UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
OFFICE OF THE SECRETARY

ATOMIC SAFETY AND LICENSING BOARD

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

In the Matter of	)	
	)	Docket No. 50-219
AMERGEN ENERGY COMPANY, LLC	)	
OYSTER CREEK NUCLEAR	)	
GENERATING STATION	)	
	)	May 11, 2007
License Renewal for Oyster Creek Nuclear	)	
Generating Station	)	
	)	

CITIZENS' OPPOSITION TO AMERGEN MOTION TO STRIKE

PRELIMINARY STATEMENT

American Energy Company LLC ("AmerGen") has moved to strike most of the Answer to AmerGen's Motion For Summary Disposition, dated April 26, 2007, submitted on behalf of 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 (collectively "Citizens"). The Motion to Strike is a transparent attempt to deny Citizens their right to respond fully to arguments raised by AmerGen. AmerGen's arguments in favor of the motion are illogical and inconsistent, defy common sense, and are entirely unsupported by relevant precedent. Thus, the Motion to Strike should be dismissed in its entirety.

BACKGROUND

In their response to AmerGen's Motion for Summary Disposition, Citizens showed that a number of factual disputes remain, including disputes about the local area acceptance criterion and the smallest estimated remaining margin. Indeed, in its Motion, AmerGen directly disputed Citizens' previously submitted statements regarding the local area acceptance criterion and the smallest estimated remaining margin. AmerGen Motion for Summary Disposition at 18-20. AmerGen also recognized that the Atomic Safety and Licensing Board (the "Board") admitted as part of the basis of the contention that the drywell shell is 0.026 inches or less from violating AmerGen's acceptance criteria. *Id.* at 9.

ARGUMENT

I. In Admitting The Contention The Board Expected Litigation About The Existing Margin and Related Issues

As AmerGen admits, the Board relied upon Citizens' assessment of the remaining margin for the sandbed region of the drywell shell when it admitted the contention. AmerGen Motion for Summary Disposition at 9. The Board was fully aware that this assessment was based on Dr. Hausler's Memorandum in which he compared the various acceptance criteria with the measurements that have been made. LBP-06-22 (slip. op. at 17) *quoting* Memorandum of Dr. R. H. Hausler, dated June 23, 2006 at 7. Dr. Hausler's memorandum was based upon the local area acceptance criteria that he then believed had been applied by AmerGen. AmerGen Motion for Summary Disposition at 21-22. In its decision admitting the contention, the Board actually stated that the existing margin "may ultimately be a topic for summary disposition" after the record became sufficient to show whether the corrosion was in large areas or isolated small patches.[1] LBP-06-22 (slip. op. at

[1] This issue remains in dispute to some extent.

17 n. 16). Thus, there is no doubt that the Board anticipated that admitting the contention would lead to litigation about the existing margins.

Furthermore, footnote 16 in LBP-06-22 confirms that the Board was fully aware that Citizens' assessment was based on a comparison of the results from the UT monitoring program with the acceptance criteria. It also illustrates that the Board understood that the acceptance criteria are dependent on the extent of the identified areas that are thinner than 0.736 inches. Thus, in anticipating litigation about margins, the Board also anticipated litigation about the extent of the areas that are thinner than 0.736 inches and which acceptance criterion should apply to which measurements.

Moreover, AmerGen's fundamental logic is flawed. Even assuming arguendo that the admitted contention raises a sub-issue that was also raised by a contention filed at same time or later that was rejected on timeliness grounds, that sub-issue could still be litigated as part of the admitted contention. AmerGen's argument that raising a sub-issue twice, once in a timely manner and once in a non-timely manner, should lead to its exclusion it entirely illogical. Where a sub-issue was properly raised in a timely manner as part of an admitted contention, it cannot be excluded by a simultaneous or subsequent failure to get a separate contention admitted.

