

January 16, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
AMERGEN ENERGY COMPANY, LLC) Docket No. 50-0219-LR
)
(Oyster Creek Nuclear Generating Station))

NRC STAFF REPLY TO CITIZENS' MOTION FOR
LEAVE TO ADD CONTENTIONS AND MOTION TO ADD CONTENTIONS

INTRODUCTION

On December 20, 2006, Citizens'¹ filed a "Motion for Leave to Add Contentions and Motion to Add Contentions" ("Late Petition"). In accordance with 10 C.F.R. § 2.309(h)(1) and the Board's ruling in its July 5, 2006 Order, the Staff of the Nuclear Regulatory Commission ("Staff") hereby answers the Late Petition.

For the reasons set forth below, the Staff opposes the admission of two late-filed contentions because they are not based on new information that is materially different from information previously available, they lack adequate factual or expert support, and they fail to raise a genuine dispute on a material issue. Moreover, Citizens have failed to address the late-filing factors. Accordingly, the contentions should be rejected because Citizens have not satisfied the contention pleading requirements in 10 C.F.R. §§ 2.309(f)(2), 2.309(f)(1), and 2.309(c)(1).

BACKGROUND

On November 14, 2005, Citizens filed a timely request for hearing concerning the application of AmerGen Energy Company, LLC (AmerGen) to renew the Oyster Creek operating license for 20 years past the April 9, 2009 expiration date. On February 27, 2006, the Atomic

¹ The six organizations are 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, and New Jersey Environmental Federation.

Safety and Licensing Board (“Board”) granted Citizens’ intervention petition, admitting a contention that alleged that the license renewal application (LRA)² was deficient due to the failure to include periodic ultrasonic test (UT) measurements of the sand bed region of the drywell liner in its aging management plan. LBP-06-07, 63 NRC 188, 211-217 (2006).³ The Board specifically rejected Citizens’ attempt to expand its contention (by raising arguments for the first time in a reply brief) to encompass the drywell liner below the sand bed region. *Id.* at 217 n.28 (citing *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224 (2004)). In LBP-06-11, 63 NRC 391 (2006), the Board similarly rejected Citizens’ February 7, 2006, attempt to raise contentions challenging, among other things, the adequacy of monitoring in inaccessible areas of the drywell liner.

Prior to the admission of the contention, AmerGen committed to “perform a set of one-time thickness measurements . . . in the ‘sand bed region’ . . . at a sample of areas previously inspected (in the 1990s) and identified as having exhibited corrosion.” Letter from C. N. Swenson, AmerGen, to NRC (Dec. 9, 2005) (“December 9 Commitment”) (ML053490219), at 3.

On April 4, 2006, AmerGen docketed a second commitment to perform periodic UT measurements in the sand bed region of the drywell liner throughout the period of extended operation. Letter from Michael P. Gallagher, AmerGen, to NRC (Apr. 4, 2006) (“April 4 Commitment”) (ML060970288).

In LBP-06-16, 63 NRC 737, 742-45 (2006), the Board ruled that Citizens’ contention of omission was rendered moot by AmerGen’s April 4, 2006, commitment to perform periodic UT measurements in the sand bed region of the drywell (i.e., prior to entering the period of extended operation and every ten years thereafter), but gave Citizens the opportunity to file a

² Letter from C. N. Swenson, AmerGen, to NRC (July 22, 2005) (ML052080172).

³ The admitted contention alleged that “AmerGen’s corrosion management program . . . will not enable AmerGen to determine the amount of corrosion in that region and thereby maintain the safety margins during the term of the extended license.” LBP-06-07, 63 NRC at 217.

new contention challenging AmerGen's new periodic UT program for the sand bed region.

Citizens' filing was to be limited to AmerGen's new UT program for that region as reflected in its April 4 commitment and was to address the remaining factors in 10 C.F.R. § 2.309(f)(2), as well as the admissibility factors in 10 C.F.R. § 2.309(f)(1). *Id.* at 744-45.

