

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 17, 2007
License Renewal for Oyster Creek Nuclear)	
Generating Station)	

CITIZENS' OPPOSITION TO AMERGEN MOTION TO STRIKE

PRELIMINARY STATEMENT

AmerGen Energy Company LLC (“AmerGen”) has moved to strike the response to NRC’s Answer in support of summary disposition (the “Response”), 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”). This is the second Motion to Strike filed by AmerGen, which is attempting to deny Citizens their right to respond to arguments raised by AmerGen and the NRC Staff.

The Response is an authorized pleading under the summary disposition rules because it was made in accordance with procedural standards detailed in the regulations on subpart G proceedings, which are imported into subpart L proceedings by specific provisions of the applicable regulations. In addition, without responsive pleadings to all the issues raised, the

Atomic Safety and Licensing Board (the “Board”) cannot apply the required substantive standard, which is whether there are material issues in dispute. Furthermore, even if the subpart L rules did not provide for the Response, due process and the cardinal rule that to be fair each side must be heard on each issue raised during briefing of dispositive motions, would require the Board to allow the Response.

ARGUMENT

I. Summary Disposition Standards Include A Right To Respond To New Issues

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). Because the burden of proof is on the movant, the evidence submitted “must be viewed in the light most favorable to the opposing party.” *Id.* However, adverse inferences may be drawn where the non moving party does not utilize its “right to respond” to the movant. *Reed v. Bennett*, 312 F.3d 1190, 1195 (10th Cir. 2002).

Citizens not only have a “right to respond” to material issues raised by the movant, they also have a right to respond to new issues that were raised by NRC Staff in their Answer on summary disposition. This is because the regulations governing this proceeding state that the Board “shall apply the standards for summary disposition set forth in subpart G of this part [set forth in 10 C.F.R. § 2.710].” 10 C.F.R. § 2.1205(c). In turn, the subpart G rules provide both substantive and procedural standards to the Board. One example of a procedural standard is that where a moving party shows a lack of a

material dispute, the party opposing summary disposition must respond by setting forth specific facts showing there is a genuine issue. 10 C.F.R. § 2.710(b). Another is that the opposing party is permitted to respond to “new facts and arguments” presented in an answer that supports the motion for summary disposition. 10 C.F.R. § 2.710(a). Ultimately, the Board must determine whether there is “no genuine issue as to any material fact.” 10 C.F.R. §2.710(d)(2).

In an attempt to deny Citizens their right to respond to NRC Staff, AmerGen seeks to draw a distinction between the substantive standards and the procedural standards to be used on summary disposition. AmerGen Motion to Strike at 2. This approach flies in the face of the language of the relevant regulation which merely refers to “standards,” making no mention of whether they are substantive or procedural. 10 C.F.R. § 2.1205(c). In addition, NRC Staff have argued cogently that “Section 2.710 contains both substantive and procedural standards” that should be applied to Subpart L hearings. NRC Staff Response to AmerGen’s Motion for Summary Disposition at notes 10-11.

Even AmerGen has sought to apply some of the procedural standards contained in Section 2.710 to the current proceeding. For example, AmerGen argued that where Citizens failed to respond to a correctly alleged material fact, that fact should be admitted. AmerGen Motion For Summary Disposition at 6 *citing* 10 C.F.R. § 2.710(a). AmerGen further argued that where it showed a lack of a material dispute on an issue, Citizens must respond with specific facts, AmerGen Motion For Summary Disposition at 5 *citing* 10 C.F.R. § 2.710(b).

Thus, AmerGen's arguments in the Motion to Strike are totally inconsistent with AmerGen's Motion For Summary Disposition. Initially, AmerGen recognized that to properly apply the standards on summary disposition contained in Section 2.710 to Subpart L hearings, the Board would have to import many procedural standards as well as the substantive standard on the ultimate issue. However, in the Motion to Strike, AmerGen argues that a key provision of Section 2.710(a) does not apply, even though it fails to retract the argument that other related parts of Section 2.710(a) are applicable. Thus, AmerGen is now trying to cherry pick Section 2.710(a) and apply the parts of the rules that it likes while ignoring the parts that it does not, based on a distinction that lacks any basis in the text of the regulation. The Board should reject this attempt out of hand.

Furthermore, if Amergen's approach were correct, when NRC Staff raised issues that had not been raised by AmerGen, the Board could have drawn an adverse inference with respect to that issue based on Citizens lack of response, even though Citizens were not permitted to respond. This would be absurd and grossly unfair. It is therefore hardly surprising that to avoid this problem, Section 2.710(a) provides Citizens with the ability to respond to new issues raised by NRC Staff, in addition to creating the adverse inference standard.

Moreover, ultimately, the Board must decide whether disputes about material issues remain. This standard requires the Board to hear both sides of each issue. Similarly, the other subpart G standards that AmerGen and the NRC Staff have also sought to apply here also only make sense if a response to allegations about each material issue is permissible. Therefore, it is logical to conclude that the Subpart G standard governing when responses to answers to summary disposition motions are permissible is among the standards incorporated into subpart L proceedings through the operation of Section 2.1205(c).

II. Fundamental Requirements of Due Process And Fairness Require Allowing A Response To New Issues

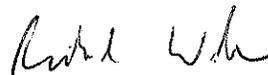
Even if the rules did not explicitly provide for the Response, more general considerations would lead the Board to allow it. Generally, Commission proceedings are governed by a cardinal rule of fairness that each side must be heard. *Houston Lighting & Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 N.R.C. 521, 524 (1976). Thus, each presiding board must fashion fair procedures for dealing with dispositive motions. *Id.* In addition, where a party raises new issues in a filing, due process requires opposing party to have an opportunity to respond to the new issues. *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-89, 16 N.R.C. 1355, 1357 (1982).

Summary disposition is a classic dispositive motion. In addition, there is no doubt that NRC Staff raised new issues in its reply to the motion. For example, NRC submitted two new factual affidavits and sought to argue for the first time that Citizens' expert could not present testimony on coatings. Notably, even AmerGen does not argue that NRC raised no new issues. Thus, standards of fundamental fairness and due process require the Board to allow Citizens to respond to the new issues raised by NRC Staff.

CONCLUSION

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

Respectfully submitted



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Dated: May 17, 2007

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 17, 2007
)	

CERTIFICATE OF SERVICE

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

I hereby certify that on May 17, 2007, I caused Citizens' response to AmerGen's latest Motion to Strike to be served via email and U.S. Postal Service on the following:

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Dated: May 17 2007