE's hearing request.[18] The Staff argues that there has been no actual or *de facto* license amendment proceeding to trigger the opportunity for a hearing under Section 189a. of the Atomic Energy Act of 1954 (AEA) and that SACE's hearing request does not satisfy the standing, contention admissibility, or timeliness requirements.[19] FPL argues that SACE's hearing request should be denied because (1) there is no proceeding in which SACE may intervene, (2) SACE has failed to demonstrate standing, (3) its hearing request is untimely, and (4) its contentions fail to meet NRC standards for admissibility.[20]

II. DISCUSSION

To obtain a hearing, a petitioner must show that its hearing request is timely, that it has standing to obtain a hearing, and that it has proposed at least one admissible contention.[21] For

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[17] *Id*. at 24.

[18] *See* Staff Answer; FPL Answer.

[19] Staff Answer at 2.

[20] FPL Answer at 1. The Nuclear Energy Institute (NEI) has requested leave to file a brief *amicus curiae* addressing the process established in 10 C.F.R. § 50.59 for licensee changes, the precedent for resolving challenges to changes made under that process, and whether use of that process for replacement of steam generators at St. Lucie in 2007 constitutes a *de facto* license amendment. *Nuclear Energy Institute Motion for Leave to File Amicus Curiae Brief* (Apr. 28, 2014), and *Amicus Curiae Brief of the Nuclear Energy Institute in Response to Southern Alliance for Clean Energy Hearing Request* (Apr. 28, 2014). SACE requests that we reject NEI's arguments. *Southern Alliance for Clean Energy's Brief in Response to Nuclear Energy Institute Amicus Brief* (May 23, 2014) (SACE Response to NEI). Our regulation at 10 C.F.R. § 2.315(d) provides for the filing of *amicus curiae* briefs when we have taken up a matter pursuant to § 2.341 or *sua sponte*, neither of which is the case here. While our rules do not provide for the filing of *amicus curiae* briefs on motions filed pursuant to 10 C.F.R. § 2.323, as a matter of discretion we have reviewed both NEI's brief and SACE's opposition. *See Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-13-9, 78 NRC 551, 556 n.17 (2013).

[21] 10 C.F.R. § 2.309(a)-(f).

the reasons discussed below, we find SACE's hearing request untimely and deny it on that basis. Because we deny SACE's hearing request on timeliness grounds, we need not address whether SACE has established standing or the admissibility of SACE's proposed contentions.[22]

A. SACE's Hearing Request is Untimely

The NRC standards for timeliness of hearing requests are set forth in 10 C.F.R. § 2.309(b). For proceedings for which a *Federal Register* notice of agency action is published, the hearing request must be filed not later than the time specified in the notice of proposed action.[23] For proceedings in which a *Federal Register* notice is not published, the hearing request shall be filed by the later of (i) sixty days after publication of notice on the NRC web site or (ii) sixty days after the requestor receives actual notice of a pending application, but not more than sixty days after agency action on the application.[24]

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[22] SACE filed two amended hearing requests in support of its proffered contentions. *Southern Alliance for Clean Energy's Amended Hearing Request Regarding De Facto Amendment of St. Lucie Unit 2 Operating License* (Apr. 25, 2014); *Southern Alliance for Clean Energy's Motion for Leave to Amend Hearing Request with Second Supplemental Declaration of Arnold Gundersen* (Nov. 6, 2014). Both FPL and the Staff oppose these requests. *Florida Power & Light Company's Answer Opposing Southern Alliance for Clean Energy's Motion for Leave to Amend Hearing Request* (May 20, 2014); *NRC Staff Answer to Southern Alliance for Clean Energy's Motion for Leave to Amend Hearing Request Regarding De Facto Amendment of St. Lucie Unit 2 Operating License* (May 20, 2014); *Florida Power & Light Company's Answer Opposing Southern Alliance for Clean Energy's Second Motion for Leave to Amend Hearing Request* (Nov. 26, 2014); *NRC Staff Answer to Southern Alliance for Clean Energy's Motion for Leave to Amend Hearing Request with Second Supplemental Declaration of Arnold Gundersen* (Dec. 1, 2014). SACE filed replies to FPL's and the Staff's answers. *Southern Alliance for Clean Energy's Reply to Answers by Florida Power & Light Co. and NRC Staff to Amended Hearing Request* (May 27, 2014) (SACE Reply to Answers); *Florida Power & Light Company's Answer Opposing Southern Alliance for Clean Energy's Second Motion for Leave to Amend Hearing Request* (Nov. 26, 2014); *NRC Staff Answer to Southern Alliance for Clean Energy's Motion for Leave to Amend Hearing Request with Second Supplemental Declaration of Arnold Gundersen* (Dec. 1, 2014). Because we deny SACE's hearing request without reaching a judgment on the admissibility of SACE's proffered contentions, we need not address SACE's amended hearing requests.

