

**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**

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| |) | |) |) |) |
| In the Matter of: |) | |) | May 27, 2008 |) |
| |) | |) | |) |
| AmerGen Energy Company, LLC |) | |) | |) |
| |) | |) | Docket No. 50-219 |) |
| (License Renewal for Oyster Creek Nuclear |) | |) | |) |
| Generating Station) |) | |) | |) |

AMERGEN’S RESPONSE TO MAY 21 BOARD ORDER

In a May 21, 2008 Order,¹ the Board directed each of the parties to submit an expert affidavit “that discusses with particularity the significance of the AmerGen Response attached to [AmerGen’s] May 5 letter” to the Commission, “accompanied by a pleading that explains the impact (if any) of that Response on the proper disposition of Citizens’ motion to reopen the record and add a new contention.”² In response to that Order, AmerGen Energy Company, LLC (“AmerGen”) files this Response along with the attached Affidavit of Gary L. Stevens.

As demonstrated below, AmerGen’s response attached to the May 5 letter confirms:

(1) that the Board should not reopen the record under 10 C.F.R. § 2.326 to entertain Citizens’ egregiously late contention because the issue Citizens raise lacks safety significance, a materially different result in this licensing proceeding is not likely, and under 10 C.F.R. § 2.309(c), Citizens

¹ Order (Directing Parties to Submit Explanatory Pleadings and Affidavits) (May 21, 2008) (unpublished) (“Order”).

² Order at 2, referring to the “Motion 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 Reopen the Record and for Leave to File a New Contention, and Petition to Add a New Contention” (Apr. 18, 2008) (“Motion”).

will not contribute to the development of a sound record; and (2) that Citizens' proposed contention fails to raise a genuine dispute as required under 10 C.F.R. § 2.309(f)(1)(vi), and is therefore inadmissible.

I. BACKGROUND

On April 3, 2008 the NRC Staff notified the Commission that it was "reviewing the use of a simplified method to calculate cumulative usage factors (CUF) that may not be conservative."³ The Staff focused its review on one type of component at Oyster Creek; namely, recirculation outlet nozzles.⁴ The Staff provided this information to the Commission, not because it raised a significant safety issue, but "because this may be an issue of public interest."⁵ In fact, the Staff stated "that the safety significance of using the simplified analysis method is low based on the risk assessments performed by the staff in resolving generic safety issues (GSI)-166 and GSI-190."⁶ The April 3 Commission Notification concluded by stating that "[t]he staff plans to ask Oyster Creek to perform a confirmatory analysis consistent with the methodology in Section III of the ASME Code."

Citizens viewed the April 3 Commission Notification as a reason to request that the Commission reopen the record and admit a new contention requesting that AmerGen be required

³ Board Notification 2008-01, Notification of Information in the Matter of Oyster Creek Nuclear Generating Station License Renewal Application (Apr. 3, 2008), available at ADAMS Accession No. ML080940688 ("Commission Notification").

⁴ *Id.* This is because AmerGen only applied the method questioned by the NRC Staff on the recirculation outlet nozzle.

⁵ *Id.*

⁶ *Id.* In a subsequent Draft Regulatory Issue Summary ("RIS"), the Staff explained that this was a generic issue that applied throughout the industry and that the simplified methodology "could be nonconservative if not correctly applied." Regulatory Issue Summary, "Fatigue Analysis of Nuclear Power Plant Components" at 1 (Apr. 11, 2008), originally available at ADAMS Accession No. ML0809502350. This RIS was later published in the Federal Register in an unnumbered format (*i.e.*, RIS 2008-XX), which is the format used in the attached Stevens Affidavit. *See* 73 *Fed. Reg.* 24094 (May 1, 2008).

to perform a confirmatory analysis for the recirculation outlet nozzles at Oyster Creek.⁷

AmerGen and the Staff opposed the Motion for its failure to meet the stringent requirements for a motion to reopen the record, or the timeliness requirements for a late-filed contention, or the substantive requirements for contention admissibility.⁸ In its Answer, AmerGen stated that it was performing a confirmatory analysis of the recirculation outlet nozzle.⁹ But AmerGen could not provide results because the analysis was not final.