Citizens subsequently submitted a contention based on the April 4 commitment and was granted permission to file a supplement "limited to AmerGen's UT program as reflected in [a June 20, 2006 commitment] and new information in that commitment." ⁴ See [Citizens] Petition to Add a New Contention (June 23, 2006); Order (Granting NIRS's Motion for Leave to Submit a Supplement to its Petition (July 5, 2006) (unpublished) ("July 5 Order"). Citizens subsequently filed its "Supplement to Petition to Add a New Contention" (July 25, 2006).

In LBP-06-22, 64 NRC ___, slip op. at 36 (October 10, 2006), the Board admitted one of seven challenges⁵ raised by Citizens as the following contention:

[I]n light of the uncertain corrosive environment and the correlative uncertain corrosion rate in the sand bed region of the drywell shell, AmerGen's proposed plan to perform UT tests prior to the period of extended operations, two refueling outages later, and thereafter at an appropriate frequency not to exceed 10-year intervals is insufficient to maintain an adequate safety margin.

The Board rejected as nontimely Citizens' challenge to the spatial scope of AmerGen's UT measurements and assertions that monitoring fails to systematically survey thin areas, noting that such challenges should have been raised after the docketing of AmerGen's December 2005 commitment based on Citizens' reliance on information about pre-LRA measurements and locations. *Id.* at 28-30. The Board also ruled that post-intervention petition enhancements to

⁴ Letter from Michael P. Gallagher, AmerGen, to NRC (June 20, 2006) ("June 20 Commitment") (ML061740573).

⁵ Citizens challenged as inadequate AmerGen's (1) acceptance criteria, (2) scheduled UT monitoring frequency, (3) moisture and coating integrity monitoring, (4) response to wet conditions and coating failure, (5) scope of UT monitoring to systematically identify and sufficiently test degraded areas, (6) quality assurance for measurements, and (7) methods for analyzing UT results. See LBP-06-22, slip op. at 9.

AmerGen's aging management program for coating integrity do not confer an automatic opportunity to advance a new contention since an unenhanced program would be inadequate and a contrary ruling would discourage voluntary program enhancements. *Id.* at 22-23.

On December 20, 2006, citing information in a December 3, 2006 AmerGen letter⁶ that supplemented the LRA to include information from the October 2006 refueling outage and revised license renewal commitments, Citizens filed the instant request for leave to file new contentions concerning (1) AmerGen's proposal to conduct UT monitoring in the embedded region and (2) the inadequacy of AmerGen's proposed monitoring in the sand bed region from the outside. See Late Petition at 1-3. Appended to this filing was the December 3 Supplement (Exh. ANC 1), AmerGen's Advisory Committee on Reactor Safeguards Information Package (Exh. ANC 2), an Oyster Creek shift turnover note for October 21-22, 2006 (Exh. ANC 3), a Memorandum of Dr. Rudolph Hausler (Dec. 19, 2006) (Exh. ANC 4) ("Sixth Hausler Memo"), an Oyster Creek Action Request (Oct. 25, 2006) (Exh. ANC 5), and a Letter from Richard Conte, NRC, to Richard Webster (Nov. 9, 2006) (Exh. ANC 6).

The Staff's response to the request to admit these late-filed contentions is set forth below.

DISCUSSION

I. Legal Standards for Admission of Late-Filed Contentions

The first matters to be addressed in ruling on a late-filed contention is to determine if it is timely and otherwise meets the requirements of 10 C.F.R. § 2.309(f)(2). *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 572 (2006). Late-filed contentions may be admitted with leave of the presiding officer only upon a showing that:

⁶ Letter from Michael P. Gallagher to NRC (Dec. 3, 2006) (enclosing [LRA] Supplemental Information Post 2006 Refueling Outage) ("December 3 Supplement") (ML063390664). Corrections to this letter were submitted on December 15, 2006 (ML963530042).

