

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	)	
	)	August 31, 2007
License Renewal for Oyster Creek Nuclear	)	
Generating Station	)	
_____	)	

**CITIZENS' OPPOSITION TO AMERGEN AND NRC MOTIONS IN LIMINE**

**PRELIMINARY STATEMENT**

American Energy Company LLC (“AmerGen”) and NRC Staff have again moved to exclude portions of the Rebuttal Statement and Exhibits 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”). AmerGen’s motion is yet another attempt to avoid the central issues in this litigation by excluding testimony that was carefully tailored to respond to the framework provided by the Atomic Safety and Licensing Board (the “Board”). NRC Staff’s motion attempts to exclude testimony that was provided in direct response to the Board’s question addressed to all parties and makes another unjustified attack on the scope of Dr. Hausler’s expertise.

## ARGUMENT

### **I. AmerGen's Motion in Limine Should Be Denied Because Citizens' Rebuttal Is Admissible**

AmerGen argues that certain portions of Citizens' Rebuttal are inadmissible.

AmerGen misconstrues the scope of the Board's prior orders, however, and attempts to unduly restrain Citizens' ability to respond fully and completely to testimony and materials filed by the other parties, as well as to the Board's questions. Furthermore, AmerGen and NRC have both apparently lost sight of the fact that this Board, as recently as August 9, 2007, has reminded the parties that "Licensing Boards are accustomed to weighing evidence, including expert testimony, and determining its relevance to the issues presented." Memorandum and Order (Ruling on Motions in Limine and for Clarification) at 2 (Aug. 9, 2007).

#### **A. Citizens Response to Question 12 Is Admissible**

AmerGen argues that "Section II of Citizens' Rebuttal is simply an attempt to relitigate Citizens' previously rejected acceptance criteria contentions." AmerGen's Motion in Limine at 3. This is a mischaracterization by AmerGen of Citizens' response to Board question number 12(e), which expressly asked for a discussion of "whether consideration of a different modeling or elementization would constitute, under NRC regulations, a challenge to the CLB." Mem. and Order at 11-12 (Aug. 9, 2007). In response to the Board, Citizens' argued that with respect to the threshold question of exactly what comprises the "GE methodology," the issue is unclear. Citizens' Rebuttal at 7. Specifically, it does not appear that NRC Staff reviewed and accepted the results of the December 11, 1992 GE study. *Id.* Therefore, the tray model may not be part of the CLB. If it is not part of the CLB, then challenges to this model would not be a challenge to the CLB. Because this is offered in

response to the Board's request for a *discussion*, it is relevant and the Board will exercise its judgment as to the weight it will give this portion of Section II.

Contrary to AmerGen's assertions that "essentially all of Section II of Citizens' Rebuttal" should be accorded no weight because it relates to previously rejected contentions, AmerGen Mot. in Limine at 3-4, a significant portion of Section II discusses the fact that, assuming that the "GE methodology" is as broad as AmerGen suggests, AmerGen is arguably in violation of the CLB. Citizens' Rebuttal at 7-9. As a result, AmerGen will be in violation of the CLB on the first day of any period of extended operation. This is at the heart of the contention, is not outside the scope of this proceeding, and thus is highly relevant.

Finally, the last paragraph of Section II of Citizens' Rebuttal is also in direct response to Board question 12(e). Therefore, it, too, is relevant and should be considered by the Board.

**B. The Board Is Capable of Determining Whether There Is Evidence Sufficient to Suggest that AmerGen May Not Be Able to Apply the Strippable Coating During Forced Outages**

AmerGen objects to Citizens' assertion that water from the reactor cavity could enter the external sand bed region during forced outages that cause the reactor to fill with water. AmerGen Mot. in Limine at 4. Simply because AmerGen does not like this suggestion, however, does not make it irrelevant. Based on past history, forced outages are not unexpected; therefore, Citizens are not arguing that "unexpected" conditions will induce AmerGen to violate its commitment. *Id.* Citizens' argument is a practical one—if there is a forced outage, by its very nature it is questionable whether AmerGen will, in fact, be able to apply the strippable coating. Citizens' Rebuttal at 23-24. Therefore, the Board should

consider this assertion in the context of the possibility of ongoing corrosion during any period of extended operation and the impact it has on the frequency of UT testing.

**C. Citizens' Exhibit 39 Satisfies the Board's Requirement For Rebuttal Testimony**

AmerGen complains that Citizens' Exhibit 39, Dr. Hausler's Memorandum entitled "Further Discussion of the Nature of the Corroded Surfaces and the Residual Wall Thickness of the Oyster Creek Dry Well," is not specific or focused enough and asks the Board to disregard it. AmerGen Mot. in Limine. at 5-6. AmerGen apparently overlooked the introduction, the summary, and the headings throughout the document. Past Board rulings are a guide in this instance. For example, just as the Board stated in its denial of Citizens' Motion in Limine, here AmerGen may, in its sur-rebuttal, respond to additional details and "challenge the adequacy of the level of detail" provided by Citizens. Mem. and Order at 9 (Aug. 9, 2007). In short, the remedy is for AmerGen to respond, rather than to ask the Board to simply disregard Citizens' Exhibit 39.

