

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Commission

In the Matter of:)	
)	January 15, 2008
AmerGen Energy Company, LLC)	
(License Renewal for Oyster Creek Nuclear)	Docket No. 50-219-LR
Generating Station))	
)	
)	

**AMERGEN’S ANSWER OPPOSING PETITION FOR
STAY AND TO REOPEN THE RECORD**

On January 3, 2008, Nuclear Information Resource Service and various other organizations submitted a Petition to the Nuclear Regulatory Commission (“Commission” or “NRC”) requesting that the Commission suspend this and other license renewal proceedings, reopen the record in this proceeding, and take other specified actions.¹ On January 11, 2008, the Commission ordered that answers be submitted no later than January 18, 2008. AmerGen Energy Company, LLC (“AmerGen”) is voluntarily submitting this answer in opposition to the Petition, pursuant to 10 C.F.R. § 2.323(c), in advance of that deadline. As discussed below, the Petition should be denied because it does not comply with the regulatory standards applicable to motions seeking the relief sought by the Petition.

¹ “Petition By Nuclear Information And Resource Service; Jersey Shore Nuclear Watch, Inc.; Grandmothers, Mothers And More For Energy Safety; New Jersey Public Interest Research Group; New Jersey Sierra Club; New Jersey Environmental Federation; Riverkeeper, Inc.; Pilgrim Watch And New England Coalition To Suspend License Renewal Reviews For Oyster Creek, Indian Point, Pilgrim, And Vermont Yankee Nuclear Power Plants Pending Investigation Of NRC Staff Review Process And Correction Of Deficiencies” (Jan. 3, 2008) (“Pet.”).

BACKGROUND

AmerGen submitted an application for renewal of the Operating License for Oyster Creek on July 22, 2005 (*available in ADAMS at ML052080185*). The NRC Staff has reviewed the application, and has issued a Supplemental Environmental Impact Statement dated January 19, 2007, *available in ADAMS at ML070100234 and ML070100258 (72 Fed. Reg. 2715 (Jan. 22, 2007))* and a Final Safety Evaluation Report dated March 30, 2007 (*available in ADAMS at ML070890637; see also NRC Staff Exh. 1; Applic. Exh. 15*). The Advisory Committee on Reactor Safeguards has reviewed the application and the NRC Safety Evaluation Report and provided the Commission with a report of its review and recommendations dated February 8, 2007. *Available in ADAMS at ML070430429; NRC Staff Exh. 3.*

Nuclear Information And Resource Service; Jersey Shore Nuclear Watch, Inc.; Grandmothers, Mothers And More For Energy Safety; New Jersey Public Interest Research Group; New Jersey Sierra Club; New Jersey Environmental Federation (collectively “Citizens”) are parties in a contested hearing on the Oyster Creek application. The Atomic Safety and Licensing Board (“ASLB”) conducted an evidentiary hearing in September 2007, and issued an Initial Decision on December 18, 2007, resolving the only remaining contention. LBP-07-17 (slip op.), *available in ADAMS at ML073520402*. Citizens filed a petition for review of the Initial Decision on January 14, 2008.² Thus, aside from the Commission’s review of the Initial Decision, all planned NRC reviews of the application have been completed.

The Petition is based primarily on Office of Inspector General (OIG) Audit Report OIG-07-A-15, Sept. 6, 2007 (“OIG Report”) concerning an audit of NRC’s License Renewal Program

² “Citizens’ Petition for Review of LBP-07-17 and the Interlocutory Decisions in the Oyster Creek Proceeding” (Jan. 14, 2008).

(Pet. at 3). The executive summary of the OIG Report includes the following introduction to its audit results: “Overall, NRC has developed a comprehensive license renewal process to evaluate applications for extended periods of operation. However, OIG identified areas where improvements would enhance program operations.” OIG Report at i.