- (i) the information upon which the amended or new contention is based was not previously available;
- (ii) the information upon which the amended or new contention is based is materially different than information previously available; and
- (iii) the amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

10 C.F.R. § 2.309(f)(2).

In addition, a nontimely contention may be admitted only upon the presiding officer's determination favoring admission after balancing the following eight factors, all of which must be addressed in the petitioner's filing:

- (i) Good cause, if any, for the failure to file on time;
- (ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
- (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;
- (iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;
- (v) The availability of other means whereby the requestor's/petitioner's interest will be protected;
- (vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;
- (vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and
- (viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

10 C.F.R. § 2.309(c)(1).

The Commission has indicated that because any contention filed after the initial petition deadline is late-filed, the factors in 10 C.F.R. § 2.309(c) and (f) should be addressed. See *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 625

(2004). This is particularly true since the 60-day petition filing period provides ample time to prepare adequately supported contentions and that the regulations allow late-filed contentions where there is a compelling justification. *Id.* at 623 & n.20 (citing 10 C.F.R. § 2.309(c)).

Petitioners seeking admission of a late-filed contention bear the burden of showing that a balancing of these factors weighs in favor of admission. *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 347 (1998) (noting that the Commission has summarily dismissed petitioners who failed to address the factors for a late-filed petition). The first factor, whether good cause exists for the failure to file on time, is entitled to the most weight. *State of New Jersey* (Department of Law and Public Safety), CLI-93-25, 38 NRC 289, 296 (1993). Where no showing of good cause for the lateness is tendered, "petitioner's demonstration on the other factors must be particularly strong." *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 73 (1992) (quoting *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-431, 6 NRC 460, 462 (1977)). The fifth and sixth factors, the availability of other means to protect the petitioner's interest and the ability of other parties to represent the petitioner's interest, are less important than the other factors, and are therefore entitled to less weight. See *id.* at 74.⁷

In addition to fulfilling the requirements of 10 C.F.R. § 2.309(f)(2), a petitioner must also show that the late-filed contention meets standard contention admissibility requirements. See *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 362-363 (1993). The NRC strictly limits the contentions that may be raised so that individual licensing adjudications are limited to deciding "genuine, substantive safety and

⁷ Cases decided when the regulations contained only five factors are applicable to the instant petition since factors (ii), (iii), and (iv), which relate to the petitioner's standing, were included in 2004 and are not at issue here. See "Final Rule, Changes to Adjudicatory Process," 69 Fed. Reg. 2,182, 2,239 (Jan. 14, 2004).

environmental issues placed in contention by qualified intervenors." *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999) (quoting H.R. Rep. No. 97-177, at 151 (1981)). The Commission has noted that "the subject of the contention must be appropriate for adjudication in an individual licensing proceeding," and that "[n]o contention is to be admitted for adjudication if it attacks applicable statutory requirements or Commission regulations, if it raises issues that are not applicable to the facility in question, or it raises a question that is not concrete or litigable." *Private Fuel Storage L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 129 (2004).

In addition to these substantive requirements, a petitioner seeking to raise a contention in an adjudicatory hearing must meet the strict pleading standards found in section 2.309(f)(1).

Id. This regulation requires a petitioner to:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing . . . ; and
- (vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reason for the petitioner's belief.

10 C.F.R. § 2.309(f)(1).

The Commission has emphasized that its rules on contention admissibility establish an evidentiary threshold more demanding than a mere pleading requirement and are “strict by design.” *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001). Failure to comply with any of these requirements is grounds for dismissing a contention. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

Each contention should refer to the specific documents or other sources of which the petitioner is aware and upon which he or she intends to rely in establishing the validity of the contentions. *Millstone*, CLI-01-24, 54 NRC at 358 (citing *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 333 (1999)). A petitioner must submit more than “‘bald or conclusory allegation[s]’ of a dispute with the applicant,” but instead “must ‘read the pertinent portions of the license application, . . . and . . . state the applicant’s position and the petitioners opposing view.’” *Millstone*, CLI-01-24, 54 NRC at 358 (quoting Final Rule, “Rules of Practice for Domestic Licensing Proceedings — Procedural Changes in the Hearing Process,” 54 Fed. Reg. 33,168, 33,171, 33,170 (Aug. 11 1989)).

