

August 1, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF ANSWER TO CITIZENS'
MOTION FOR CLARIFICATION AND MOTION IN LIMINE

INTRODUCTION

Pursuant to the "Memorandum and Order (Prehearing Conference Call Summary, Case Management Directives, and Final Scheduling Order)" (April 17, 2007) (unpublished) ("April 17 Order"), at 5, the Staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby answers "Citizens"¹ Motion for Clarification and Motion in Limine" (July 27, 2007) ("Motion"). For the reasons set forth below, the Staff opposes Citizens' Motion.

DISCUSSION

The Motion contains Citizens' requests concerning the Staff's testimony and the first five parts of the testimony filed by AmerGen Energy Company, LLC ("AmerGen").² These requests and the Staff's responses follow.

¹ The six organizations--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--are collectively referred to as "Citizens."

² See "NRC Staff Testimony of Hansraj G. Ashar, Dr. James A. Davis, Dr. Mark Hartzman and Timothy L. O'Hara Concerning Drywell Contention" ("Staff Testimony") at A8, appended to "NRC Staff Initial Statement of Position on the Drywell Contention" (July 20, 2007). See also "AmerGen Energy Company, LLC Initial Statement of Position" (June 20, 2007), and the attached "AmerGen's Pre-filed Direct Testimony Part 1: Introduction, Drywell Physical Structure, History and Commitments" ("Part 1"), "AmerGen's Pre-filed Direct Testimony Part 2: Acceptance Criteria" ("Part 2"), "AmerGen's Pre-filed Direct Testimony Part 3: Available Margin" ("Part 3"), "AmerGen's Pre-filed Direct Testimony Part 4: Sources of Water" ("Part 4"), and "AmerGen's Pre-filed Direct Testimony Part 5: The Epoxy Coating" ("Part 5").

I. Citizens' Motion for Clarification

Citizens request that the Board clarify whether certain Staff testimony is within the scope of the admitted issue, and generally whether the parties are obligated to both limit the scope of their testimony and promptly object when they believe an issue is outside the scope and, are thereafter estopped from objecting to any responses to such matters on the grounds of scope. See Motion at 1-3.

With respect to the first matter raised, the Staff does not believe that any clarification is necessary. The issue is not whether any testimony about the Sandia Report, "Structural Integrity Analysis of the Degraded Drywell Containment at the Oyster Creek Nuclear Generating Station," dated January 2007, is outside the scope of this proceeding. The issue is whether the Staff's response in A8, which mentioned the Sandia Report in the context of describing how its judgments about whether the Oyster Creek drywell shell would maintain ASME safety margin (*i.e.*, minimum safety factor against buckling) during the renewal period, exceeded the permissible scope of the proceeding. In the Staff's view, this background information regarding how the Staff performed its license renewal review is not outside the scope of this proceeding and should not be excluded.³ To rule otherwise would unduly restrict the Board's ability to fully understand Staff's basis for its conclusions regarding safety margins.

Citizens also argue that they should have the right to respond to the discussion of the Sandia Report as a "notion of fundamental fairness." See Motion at 3. No relief would appear to be necessary since if the testimony is not excluded, Citizens can to respond in the written

³ For example, the Board noted its interest in understanding buckling. See Memorandum and Order (Denying AmerGen's Motion for Summary Disposition) (June 19, 2007) (unpublished) at 7 n.10. By contrast, the use of the Sandia Report to challenge AmerGen's acceptance criteria was specifically rejected by the Board in ruling on a late-filed contention. See Memorandum and Order (Denying Citizens' Motion for Leave to Add a Contention and Motion to Add a Contention (Apr. 10, 2007) (unpublished), at 5-6, 13.

response and rebuttal testimony due August 17th. See April 17 Order at 5-6.⁴

With respect to Citizens' request that the Board clarify the obligations of the parties, the Staff believes the Board has already provided sufficient guidance on this matter in its April 17 Order. That order clearly states that a party that wishes to exclude any portion of another party's written submission must timely file a motion in limine. See April 17 Order at 5, 6. Thus, the requested clarification is not necessary.

II. Citizens' Motion in Limine

Citizens ask the Board to exclude or strike from the record evidence presented by AmerGen and the Staff that either is "not supported by detail sufficient for comprehension or confirmation by another expert" or pertains to matters beyond the scope of the proceeding. See Motion at 2-3. In the alternative, Citizens ask that AmerGen and the Staff be given the opportunity to withdraw "unsupported testimony" or provide the required support with Citizens having the opportunity to respond after such support is provided. See Motion at 3-4.

The Staff does not support Citizens' motion. The passages Citizens identify appear to reflect a disagreement with the views expressed in the testimony rather than a failure to support the testimony.⁵ For example, Citizens' argue that there is no basis for AmerGen's statement in its Part 1 testimony (A.20) or Part 4 (A.13) that investigations about the source of water in the drywell have been "extensive" or the Staff's statement (Staff Testimony at A.7) that postulated wall thinning did not have a "significant effect on buckling loads." Such disagreements about the merits of AmerGen and Staff views can be pursued through Citizens' proposed questions for

⁴ Although they did not first seek the Board's permission, Citizens already present in their Motion a written response to the Staff testimony they seek to exclude. See Motion at 2-3.

⁵ For example, Citizens' argue that there is no basis for AmerGen's statement in its Part 1 testimony (A.20) or Part 4 (A.13) that investigations about the source of water in the drywell have been "extensive" or the Staff's statement (Staff Testimony at A.7) that postulated wall thinning did not have a "significant effect on buckling loads."

the Board to ask these parties. In addition, Citizens may argue in proposed findings that testimony on these matters did not include persuasive information on these matters.

With respect to Citizens request that AmerGen and the Staff be afforded the opportunity to provide additional information regarding the testimony Citizens seek to exclude, the Staff, without conceding that the testimony is deficient, does not object to either AmerGen or the Staff being given an opportunity to further elaborate on such matters in their respective rebuttal testimony due August 17, 2007, and Citizens being provided an opportunity to respond in surrebuttal testimony due September 14, 2007. See April 17 Order at 5, 6. Citizens, by virtue of their request, apparently are waiving any objections to whether such additions would exceed the scope of rebuttal.

In sum, while the Staff does not agree that Citizens' motions for clarification and in limine should be granted, the Staff does not object to AmerGen and the Staff being permitted to provide additional evidence in rebuttal testimony and Citizens being permitted to respond to any such additions in its surrebuttal filing.

CONCLUSION

For the reasons discussed above, Citizens' motions should be denied.

Respectfully submitted,

/RA/

Mitzi A. Young
Counsel for NRC Staff

Dated at Rockville, Maryland
this 1st day of August, 2007

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF ANSWER TO CITIZENS' MOTION FOR CLARIFICATION AND MOTION IN LIMINE" in the above-captioned proceeding have been served on the following by electronic mail with copies by deposit in the NRC's internal mail system or as indicated by an asterisk, by electronic mail, with copies by U.S mail, first class, this 1st day of August, 2007.

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