

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

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

In the Matter of:)	May 4, 2007
AmerGen Energy Company, LLC)	Docket No. 50-219
(License Renewal for Oyster Creek Nuclear Generating Station))	

AMERGEN MOTION TO STRIKE

In accordance with 10 C.F.R. § 2.323(a) and this Board’s Order of May 1, 2007,¹ AmerGen Energy Company, LLC (AmerGen) moves to strike portions of “Citizens’ Answer Opposing AmerGen’s Motion for Summary Disposition” (April 26, 2007) (Answer).² As demonstrated below, Citizens’ Answer and the supporting Memorandum of Dr. Rudolf Hausler (Hausler Memorandum) go well beyond the limited issue in contention. They impermissibly raise issues that this Board has repeatedly and unambiguously excluded from the scope of this proceeding. They also raise new issues that are outside the scope of the contention. Citizens had an obligation to amend their contention if they wished to raise these new issues. Accordingly, the Board should strike

¹ Order (Granting AmerGen’s Request for Leave to File Motion to Strike) (May 1, 2007) (unpublished).

² 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.

the portions of the Answer and the Hausler Memorandum specified in MTS Exhibits 1 and 2, respectively.³

I. PREVIOUSLY REJECTED ISSUES MUST BE STRICKEN

Citizens' Answer and the Hausler Memorandum impermissibly raise three issues that this Board has excluded from this proceeding on numerous occasions; namely, challenges to: (1) the acceptance criteria; (2) AmerGen's methods for analyzing UT results in the sand bed region; and (3) the scope of UT monitoring (*i.e.*, where the UT measurements are taken).

A. Citizens' Fifth Attempt to Litigate Acceptance Criteria Must Be Rejected

Citizens are once again challenging the minimum thickness acceptance criteria for the sand bed region of the drywell shell.⁴ This represents an impermissible attempt to litigate, *for the fifth time*, those acceptance criteria. The Board explicitly excluded from the admitted contention any challenge to the existing acceptance criteria,⁵ and has repeatedly rejected each of Citizens' four untimely attempts to litigate this issue.⁶

³ The justifications for each portion to be stricken are indicated in the Exhibits, according to the following legend:

- (1) Statements disputing the local area acceptance criteria (see § I.A., below);
- (2) Statements disputing the statistical methods for analyzing the UT results (see § I.B., below);
- (3) Statements disputing the spatial scope of UT monitoring (see § I.C., below); and
- (4) Statements addressing the October 2006 UT results (see § II below).

⁴ *See, e.g.*, Answer at Section III.A; Hausler Memorandum at 7-8.

⁵ Memorandum and Order (Granting Petition to File a New Contention), LBP-06-22, 64 N.R.C. ____, slip op. at 10-14 (Oct. 10, 2006).

⁶ *See* Memorandum and Order (Denying New Jersey's Request for Hearing and Petition to Intervene, and Granting NIRS Request for Hearing and Petition to Intervene), LBP-06-11, 63 N.R.C. 391, 398 (2006) (rejecting the challenge to the acceptance criteria raised in "Motion for Leave to Add Contentions or Supplement the Basis of the Current Contention" (Feb. 7, 2006); LBP-06-22, slip op. at 14 (rejecting two challenges to the acceptance criteria raised in "Petition to Add a New Contention" (June 23, 2006) at 4 (June 23 Petition) and "Supplement to Petition to
(footnote continued)

Unfortunately, the Board is called upon once again to rule on a pleading that has been filed in flagrant disregard of Board Orders in this proceeding.

Citizens seek to mask their most recent challenge by arguing that the local area acceptance criterion has become “more stringent.”⁷ Yet this challenge is identical to a challenge this Board rejected in LBP-06-22. Specifically, in their June 23 Petition Citizens sought to argue, among other things, that “AmerGen had *changed the acceptance criteria* for measurements that showed that the steel shell was already thinner than the initial 0.736 inch criterion.”⁸ The Board found that argument untimely then, and it is therefore impermissible for Citizens to raise it again at this late date.

Citizens also now argue that use of the local area acceptance criterion (as described in AmerGen’s Motion for Summary Disposition) “could not be justified,” and they list various reasons why they think that is the case.⁹ Citizens, however, are prohibited from arguing that these criteria are unacceptable, as the Board recently reiterated that such arguments are precluded from litigation in this proceeding.¹⁰

B. Citizens Are Not Permitted to Litigate the Methods for Analyzing UT Results

Citizens also devote portions of their Answer and the Hausler Memorandum to once again challenge AmerGen’s methods for analyzing the results of UT of the drywell

Add a New Contention” (July 25, 2006) at 17-22 (July 25 Supplement); Memorandum and Order (Denying Citizens’ Motion for Leave to Add a Contention and Motion to Add a Contention) at 6 (April 10, 2007) (unpublished) (April 10, 2007 Order) (rejecting the challenge to the acceptance criteria raised in “Motion for Leave to Add a Contention and Motion to Add a Contention” (Feb. 6, 2007)).

⁷ Answer at 6.

⁸ LBP-06-22, slip op. at 11 (quoting June 23 Petition at 16) (emphasis added).

⁹ Answer at 7.