A contention of omission cannot be transformed into a contention that challenges a broad series of disparate new claims without adequate basis and support. *See Duke Power Co.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1& 2), CLI-02-28, 56 NRC 373, 383 (2002). A late contention must be based on data or conclusions that differ significantly from what was submitted in the license application and cannot raise arguments that could have been raised previously if publicly available information about the facility had been examined. *See id.* at 385-86.

License renewal focuses on the potential detrimental effects of aging that are not routinely addressed by ongoing regulatory oversight programs. *Florida Power & Light Co.*

(Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 NRC 3 (2001).

II. Citizens' Proffered Contentions

Citizens seek admission of the following contentions based on AmerGen's December 2006 Supplement:

[1] The proposed UT monitoring program for the embedded region of the drywell shell is inadequate to ensure that safety margins will be maintained for any extended licensing period because the spatial scope of the monitoring is too restricted, a reasonable potential corrosion rate has not been developed, the proposed frequency of monitoring is not justified, and the monitoring could cease if AmerGen filled in the trench from which it proposes to do monitoring.

[2] The proposed UT monitoring program for monitoring the lower portion of the sandbed region from the outside of the shell is inadequate to ensure that safety margins will be maintained for any extended licensing period because it fails to provide systematic monitoring of potential corrosion occurring from the inside of the drywell shell in the sandbed region.

Late Petition at 4-5.

In its December 2006 supplement, AmerGen updated its LRA to include additional descriptions of its aging management review activities associated with the drywell and updated its LRA commitment list to include, *inter alia*, (1) UT measurements taken from outside the drywell in the sand bed region during the 2006 refueling outage on thinned areas examined during the October 2006 refueling outage, (2) UT measurements from outside the drywell in two sand bed bays per outage (beginning in 2010), and (2) 2008 UT measurements inside the trenches in examined in 2006, and repeating the UTs at refueling outages until the trenches are restored to the original design configuration using material to prevent moisture collection in these areas. See Late Petition Exh. ANC 1 at 38-39.

Citizens argue that they have timely raised contentions challenging AmerGen's aging management plan for corrosion in the sand bed and embedded region of the drywell because they are being submitted shortly after AmerGen's December 2006 commitment to monitor the embedded region and to take measurements from the outside of the drywell shell during the renewal period. Late Petition at 1-2, 10. Citizens' attempt to expand this proceeding to include

the proffered contentions should be rejected

A. Citizens Have Not Satisfied 10 C.F.R. § 2.309(f)(2)

Citizens' first contention challenging the spatial scope of monitoring in the embedded region is untimely under 10 C.F.R. § 2.309(f)(2)(i) - (iii). The permissible scope of any late-filed contention concerning the drywell is limited to the sand bed region. See LBP-06-16, 63 NRC at 744. While Citizens argue that the December 2006 supplement includes, for the first time, a commitment from AmerGen to monitor the embedded region during the license renewal period and new thickness measurements for the drywell,⁸ see Late Petition at 1, 2, Citizens fail to acknowledge that (1) previous AmerGen submittals included commitments to conduct UT measurements in this region, see Letter from Michael P. Gallagher, AmerGen, to NRC (May 1, 2006) (ML061240171), Enclosure at 2; Letter from Michael P. Gallagher, AmerGen, to NRC (July 7, 2006) (ML061940020), Enclosure at 5, and (2) measurements taken during the October outage were consistent with AmerGen's LRA statements that UT measurements taken from the excavated trench in the drywell concrete floor indicated that corrosion in that region is no more severe than the sand bed region, *compare* LRA 3.5-19 *with* Late Petition Exh. ANC 1, Enclosure at 55-58. Thus, the cited information, although, more detailed, is not materially different from that previously available.