AmerGen completed the confirmatory analysis for the recirculation outlet nozzle, and provided the results as a response to a Staff Request for Additional Information,¹⁰ which it docketed on Thursday, May 1, 2008 (“RAI Response”).¹¹ Counsel for AmerGen submitted that RAI Response to the Commission and the parties on Monday, May 5, 2008.¹²

The intent of AmerGen’s Commission Notification was to close the loop created by the Staff’s Commission Notification by communicating to the Commission and the general public that the confirmatory analysis that the Staff had requested was complete, and that the result of

⁷ See Motion at 12. Citizens also requested that similar confirmatory analyses be carried out for any other component that relied upon the potentially non-conservative analysis method, and the metal fatigue monitoring program for Oyster Creek be revised to eliminate reliance on the potentially non-conservative analysis method. However, in their Reply, they withdrew these other issues from litigation. “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” at 3 (May 5, 2008) (“Reply”).

⁸ “AmerGen’s Answer Opposing Citizens’ Motion to Reopen Record and Petition to Add a New Contention” (Apr. 28, 2008) (“Answer”); NRC Staff’s Response in Opposition to Citizens’ Motion to Reopen the Record and for Leave to File and Add a New Contention” (Apr. 28, 2008) (“Staff Answer”).

⁹ See Answer at 23.

¹⁰ Request for Additional Information Related to Oyster Creek Generating Station License Renewal Application (Apr. 29, 2008) available at ADAMS Accession No. ML0810800770. AmerGen obviously did not wait for the Staff to issue a Request for Additional Information to begin its confirmatory analysis.

¹¹ Letter from M. Gallagher to NRC Document Control Desk, “Response to NRC Request for Additional Information on Metal Fatigue Analysis Related to Oyster Creek Nuclear Generating Station License Renewal Application (TAC No. MC7624)” (May 1, 2008) available at ADAMS Accession No. ML081270386 (“RAI Response”).

¹² Letter from A. Polonsky to Chairman D. Klein, “In the Matter of AmerGen Energy Company, LLC (License Renewal for Oyster Creek Nuclear Generating Station) Docket No. 50-219-LR” (May 5, 2008).

that analysis confirmed that the recirculation outlet nozzle at Oyster Creek would perform within ASME Code allowables. It also closed the loop in AmerGen's Answer, which stated that the analysis was being performed, but which could not provide the results of the analysis because they were not yet final.

The Secretary referred adjudication of the Motion to the Board,¹³ and on May 21, the Board issued its Order requesting this response.

II. ARGUMENT

Citizens must satisfy *all* of the requirements in: (1) 10 C.F.R. § 2.326 to reopen the record; (2) 10 C.F.R. § 2.309(c) for nontimely filings; and (3) 10 C.F.R. § 2.309(f)(1) and (2) for contention admissibility. The RAI Response affects the Board's analysis of Citizens' Motion to Reopen and Petition to have admitted a late-filed contention under §§ 2.326, 2.309(c), and 2.309(f)(1).

A. AmerGen's Response Confirms That The Board Should Not Reopen The Record Or Entertain A Late-Filed Contention on Metal Fatigue

The RAI Response affects the Board's analysis of Citizens' Motion to Reopen under 10 C.F.R. § 2.326(a)(1) (authorizing a Board to consider an exceptionally grave issue even if it is untimely); § 2.326(a)(2) (that the motion must address a significant safety issue), and § 2.326(a)(3) (that the motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially).

1. The RAI Response Confirms that the Record Should Not Be Reopened

The RAI Response demonstrates that there is no justification to reopen the record, because it confirms the lack of safety significance of the issue Citizens raise and because it provides additional evidence showing that a materially different outcome is unlikely.

¹³ Order (May 9, 2008) (unpublished).

As to the safety significance, the Staff's Commission Notification unambiguously stated that "the staff believes that the safety significance of using the simplified analysis method is low."¹⁴ The RAI Response "confirms that the results of the original analysis are conservative and remain acceptable."¹⁵ Specifically, the confirmatory analysis revealed a cumulative usage factor ("CUF") with environmental effects included of 0.1366, far lower than the previously calculated value of 0.9781 and below the acceptable limit of 1.0 by nearly an order of magnitude.¹⁶ Mr. Stevens explains this further in his attached affidavit.¹⁷ By demonstrating that the simplified fatigue usage calculation method provided conservative and acceptable results for the recirculation outlet nozzle, the RAI Response provides additional evidence of the low safety significance of the issue Citizens raise. Thus, the RAI Response confirms that Citizens' motion to reopen fails to raise a significant safety issue, contrary to 10 C.F.R. § 2.326(a)(2).

