

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE COMMISSION

In the Matter of)	
AMERGEN ENERGY COMPANY, LLC)	Docket No. 50-0219-LR
(License Renewal for the Oyster Creek)	
Nuclear Generating Station))	February 27, 2008
)	
)	

CITIZENS' MOTION FOR CLARIFICATION

Nuclear Information and Resource Service, Jersey Shore Nuclear Watch, Grandmothers, Mothers and More for Energy Safety, New Jersey Public Interest Research Group, New Jersey Sierra Club, and New Jersey Environmental Federation (collectively "Citizens"), by and through their attorney Richard Webster, file this motion because Citizens believe that the NRC Staff violated basic principles of administrative law by making an ex-parte, unauthorized submission to the Commission that addresses the issues Citizens raised in their pending appeal. Although the Secretary returned the submission without Commission action, NRC Staff counsel stated to Citizens counsel, when being consulted about this motion, that the Staff's submission to the Commission was not inappropriate. Citizens therefore request the Commission to clarify the rules and, if in fact the Staff made an ex-parte and unauthorized submission, instruct the Staff not to make any further unauthorized submissions that concern the pending appeal and not to communicate ex-parte with the Commission.

FACTUAL BACKGROUND

On February 14, 2008, the NRC Staff sent to the Commissioners a paper requesting Commission approval to issue the renewed license for the Oyster Creek Nuclear Generating Station (“Oyster Creek”). SECY-08-0018, dated February 14, 2008 (“Staff Paper”) at 1. The Staff Paper discusses the SER and the commitments made by the reactor operator after ACRS review. *Id.* at 1-2. The Staff Paper concluded that reasonable assurance exists that Oyster Creek will continue operate in accordance with the current licensing basis (“CLB”). *Id.* at 4. The Staff Paper also states that the Office of General Counsel reviewed it and made no legal objections. *Id.* at 7. The attorney for the Staff did not serve the Staff Paper upon the parties in this proceeding, even though the Staff is a party to this proceeding. Citizens’ counsel contacted counsel for the NRC Staff and AmerGen prior to filing this Motion. The NRC Staff oppose this Motion, while AmerGen intends to review the Motion after it is filed.

ARGUMENT

Having decided to act as a party in this proceeding, the Staff must adhere to the restrictions placed upon parties. The 10 CFR Part 2 rules prohibit persons outside the agency from engaging in ex-parte communications relevant to the outcome of the proceeding. 10 C.F.R. § 2.347. In addition, the consequences of knowingly making such an ex-parte communications are potentially severe. *See* 10 C.F.R. § 2.347(d) (penalties include dismissal of the offending party’s claim or interest in the proceeding). Where Staff litigate a proceeding that is being adjudicated by the agency, they become “persons outside of the agency” for procedural purposes. *Professional Air Traffic Controllers Organization v. Federal Labor Relations Authority*, 685 F.2d 547, 566 (D.C. Cir. 1982).

In addition, when NRC Staff perform any investigative or litigative function, ex-parte communications between the NRC Staff and Commission adjudicatory employees are explicitly prohibited. 10 C.F.R. § 2.348(a). In pertinent part, the regulation states that NRC Staff exercising such functions may not advise a Commission adjudicatory employee about the “initial or final decision on any disputed issue in that proceeding” except through communications that are received or observed by all parties. *Id.* The term “Commission adjudicatory employee” includes the Commissioners. 10 C.F.R. § 2.4.

