

March 4, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S RESPONSE IN OPPOSITION TO CITIZENS' MOTION FOR CLARIFICATION

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the Staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby responds to "Citizens' Motion for Clarification" ("Motion") dated February 27, 2008. For the reasons set forth herein, Citizens' Motion should be denied.

DISCUSSION

Citizens assert that the Memorandum from Luis A. Reyes, Executive Director of Operations, to the Commissioners regarding Renewal of Full-Power Operating License for Oyster Creek Nuclear Generating Station (SECY-08-0018), dated February 14, 2008, and served by the Office of the Secretary on the parties on February 21,¹ was an "unauthorized and ex parte submission" and request that the Commission instruct the Staff not to make further unauthorized or ex parte submissions.² Motion at 1.

¹ See Memorandum from Annette L. Vietti-Cook to Luis A. Reyes Re: SECY-08-0018 (Feb. 21, 2008).

² The remedy for an ex parte communication or communication in violation of separation of functions is disclosure of the communication. See, e.g., 10 C.F.R. § 2.348(c). SECY-08-0018 has been disclosed. In addition, Citizens have not alleged that they were harmed by the Staff's submission of SECY-08-0018.

SECY-08-0018 was neither unauthorized nor an ex parte submission to the Commission. Rather, it was sent to the Commission consistent with the Commission's procedures and past practice. Sections 2.340 and 54.32 of the Commission's regulations provide that a renewed operating license may be issued notwithstanding the pendency of a petition for Commission review under 10 C.F.R. § 2.341.³ The Commission has authorized the Director of the Office of Nuclear Reactor Regulation (NRR) to issue renewed operating licenses once he or she has made the appropriate findings in uncontested license renewal proceedings. However, the Commission, as a matter of policy, has not allowed the Director of NRR to make the appropriate findings and renew operating licenses in contested proceedings without Commission authorization. Staff Requirements Memorandum-SECY-02-0088-Turkey Point Nuclear Plant, Units 3 & 4, Renewal of Full Power Operating Licenses (SRM-SECY-02-0088) (June 5, 2002). Therefore the Director of NRR must seek Commission authorization to issue renewed licenses in contested proceedings.

In the only other license renewal proceeding thus far in which an adjudicatory matter was still pending at the time the Director was prepared to make the required findings and issue the renewed license, the Staff followed the Commission's guidance in SRM-SECY-02-0088, sending a memorandum⁴ to the Commission informing it of the results of the Staff's review of the McGuire-Catawba license renewal applications, and

³ In the statements of consideration for the license renewal rule, the Commission stated: "Neither the AEA, the Administrative Procedure Act, nor any precept of administrative law compels the NRC to await exhaustion of the judicial appeals before it may issue a license." Nuclear Power Plant License Renewal, 56 Fed. Reg. 64,943, 64,964 (Dec. 13, 1991). Section 54.31 also provides that if a renewed license is later set aside on further administrative or judicial action, the operating license previously in effect will be reinstated.

⁴ Renewal of Full-Power Operating Licenses for McGuire Nuclear Station, Units 1 & 2, and Catawba Nuclear Station, Units 1 & 2 (SECY-03-0200) (Nov. 18, 2003).

requesting that the Commission allow the Director of NRR to renew the licenses upon the making of the proper findings.⁵ The Office of the Secretary (SECY) made SECY-03-0200 publicly available on November 24, 2003, and counsel for the Staff served SECY-03-0200 on the parties to the proceeding on November 25, 2003.⁶

Consistent with the Commission's directions and past practice, the Staff prepared SECY-08-0018 because the Oyster Creek license renewal proceeding is still contested. Consequently, contrary to Citizens' assertion, the Staff's submission of SECY-08-0018 was not an unauthorized submission but rather an appropriate step in the licensing process.

Moreover, the Staff's submission of SECY-08-0018 did not run afoul of the Commission's rules against restricted communications in adjudications. Although Citizens assert that the Staff violated 10 C.F.R. § 2.347, Staff communications are governed by § 2.348, which addresses separation of functions.⁷ Pursuant to 10 C.F.R. § 2.348, NRC officers or employees engaged in the performance of a litigating function in

⁵ At the time SECY-03-0200 was sent to the Commission, an appeal of the licensing board's decision in LBP-03-17, 58 NRC 221 (2003), was pending before the Commission and that SECY paper was not released to the parties until publicly released by the Office of the Secretary.

⁶ The Commissions Internal Procedures provide that Commission Papers will be released 10 business days after receipt by the Commission. Commission Internal Procedures, Chapter II, *available at* <http://www.nrc.gov/about-nrc/policy-making/internal.html#SECYPapers>. Also, In accordance with Management Directive (MD) 3.57, Handbook 3.57 Section 5.6, "SECY finalizes each Commission paper in ADAMs, determines its public or non-public availability, and declares the paper an official agency record."