II. The Board Has Not Excluded Issues Concerning The Nature of The Current Acceptance Criteria

At the same time as they petitioned to add the current contention, Citizens also Petitioned to add a contention alleging that "AmerGen's acceptance criteria are inadequate to ensure adequate safety margins." LBP-06-22 (slip. op. at 9). The Board's opinion made clear that this contention challenged the modeling used to derive the acceptance criteria, but rejected the contention because it was not timely. LBP-06-22 (slip. op. at 10-14).

Most recently, the Board rejected another contention that alleged that the acceptance criteria needed to be more stringent to adequately ensure that safety margins will be maintained, again on timeliness grounds. Memorandum and Order (denying Citizens Motion for Leave to Add a Contention and Motion to Add a Contention) at 6 (April 10, 2007). Once again, that contention explicitly concerned the adequacy of the modeling techniques used to justify the acceptance criteria.

AmerGen now mistakenly alleges that these decisions have precluded any litigation about the acceptance criteria. AmerGen Motion to Strike at 2-3. This view is based on an excessively expansive view of the scope of the rejected contentions and an overly narrow view of the current contention. The rejected contentions concerned the adequacy of the modeling used to derive the acceptance criteria. In contrast, the Board has recognized that in the present litigation, issues concerning which acceptance criterion is appropriate could arise.

All Citizens have done in their response to AmerGen on summary disposition is to suggest that AmerGen should consistently apply the local acceptance criterion stated in Exhibits SJA 1 and 2 to all of the UT results to date. Citizens did not argue that the modeling used to derive the acceptance criteria was inadequate. Instead, they showed that in its Motion AmerGen had misstated the local area acceptance criterion that *is* in use and that the misstated criterion, which *is not* is use, could not be justified because, even according to the modeling upon which AmerGen is relying, it would not ensure safety. Thus, Citizens did not raise any issue concerning the modeling in their response. In summary, the Board's rejection of contentions about the modeling that underpins the acceptance criteria do not preclude litigation to establish how to correctly state the acceptance criteria that AmerGen is actually using and consideration of whether those acceptance criteria have been consistently applied.

III. AmerGen Raised The Dispute About Acceptance Criteria

AmerGen is now making two inconsistent arguments. On the one hand, AmerGen raised the issue of how to correctly state the local area acceptance criterion. AmerGen Motion for Summary Disposition at 20-21. On the other hand AmerGen has also argued that Citizens response showing that AmerGen has stated the local area acceptance criterion in varying ways over time is not permissible. AmerGen Motion to Strike at 2-3. Here, by pleading the issue in its Motion, AmerGen has actually recognized that the statement of the local area acceptance criterion is a material issue raised by the contention. Having recognized this, AmerGen now appears to be seeking to deny Citizens the right to respond to issues that AmerGen itself raised. Such an approach would obviously violate the basic principles of due process and would be grossly unfair.

AmerGen seems to have reached this contradictory position because it has changed its view on what is permissible after it reviewed Citizens response to the Motion. Originally AmerGen stated that the Citizens cannot challenge the "origin, derivation or adequacy" of the acceptance criteria, but felt free to argue that Citizens had incorrectly stated the local area acceptance criterion. AmerGen Motion for Summary Disposition at 11, 19-21. Thus, AmerGen appeared to recognize that imposing a complete ban on litigating the correct statement of the acceptance criteria would lead to absurd results, because that statement is needed if margins are to be calculated.

However, after AmerGen saw that Citizens had found that AmerGen's statements about the nature of the local area acceptance criterion had varied over time and were inconsistent, it appears to have changed positions and now tries to argue that "the Board explicitly excluded from the admitted contention *any* challenge to the existing acceptance criteria." AmerGen Motion to Strike at 2.

Here, Citizens are certainly not seeking to challenge the "origin, derivation or adequacy" of the local area acceptance criterion that AmerGen has used most recently. In fact, Citizens are not seeking to challenge the local area acceptance criterion stated in Exhibits SJA 1 and SJA 2 at all. All Citizens are seeking to do is to establish that those documents correctly state the local area acceptance criterion. This issue is integral to this hearing, because without a clear statement of the local area acceptance criterion, the existing margin cannot be calculated. Furthermore, by raising this very issue in its Motion, AmerGen is now estopped from arguing that Citizens may not respond.