Here, the Staff opted to be a party, performed investigative and litigating functions, and placed themselves outside the agency for procedural purposes. The Staff Paper is a communication addressed directly to the Commissioners, yet not served on the parties to this case. The scope of the communication includes the Staff’s final decisions on issues that are yet to be adjudicated by the Commission in this matter. For instance, one essential dispute in this proceeding is whether reasonable assurance exists that the aging management regime for the drywell shell will ensure compliance with the CLB during any extended period of operation. The Staff Paper explicitly deals with the final decision on this and many other issues, concluding that reasonable assurance exists that the CLB will be maintained. In addition, Citizens alleged that the Staff’s safety review must be supplemented before it will provide the Commission with sufficient information to make an technically sound and informed decision on the adequacy of the protection provided by the proposed aging management regimes. Because the Staff Paper requests authorization to issue the license, it clearly rejects Citizens’ allegations in this regard.¹

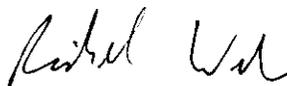
¹ The Staff Paper makes the claim that the Commission may issue the renewed license for Oyster Creek without deciding on the issues raised by this proceeding. Citizens contend that this claim is incorrect. Because the Secretary returned the Staff Paper without Commission action, Citizens are not briefing the issue in this Motion. However, this difference in view illustrates precisely why all parties have right to see and respond to submissions to the adjudicator by other parties.

The NRC Staff has claimed to Citizens' counsel that the Staff Paper merely informed the Commission of the status of the Staff's review. This claim is obviously incorrect because the Staff Paper specifically requests permission to issue the renewed license for Oyster Creek. In addition, the Commission is already fully aware of the status of this proceeding because all parties, including the Staff, have already briefed the outstanding issues. In fact, the Staff Paper is a communication to the primary adjudicators of this proceeding that provides the Staff's final decisions on all issues associated with the license renewal, including those that are in dispute in this proceeding. The Staff did not serve it upon any of the parties. Therefore, it is a communication prohibited by Sections 2.347 and 2.348(a). Furthermore, this ex-parte communication violates the Administrative Procedure Act ("APA"), 5 U.S.C. § 554(d), and the Government In The Sunshine Act. 5 U.S.C. § 557(d)(1); *Electric Power Supply Ass'n v. F.E.R.C.*, 391 F.3d 1255 (D.C. Cir. 2004). Accepted norms of due process and fundamental fairness also prevent parties in adjudicatory proceedings from making such ex-parte communications. Because counsel to NRC Staff would not agree to refrain from making any further similar submissions, Citizens respectfully request the Commission to instruct the NRC Staff that they may not make such ex-parte submissions to the Commission on any contested issue in this case.

CONCLUSION

For the foregoing reasons, the Commission should instruct the Staff not to make any further ex-parte communications and grant any other relief as it may see fit.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Richard Webster", written over a horizontal line.

Richard Webster, Esq.
Eastern Environmental Law Center
Attorneys for Citizens

Dated: February 27, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
AMERGEN ENERGY COMPANY, LLC)	Docket No. 50-0219-LR
(License Renewal for the Oyster Creek)	ASLB No. 06-844-01-LR
Nuclear Generating Station))	February 27, 2008

CERTIFICATE OF SERVICE

I, Richard Webster, of full age, certify as follows:

I hereby certify that on February 27, 2008, I caused Citizens' Motion for Clarification to be served via email and U.S. Postal Service (as indicated) on the following:

Secretary of the Commission (Email and original and 2 copies via U.S Postal Service)
United States Nuclear Regulatory Commission
Washington, DC 20555-0001
Attention: Rulemaking and Adjudications Staff
E-mail: HEARINGDOCKET@NRC.GOV

Office of Commission Appellate Adjudication (Email and U.S. Postal Service)
United States Nuclear Regulatory Commission
Washington, DC 20555-0001
Attention: Rulemaking and Adjudications Staff
Email: OCAAMail@nrc.gov

Administrative Judge
E. Roy Hawkens, Chair (Email and U.S. Postal Service)
Atomic Safety and Licensing Board Panel
Mail Stop – T-3 F23
United States Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: erh@nrc.gov

Administrative Judge
Dr. Paul B. Abramson (Email and U.S. Postal Service)
Atomic Safety and Licensing Board Panel
Mail Stop – T-3 F23
United States Nuclear Regulatory Commission

