

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. 50-0219-LR
AMERGEN ENERGY COMPANY, LLC)	
)	ASLB No. 06-844-01-LR
(License Renewal for the Oyster Creek)	
)	August 24, 2007
)	

MOTION TO CROSS-EXAMINE PETER TAMBURRO AND FOR AN EXTENSION OF TIME REGARDING NRC'S ERRATA

PRELIMINARY STATEMENT

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") are filing this motion because the documents authored by Mr. Tamburro are inconsistent with each other and unclear. Furthermore much of a sworn affidavit submitted by Mr. Tamburro on behalf of AmerGen Energy Co. ("AmerGen") was inconsistent with other testimony filed by AmerGen and a document generated by Mr. Tamburro on the same day that he swore the affidavit.

Despite his previously expressed concerns about many issues relating to the safety of the drywell, Mr. Tamburro's inconsistent affidavit enabled AmerGen to use arguments that were, at minimum, misleading in an attempt to induce the Atomic Safety and Licensing Board (the "Board") to

grant summary disposition before it was in possession of critical new information authored by Mr. Tamburro. The critical new information authored by Mr. Tamburro shows that there is a reasonable technical justification for Citizens' position that the margins for the drywell shell are, at best, much smaller than AmerGen has claimed to date. Mr. Tamburro is the crucial fact witness in this case, and it is therefore critical that Citizens be granted an opportunity to learn the truth about his actions and assessments of the drywell. Unless Citizens are able to cross-examine Mr. Tamburro individually, rather than in a panel, it will be impossible to make him explain the inconsistencies. Without individual cross examination, Citizens will be unable to learn whether Mr. Tamburro is actually sure that the drywell shell meets the safety requirements. Thus, Citizens are moving to cross-examine AmerGen's expert, Peter Tamburro under 10 C.F.R. § 2.310(b)(3) in this case.

In addition, Citizens are requesting an extension of the deadline to file motions and questions related to the NRC errata, which was filed after 5 pm on August 23, 2007 (yesterday). Because Citizens' counsel is going on vacation at 4 am tomorrow until Labor Day, Citizens request that the deadline to submit questions and motions relating to the NRC errata be extended to the deadline for the submission of questions and motions regarding sur-rebuttal (September 18, 2007).¹

ARGUMENT

I. Legal Standard For Granting Cross-Examination

10 C.F.R. § 2.1204(b) authorizes the Board to allow any party to cross-examine a witness when "it is necessary for the development of [an] adequate record for a sound decision or is required for a full and true disclosure of the facts." *In the Matter of Entergy Nuclear Vermont Yankee LLC (Vermont Yankee Nuclear Power Station)*, 60 N.R.C. 686, 689 (2004). The basis for granting a motion to cross-

¹ Citizens have contacted AmerGen and NRC Staff about these motions. Citizens understand that AmerGen objects to the Motion for Cross Examination, but does not object to the motion for an extension. NRC Staff would only agree to an

examine experts “is not restricted to those situations described in 10 C.F.R. § 2.310(d)” relating to credibility of witnesses. *Id.* at 690. Instead, cross-examination under Subpart L is broader and “can encompass any issue that is relevant to the findings of fact that a Board or presiding officer must make in order to render a decision.” *Id.* The breadth of this ability to cross-examine witnesses arises out of the fact that the opportunity for cross-examination under Subpart L has been judicially determined to be equivalent to that same opportunity under 5 U.S.C. § 556(d). *See id.* at 710 (citing *CAN v. United States*, No. 04-1145, 2004 WL 2827697 (1st Cir. 2004)). In particular, the Board has recognized the appropriateness of supplemental cross-examination in instances where decisions hinge on “expert opinions, technical and scientific facts,” recognizing that the Board “is not experts in all disciplines nor as well versed in the nuances of some issues as some of the litigats.” *Id.* at 711.

Finally, Commission proceedings are governed by a cardinal rule of fairness that each side must be heard. *Houston Lighting & Power Co. (Allens Creek Nuclear Gnerating Station, Unit 1)*, ALAB-565, 10 N.R.C. 521, 524 (1976). It would be unfair to Citizens if AmerGen were able to support its position with a grossly inconsistent witness and effectively deny Citizens the ability to find out why he has been so inconsistent by breaking up questioning on his testimony into a number of witness panels.

