

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

**Before Administrative Judges:
E. Roy Hawkins, Chair
Dr. Paul B. Abramson
Dr. Anthony J. Baratta**

In the Matter of:)	March 20, 2007
AmerGen Energy Company, LLC)	
(License Renewal for Oyster Creek Nuclear Generating Station))	Docket No. 50-219

AMERGEN MOTION TO STRIKE

In accordance with 10 C.F.R. § 2.323(a), AmerGen Energy Company, LLC (AmerGen), hereby files this Motion to Strike in response to “Citizens’ Combined Reply to AmerGen’s and NRC Staff’s Answer to Their Petition to Add a New Contention” (March 13, 2007) (Reply).¹ As demonstrated below, to the extent Citizens’ Reply addresses AmerGen’s March 5, 2007 “Answer Opposing Citizens’ Motion for Leave to Add a Contention and Motion to Add a Contention” (Answer), it is impermissibly late. Citizens’ Reply also impermissibly presents – for the first time – a new purported basis for their most recent late-filed contention, while ignoring the criteria of 10 C.F.R. § 2.309

¹ Citizens 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. As required by 10 C.F.R. § 2.323(b), counsel for AmerGen contacted counsel for Citizens, in an attempt to resolve the issues in this motion. Citizens’ counsel did not agree to the relief requested in this motion. Counsel for the Staff did not express an opinion regarding this motion.

I. THE BOARD SHOULD DISREGARD CITIZENS' RESPONSES TO AMERGEN'S ANSWER BECAUSE THEIR REPLY IS UNTIMELY

Citizens' Reply to AmerGen's Answer is untimely. AmerGen filed its Answer via electronic mail prior to 5 p.m. on March 5, 2007.² Thus, under 10 C.F.R. §§ 2.306 and 2.309(h)(2), Citizens' Reply was due on Monday, March 12, 2007, but they did not file until Tuesday, March 13. AmerGen therefore requests that the Board strike Citizens' Reply as it pertains to AmerGen's Answer, including (1) Citizens' challenge to AmerGen's argument that certain issues were resolved during the February 1, 2007 ACRS Full Committee meeting, Reply at 3-5, 6 n.1, 8-9; and (2) their response to AmerGen's arguments regarding the non-timely filings requirements in 10 C.F.R. § 2.309(c)(1), Reply at 9-10.³

II. THE BOARD ALSO SHOULD DISREGARD CITIZENS' NEW ARGUMENTS BASED ON A FEBRUARY 9 E-MAIL

Citizens' Reply also includes impermissible new arguments. In a belated attempt to rehabilitate their newest late-filed contention, Citizens argue – for the first time - that “Sandia continues to disagree about the appropriate capacity reduction factor.” Reply at 9. Citizens rely on an e-mail sent by Sandia's Michael Hessheimer to the NRC Staff on February 9, 2007 (February 9 e-mail),⁴ claiming that “[i]t has now become clear . . . that Sandia does not agree with the Staff's presentation at the February 1, 2007 ACRS

² Counsel for Citizens has confirmed that he received AmerGen's Answer prior to 5 p.m. on March 5.

³ In their response on this point, Citizens assume that AmerGen has been producing documents regarding GE's derivation, in the early 1990s, of the acceptance criteria for the Oyster Creek drywell shell. Reply at 9. The Board, however, has specifically excluded challenges to the acceptance criteria from the admitted contention. Memorandum and Order, LBP-06-22 (slip op. at 10-14) (Oct. 10, 2006). Accordingly, AmerGen's mandatory disclosures do not include documents regarding GE's derivation of the acceptance criteria.

⁴ ML070430292.

meeting.” Reply at 8; *see also id.* at 3 (first paragraph), 4-5 (Section II.A), 6 n.1.

Desperate to recover from their apparent failure to support their newest late-filed contention with any of the four original bases in their February 6, 2007 “Motion for Leave to Add a New Contention and Motion to Add a Contention” (Motion), Citizens now attempt to proffer a fifth purported basis for their new contention. In doing so, Citizens utterly ignore the requirements for late-filed amendments to contentions in 10 C.F.R. § 2.309(f)(2), and the non-timely filing criteria in Section 2.309(c)(1), such as the required showing that late-filed amendments to contentions be based on new, *materially different* information. Because their “late attempt to reinvigorate [a] thinly supported contention[] by presenting [an] entirely new argument[] in the reply brief[]” is prohibited, Citizens’ arguments based on the February 9 e-mail should be stricken.⁵ *Louisiana Energy Servs., L.P.* (National Enrichment Facility), CLI-04-25, 60 N.R.C. 223, 224 (2004), *reconsideration denied*, CLI-04-35, 60 N.R.C. 619 (2004).

After failing to reference the February 1 Advisory Committee on Reactor Safeguards (ACRS) Full Committee Meeting in their Motion, Citizens now point to the February 9 e-mail, claiming that they, “have not had the chance to explore how Dr. Miller reached his conclusions about the enhanced capacity reduction factor presented at the February 1, 2007 meeting.” Reply at 9. Citizens had the opportunity to explore Dr.

⁵ Further, in proffering the February 9 e-mail alone, Citizens yet again fail to provide full candor to the Board, and offer only a preliminary and incomplete analysis of the technical issues in support of their late-filed contention. The NRC Staff served the Board and Citizens with its March 8 response to the February 9 e-mail. The Staff’s response emphasized that, “Mr. Hessheimer agreed with the staff’s determination that the [Sandia] analysis did not incorporate the effects of hoop tension to modify the capacity reduction factor.” Memorandum from P. T. Kuo, NRR, to F. Gillespie, ACRS, “Advisory Committee on Reactor Safeguards Review of the Oyster Creek Nuclear Generating Station License Renewal Application – Safety Evaluation Report,” at 1 (March 8, 2007), *available in ADAMS at ML070650376*.

Miller's conclusions in their Motion, but instead left those conclusions unchallenged. Having chosen not to dispute this information in their Motion, the Board should not permit Citizens to now "add new bases or new issues that simply did not occur to them at the outset," CLI-04-25, 60 N.R.C. at 225 (internal quotations omitted), without even addressing the late-filing criteria. By not addressing the late-filing criteria for amended contentions, Citizens' inclusion of this information in their Reply violates the "cardinal rule" of fairness in Commission proceedings. *See Houston Lighting & Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 N.R.C. 521, 524 (1979).⁶

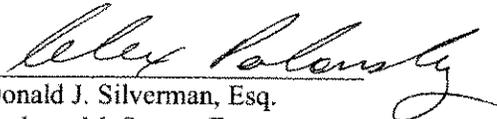
III. CONCLUSION

Because Citizens failed to submit their Reply to AmerGen's Answer in a timely fashion, and failed to address the criteria in 10 C.F.R. §§ 2.309(f)(2) and (c)(1) for

⁶ In LBP-06-7, this Board permitted Citizens to introduce additional support for their original contention by attaching previously-existing documents as exhibits in their reply because AmerGen was already "on notice" as to the issues in contention. 63 N.R.C. 188, 226-27 (2006). Here, in contrast, Citizens attach a new document, containing new information not available at the time they filed their contention, as an additional basis.

amending their late-filed contention, the Board should grant AmerGen's Motion to Strike the arguments specified above.

Respectfully submitted,



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Dated in Washington, D.C.
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