Washington, DC 20555-0001

E-mail: pba@nrc.gov

Administrative Judge

Dr. Anthony J. Baratta (Email and U.S. Postal Service)

Atomic Safety and Licensing Board Panel

Mail Stop – T-3 F23

United States Nuclear Regulatory Commission

Washington, DC 20555-0001

E-mail: ajb5@nrc.gov

Law Clerk

Emily Krause (Email and U.S. Postal Service)

Atomic Safety & Licensing Board Panel

Mail Stop – T-3 F23

U.S. Nuclear Regulatory Commission

Washington, DC 20555-0001

E-mail: DAW1@nrc.gov

Office of General Counsel (Email and U.S. Postal Service)

United States Nuclear Regulatory Commission

Washington, DC 20555-0001

E-mail: OGCMAILCENTER@NRC.GOV

James E. Adler (Email and U.S. Postal Service)

U.S. Nuclear Regulatory Commission

Office of the General Counsel

Mail Stop: O-15 D21

Washington, DC 20555-0001

E-mail: jeal@nrc.gov

Mary C. Baty (Email and U.S. Postal Service)

U.S. Nuclear Regulatory Commission

Office of the General Counsel

Mail Stop: O-15 D21

Washington, DC 20555-0001

E-mail: mcb1@nrc.gov

Alex S. Polonsky, Esq. (Email and U.S. Postal Service)

Morgan, Lewis, & Bockius LLP

1111 Pennsylvania Avenue, NW

Washington, DC 20004

E-mail: apolonsky@morganlewis.com

Kathryn M. Sutton, Esq. (Email and U.S. Postal Service)

Morgan, Lewis, & Bockius LLP

1111 Pennsylvania Avenue, NW

Washington, DC 20004

E-mail: ksutton@morganlewis.com

Donald Silverman, Esq. (Email and U.S. Postal Service)
Morgan, Lewis, & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
E-mail: dsilverman@morganlewis.com

J. Bradley Fewell (Email and U.S. Postal Service)
Exelon Corporation
200 Exelon Way, Suite 200
Kennett Square, PA 19348
E-mail: bradley.fewell@exeloncorp.com

John Covino, DAG (Email and U.S. Postal Service)
State of New Jersey
Department of Law and Public Safety
Office of the Attorney General
Hughes Justice Complex
25 West Market Street
P.O. Box 093
Trenton, NJ 08625
E-mail: john.corvino@dol.lps.state.nj.us

Valerie Gray (Email)
State of New Jersey
Department of Law and Public Safety
Office of the Attorney General
Hughes Justice Complex
25 West Market Street
P.O. Box 093
Trenton, NJ 08625
E-mail: valerie.gray@dol.lps.state.nj.us

Paul Gunter (Email and U.S. Postal Service)
c/o Nuclear Information and Resource Service
6930 Carroll Ave., Suite 340
Takoma Park, MD 20912-4446
E-mail: paul@beyondnuclear.org

Edith Gbur (Email)
Jersey Shore Nuclear Watch, Inc.
364 Costa Mesa Drive. Toms River, New Jersey 08757
E-mail: gburl@comcast.net

Paula Gotsch (Email)
GRAMMIES
205 6th Avenue

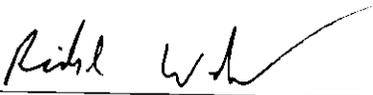
Normandy Beach, New Jersey 08723
E-mail: paulagotsch@verizon.net

Jeff Tittel (Email)
New Jersey Sierra Club
139 West Hanover Street
Trenton New Jersey 08618
E-mail: Jeff.Tittel@sierraclub.org

Peggy Sturmfels (Email)
New Jersey Environmental Federation
1002 Ocean Avenue
Belmar, New Jersey 07319
E-mail: psturmfels@cleanwater.org

Michele Donato, Esq. (Email)
PO Box 145
Lavalette, NJ 08735
E-mail: mdonato@micheledonatoesq.com

Signed:



Richard Webster

Dated: February 27, 2008