[23] 10 C.F.R. § 2.309(b)(3)(i).

[24] *Id.* § 2.309(a)-(f).

As discussed above, FPL installed the replacement generators in 2007 after performing an evaluation under section 50.59 and determining that the replacement did not require a license amendment. Therefore, there was no associated agency action requiring notice. Nonetheless, SACE argues that its hearing request meets our timeliness standard under the theory that the Staff's approval of a *de facto* amendment has been "ongoing" since 2007, and will continue into the future, with each Staff decision that "implicitly sanctions" the use of the replacement steam generators.[25] SACE contends that the Staff has "implicitly sanctioned" the steam generator design changes each time it has reviewed the results of FPL's outage inspections of the steam generators and determined that the results do not warrant regulatory action.[26] As examples of these actions, SACE cites two letters from the Staff to FPL, dated November 30, 2010, and January 27, 2014, in which the Staff stated that it had determined, based upon reviews of FPL inspections of the steam generators, that no follow-up action was necessary.[27] SACE cites to a third letter to support its claim that the *de facto* amendment is continuing. Specifically SACE cites a February 24, 2014 letter from the Staff requesting information relating to a then-planned, steam generator tube inspection during the 2014 refueling outage and notifying FPL of a planned Staff baseline inservice inspection during the

[25] Hearing Request at 21.

[26] *Id.;* Gundersen Decl. ¶¶ 52-58. Mr. Gundersen asserts that the "alternating pattern of information-gathering and regulatory decision-making by the NRC shows not only that the NRC has informally amended FPL's operating license on multiple occasions by approving continued operation with equipment that is clearly outside the reactor's design basis; and that the approval process continues as the Staff continues to gather and assess information about the faulty [replacement steam generators]." *Id.* ¶ 58.

[27] Hearing Request at 21; Gundersen Decl. ¶¶ 53, 56 (citing Orf, Tracy, NRC, letter to Mano Nazar, FPL, "St. Lucie Unit 2—Summary of the Staff's Review of the 2009 Steam Generator Tube Inservice Inspections (TAC No. ME2969)" (Nov. 30, 2010) (ML103340040) and Lingam, Siva, NRC, letter to Mano Nazar, FPL, "St. Lucie Plant, Unit 2—Review of the 2012 Refueling Outage Steam Generator Tube Inservice Inspection Report (TAC No. MF1786)" (Jan. 27, 2014) (ML14013A247) (January 2014 Letter)).

same outage.[28] SACE argues that its hearing request should be considered timely because the request was filed on March 10, 2014, within sixty days of the Staff's January and February 2014 correspondence.[29]

As an initial matter, we do not accept SACE's premise that each cited Staff communication should be considered as an element of a single, overarching action that dates back to 2007. SACE argues that a *de facto* license amendment has been granted as a result of a series of Staff actions and activities relating to plant oversight dating back to 2007, including the 2012 approval of the extended power uprate amendment and continuing with subsequent routine Staff inspection and oversight activities. But SACE conflates NRC licensing and oversight activities. This distinction between licensing and oversight activities is central to our evaluation of the timeliness of SACE's hearing request because only certain activities trigger the opportunity for a hearing. Specifically, AEA section 189a. requires the Commission to afford interested persons an opportunity for a hearing on "the granting, suspending, revoking or amending of any license."[30] A licensee cannot amend the terms of its license unilaterally.[31] Agency approval or authorization is a necessary component of Commission action that affords a hearing opportunity under section 189a., but not all agency approvals granted to licensees

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[28] Hearing Request at 21-22. Regarding the activities scheduled for the 2014 refueling outage, SACE cites a Staff statement that FPL had committed to inspect 100 percent of the steam generator tubes during a February 19, 2014 meeting, a Staff request for information about the inspection, and a notice of its plan to conduct a baseline inservice inspection at Unit 2 during the outage. Gundersen Decl. ¶ 57 (citing López-Santiago, Omar, NRC, letter to Mano Nazar, FPL, "St. Lucie Nuclear Plant, Unit 2—Notification of Inspection and Request for Information") (Feb. 24, 2014) (ML14056A110) (February 2014 Letter)).