⁷ Section 2.347 only applies to communications between persons *outside* the agency and Commission adjudicatory employees relevant to the merits of the proceeding. See Revision of Ex Parte and Separation of Functions Rules Applicable to Formal Adjudicatory Proceedings, 53 Fed. Reg. 10360 (Mar. 31, 1988); Revision to Ex Parte and Separation of Functions Rules Applicable to Formal Adjudicatory Proceedings, 51 Fed Reg. 10,393, 10394 (Mar. 26, 1986).

Citizens also incorrectly assert that submission of SECY-08-0018 violated Sections §§ 554(d) and 557(d) of the Administrative Procedures Act. Sections 554(d) and 557(d) apply only to adjudications required to be "on the record." Most NRC licensing proceedings are not required to be "on the record" by the Atomic Energy Act or any other statute. Therefore, the application of ex parte and separation of function limitations in NRC proceedings is "a matter of discretion." 72 Fed. Reg. at 49417.

a proceeding are prohibited from *advising* Commission adjudicatory employees about any disputed issue in that proceeding, but may report status and provide general background. Section 2.348 does not apply to uncontested issues in contested proceedings. See 72 Fed. Reg. at 49417.

The express purpose of SECY-08-0018 was to inform the Commission of the results of the Staff's review of Oyster Creek's license renewal application and request that the Commission authorize the Director of NRR to make the appropriate findings and renew Oyster Creek's operating license. The Staff did not intend to present new facts, opinions, arguments, or other information that was not already part of the public record. Indeed, the Staff noted that pending administrative and judicial appeals in the proceeding. Moreover, the Staff, well aware of its separation of functions obligations, intended to serve SECY-08-0018 on the parties in accordance with Commission procedures had SECY not served SECY-08-0018 on the parties itself.⁸

Assuming *arguendo* that SECY-08-0018 contained information restricted by the separation of functions rule, SECY-08-0018 was served on the parties in fulfillment of § 2.348, and Citizens have suffered no harm. Thus, no clarification of the Commission's rules on restricted communications is warranted and no further action need be taken in response to Citizens' Motion.

⁸ See procedures cited *supra* note 6. As noted above, in the case of SECY-03-0200, the Staff waited to serve the paper until SECY made it publicly available

CONCLUSION

For the reasons set forth above, the Commission should deny Citizens' Motion for Clarification.

Respectfully submitted,

/RA/

Mary C. Baty
Counsel for NRC Staff

Dated at Rockville, Maryland
this 4th day of March 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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 "NRC STAFF'S RESPONSE IN OPPOSITION TO CITIZENS' MOTION FOR CLARIFICATION" in the above-captioned proceeding have been served on the following by electronic mail and deposit in the U.S. Mail Service or deposit in the U.S. Nuclear Regulatory Commission's internal mail system, or by deposit in the U.S. Nuclear Regulatory Commission's internal mail system, or by deposit in the U.S. mail system, as indicated by an asterisk (*), this 4th day of March 2008.

E. Roy Hawken, Chair
Administrative Judge
Atomic Safety and Licensing Board
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: ERH@nrc.gov

Anthony J. Baratta
Administrative Judge
Atomic Safety and Licensing Board
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: AJB5@nrc.gov

Paul B. Abramson
Administrative Judge
Atomic Safety and Licensing Board
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: PBA@nrc.gov

Office of the Secretary
ATTN: Docketing and Service
Mail Stop: O-16G4
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: HEARINGDOCKET@nrc.gov

Office of Commission Appellate
Adjudication
Mail Stop: O-16G4
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: OCAAMail@nrc.gov

Emily Krause
Law Clerk
Atomic Safety and Licensing Board
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: ELK1@nrc.gov

Suzanne Leta Liou*
New Jersey Public Interest Research Group
11 N. Willow St.
Trenton, NJ 08608
E-mail: слиou@environmentnewjersey.org

Donald Silverman, Esq.*
Alex S. Polonsky, Esq.
Kathryn M. Sutton, Esq.
Raphael P. Kuyler, Esq.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Ave., N.W.
Washington, DC 20004
E-mail: dsilverman@morganlewis.com
apolonsky@morganlewis.com
ksutton@morganlewis.com
rkuyler@morganlewis.com

Paul Gunter, Director*
Kevin Kamps
Reactor Watchdog Project
Nuclear Information
And Resource Service
6930 Carroll Avenue Suite 340
Takoma Park, MD 20912
E-mail: paul@beyondnuclear.org
kevin@beyondnuclear.org

J. Bradley Fewell, Esq.*
Exelon Corporation
4300 Warrenville Road
Warrenville, IL 60555
E-mail: bradley.fewell@exeloncorp.com

Richard Webster, Esq.*
Julia LeMense, Esq.
Eastern Environmental Law Center
744 Broad Street, Suite 1525
Newark, NJ 07102
Email: rwebster@easternenvironmental.org
jlemense@easternenvironmental.org

/RA/

Mary C. Baty
Counsel for the NRC Staff