As part of their showing of the most current statement of the local area acceptance criterion, Citizens also showed that the statement set forth by AmerGen was incorrect, by making reference to the modeling studies that underlie the acceptance criteria. Such an approach is entirely appropriate because Citizens made no challenge to the underlying modeling. Instead Citzens showed that according to the modeling, AmerGen's statement of the local area acceptance criterion contained in its pleading would not ensure safety. This was not a challenge to the "existing acceptance criteria" because the statement of the local area acceptance criterion contained in AmerGen's pleading has never been used to screen UT results for acceptability.

IV. Citizens Are Permitted To Point Out Flaws In AmerGen's Analysis Of The Existing Margins

The Board previously rejected on timeliness grounds Citizens' contention challenging the statistical techniques employed by AmerGen to analyze the UT results on timeliness grounds. LBP-06-22 at 33-36. The only elements of that contention that related to the existing margin alleged that AmerGen had failed to use extreme value statistics and that AmerGen had omitted some of the thinnest points in the grids of the UT measurements from its calculations. *Id.* at 33-34.

In their response on summary disposition, Citizens pointed out a number of other problems with AmerGen's analysis of the existing margin, including the failure to properly screen the 2006 external results against all of the acceptance criteria, the failure to account of the uncertainty of the mean thicknesses, and the use of a correction technique in 1992 that obscured the results of the external UT measurements. However, contrary to AmerGen's allegation, AmerGen Motion to Strike at 3-4, none of these issues was previously rejected by the Board. In fact, as discussed above, the Board recognized when it admitted the contention that litigation about the interpretation of the UT results would probably ensue. Indeed, the proper interpretation of the UT measurements is at the heart of the admitted contention because the monitoring frequency is directly dependent on the margin available.

V. Summary Disposition Motions Are Decided On The Entire Record

Summary disposition is only possible "if the filings in the proceeding, depositions, answers to interrogatories and admissions on file, together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a decision as a matter of law." 10 C.F.R. §§ 2.1205(c), 2.710(d)(2). Prior NRC opinion has held that summary disposition motions under 10 C.F.R. § 2.749 (the equivalent rule prior to the revision of 2004) should be evaluated under the same

standards as motions made under Federal Rules of Civil Procedure, Rule 56. *Advanced Med. Sys., Inc*, CLI-93-22, 38 N.R.C. 98, 102 (1993). Under this rule, the moving party bears the burden of proving the absence of a genuine issue of material fact. *Adickes v. Kress & Co.*, 398 U.S. 144, 157 (1970). A genuine issue is one in which "the *factual record, considered in its entirety*, must be enough in doubt so that there is a reason to hold a hearing to resolve the issue." *Duke Cogema Stone & Webster (Savanna River Mixed Oxide Fuel Fabrication Facility)*, LBP-05-04, 61 N.R.C. 71, 80-81, (2005) ("DCS") *quoting Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), LBP–83-46, 18 N.R.C. 218, 223 (1983) (emphasis added).

There is little doubt that the factual record that must be considered on summary disposition includes the results of discovery. Part of the standard on summary disposition for a subpart G hearing, which the Board must follow here, refers to "depositions, answers to interrogatories and admissions on file." 10 C.F.R. §§ 2.1205(c), 2.710(d)(2). In subpart L proceedings mandatory disclosures replace "depositions, answers to interrogatories and admissions on file." Thus, the text of the rules shows that the results of discovery should be considered at the summary disposition stage.

Further confirming this view, licensing boards have previously considered granting extensions of the time to reply to summary disposition where petitioners might have gained important information from recently available documents. *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), 18 N.R.C. at 226. The Board has also found that the record stays open until the hearing is closed and all evidence is submitted. *Connecticut Yankee Atomic Power Co. (Haddam Neck Plant)*, ASLB 01-7878-02, 2003 WL 21314058 (2003). Furthermore, even where additional relevant evidence comes to light after the hearing is complete, it may be added to the record. *Id.* Moreover, the federal courts are clear that even where an opposing party cannot any present facts to dispute material issues raised

on summary judgment, the court may continue the motion for summary judgment to allow further discovery pursuant to rule 56(f). *E.g. Garrett v. City and County of San Francisco*, 818 F.2d 1515, 1518 (9th Cir. 1987). Obviously, this procedure is predicated on the uncontroversial notion that the facts discovered may be used to resist summary judgment.