[29] SACE concedes that its hearing request is untimely if timeliness is measured from Staff actions that predate its January and February 2014 correspondence. Hearing Request at 22.

[30] 42 U.S.C. § 2239(a)(1)(A).

[31] *See* 10 C.F.R. § 50.90 ("Whenever a holder of a license . . . desires to amend the license . . . [,] application for an amendment must be filed with the Commission . . . .").

constitute *de facto* license amendments.[32] To determine whether an approval constitutes a *de facto* license amendment, we have articulated two key factors to consider: Whether the approval (1) granted the licensee any greater operating authority or (2) otherwise altered the original terms of a license.[33]

In contrast to the issuance of a license amendment, NRC oversight of a facility does not approve or authorize changes to an NRC license. NRC oversight activities, such as inspections, performance assessments, and enforcement, are conducted to ensure that licensees comply with NRC requirements and license conditions.[34] But neither licensee activities nor NRC inspection of (or inquiry about) those activities provides the opportunity for a hearing under the AEA because those activities only concern compliance with the terms of an existing license.[35]

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[32] *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315, 326 (1996).

[33] *Id*. We note that SACE cites the recent licensing board decision in *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-13-7, 77 NRC 307, *vacated as moot*, CLI-13-9, 78 NRC 551 (2013), to support its claims that the Staff's inspection and oversight of FPL's actions are part of an ongoing *de facto* license amendment. Hearing Request at 3 (observing that like the process the Board considered in *San Onofre*, "the NRC Staff's process for amending the Unit 2 operating license is also 'protracted and evolving'"). But prior *de facto* license amendment precedents have examined whether agency actions constituted *de facto* license amendments. *See, e.g.*, *Perry,* CLI-96-13, 44 NRC at 326; *Citizens Awareness Network, Inc. v. NRC*, 59 F.2d 284, 292 (1st Cir. 1995). Thus, to the extent *San Onofre* found that unilateral licensee activities can constitute *de facto* license amendments, *San Onofre,* 77 NRC at 325-26, 338-39 (considering whether the licensee's proposed, unapproved activities constituted a *de facto* license amendment), we decline to adopt that Board's reasoning here.

[34] *See* NRC Enforcement Policy (Jan. 28, 2013) § 1.0, at 4 (ML13228A199).

[35] *See Kelley v. Selin,* 42 F.3d 1501,1515 (6th Cir. 1995); *Massachusetts v. NRC*, 878 F.2d 1516, 1521-22 (1st Cir. 1989) ("Nor is this a case where the NRC has changed Edison's license in such a way that Edison is no longer required to follow NRC's regulations and rules. Rather, this is a case where the NRC has temporarily exempted the licensee, on the basis of an existing rule, from one of many rules made generally applicable by the license. This does not amount to a license amendment."). This distinction with respect to hearing rights was discussed at some length by the Appeal Board considering a challenge to low-power testing performance in *Public*

(continued . . .)

Applying this distinction to the case at hand, we consider SACE's claim that the Staff approved FPL's installation of the replacement steam generators and, since that time, has engaged in an ongoing process of revisiting and sanctioning that approval. Specifically, SACE claims that the Staff has approved, and is continuing to approve, a *de facto* amendment each time it reviews the condition of the Unit 2 steam generators and makes a regulatory finding that allows FPL to continue operating with the replacement generators.[36] SACE relies on Staff correspondence dated January 27 and February 24, 2014, to support its claim that the *de facto* amendment remains ongoing, as the Staff continues to review the condition of the steam generators.[37] We decline to ascribe a hearing opportunity to these letters because NRC oversight activities gathering information about and evaluating plant performance, regardless of the findings it makes, do not alter the conditions of a license and, therefore, cannot form the basis for the right to request a hearing.[38]

Underpinning SACE's argument is the assumption that each time the Staff reviewed the condition of the steam generators and did not take regulatory action, it revisited the installation of replacement steam generators and permitted plant operation despite "the gross mismatch between the requirements of Unit 2's license and technical specifications and the changed design of the [replacement steam generators]."[39] We disagree. SACE is not entitled to a

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Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-940, 32 NRC 225, 234-38 (1990).

