

May 5, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

REPLY BY 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 TO AMERGEN'S OPPOSITION TO THEIR PETITION TO ADD A NEW CONTENTION

Submitted by:

Richard Webster
Eastern Environmental Law Center
744 Broad Street, Suite 1525
Newark, NJ 07102-3094

Counsel for 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; New Jersey Environmental Federation

TABLE OF CONTENTS

PRELIMINARY STATEMENT	1
FACTUAL ERRORS MADE BY AMERGEN	2
ARGUMENT	3
A. The Contention Should Be Granted In Part.....	3
B. The Contention Is Timely.....	4
C. The Contention Has Ample Basis	6
D. The New Contention Raises A Material Dispute.....	7
E. The Contention Otherwise Meets Regulatory Requirements	7
CONCLUSION	10

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE COMMISSION

In the Matter of)	
)	Docket No. 50-0219-LR
AMERGEN ENERGY COMPANY, LLC)	
)	
(License Renewal for the Oyster Creek)	
Nuclear Generating Station))	May 5, 2008
)	

**REPLY TO AMERGEN’S OPPOSITION TO PETITION TO ADD A NEW
CONTENTION**

PRELIMINARY STATEMENT

On April 28, 2008, AmerGen Energy Company LLC (“AmerGen”) answered the metal fatigue Petition (the “Petition”) filed by Nuclear Information and Resource Service, Inc., Jersey Shore Nuclear Watch, Inc., Grandmothers, Mothers and More for Energy Safety, New Jersey Public Interest Research Group, New Jersey Sierra Club, and the New Jersey Environmental Federation (collectively “Citizens”). AmerGen objects to the new contention on multiple grounds, including timing. However, AmerGen’s timeliness argument is that Citizens’ contention is both too late and too early, echoing the cry of the White Queen in Alice in Wonderland that “the rule is, jam tomorrow and jam yesterday - but never jam today.” This, of course, directly contradicts the mandate of the Atomic Energy Act (“AEA”) that Citizens must be provided an opportunity to obtain a hearing on all material issues and therefore cannot reflect the Commission’s intent in enacting the rules.

Citizens primary contention is that AmerGen’s prediction of the metal fatigue cumulative use factor corrected for environmental factors for the recirculation nozzles is currently

inadequate and may become as high as 1.4, violating the ASME code and the requirement that an adequate time limited aging analysis (“TLAA”) be in place before license renewal may be granted. AmerGen’s response is that it intends to carry out an adequate analysis and that Citizens cannot be certain what the outcome of the analysis will be. In contrast, a sworn declaration submitted by the NRC Staff confirms that the inadequate method used to date could have severely under-predicted the fatigue factor in the manner Citizens suggest. However, Citizens acknowledge that before the required reanalysis is complete, there can be little certainty about exactly what that results will be and Citizens have no way of knowing whether the reanalysis will actually be sufficiently conservative. If the Commission finds that it is not currently appropriate to admit Citizens’ contention due to this uncertainty, Citizens request that the Commission suspend the current proceeding, order AmerGen to provide the full reanalysis to Citizens,¹ and then provide Citizens with an opportunity to review the analysis and file a new contention, if necessary.

FACTUAL ERRORS MADE BY AMERGEN

AmerGen alleges that the NRC released a Regulatory Issues Summary (“RIS”) that somehow made the metal fatigue issue “generic.” AmerGen Ans. at 3. This allegation is factually incorrect and totally illogical. First, although Citizens believed that a RIS regarding metal fatigue had been issued to licensees, it has now become clear that the Staff has only put forward the RIS for comment. 73 Fed. Reg. 24,094 (May 1, 2008). Second, by definition a RIS requires no response or action. NRC Ans. at 3 n. 7. Obviously, the Staff cannot resolve the metal fatigue issues at Oyster Creek Nuclear Generation Station (“Oyster Creek”) by publishing for comment a document that would require no response or action even if issued. AmerGen is

¹ AmerGen has suggested that the claimed proprietary nature of the analysis could cause an obstacle to such disclosure. This is incorrect because Citizens’ counsel is already in possession of proprietary information supplied by AmerGen pursuant to a protective order of the Atomic Safety and Licensing Board (“ASLB” or “Board”).

therefore in error when it alleges that the RIS has resolved the metal fatigue problem generically and removed it from the scope of this proceeding.