¹⁰ April 10, 2007 Order at 6.

shell in the sand bed region.¹¹ This includes a challenge to the analysis of UT data from 1992, as well as UT data from the most recent refueling outage in October 2006. For example, they state that AmerGen's "procedure" for "evaluating the 1992 external [ultrasonic testing] results" is "highly arbitrary" and "masked the full extent of the corrosion."¹²

Such a claim mirrors Citizens' June 23 Petition, in which they argued, among other things, that "the average of the individual [UT] measurements taken in each grid is used to analyze the corrosion rates, leading to artificially low estimates of uncertainty; [and] it omits from the mean some of the thinnest points in the grids, leading to artificially high estimates of the current mean thickness."¹³ The Board, of course, ruled that part of the Petition outside the scope of the admitted contention.¹⁴ Citizens' efforts to wedge it back into this proceeding under guise of their Answer is exemplary of their lack of discipline and the above-cited disregard for this Board's Orders.

C. Citizens Are Not Permitted to Litigate the Scope of UT

Citizens devote portions of the Hausler Memorandum to once again challenge the scope of UT monitoring (*i.e.*, where the UT measurements are taken). For example, Dr. Hausler states:

[S]ince the outside of the drywell in the sandbed region had been coated in 1992, corrosion in the upper regions of the sandbed (*i.e.* where monitoring is being proposed) has become less relevant because water accumulations (the

¹¹ See, *e.g.*, Answer at Section III.B. & C; Hausler Memorandum at 8-10.

¹² Answer at 8; see also Hausler Memorandum, *passim*.

¹³ LBP-06-22 at 33-34 (citing June 23 Petition at 11-12).

¹⁴ *Id.* at 36.

primary causes for corrosion) will now more likely occur towards the bottom of the former sandbed region.¹⁵

The Board, however, has already ruled that this argument may not be litigated in this proceeding.¹⁶

II. NEW ARGUMENTS ARE PRECLUDED

Section III.C of Citizens' Answer presents arguments based on alleged deficiencies in the 2006 UT measurements and in AmerGen's methods for analyzing these measurements. Yet, since the Board admitted Citizens' contention on October 10, 2006, Citizens have not amended their contention to address the results of the UT measurements taken during the subsequent October 2006 outage or the revisions to AmerGen's License Renewal Application submitted to the NRC in December 2006 addressing those results.¹⁷

The Board in *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-04-9, 59 N.R.C. 286 (2004), faced a similar fact pattern. The Board had admitted a contention based on DCS' initial Application, but DCS then revised the Application. DCS subsequently filed a motion for summary disposition. In response, the intervenor challenged new information that was part of DCS' revised application. The Board granted summary disposition, finding that intervenor "should have been well aware of the Board's expectation that late-filed contentions or *late-filed amended*

¹⁵ Hausler Memorandum at 1.

¹⁶ LBP-06-22 at 36.

¹⁷ Letter, from Michael P. Gallagher, AmerGen, to NRC Document Control Desk, "Information from the October 2006 Refueling Outage Supplementing AmerGen Energy Company, LLC (AmerGen) Application for a Renewed Operating License for Oyster Creek Generating Station," (Dec. 3, 2006).

contentions should be filed promptly following the issuance of any documents containing significant new or different information.”¹⁸

Citizens chose not to file any late-filed amendments to their contention after AmerGen submitted its revised Application in December 2006 to incorporate the results of the 2006 outage. Accordingly, AmerGen limited its Motion for Summary Disposition to Citizens’ arguments as admitted by the Board in LBP-06-22. The Board should not permit Citizens to raise these issues now in an Answer to a Motion for Summary Disposition, when they had approximately five months to do so as an amendment to their contention. By doing so in their Answer for the first time, they prevent AmerGen and the Staff from providing any substantive reply. This is akin to including information in a reply brief that was not raised in an initial pleading, which the Commission has ruled is impermissible.¹⁹ As a result, arguments addressing this new information are beyond the scope of the admitted contention, and should be stricken.²⁰

¹⁸ LBP-04-9, 59 N.R.C. at 292 (emphasis added).

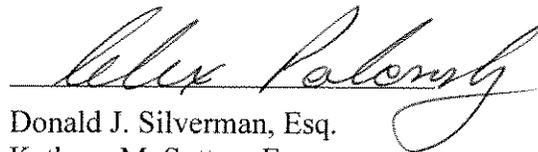
¹⁹ *Louisiana Energy Servs., L.P.* (National Enrichment Facility), CLI-04-25, 60 N.R.C. 223 (2004) (upholding the Board's refusal to consider arguments presented for the first time in reply briefs, because "the reply briefs constituted a late attempt to reinvigorate thinly supported contentions by presenting entirely new arguments").

²⁰ *See also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-23, 49 N.R.C. 485, 493 (1999) (“Given there is not a material dispute over the present status of the application,” intervenors’ arguments challenging the revised application would “favor . . . the admission of a new contention” rather than preclude summary disposition.).

III. CONCLUSION

Because Citizens' Answer and the supporting Hausler Memorandum present issues that the Board previously has rejected and/or that are beyond the scope of the admitted contention and its bases, the Board should strike the portions of Citizens' Answer and the Hausler Memorandum indicated on the markups attached to this Motion as MTS Exhibits 1 and 2, respectively.

Respectfully submitted,



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Dated in Washington, D.C.
this 4th day of May 2007.

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**UNITED STATES OF AMERICA
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CERTIFICATE OF SERVICE

I hereby certify that copies of "AmerGen Motion to Strike" were served this day upon the persons listed below, by E-mail and first class mail, unless otherwise noted.

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