In a recent memorandum, OIG stated that all of its recommendations relevant to the Petition have been resolved. (The one OIG recommendation remaining open is related to the backfit rule, and is not material to the Petition). *See* Memorandum to L. Reyes, Executive Director for Operations, from S. Dingbaum, Assistant Inspector General for Audits (Jan. 7, 2008), *available in* ADAMS at ML080070247. The OIG Report findings are not mentioned in the Inspector General’s Assessment of the Most Serious Management and Performance Challenges Facing NRC, OIG-07-A-20 (September 28, 2007), *available in* ADAMS at ML072710216. Moreover, the NRC Lessons-Learned Oversight Board determined that none of the recommendations in the OIG Report rose to the level of a lesson learned under Management Directive 6.8, which is based on criteria such as whether the issue has significant safety or generic implications. *See* Memorandum to L. Reyes, Executive Director for Operations from J. Wiggins, Chairman of the Lessons-Learned Oversight Board, (Jan. 3, 2008) *available in* ADAMS at ML073600202.

ARGUMENT

The Petition states that it should be treated as a general motion, Pet. at 7, and that it seeks suspension of this proceeding (Pet. at 1, 28, 30). It does not elaborate on what such a suspension would entail. As discussed above, the planned NRC Staff and ACRS reviews of the application, and the ASLB hearing have been completed. Only two further NRC actions are pending on AmerGen’s application: (1) the Commission’s review of Citizens’ expected appeal of the

ASLB's Initial Decision pursuant to 10 C.F.R. Part 2, and (2) the NRC Staff's issuance of the renewed license pursuant to 10 C.F.R. Part 54.

To the extent that the Petition seeks suspension of the Commission review, it could be considered a petition for review of the Initial Decision. The Petition, however, does not comply with the requirements applicable to such a petition. *See* 10 C.F.R. §§ 2.1210, 2.1212, and 2.341.

The Petition:

- (1) exceeds the 25 page limit (§ 2.341(b)(2));
- (2) does not provide a summary of the decision or action for which review is sought (§ 2.341(b)(2)(i)); and
- (3) does not identify where the matter was raised before the presiding officer (§ 2.341(b)(2)(ii)).

Failure to have raised the issue before the ASLB is generally sufficient reason to reject a review petition. *E.g., Hydro Resources, Inc.* (P.O. Box 777, Crownpoint, NM 87313), CLI-06-29, 64 NRC 417, 421 (2006). Citizens attempt to justify this failure by citing the limits on ASLB jurisdiction, Pet. at 7, but do not explain why they did not follow the process specified in 10 C.F.R. § 2.335 for seeking a waiver of such limits. Moreover, Citizens are merely advancing a new legal theory based on the same facts and documents they previously cited in the proceeding before the ASLB. *See* Citizens' Motion to Strike Erroneous Testimony at 2 (October 26, 2007) available in ADAMS at ML07310097 (*citing* the OIG Report); Initial Decision at 54-55 (denying Citizens' motion of Oct. 26, 2007); Citizens Exh. 20 (a letter dated November 9, 2006 to Citizens from the NRC discussing NRC's assessment of the Oyster Creek leakage monitoring issue that is discussed in the Petition at 17 to 19); Citizens Exh. 47 (an internal Oyster Creek memorandum concerning the leakage monitoring issue hearing, Bates No. OCLR00015508,

which indicates it was disclosed to Citizens on Jan. 26, 2007); Hearing Tr. at 523 (testimony of Citizens' expert witness Dr. Hausler).

Further, Citizens have filed a separate petition for Commission review of the Initial Decision. *See* "Citizens' Petition for Review of LBP-07-17 and the Interlocutory Decisions in the Oyster Creek Proceeding" (Jan. 14, 2008). Nothing asserted by the Petition would provide any basis for considering theories that could have been raised earlier apart from the Commission's review of the Initial Decision, let alone for delaying that review.

With respect to the NRC Staff action on the application, the Petition again does not comply with the regulations that specify a process for a party to seek a delay. *See* 10 C.F.R. § 2.1213 Application for a stay. The Petition:

- (1) is premature because it was filed before the licensing action, which has not yet occurred (*see* § 2.1213(a));
- (2) does not meet the 10 page limit (§ 2.1213(b)); and
- (3) does not provide grounds for stay with any reference to the applicable factors in § 2.1213(d) (§ 2.1213(b)(2)).