ARGUMENT

A. The Contention Should Be Granted In Part

A declaration provided by AmerGen has made it clear that the second part of the contention, which concerns structures other than the recirculation nozzles for which the non-conservative analysis was used, is moot because there are no such structures. Declaration of Frederick W. Polaski, dated April 28, 2008 at ¶ 4 (attached to AmerGen Ans). Citizens added the second part of the proposed new contention because they were unable to determine this fact from the available documents. Based upon Mr. Polaski's declaration Citizens hereby withdraw the second part of their contention.

The third part of Citizens contention addresses the stress-based fatigue monitoring program. However, Citizens now know that the stress-based fatigue monitoring is being used exclusively for the feedwater nozzle. Declaration of John R. Fair, dated April 28, 2008 ("Fair Decl.") at ¶ 10 (attached to NRC Staff Ans.). Because the only components that used the simplified analysis were the recirculation nozzles, Citizens hereby withdraw the third part of their contention related to stress-based fatigue monitoring.

The contention is therefore:

The predictions of metal fatigue for the recirculation nozzles at Oyster Creek are not conservative. A confirmatory analysis using a conservative method is required to establish whether these nozzles could exceed allowable metal fatigue limits during any extended period of reactor operation.

This reply discusses the admissibility of this part of the originally proposed contention.

B. The Contention Is Timely

Even though the NRC Staff issued a notification alerting the Commission to “significant new information,” AmerGen argues that the information is contained in the notification is neither new nor significant. AmerGen Ans. 10-12. On timeliness, AmerGen’s main argument is that Citizens would have been aware that the identified problems with the metal fatigue analysis at Vermont Yankee also applied to Oyster Creek, had they known about statements given by a consultant to Entergy at a public meeting on January 8, 2008. AmerGen Ans. at 11-12. However, this information related to an entirely different license renewal proceeding and was in any event very vague, giving no details of which components at Oyster Creek used which analysis. Presentation to NRC by Vermont Yankee Regarding Environmental Fatigue Analyses for License Renewal, dated January 8, 2008 at 20 *available at* ML080100282. In fact, NRC’s summary of the meeting to which AmerGen cites, AmerGen Answer at 11, makes no reference at all to Oyster Creek.

Given their lack of involvement in the Vermont Yankee proceeding, Citizens would therefore have been extremely unlikely to notice the connection between Vermont Yankee and Oyster Creek. Even though Dr. Hausler, Citizens’ expert on the drywell contention, listened to the meeting by telephone, by that time the record of this proceeding had closed and the initial decision had been taken by the Board. The attendance sheet referenced by AmerGen makes clear that Dr. Hausler listened to the meeting because he was acting as an expert for New York Office of the Attorney General. Therefore, unsurprisingly, Dr. Hausler did not discuss the meeting with Citizens. Dr. Hopenfeld also attended the meeting, but he had no association with Citizens until after the notification was issued.

Citizens were not aware of the mention of Oyster Creek at the January 8, 2008 meeting until after they received the April 3, 2008 notification. Furthermore, as the ASLB has recently

pointed out, it is unreasonable to expect that petitioners will continually search all the documents in ADAMS to try to discover whether new information relevant to their proceeding has arisen. *Crow Butte Resources, Inc.* (License Amendment for the North Trend Expansion Project), LBP-08-06 (April 29, 2008), slip op. at 14. While Citizens may be charged with having to search ADAMS for documents that relate to the docket number for this proceeding, they cannot be charged with constructive knowledge of documents that are not tagged in ADAMS as part of this proceeding. *Id.* Here, the document upon which AmerGen bases its primary argument was correctly encoded as part of the Vermont Yankee license renewal proceeding. Thus, Citizens lack of knowledge about the document is entirely understandable and may not be used to exclude the contention. Furthermore, all the other record documents referenced by Citizens to support the contention are similarly part of the Vermont Yankee license renewal proceeding, not this proceeding.

Moreover, the mention of Oyster Creek at the January 8, 2008 meeting was vague and did not specify which structures were analyzed using the simplified method. The need for AmerGen and the NRC Staff to file factual declarations clarifying this point illustrates that the documents in the record prior to April 28, 2008 did not make this issue clear. Thus, in the absence of the April 3, 2008 notification, Citizens would not have been alerted to the existence of the documents and information that they have used as a basis for their contention. This means that the test of timeliness is whether Citizens moved promptly after April 3, 2008 to file a new contention. Because Citizens took a mere 15 days to file thereafter, they acted extremely promptly.