II. Peter Tamburro’s Documents and Testimony Are Inconsistent With Each Other

AmerGen Ex. 16, authored by Mr. Tamburro in March 2007, but only provided to Citizens on June 1, 2007, revealed that AmerGen’s own assessment shows that there is, at minimum, a reasonable technical argument that the assured remaining margin in the drywell is 0.022 inches or less. This directly contradicts an affidavit sworn by Mr. Tamburro, which was submitted by AmerGen in support of summary disposition. In addition, Citizens Ex. 3, also authored by Mr. Tamburro, shows that he had

extension to August 31, which not have allowed Citizens’ counsel to deal with the matter. Thus NRC Staff object to the motion for an extension, but expressed no position on the motion for cross-examination.

serious concerns about the safety justification for the drywell shell, which he subsequently decided to overlook. Because Citizens and the Board need to understand the motivation behind Mr. Tamburro's changes in position and inconsistent testimony, and such understanding will be impossible to obtain if Mr. Tamburro provides his evidence as a member of a number of witness panels, Citizens respectfully request the opportunity to cross-examine Peter Tamburro individually pursuant to 10 C.F.R. § 2.1204(b).

A. Mr. Tamburro's Assessment Of 2006 External Results Supported Citizens' Arguments That Margins Were Less Than 0.021 Inches

On June 1, 2007, Citizens received from AmerGen a copy of C-1302-187-5320-24 revision 2, AmerGen Ex. 16. Mr. Tamburro prepared this document on March 26, 2007. This document assesses whether the external UT results taken in October 2006 comply with the current licensing basis of the plant. On page 5 it contains a helpful summary table which shows the various acceptance criteria and the actual thickness for each bay. For the local buckling criterion, the table shows that in Bay 13, Mr. Tamburro assessed the limiting local thickness as 0.658 inches, compared to an acceptance criterion of 0.636 inches. *Id.* at 5. Thus, the derived margin was, at least arguably, 0.022 inches. Similarly, in Bay 17, Mr. Tamburro found the limiting local thickness to be 0.663 inches, *id.*, yielding a margin of 0.027 inches.

Considering the document in greater detail, it states that the local wall criteria for buckling requires that the 12 inch by 12 inch center of a 36 inch by 36 inch evaluation area must be 0.636 inches thick or greater. *Id.* at 10. It also requires that the area within the evaluation area surrounding the center square must be "on average thicker than the transition from 0.636" to 0.736." *Id.*

The evaluation of the surrounding area for Bay 1, illustrated graphically that the margins are extremely narrow. *Id.* at Figure 1-5. Reading from the graph, the margin shown is of the order of

0.005 inches to 0.01 inches. *Id.* The text also confirms that the thinnest 12 inch by 12 inch area in Bay 13 is 0.658 inches, *id.* at 61, and the thinnest 12 inch by 12 inch area in Bay 17 is 0.663 inches. *Id.* at 83. Thus, the document provides technical support for an argument that the most limiting margins derived from the external results taken in 2006 are between 0.005 inches and 0.027 inches.

B. Mr. Tamburro's Affidavit Contradicts Mr. Tamburro's Assessment Of The 2006 External Results

On the same day that Mr. Tamburro completed his draft of the evaluation of the 2006 external UT results, he also swore an affidavit, which AmerGen submitted as part of its Motion for Summary Disposition. Directly contradicting his evaluation discussed above, Mr. Tabmurro swore that the local acceptance criterion includes a one square foot area that must be greater than 0.536 inches. Affidavit of Peter Tamburro, dated March 26, 2006 ("Tamburro Aff.") at ¶¶ 20, 22, 24. In fact, as discussed above, in the draft evaluation Mr. Tamburro used 0.636 inches as the correct local area acceptance criterion.

Even more seriously, the entire first part of Mr. Tamburro's opinion is that "Citizens Allegation of 0.026" Remaining Margin Is Technically Unsupportable." Tamburro Aff. at 4. Further Mr. Tamburro specifically stated that "Citizens' assertion that the margin above the acceptance criteria is as low as 0.026 inches, therefore, is not supported by the data." *Id.* at ¶ 25. As demonstrated above, Mr. Tamburro's contemporaneous evaluation of the 2006 UT results showed precisely the opposite. There is a technically supportable argument that the data actually showed that the margin above the acceptance criteria was in some instances even lower than 0.026 inches. Far from being technically unsupportable, Citizens' allegation was in fact supported by a document authored by Mr. Tamburro, that was not then in Citizens' possession.