Here, Citizens have done no more than use documents disclosed by AmerGen during discovery to show that there are factual disputes about the material issues AmerGen has raised. Those documents reinforced the arguments Citizens made at the time the contention was admitted. The case law shows that parties opposing summary judgment are supposed to use the entire record, including the information gained through discovery, to show material facts are in dispute. This is precisely what Citizens have done.

AmerGen attempts to suggest that somehow "new arguments are precluded" when Citizens respond to summary disposition motions. AmerGen Motion to Strike at 5-6. While not entirely clear, it appears that the main objection is that Citizens have analyzed the 2006 results. *Id.* However, this objection is totally inconsistent with AmerGen's summary disposition motion, which argued that the 2006 results confirm that the corrective action is adequate. AmerGen's Motion for Summary Disposition at 16. Once again, having raised an issue, AmerGen can hardly complain when Citizens respond with the argument that the 2006 results actually show that the proposed aging management regime is inadequate. Furthermore, AmerGen's use of the 2006 results to support its summary disposition motion, makes its claim that it had no chance to reply to arguments about the 2006 results totally irrelevant, because here AmerGen is seeking to strike material from an answer, not a reply brief.

Moreover, even if AmerGen had not raised the issue of what the 2006 results show in its summary disposition motion, Citizens could have used the results to show that material issues exist, because the 2006 results are part of the "entire record" that must be considered

on summary disposition. To try to bolster its argument to exclude arguments about the 2006 results, AmerGen cited two cases that dealt with contentions of omission, but those cases are entirely inapposite. Both concern situations where contentions become moot because of subsequent submissions by an applicant.[2]

In contrast, here AmerGen has already successfully had Citizens' initial contention dismissed on mootness grounds. The initial contention was then replaced by a contention challenging the adequacy of the aging management program that mooted the original contention. Subsequent discovery, far from undercutting the admitted contention, has further confirmed its validity. Thus, there was no requirement whatsoever for Citizens to amend the admitted contention.

CONCLUSION

For the foregoing reasons, AmerGen's Motion to Strike should be denied.

Respectfully submitted

Richard Webster, Esq
RUTGERS ENVIRONMENTAL
LAW CLINIC
Attorneys for Petitioners

Dated: May 11, 2007

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[2] *See Duke Cogema Stone & Webster (Savanna River Mixed Oxide Fuel Fabrication Facility)*, LBP-04-9, 59 N.R.C. 286 (2004) and *Private Fuel Storage L.L.C. (Independent Fuel Storage Installation)*, LBP 99-23, 49 N.R.C. 485 (1999).

UNITED STATES OF AMERICA
BEFORE THE NUCLEAR REGULATORY COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	Docket No. 50-0219-LR
AMERGEN ENERGY COMPANY, LLC	)	
	)	ASLB No. 06-844-01-LR
(License Renewal for the Oyster Creek	)	
Nuclear Generating Station)	)	May 11, 2007
	)	

CERTIFICATE OF SERVICE

I, Richard Webster, of full age, certify as follows:

I hereby certify that on May 11, 2007, I caused Citizens' response to Amergen's Motion to Strike to be served via email and U.S. Postal Service on the following:

Secretary of the Commission (Email and original and 2 copies via U.S Postal Service)
United States Nuclear Regulatory Commission
Washington, DC 20555-0001
Attention: Rulemaking and Adjudications Staff
Email: HEARINGDOCKET@NRC.GOV

Administrative Judge
E. Roy Hawkens, Chair (Email and U.S. Postal Service)
Atomic Safety and Licensing Board Panel
Mail Stop – T-3 F23
United States Nuclear Regulatory Commission
Washington, DC 20555-0001
Email: erh@nrc.gov