As for Citizens' apparent suggestion that wet conditions discovered during the October outage and AmerGen's decision to assume the presence of water is a normal operating environment is information not previously available, see Late Petition at 3, it is clear that Citizens were aware in September 2006, based on an NRC inspection, that water had been collected from sand bed drains, that AmerGen had a history of leakage problems and a

⁸ Citizens incorrectly state that no thickness measurements have been taken in the embedded region. See Late Petition at 2. The December 2006 Supplement describes 1986 UT measurements in the trenches of bays #5 and #17. See Late Petition Exh. ANC 1, Enclosure at 13. AmerGen did examine six inches of the newly exposed internal drywell shell surface that had been encased in concrete since before 1969. See Exh. ANC 1 at 19-20.

longstanding commitment (pre-dating its LRA) to address leakage, and that prior to 1992, there was no seal between the drywell shell and the concrete to reduce water penetration. See Late Petition at Exh. ANC 6; Initial Petition at 4-6, 12-13, and Exh. 9; Advisory Committee on Reactor Safeguards October 3, 2006 Meeting, Tr. 188-89 (Webster). Citizens were previously cited a 12 gpm leak rate and crevice corrosion as among their concerns. See Transcript of Public Meeting (June 1, 2006) (ML061680242), Tr. 94-95 (Gunter) (which was appended to Citizens' June 23, 2006 Petition as Exh. NC 4). Thus, Citizens' attempt to raise concerns based on the presence of water is untimely.

In addition, the UT testing plan challenged by Citizens is not materially different from the prior plans. For example, the April 4 commitment included UT measurements.⁹ Also, corrective actions to be taken if water were detected in sand bed drains with visible signs of corrosion included taking measurements in the affected areas from either inside or outside the drywell to ensure shell thickness. See June 20 Commitment, Enclosure at 14-15. In addition, Citizens cite information dating back to 1986-93 that craters were found in the sand bed concrete floor after removal of the sand and that an epoxy was applied at the junction of the drywell shell and the sand bed concrete floor to prevent intrusion of moisture. See Hausler Sixth Memo at 3-4; Late Petition Exh. ACN 2, at 4-2 to 4-3. Citizens were aware of this information as early as

⁹ The April 4 commitment letter included: 1) A commitment to perform, prior to the period of extended operation, a visual inspection of the epoxy coating applied to the drywell exterior in the sand bed region in accordance with ASME Section XI, Subsection IWE; and 2) A commitment to perform UT thickness measurements of the drywell shell prior to the period of extended operation and every 10 years thereafter (e.g., comparing results from 1992, 1994, and 1996 UT measurements, conducting a visual inspection of the exterior surface in the sand bed region in areas where unexpected corrosion is detected, and performing engineering evaluation to determine if additional inspections are necessary to ensure drywell integrity). See Enclosure to Letter from Michael Gallagher to NRC, dated April 4, 2006. That letter indicates that AmerGen committed in its application to manage containment aging in accordance with its ASME Section XI, Subsection IWE program and committed to inspect the drywell shell in sand bed region in Letter 2130-05-20238 to the NRC, dated December 9, 2005 (ML053490219). In its December 9, 2005, submittal, AmerGen states that it will perform one-time thickness measurements in some of the areas previously inspected in the 1990s. The Generic Aging Lessons Learned (GALL) Report indicates that the primary method specified in IWE is visual examination, but limited volumetric examination (ultrasonic thickness measurement) and surface examination may be necessary. See NUREG-1801, Rev. 1, at page XI S-1.

October 3, 2006. See Transcript of ACRS Meeting (Oct. 3, 2006), Tr. 180-192 (Webster) & attached Citizens' Meeting Slides at 5. Also included as Exh. 4 to Citizens' initial petition, was the summary of May 5, 1993, meeting with GPU Nuclear Corporation that includes a slide entitled "Concrete Floor Condition" that after sand removal the floor was unfinished, craters about 12-13' long, 12-20 inches deep and 8-12 inches wide with exposed rebars were seen. See Late Petition, Exh. ANC 2 at 9-2 (Ref. No. 24).

Even if it can be argued that the December 2006 Supplement contains information and additional aging management activities for the drywell not previously available, AmerGen's letter indicates that these examinations of the embedded region are enhancements to the existing program. See Exh. ANC 1, at 36. Enhancements, even at additional locations, should not provide an automatic opportunity to challenge the adequacy of the proposed monitoring plan, particularly when information regarding UT criteria and locations was previously available both prior to the LRA and in June and July 2006. See LBP-06-22, slip op at 23, 29-30; June 20 commitment at 14-15; July 7 commitment at 5. Thus, Citizens fail to meet their burden to satisfy 10 C.F.R. § 2.309(f)(2).