C. Mr. Tamburro Expressed Concerns That He Subsequently Disregarded

In March 2006 Mr. Tamburro authored a memorandum that pointed out many deficiencies in C-1302-187-5320-24 rev. 0, which was “the only safety related calculation that demonstrates that the 1992 as left Drywell Vessel Thicknesses in the former sandbed meets design basis.” Citizens’ Ex. 3 at 1.

As Citizens pointed out in their initial statement of position, Mr. Tamburro saw the need to either justify that the full cut out trays modeled by GE could be use as a local area acceptance criterion, or revise the acceptance criteria to a more stringent requirement. Citizens’ Initial Statement at 6-7. The subsequent revisions to C-1302-187-5320-24 took the route of using more stringent acceptance criteria rather than justifying the 9.5% reduction in buckling strength that the full cut out would cause. *Id.* However, in his testimony to the Board, Mr. Tamburro has stated that the local area acceptance criterion is based on the full cut out, not the revised criteria used in the subsequent revisions to C-1302-187-5320-24. Similarly, Citizens wish to examine Mr. Tabmurro about his concerns relating to other items, including the correction applied to the 1992 external data, and how to decide whether Bays with more than one area that is thinner than 0.736 inches are acceptable.

D. Mr. Tamburro’s Assessment Of The 2006 External Data Shows That The Drywell Violates The Acceptance Criteria

Calculation C-1302-187-5320-24 Rev 2, authored by Mr. Tamburro, shows that the acceptance criteria are probably being violated. Citizens Rebuttal Statement at 16. Mr. Tamburro chose to ignore that fact when he authored the document and has continued to maintain that the drywell meets the acceptance criteria. Because the data presentation in calculation C-1302-187-5320-24 Rev 2 is unclear and at times misleading, counsel for Citizens has spent considerable time annotating the document and trying to understand how various figures relate to the underlying data. Citizens respectfully maintain

that the Board would find it very difficult to ask probing questions about this document, simply because it is so unclear. Instead of allowing AmerGen to take advantage of the hinderence produced by Mr. Tamburro's opaque presentation of the data, the Board should allow counsel for Citizens to cross examine Mr. Tamburro on this aspect of his testimony.

III. Cross Examination By Citizens Should Be Permitted

In the case of the testimony of Mr. Tamburro, supplemental cross-examination by Citizens should be allowed, because the inconsistencies in his testimony and the lack of clarity in the documents he has authored do not allow Citizens to offer to the Board a full and complete cross-examination plan that the Board could reasonably be expected to follow. In addition, cross-examination of Mr. Tamburro on the various inconsistencies requires a nuanced understanding of a myriad of documents in the record. Moreover, in the absence of this motion being granted, Citizens' questions for Mr. Tamburro would be divided among three panels. This has two adverse consequences. First, questions about a single document, such as Citizens Ex. 3, would have to be spaced out in time, reducing the intensity of the focus on the document. Second, other witnesses on the panels may seek to prevent Mr. Tamburro from fully expressing his views. For example, Michel Gallagher, who is on panel two with Mr. Tamburro is a vice president of Exelon, while Mr. Tamburro is a senior engineer at Oyster Creek. Thus, because Mr. Gallagher outranks Mr. Tamburro, Mr. Tamburro may feel obliged to follow Mr. Gallagher's lead in responding to certain questions. Thus, without individual cross-examination of Mr. Tamburro by Citizens' counsel, it is unlikely the Board will be able to identify the inconsistencies in Mr. Tamburro's work and effectively probe into Mr. Tamburro's motivation for allowing those inconsistencies to develop and persist. Therefore, in order to develop an adequate record for decision

in this case, Citizens respectfully request that the Board grant this motion to allow Citizens to cross-examine Mr. Tamburro.

CONCLUSION

For all of the forgoing reasons, the ASLB should grant Citizens' motion to cross-examine Mr. Tamburro pursuant to 10 C.F.R. § 2.310(b). In addition, the Board should grant Citizens request that the deadline to submit questions and motions relating to the NRC errata be extended to the deadline for the submission of question sur-rebuttal (September 18, 2007). Furthermore, this Board may grant such further relief as it sees fit.

Respectfully submitted,



Richard Webster, Esq.
RUTGERS ENVIRONMENTAL LAW CLINIC
Attorneys for Citizens

Dated: August 24, 2007