Administrative Judge
Dr. Paul B. Abramson (Email and U.S. Postal Service)
Atomic Safety and Licensing Board Panel
Mail Stop – T-3 F23
United States Nuclear Regulatory Commission
Washington, DC 20555-0001
Email: pba@nrc.gov

Administrative Judge
Dr. Anthony J. Baratta (Email and U.S. Postal Service)
Atomic Safety and Licensing Board Panel
Mail Stop – T-3 F23
United States Nuclear Regulatory Commission
Washington, DC 20555-0001
Email: ajb5@nrc.gov

Law Clerk
Debra Wolf (Email and U.S. Postal Service)
Atomic Safety & Licensing Board Panel
Mail Stop – T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
DAW1@nrc.gov

Office of General Counsel (Email and U.S. Postal Service)
United States Nuclear Regulatory Commission
Washington, DC 20555-0001
Email : OGCMAILCENTER@NRC.GOV

Mitzi Young (Email and U.S. Postal Service)
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop: O-15 D21
Washington, DC 20555-0001
E-mail: may@nrc.gov

Mary C. Batty (Email and U.S. Postal Service)
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop: O-15 D21
Washington, DC 20555-0001
E-mail: mcb1@nrc.gov

Alex S. Polonsky, Esq. (Email and U.S. Postal Service)
Morgan, Lewis, & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Email: apolonsky@morganlewis.com

Kathryn M. Sutton, Esq. (Email and U.S. Postal Service)
Morgan, Lewis, & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Email: ksutton@morganlewis.com

Donald Silverman, Esq. (Email and U.S. Postal Service)
Morgan, Lewis, & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Email: dsilverman@morganlewis.com

J. Bradley Fewell (Email and U.S. Postal Service)
Exelon Corporation
200 Exelon Way, Suite 200
Kennett Square, PA 19348
bradley.fewell@exceloncorp.com

John Covino, DAG (Email and U.S. Postal Service)
State of New Jersey
Department of Law and Public Safety
Office of the Attorney General
Hughes Justice Complex
25 West Market Street
P.O. Box 093
Trenton, NJ 08625
E-mail: john.corvino@dol.lps.state.nj.us

Valerie Gray (Email and U.S. Postal Service)
State of New Jersey
Department of Law and Public Safety
Office of the Attorney General
Hughes Justice Complex
25 West Market Street
P.O. Box 093
Trenton, NJ 08625
E-mail: valerie.gray@dol.lps.state.nj.us.

Paul Gunter (Email and U.S. Postal Service)
Nuclear Information and Resource Service
6930 Carroll Ave., Suite 340
Takoma Park, MD 20912-4446
Email: pgunter@nirs.org

Edith Gbur (Email)
Jersey Shore Nuclear Watch, Inc.
364 Costa Mesa Drive. Toms River, New Jersey 08757
Email: gburl@comcast.net

Paula Gotsch (Email)
GRAMMIES
205 6th Avenue
Normandy Beach, New Jersey 08723

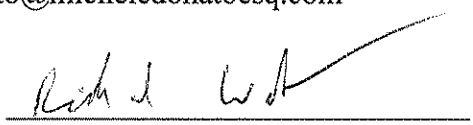
paulagotsch@verizon.net

Jeff Tittel (Email)
New Jersey Sierra Club
139 West Hanover Street
Trenton New Jersey 08618
Email: Jeff.Tittel@sierraclub.org

Adam Garber (Email)
New Jersey Public Interest Research Group
11 N. Willow St,
Trenton, NJ 08608.
Email: agarber@njpirg.org

Peggy Sturmfels (Email)
New Jersey Environmental Federation
1002 Ocean Avenue
Belmar, New Jersey 07319
Email: psturmfels@cleanwater.org

Michele Donato, Esq. (Email)
PO Box 145
Lavalette, NJ 08735
Email: mdonato@micheledonatoesq.com

Signed: 
Richard Webster

Dated: May 11, 2007