In addition, inasmuch as AmerGen's proposal to perform UT examinations on the drywell for license renewal dates back to December 2005, concerns regarding the direction from which measurements should be taken (whether from the inside or outside of the drywell shell) should have been raised months ago. In addition, concerns about the embedded region are untimely, as this Board has previously noted, because Staff guidance dating back to September 2005 addressed potential corrosion in some areas of the drywell shell that are embedded in concrete. See LBP-06-11, 63 NRC at 398 & n.6.

The contention challenging whether AmerGen plans to conduct an examination of the sand bed region in a systematic fashion is basically a restatement of the spatial scope issue also rejected as untimely by the Board in LBP-06-22, see slip op. at 28-30. Given that

information about the scope of monitoring was available either at the time the initial petition was filed (or shortly thereafter), this contention is untimely and not based on materially different information that was previously unavailable.

In sum, contrary to 10 C.F.R. § 2.309(f)(2)(i)-(iii), Citizens' two contentions are not based solely on information that was not previously available, the information is not materially different from that previously available and the claims were not submitted in a timely fashion.

B. The Late-filed Contentions Do Not Satisfy 10 C.F.R. § 2.309(f)(1)

A contention "must show that a 'genuine dispute' exists with the applicant on a 'material' issue of law or fact." *Duke Energy Corp.* (Oconee Nuclear Station Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 333-34 (1999) (*citing* 10 C.F.R. § 2.714(b)(2)(iii) (now 10 C.F.R. § 2.309(f)(1)(vi)). The dispute at issue is "material" if its resolution would "make a difference in the outcome of the licensing proceeding." *Id.* (*citing* Final Rule, Rules of Practice for Domestic Licensing Proceedings -- Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,172 (Aug. 11, 1989)).

While the contentions appear to raise issues within the scope of a renewal proceeding and Citizens arguably state a basis for each contention, the proffered contentions do not appear to be adequately supported or to raise a genuine dispute with the applicant regarding the adequacy of its aging management program for the drywell as statements related to the contentions are, in large part, vague or speculative.

Citizens argue, with respect to the first contention, that (1) AmerGen failed to select the most degraded bay to take measurements or to excavate additional concrete, (2) NRC guidance "requires" that a corrosion rate be established based on representative samples, (3) AmerGen cannot establish a corrosion rate or monitoring frequency based only on the 2006 outage bay 5 measurements since the corrosion time period cannot be determined and "worst case" conditions or rates are not established, (4) AmerGen recently indicated water could have

infiltrated into the floor at the bottom of the sand bed region, (5) AmerGen's conclusion that a margin of .336 inches would remain in the embedded region is disputable because AmerGen lacks sufficient information about corrosion in the embedded region, and (6) AmerGen should not be allowed to fill the trench. See Petition at 5-7, 8 (citing Exh. ANC 1 at 20; Sixth Hausler Memo at 4-6.

Citizens' arguments do not raise a genuine dispute with the LRA in that Citizens acknowledge that measured corrosion was not severe, see Late Petition at 5, and claims about groundwater intrusion as a new corrosion mechanism are speculative, see *id.* 6, 8.¹⁰ NRC guidance cannot impose "requirements" on an applicant,¹¹ and Citizens do not address why measurements in the concrete in the trench in bay #5, which had approximately five inches of standing water, were not representative. Citizens' expert speculates about possible intrusion of ground water in pH ranges that could cause "significant" corrosion, but opines that much of the water in the trenches "may have been condensation running down the inside walls of the liner." See Sixth Hausler Memo at 4-6. This speculation does not dispute AmerGen's statement in its June 20 Commitment, Enclosure at 12-13, that it is reasonable to assume that corrosion rates in the embedded shell would be less than the sand bed, in part, because contact with high pH

¹⁰ Dr. Hausler generally asserts, without addressing the design of the concrete foundation, that concrete used in 40-year old construction is susceptible to penetration by low pH groundwater due to "poor" conditions in the concrete. See Sixth Hausler Memo at 6-7. However, Citizens ignore that the floor is 10 feet thick and a waterproof membrane at the bottom of the mat that extends up outside exterior walls. See ANC 2 at 7-4

¹¹ Citizens argue that AmerGen is required to follow guidance published in the "Notice of Availability of the Final License Renewal Interim Staff Guidance—LR-ISG-2006-1; Plant Specific Aging Management Program for Inaccessible Areas of Boiling Water Reactor (BWR) Mark I Steel Containment Drywell Shell," 71 Fed. Reg. 67,923 (Nov. 24, 2006).