[36] Hearing Request at 21 (referring to the Staff's review of the "deteriorating condition of the Unit 2 steam generators and issu[ance] of an affirmative finding that no regulatory action was warranted").

[37] Hearing Request at 22-23; Gundersen Decl. ¶¶ 54, 57; *see* January 2014 Letter; February 2014 Letter.

[38] *See Perry,* CLI-96-13, 44 NRC at 326.

[39] Hearing Request at 21.

hearing concerning a change implemented through the section 50.59 process based upon the theory that this change was somehow ratified by the Staff's January 24 or February 24, 2014, correspondence—the only Staff activities that took place in the sixty-day window preceding SACE's petition. The Staff judgment documented in those letters that no regulatory action is necessary does not satisfy our test in *Perry*. Indeed, if a hearing could be invoked each time the NRC engaged in oversight over or inquiry into plant conditions, the NRC's administrative process could be brought to a virtual standstill.[40]

In short, SACE's hearing request was not filed within sixty days of a licensing action that provided the opportunity for a hearing. On that basis, we find SACE's hearing request untimely. Although we base our conclusion on timeliness grounds and, therefore, need not reach the question whether SACE could have sought a hearing at the time of the steam generator replacement, we emphasize that the appropriate means of challenging licensee actions undertaken in accordance with 10 C.F.R. § 50.59 is through a petition under 10 C.F.R. § 2.206.[41]

B. SACE Has Not Shown Good Cause for Its Untimely Hearing Request

SACE argues that, even if its hearing request does not satisfy the sixty-day timeliness standard in 10 C.F.R. § 2.309(b)(4)(ii), it has shown good cause for its untimely filing. Under our rules, we do not consider hearing requests after the deadline in section 2.309(b) has passed absent a determination that the petitioner has demonstrated good cause by showing the following criteria have been met:

> (i) The information upon which the filing is based was not previously available;

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[40] *See Kelley,* 42 F.3d at 1514 (citing *Bellotti,* 725 F.2d at 1382).

[41] *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-12-20, 76 NRC 437, 439-40 (2012); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 101 n.7 (1994).

(ii) The information upon which the filing is based is materially different from information previously available; and

(iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.[42]

Fundamentally, SACE's good cause arguments are predicated on its claim that it was not provided adequate notice of the Staff's approval of the design changes associated with the 2007 installation of the replacement steam generators at Unit 2. As discussed above, we decline to find an ongoing, *de facto* license amendment proceeding that began with the steam generator replacement. For the same reason, we reject SACE's arguments to the extent they are based upon the assertion that the lack of a hearing on the steam generator replacement in 2007 *itself* constitutes good cause for SACE's untimeliness. We consider, however, SACE's claims that new information supplies justification for its untimely request.

SACE claims that it only recently was able to put together a complete picture of the design changes resulting from FPL's installation of the replacement steam generators because the underlying information was "misrepresented, scattered, or buried."[43] Specifically, SACE asserts that FPL provided inaccurate information concerning the scope of the design changes in its section 50.59 evaluation and that SACE did not become aware of the true magnitude of the changes until they became public during a 2013 licensing board proceeding pertaining to the replacement of the steam generators at San Onofre Nuclear Generating Station.[44] We do not

[42] 10 C.F.R. § 2.309(c)(1).

[43] Hearing Request at 23 (citing Gundersen Decl. ¶ 47 (asserting that FPL misrepresented changes made as part of the steam generator replacement)).

[44] SACE asserts that the removal of the stay cylinder (a cylindrically shaped structure that provided structural support to the tubesheet in the original steam generators) did not become public information until it was disclosed when the San Onofre steam generator design was compared to other reactors where stay cylinders had been removed. Hearing Request at 23; Gundersen Decl. ¶ 47; *see San Onofre*, LBP-13-7.

consider these assertions to constitute good cause. As an initial matter, it would be incongruent to find an asserted misrepresentation made in the licensee's section 50.59 analysis—which is properly challenged through a section 2.206 petition rather than via a hearing request—to be a justification for a late hearing request.