In addition to arguing the contention is too late, AmerGen also tries to argue that it is too early, accusing Citizens of “speculation” and “blatant speculation” about the possible results of

the revised analysis. AmerGen Ans. at 7, 14-15, 27. In contrast, Mr. Fair, the expert for the NRC Staff agrees with Citizens that “the results of the detailed analysis [at Vermont Yankee] indicated that the simplified method could under-predict the CUF by 40%” and then acknowledged that such an under-prediction would lead to an environmentally corrected CUF of around 1.4 for the recirculation nozzle at Oyster Creek. Fair Decl. at ¶ 9. AmerGen’s arguments here show that if the Commission does not interpret the Part 2 rules with care, Citizens could be snared in a Catch-22 that would prevent Citizens from having any opportunity to obtain a hearing on the fatigue issue. Because the fatigue issue is material to relicensing, such an outcome is forbidden by the AEA.

Most obviously, Citizens cannot even obtain a copy of the revised analysis unless this contention is admitted or the Commission orders AmerGen to provide a copy to the parties. Furthermore, if Citizens had done nothing in response to the NRC notification, beyond asking for the results of the revised analysis, AmerGen would have undoubtedly argued forcefully that Citizens should have moved to admit a contention in response to the NRC notification or earlier. Thus, to preserve their rights, Citizens were forced to move to admit the new contention before the results of the revised analysis are available. Using the lack of availability of the revised analysis as a reason to dismiss the contention would therefore be unjust and would deny Citizens the right to a hearing on a material issue, violating the AEA.

C. The Contention Has Ample Basis

In addition to the facts and the Hopenseld declaration, Citizens’ basis has been reinforced by Mr. Fair’s declaration, which acknowledges that the new analysis for the recirculation nozzle could yield a result that would violate the ASME code standard of 1.0 for the environmentally corrected CUF. Although Mr. Fair attempts to argue factually that such a result would not be a major risk, that is actually an argument that the ASME code is too conservative, not an argument

that this issue is not material to licensing. As AmerGen and the NRC Staff have repeatedly stressed, arguments about generally applicable safety standards have no place in facility-specific licensing hearings. Irrespective of the Staff's view on the ASME code, the Commission cannot renew the license at Oyster Creek until it is convinced that the TLAA is adequate to ensure continued compliance with the Code. Because experts from the Staff and Citizens have both concluded that a more complex analysis is required before the fatigue analysis for the recirculation nozzle can be relied upon to provide an adequate TLAA, there is, as a matter of law, a significant outstanding safety issue concerning the inadequate prediction and monitoring of metal fatigue for the recirculation nozzles at Oyster Creek.

D. The New Contention Raises A Material Dispute

AmerGen has argued that there *is* no material dispute because it *will* complete the revised analysis. AmerGen Ans. at 27. This effectively concedes that there is currently a material dispute, which could be resolved in the future by the revised analysis, *if* it is sufficiently conservative. This is confirmed by the NRC Staff's Answer which points out that completion of the revised analysis *could* moot the contention. NRC Staff Ans. at 23. Speculation about the future does not have any bearing on the current admissibility of the contention. Until a sufficiently conservative analysis is carried out, the contention raises a material dispute about the adequacy of the TLAA for the recirculation nozzles. However, if the Commission is reluctant to admit a contention that could soon be moot, it could instead grant the relief requested in Citizens' stay motion by ordering AmerGen to supply the revised analysis to all parties and allowing Citizens a reasonable time to decide whether the new analysis is sufficiently conservative or whether they need to petition to add a new contention on this issue.

E. The Contention Otherwise Meets Regulatory Requirements

As discussed in Citizens' Petition, Citizens believe that 10 C.F.R. § 2.326(d) is better read to mean that petitions to admit new contentions that accompany motions to reopen should

meet the requirements of 10 C.F.R. § 2.309(c) if they are late-filed, or the requirements of 10 C.F.R. § 2.309(f)(2) if they are timely filed following the discovery of new information.

However, even if the 10 C.F.R. § 2.309(c) standard applies, Citizens meet that standard.