The Petition focuses on the adequacy of the NRC Staff's review of the application. These questions are outside the scope of the issues in the hearing, and the Petition concedes that the NRC Staff's review is "a subject the Commission has excluded from the purview of the ASLB." Pet. at 7. The Petition fails to show that Citizens would suffer any injury in the absence of a stay. *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 258 (1990) (denying a stay based on lack of showing of irreparable harm, and absence of a strong showing on the other factors). The Petition does not identify any error in the Initial Decision, or otherwise meeting their burden of showing that they have a strong likelihood of success on the merits. *See International Uranium (USA) Corp.* (White Mesa Uranium Mill),

CLI-02-10, 55 NRC 251, 259 (2002) (denying a stay, in part because movant's mere allegations, until substantiated, fell short of meeting the "likelihood of success" and "irreparable injury" requirements). Accordingly, Petitioners have not met their burden for issuance of a stay.

In addition to requesting suspension of the proceeding, Petitioners request the Commission to reopen the record so that the revised safety review they seek can form the basis of new contentions. Pet. at 31. The Petition, however, does not meet the NRC requirements for a motion to reopen in 10 C.F.R. § 2.326, because:

(1) The Petition does not address its timeliness, *see* § 2.326(a)(1), and it is not timely. The OIG Report that is the principal basis for the Petition is dated September 6, 2007, and ADAMS indicates that it was added to ADAMS on September 7, 2007. *Available in* ADAMS at ML072490486. Thus, the OIG Report was available to Citizens more than two weeks before the start of the evidentiary hearing, and almost four months before the date of the Petition. *See, e.g., Houston Lighting & Power* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-547, 9 NRC 638, 639 (1979) (denying appeal as untimely because it was filed nearly three months after a Licensing Board order denying intervention); *see also* Citizens' Motion For Leave To Add Contentions And Motion To Add Contentions at 10 (Dec. 20, 2006) (stating, "Finally, the Commission interprets the 'timely fashion' requirement of 10 C.F.R. § 2.309(f)(2)(iii) as being anywhere from twenty to thirty days from the availability of the new information upon which the new contention is based"). The Oyster Creek-specific issue raised by the Petition (Pet. at 3, 17-19, 24) is even less timely. The issue was identified in an NRC Inspection, IR 05000219/2006007, dated September 21, 2006, at pages 23-24 (NRC Staff Exh. 5) and subsequently addressed directly in correspondence between Citizens and the NRC Staff. *See* e-mail exchange (Sept. 28, 2006), *available in* ADAMS at ML0630030112; *see also* Citizens Exh.

20), and introduced in evidence by Citizens in the September 2007 hearing (*see* Citizens Exhs. 20, 47).

(2) The Petition does not address a significant safety or environmental issue. *See* 10 C.F.R. § 2.326(a)(2). At most, it relies on speculation that, in its review of the application, the NRC Staff might have failed to identify such an issue. *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 600-01 (1988) (denying a petition for waiver of regulations, in part because petitioners' speculation about shortcuts in low-power testing did not present a significant safety issue).

(3) The Petition does not demonstrate that a materially different result would be likely if the record is reopened. *See* 10 C.F.R. § 2.326(a)(3). The Petition does not even make such a claim; and

(4) The Petition is not supported by affidavits. *See* 10 C.F.R. § 2.326(b). Instead, the Petition attempts to bridge the wide gap between the OIG Audit Report's recommendations "to help NRC improve the effectiveness of its License Renewal Program" and the Petition's allegations of deficiency with unsworn characterizations of discussions with OIG representatives (*see* Pet. at 27, fn. 11).

In short, 10 C.F.R. § 2.326 makes clear that the record of a hearing is to be reopened only in very limited circumstances. The Petition does not allege the existence of such circumstances. Accordingly, the Petition does not provide any basis for reopening the record.

Conclusion

The Petition is not timely, does not comply with the regulatory requirements that apply to requests to stay the Commission's review of the Initial Decision or the NRC Staff's approval of

the application or to reopen the hearing record, and is wholly unjustified. Accordingly, AmerGen urges the Commission to deny the requests of Citizens for relief in this proceeding pursuant to 10 C.F.R. § 2.323.

Respectfully submitted,



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Dated in Washington, D.C. this 14th day of January 2008.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "AmerGen's Answer Opposing Petition for Stay and to Reopen the Record" were served this day upon the persons listed below, by e-mail and first class mail, unless otherwise noted.

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