Moreover, as noted above, the results of an NRC inspection performed after the steam generator replacement, which included review of FPL's section 50.59 analysis, identified no findings of significance.[45] Finally, while SACE asserts that it only became aware of the nature of the design modifications associated with the steam generator replacement during the *San Onofre* proceeding, SACE did not file its hearing request until March 2014, more than ten months after the Board's May 2013 merits ruling in *San Onofre.*[46] Thus, even if the delayed disclosure of the design of the new steam generators constituted good cause for an untimely filing, SACE has not provided an explanation for waiting until March 2014 to request a hearing with respect to a change implemented more than seven years earlier.

SACE also argues that the Staff, in approving the extended power uprate amendment, approved the design changes associated with the 2007 steam generator replacement, without providing notice to the public that it did so.[47] Specifically, SACE asserts that FPL's amendment request included only limited information regarding the design of the replacement steam generators, without identifying, in a comprehensive or systematic way, the design features of the original steam generators that were removed or changed.[48]

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[45] *See* note 5, *supra.*

[46] *See San Onofre,* LBP-13-7, 77 NRC at 307.

[47] SACE Reply to Oppositions at 1-2, 5-12; SACE Response to NEI at 1-2; SACE Reply to Answers at 2-4.

[48] SACE Reply to Oppositions at 7-9.

We find SACE's argument relating to the extended power uprate amendment misplaced. That amendment did not approve, and did not purport to approve, the installation of the replacement steam generators that had occurred five years earlier. We agree with FPL and the Staff that the extended power uprate amendment merely approved operation of St. Lucie Unit 2 at a higher power level with the already-replaced steam generators.[49]

Nor do we find support for SACE's claim that the extended power uprate amendment had the additional, "secret" purpose of approving all the design changes associated with the installation of the steam generators that occurred five years earlier.[50] In particular, we find no merit in SACE's claim that FPL and the Staff effectively conceded as much in their filings. To the contrary, FPL stated that the purpose of the license amendment request was to permit an extended power uprate at St. Lucie Unit 2.[51] The Staff simply acknowledged that FPL's extended power uprate amendment application requested authorization to use the replacement steam generators at higher power levels.[52] Neither FPL nor the Staff alluded to any other purpose underlying the extended power uprate amendment, and we find no ulterior motive.[53]

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[49] Staff Answer at 8-9; FPL Answer at 5, 13. The NRC's safety evaluation included a review of FPL's evaluation of the effects of the proposed extended power uprate on the integrity of replacement steam generators. The Staff concluded that FPL had demonstrated that tube integrity would continue to be maintained and meet the relevant performance and regulatory criteria. "Safety Evaluation by the Office of Nuclear Reactor Regulation Related to Amendment No. 163 to Facility Operating License No. NPF-16 Florida Power and Light Co St. Lucie Plan, Unit No. 2 Docket No. 50-389," (Sept. 24, 2012), at 38-39 (Attachment 2 to Orf, Tracy, NRC, letter to Mano Nazar, FPL, "St. Lucie Plant, Unit 2—Issuance of Amendment Regarding Extended Power Uprate (TAC No. ME5843)" (Sept. 24, 2012) (ML12235A463)).

[50] SACE Reply to Oppositions at 1-3; SACE Reply to Answers at 1-3.

[51] FPL Answer at 5.

[52] Staff Answer at 8-9.

[53] *Cf. Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-03-2, 57 NRC 19, 29 (2003) ("We have long declined to assume that licensees will refuse to meet their obligations under their licenses or our regulations." (footnote omitted)).

SACE's assertion that FPL replaced the steam generators under section 50.59 but, five years later, effectively requested NRC approval for that action in a license amendment request, also lacks support. Given that FPL replaced the steam generators in 2007 and the Staff's 2008 inspection of FPL's section 50.59 analysis resulted in no findings of significance,[54] FPL would have had no reason to request retroactive approval when it sought the extended power uprate amendment. Because, as noted above, the extended power uprate amendment request did not seek approval of the installation of the replacement steam generators, there was no requirement that the notice of the proposed amendment disclose, other than as necessary to provide the requisite context for the amendment request, the design changes associated with the replacement of the steam generators.[55] As a result, we reject SACE's claim that notice of the extended power uprate license amendment was inadequate and that this inadequacy excuses its untimeliness.[56]

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[54] Staff Answer at 5; FPL Answer at 4.

