CITIZEN'S 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.\footnote{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,

Richard Webster, Esq.
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Attorneys for Citizens

Dated: February 27, 2008
UNION STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

In the Matter of

AMERGEN ENERGY COMPANY, LLC

(License Renewal for the Oyster Creek Nuclear Generating Station)

Docket No. 50-0219-LR
ASLB No. 06-844-01-LR
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:

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Dated: February 27, 2008