Because it fails to raise a significant safety issue, it necessarily follows that it does not present an exceptionally grave issue that justifies waiving the timeliness requirements of 10 C.F.R. § 2.326(a)(1).

The RAI Response also demonstrates that a materially different result is unlikely because both the original and confirmatory analyses determined that the CUF would be less than the ASME Code limit after 60 years of plant operation. As explained in AmerGen's Answer, Citizens have failed to provide any evidence or information to carry their burden of showing that a materially different result *is* likely.¹⁸ In fact, Citizens relied on their misinterpretation that the Commission Notification identified a significant safety issue for their argument on this

¹⁴ Answer at 15 (*quoting* Commission Notification).

¹⁵ RAI Response Encl. at 4.

¹⁶ *Id.* at 2.

¹⁷ Stevens Affidavit, ¶¶ 9, 10.

¹⁸ *See* Answer at 17-19.

requirement.¹⁹ Thus, the RAI Response provides additional unchallenged evidence showing that Citizens have not met this burden.

2. *The RAI Response Confirms that Citizens Cannot Assist in Developing a Sound Record*

The RAI Response also further demonstrates Citizens' inability to assist in developing a sound record, cutting against Citizens under the eighth factor of the balancing test in 10 C.F.R. § 2.309(c). Citizens' safety significance argument and the substance of their proposed contention rely heavily upon Dr. Hopenfeld's "expectation" about the results of any confirmatory analysis: "I expect that the simplified method has under-estimated [*sic*] the CUF of the recirculation nozzle at Oyster Creek."²⁰ But the RAI Response shows that this speculation is unfounded and demonstrates that the original CUF calculation is conservative.²¹ By confirming that Citizens' testimony and arguments are not only speculative, but false, the RAI Response further undermines any claim by Citizens that they will contribute to the development of the record.

B. AmerGen's RAI Response Confirms That Citizens' Contention Fails To Raise A Genuine Dispute

In its Answer, AmerGen explained that the new contention is inadmissible because it fails to raise a genuine dispute, contrary to 10 C.F.R. § 2.309(f)(1)(vi), for two reasons: first, because the relief Citizens requested (*i.e.*, performance of a confirmatory analysis) had already been granted, and second because the contention rested on Dr. Hopenfeld's speculation that the

¹⁹ *See id.*

²⁰ Citizens' Exh. MFC-1, Declaration of Dr. Joram Hopenfeld ¶ 7 (Apr. 15, 2008) ("Hopenfeld Declaration").

²¹ *See generally* attached Stevens Affidavit; RAI Response.

confirmatory analysis would reveal that the originally-calculated CUF for the recirculation line outlet nozzles was not conservative.²²

The RAI Response demonstrates that Dr. Hopfenfeld's speculation is wrong. As explained in Section III.A.2, above, contrary to Dr. Hopfenfeld's speculation, the confirmatory analysis shows that the originally-calculated CUF for the recirculation outlet nozzle is conservative and acceptable. Thus, the RAI Response provides additional evidence that the proposed contention fails to raise a genuine dispute.

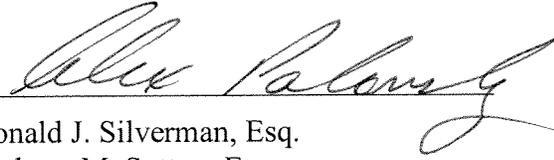
Moreover, now that the confirmatory analysis is complete, Citizens' request that the NRC require AmerGen to do so even more clearly fails to raise a genuine dispute with the other parties to this proceeding. As the RAI Response shows, and as more fully explained in the attached affidavit, the confirmatory analysis uses a conservative method to demonstrate that the original analysis was adequate to meet ASME Code allowables. Thus, it is now even clearer that Citizens' contention fails to raise a genuine dispute.

III. CONCLUSION

For the reasons set forth above, the RAI Response confirms that the Board must not reopen the record or admit Citizens' late-filed contention.

²² See Answer at 26-28.

Respectfully submitted,



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Dated in Washington, D.C.
this 27th day of May 2008

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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

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CERTIFICATE OF SERVICE

I hereby certify that copies of "AmerGen's Response to May 21 Board Order" were served this day upon the persons listed below, by e-mail and first class mail.

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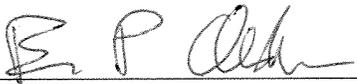
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