[55] Had SACE timely requested a hearing on the extended power uprate amendment request, its contentions would have been limited to matters appropriately within the scope of that application (e.g., challenges to the proposed extended power uprate as they related to the replacement steam generators, which were in place at the time FPL requested the amendment). The scope of an adjudicatory hearing is limited to the notice of hearing, which in licensing matters normally extends only to the application at issue. *See, e.g.*, *South Texas Project Nuclear Operating Co.* (South Texas Project, Units 3 and 4), LBP-09-25, 70 NRC 889 & n.138 (2009) ("Here, the Notice of Hearing establishes that the permissible scope of the hearing is confined solely to the application.").

[56] For these same reasons, FPL's 2006 license amendment request to amend the technical specifications related to steam generator tube integrity, in line with Revision 4 to Technical Specification Task Force Standard Technical Specification Change Traveler, TSTF-449, "Steam Generator Tube Integrity," did not constitute an approval of the replacement steam generators design and therefore was adequately noticed. Biweekly Notice; Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations, 71 Fed. Reg. 40,742, 40,747-78 (July 18, 2006); *see* SACE Reply to Answers at 6.

For the above reasons, we reject SACE's hearing request on timeliness grounds. Nevertheless, SACE has another avenue for obtaining relief under 10 C.F.R. § 2.206, and we find that action under that provision is warranted below.

C. Referral Under 10 C.F.R. § 2.206

SACE asks us to take measures necessary to address the harm it asserts has occurred by not allowing a hearing prior to installation of the replacement steam generators. SACE argues that, if the steam generator design changes had been fully vetted in a hearing, it is possible that FPL would not have been allowed to remove or replace "major safety components"[57] that have resulted, in SACE's view, in a "high degree of damage" to the Unit 2 steam generator tubes.[58] SACE asks us to ensure that its concerns are heard and resolved in an informed way.[59]

SACE's request returns us to its argument that interested persons should have been offered the opportunity to request a hearing before FPL installed the replacement steam generators pursuant to section 50.59. But as we have explained above, hearing opportunities do not attach to licensee changes made under section 50.59 because they do not require NRC approval, and we decline to grant a discretionary hearing under these circumstances.[60] We have long held that a member of the public may challenge an action taken under section 50.59

[57] SACE states that changes to the design of the steam generators included removal of the stay cylinder, perforation of the central region of the tubesheet, the addition of 588 tubes in the central region, and the substitution of broached trefoil places for a lattice or egg crate support system. Hearing Request at 1-2; SACE Reply to Oppositions at 3-4; Gundersen Decl. ¶¶ 43-44, 59, 62.

[58] SACE Reply to Oppositions at 3-4; Gundersen Decl. ¶ 63.

[59] SACE Reply to Oppositions at 3-4.

[60] In any event, discretionary intervention is permitted under 10 C.F.R. § 2.309(e) only where at least one petitioner has established standing and at least one admissible contention has been admitted.

only by means of a petition for enforcement action under 10 C.F.R. § 2.206.[61] As we recently observed, this process provides stakeholders a forum to advance concerns and obtain full or partial relief, or written reasons why the requested relief is not warranted.[62] And as we have explained, we consider a section 2.206 petition a meaningful vehicle through which the public may seek review of safety-related concerns.[63] Accordingly, we refer SACE's safety concerns regarding the replacement steam generators at St. Lucie Unit 2 to the NRC Executive Director for Operations for disposition under 10 C.F.R. § 2.206.

III. CONCLUSION

For the reasons discussed above, we *deny* SACE's hearing request as untimely and *refer* it to the Executive Director for Operations for disposition under 10 C.F.R. § 2.206.

IT IS SO ORDERED.

For the Commission

NRC SEAL

/RA/

Rochelle C. Bavol
Acting Secretary of the Commission

Dated at Rockville, Maryland,
this 19th day of December, 2014

[61] *Yankee Rowe*, CLI-94-3, 39 NRC at 101 n.7.

[62] *San Onofre*, CLI-12-20, 76 NRC at 439-40.

[63] *Id.*

Concurring Opinion of Commissioner Baran

I concur in the majority's result and with the reasoning in this memorandum and order. However, I write separately to express my view that footnote 33 is unnecessary to resolve this matter. Although the licensing board decision in the *San Onofre* case was appealed, the Commission vacated the decision prior to the parties briefing the issues.[1] Further, the facts presented here do not require us to assess the merits of LBP-13-7. For these reasons, I would not include footnote 33 in this decision.

[1] *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-13-7, 77 NRC 307, *vacated as moot*, CLI-13-9, 78 NRC 551 (2013).