The standard contained in Section 2.309(c) is that late-filed contentions will be admitted based upon a balancing of the following factors:

- (i) Good cause, if any, for the failure to file on time;
- (ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
- (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;
- (iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;
- (v) The availability of other means whereby the requestor's/petitioner's interest will be protected;
- (vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;
- (vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and
- (viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

This balancing test is at root a test of the equities of admitting a late-filed contention. In applying this test, the Commission should be mindful of the resources and responsibilities of each of the parties. Although AmerGen disputes whether Citizens had good cause to file late, AmerGen Ans. at 21, the record unambiguously shows that while the Staff may have been aware that there could be a problem with the Oyster Creek metal fatigue predictions in January 2008, there was no specific information on how the simplified analysis had been applied at Oyster Creek. The information that the simplified analysis has been applied to the recirculation nozzle at Oyster Creek only became publicly available when the Staff issued the notification on April 3, 2008. Confirmation that the simplified analysis had not been used for other nozzles only came with the Answers from AmerGen and the NRC Staff. It would be entirely unfair to hold against

Citizens the Staff's delay in issuing the notification. Although the Staff may have been aware of the deficiency in the LRA before Citizens, unlike the Staff, Citizens have no ability to investigate vague disclosures regarding issues that are not relevant to admitted contentions. Thus, Citizens are forced to wait until specific information comes into the public domain. Furthermore, as discussed above, Citizens cannot be expected to monitor every communication in every licensing proceeding. Finally, had AmerGen made its renewal application explicit on the subject of how the recirculation nozzle fatigue analysis had been done, it might have a better argument that Citizens should have known this key fact before April 3, 2008. Having failed to do so, it can hardly complain about the newness of this information to Citizens.

Turning to the next five factors, which even AmerGen does not dispute favor Citizens, AmerGen then contradicts the explicit language of the regulation, by attempting to dismiss the importance of all of these issues. AmerGen Ans. at 21. This is of course totally unjustified. For example, one of the factors is whether Citizens have any alternative means of seeking relief. AmerGen apparently concedes that Citizens do not, but nonetheless suggests that this should be disregarded or accorded *de minimis* weight. *Id.* This simply cannot be correct, because the AEA guarantees that Citizens should have an opportunity for a hearing on all material issues. Thus, this factor must be given considerable weight in deciding whether to admit a new contention. Furthermore, the other factors speak to petitioners' interests, which are balanced against factor vii), which speaks to the licensee's interest. Omitting factors ii) to vi) from the test would therefore create systemic bias against petitioners and lead to violations of the AEA. Citizens trust that the Commission will avoid such an approach.

On the seventh factor, regarding delay and broadening, Citizens have considerably narrowed the issues they are seeking to raise and agree that the contention could be mooted in a relatively short time, if AmerGen provides a sufficiently conservative analysis of recirculation nozzle metal fatigue. Finally, with regard to the eighth factor concerning establishment of a sound record, AmerGen erroneously states that Citizens have failed to make an adequate showing. AmerGen Ans. at 23. This is totally incorrect. Citizens are indisputably prepared to present testimony from Dr. Hopenfeld, the expert who first

identified the lack of conservatism in the simplified fatigue calculations. The subsequent proceedings regarding Vermont Yankee showed that Dr. Hopenfeld was correct and the simplified calculations under-predicted fatigue by upto 40%. This non-conservatism has been confirmed by the NRC Staff in the expert declaration attached to their Answer. Fair Decl. at ¶ 9. Contrary to AmerGen's assertions, Citizens have no specific tactics in mind beyond ensuring an open and transparent resolution of the issue raised by the Staff notification regarding metal fatigue. In particular, Citizens have no way of knowing whether the revised analysis will be conservative or what Dr. Hopenfeld's opinion regarding that analysis will be. They are therefore unable to present more specific testimony until the revised analysis is available.

CONCLUSION

For the forgoing reasons, Citizens respectfully request that the Commission admit the proposed new contention, as modified on page 3. In the alternative, the Commission should grant the relief requested in the Citizens' stay motion by ordering AmerGen to supply to the revised analysis to all parties and allowing Citizens a reasonable time to decide whether the new analysis is sufficiently conservative or whether they need to petition at that time to add a new contention regarding the adequacy of the revised metal fatigue analysis.

Respectfully submitted

/s

Richard Webster, Esq.
Eastern Environmental Law Center
Attorneys for Citizens

Dated: May 5, 2008