NRC guidance documents document do not have the binding effect of regulations and merely constitute the Staff's advice on how to meet regulatory requirements. See, e.g., *Curators of Univ. of Missouri*, CLI-95-1, 41 NRC 71, 150 (1995); *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station, CLI-74-40, 8 AEC 809, 811 (1974). Licensees are free to use other means to accomplish the same regulatory objectives. See *Curators*, 41 NRC at 150 & n.121; *Vermont Yankee*, 8 AEC at 811. Thus, arguments that AmerGen must take UT measurements in one foot square grids, see Late Petition at 7, do not raise a genuine dispute on a material issue regarding the LRA, particularly since other approaches can be justified. See 71 Fed. Reg. 67, 923, 67,925.

concrete. See also December 3 Supplement at 18.

As for corrosion rates, Citizens have not provided information that raises a genuine dispute regarding AmerGen's statement that based on the observed corrosion, the integrity of the drywell shell margin will be maintained under the proposed aging management program.

In addition, with respect to the Citizens' contention claiming that AmerGen will not systematically monitor corrosion in the sand bed region, see Late Petition at 8, Citizens similarly fail to offer information that disputes AmerGen's approach of taking measurements again in 2008 and periodically confirming corrosion rates in thinned areas of the sand bed region of the drywell shell. See December 3 Supplement, Enclosure at 14-15, 38-39.

In short, Citizens' contentions challenging the UT monitoring program in the embedded and sand bed regions do not appear to raise a genuine dispute on a material issue or to be adequately supported. Thus, Citizens have failed to plead information that satisfies the requirements of 10 C.F.R. §2.309(f)(1)(v) and (vi).

C. Citizens Fail to Address the Late-filing Factors in 10 C.F.R. § 2.309(c)

Citizens do not include a discussion of why their untimely filing satisfies the late-filing factors in 10 C.F.R. § 2.309(c)(1) as required by 10 C.F.R. § 2.309(c)(2). This failure is fatal to the instant request. See *Calvert Cliffs*, 48 NRC at 347.

The factor attributed the most weight is whether there is good cause for the late-filing. *State of New Jersey*, CLI-93-25, 38 NRC at 296. As discussed above, because the information raised in the Late Petition is not new or materially different, and information underlying Citizens' drywell shell concerns was available prior to the filing of the initial petition or as recently as October 2006, Citizens do not have good cause for late-filing these contentions. It is also not apparent that Citizens could prevail on the other factors. Consequently, the Late Petition should be rejected.

CONCLUSION

For the reasons discussed above, the Staff objects to the admissibility of the two late-filed contentions because they do not appear to be based on new information that was not previously available prior to the recent commitments, those commitments are not materially different previous AmerGen commitments, and Citizens have not raised a genuine dispute on a material issue with AmerGen.

Respectfully submitted,

/RA/

Mitzi A. Young
Counsel for NRC Staff

Dated at Rockville, Maryland
this 16th day of January 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
AMERGEN ENERGY COMPANY, LLC	)	Docket No. 50-219-LR
	)	
(Oyster Creek Nuclear Generating Station)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF ANSWER TO CITIZENS' MOTION TO FOR LEAVE TO ADD NEW CONTENTIONS AND MOTION TO ADD CONTENTIONS" in the above-captioned proceeding have been served on the following by electronic mail with copies by deposit in the NRC's internal mail system or, as indicated by an asterisk, by electronic mail, with copies by U.S. mail, first class, this 16th day of January, 2007.

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