

March 30, 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))

NRC STAFF ANSWER TO AMERGEN'S MOTION TO STRIKE

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the Staff of the Nuclear Regulatory Commission ("Staff") hereby answers the AmerGen's March 20, 2007 "Motion to Strike" (Motion) portions of "Citizens'¹ Combined Reply to AmerGen's and NRC Staff's Answer to Their Petition to Add a New Contention" (Combined Reply). In its Motion, AmerGen argued that Citizens' Combined Reply impermissibly presented a new purported basis for their most recent late-filed contention.² Motion at 1. For the reasons set forth below, the Motion should be granted.

BACKGROUND

On February 6, 2007, Citizens filed a "Motion for Leave to Add a Contention and Motion to Add a Contention" (Contention Motion). To support this new contention, Citizens discussed comments made at the January 18, 2007 meeting of the Advisory Committee on Reactor

¹ Citizens are six organizations 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.

² AmerGen's Motion also sought to strike Citizens' Combined Reply, filed on March 13, 2007, insofar as it responded to AmerGen's "Answer Opposing Citizens' Motion for Leave to Add a Contention and Motion to Add Contention" (AmerGen Answer), dated March 5, 2007 on the ground that the reply to AmerGen was not timely. However, by e-mail dated March 23, 2007, counsel for AmerGen acknowledged that counsel for Citizens did not receive the AmerGen Answer until after 5:00 on March 5, 2007. Thus, AmerGen withdrew that portion of its Motion.

Safeguards (ACRS) about a study performed by the Sandia National Laboratory, arguing that these comments indicated that “in the opinion of a highly respected national laboratory, the enhancement of the capacity reduction factor used by GE is not justified.” Contention Motion at 12. AmerGen and the Staff each filed answers to Citizens’ Contention Motion.³ Specifically, AmerGen argued that Citizens alleged fundamental flaws in the GE analysis based upon statements made at the January 18, 2007 ACRS meeting without mentioning that these alleged flaws were resolved at the February 1 ACRS meeting. AmerGen Answer at 12.

Citizens’ Combined Reply discusses the February 1 ACRS meeting, which Citizens failed to address in the February 6 Contention Motion, and also raises, for the first time, an e-mail sent on February 9, 2007.⁴ Combined Reply at 2-3, 8-9. AmerGen subsequently filed the instant motion to strike Citizens’ arguments involving the February 9 e-mail.

DISCUSSION

Under the Commission’s rules of practice, a petitioner may file a reply to any answer filed in response to its petition. 10 C.F.R. § 2.309(h)(2). While the regulation does not limit the scope of a reply, the Commission has held that it must be “narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC Staff answer.” *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004), *reconsideration denied*, CLI-04-35, 60 NRC 619 (2004) (LES); *see also* Final Rule: “Changes to the Adjudicatory Process,” 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004). Petitioners may not use a reply to reinvigorate thinly supported contentions. *LES*, CLI-04-25, 60 NRC at 224. Petitioners may not “initially file vague, unsupported, and generalized allegations and simply recast,

³ See AmerGen Answer; “NRC Staff Answer to Citizens’ Motion for Leave to Add a Contention and Motion to Add a Contention,” dated March 5, 2007.

⁴ E-mail from M. Hessheimer, Sandia, to D. Ashley, NRC, dated February 9, 2007. Agencywide Document Access and Management System (ADAMS) Accession No. ML070430292.

support, or cure them later.” *LES*, CLI-04-35, 60 NRC at 622. In providing support for their contentions, petitioners are “not . . . asked to prove their case, or to provide an exhaustive list of possible bases, but simply to provide sufficient alleged factual and legal bases to support the contention, and to do so at the outset.” *Id.* at 623.

Allowing “reply briefs to provide, for the first time, the necessary threshold support for contentions . . . would effectively bypass and eviscerate [the Commission’s] rules governing timely filing, contention amendment, and submission of late-filed contentions.” CLI-04-35, 60 NRC at 623. In order to supplement the bases for a contention, petitioners must address the Commission’s late-filed contention criteria found in 10 C.F.R. §§ 2.309(c) and (f)(2). *See id.* at 623, n.20; *see also Louisiana Energy Services* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 58 (2004), *aff’d* CLI-04-25, 60 NRC 223 (2004). Raising new claims in a reply unfairly deprives other participants of an opportunity to rebut the claims. *See Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006).

AmerGen’s Motion challenges the propriety of arguments in Citizens’ Combined Reply based upon an e-mail dated February 9, 2007, three days after Citizens filed its Contention Motion. *See* Motion at 2-4. In its Answer, AmerGen argued that the February 1 ACRS meeting resolved Citizens’ concerns about the use of the capacity reduction factor in GE’s analysis. *See* AmerGen Answer at 12 (“Citizens cite to the Sandia Report and comments on that report at the January 18, 2007 ACRS Subcommittee meeting to allege fundamental flaws in the GE analysis, without even mentioning that these alleged flaws were entirely and unambiguously resolved during the subsequent presentations made by AmerGen and the NRC Staff at the February 1 ACRS meeting.”).

As discussed above, a petitioner's response must be "narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer." *LES*, CLI-04-25, 60 NRC at 225. Although it may be argued that Citizens' assertions concerning the February 9 e-mail are narrowly focused on the argument in AmerGen's Answer, Citizens may not rely on such new information to provide threshold support for their contention without addressing the Commission's late-filed contention criteria. See *LES*, LBP-04-14, 60 NRC at 58, *aff'd*, CLI-04-25, 60 NRC 223; see also *LES*, CLI-04-35, 60 NRC at 623. As the Commission made clear in the *Palisades* license renewal proceeding, raising new claims in a reply unfairly deprives other participants of an opportunity to rebut the claims. CLI-06-17, 63 NRC at 732.

Citizens may raise new information, such as the February 9 e-mail, in this proceeding. However, the Commission has created a process to raise such new information and that process must be followed. See *LES*, LBP-04-14, 60 NRC at 58, *aff'd* CLI-04-25, 60 NRC 223; see also *LES*, CLI-04-35, 60 NRC at 623. Intervenors may raise new contentions or supplement the bases for their existing contentions by filing a motion addressing the late-filed contention standards in 10 C.F.R. §§ 2.309(c) and (f)(2). Absent such a showing, the inclusion of new information in a reply, in an attempt to demonstrate the existence of a genuine dispute on a material issue of law or fact, is impermissible.

CONCLUSION

For the reasons discussed above, AmerGen's Motion should be granted.

Respectfully submitted,

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Counsel for NRC Staff

Dated at Rockville, Maryland
this 30th day of March, 2007

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF ANSWER TO AMERGEN'S MOTION TO STRIKE" 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 30th day of March, 2007.

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