**D. Citizens' Argument About Bare, Inaccessible Areas of the Sand Bed Region Is Permissible Because it Goes to Frequency of the UT Monitoring**

AmerGen contends that Citizens' argument that "AmerGen has failed to establish that the epoxy coating was applied to all of the drywell shell in the sand bed region," should be given no weight by the Board because it is an impermissible attempt to expand the contention and challenge the scope of the UT monitoring program. AmerGen Mot. in Limine at 6. This is a facile argument. Citizens do not argue on rebuttal that AmerGen should be monitoring these areas. Rather, Citizens maintain that corrosion, especially ongoing corrosion, in these areas could cause the drywell shell to corrode faster than currently predicted by AmerGen.

Citizens' Rebuttal at 21. If the corrosion rate is greater than predicted by AmerGen, then the only way to determine that the facility remains above safety margins during any period of extended operations is to increase the frequency. As such, this argument is relevant and the Board should consider it.

**E. Citizens' Discussion of Extreme Value Statistics Responds to Board Question 10.**

AmerGen objects to Citizens' use of extreme value statistics in its Rebuttal and Testimony. AmerGen Mot. in Limine at 7. AmerGen asserts that the discussion is beyond the scope of the Board's August 9, 2007 Memorandum and Order, citing to page 4 of that decision. *Id.* Apparently, AmerGen maintains that Dr. Hausler's role in the proceeding has been reduced to taking AmerGen's data and plotting it on a graph. *Id.* Citizens disagree with that characterization. Regardless, the Board asked for an elucidation of various UT thickness measurements and requested that the discussion "include use of mean versus extreme value statistics" to make a more informed decision. Mem. and Order at 10 (Aug. 9, 2007). That is what Citizens provided and the Board will afford it the appropriate level of consideration.

**F. Citizens' Argument that the Thinnest Spot May Be Less than 0.49 Inches Goes to Frequency and Is Permissible**

AmerGen objects to Citizens' argument that there may be a point on the drywell shell that is thinner than 0.49 inches. AmerGen Mot. in Limine at 7. Again, AmerGen contends that this argument goes to the scope of the UT monitoring regime, not the frequency, and as such is impermissible. *Id.* at 7-8. AmerGen has oversimplified this argument and ignores the fact that to determine frequency, the gravamen of the contention, the margins must first be established. In this regard, the Board has consistently found that the existing margin must be

addressed as part of the contention. For example, in denying AmerGen's Motion for Summary Disposition, the Board stated that the litigable issues in this proceeding are the existing margin, the potential for existence of a corrosive environment, and the estimated corrosion rate. Board Order at 7 (June 19, 2007). The Board recognized that the margin had to take account of the uncertainties in the measurements, stating that "in addressing uncertainties, the parties may provide evidence associated with the measurement technique as well as with the interpretation of the data. The Board's consideration of this information will be for the purpose of determining how much the actual values of thickness can reasonably be expected to differ from the measured values. . . ." Board Order at 7 n.10 (June 19, 2007). Because Citizens' argument about the thinnest spot on the drywell shell addresses the issue of margins, it is relevant and the Board should consider it.

**G. Evidence of Past Trough Defects Is Relevant to Show Likelihood of Degradation in the Future**

AmerGen disputes Citizens' statement about the degradation of the trough below the reactor cavity. AmerGen Mot. in Limine at 8. What AmerGen does not and cannot dispute, however, is the fact that the 1986 and 1996 inspections show deterioration in the concrete. Citizens' Rebuttal at 20. Because past inspections show degradation of the trough, it is neither inappropriate nor irrelevant for Citizens to maintain that it is likely to degrade in the future. Recognizing past degradation for purposes of determining the frequency of the UT monitoring is relevant to the question of whether the frequency is sufficient to ensure the facility is safe during any period of extended operation.

**H. The 10 Mils Per Year Interior Corrosion Rate is Precautionary**

AmerGen also objects to Citizens' legal argument regarding the corrosion rate. AmerGen Mot. in Limine at 8. Citizens offered the precautionary rate as a legal

argument. The Board will afford it whatever weight it deems appropriate. AmerGen's remedy is to respond when it files its sur-rebuttal.

**I. Evidence Regarding Acceptance Criteria Is Admissible**

AmerGen once again mistakenly alleges that the Board's decisions have precluded any litigation about the acceptance criteria. AmerGen Motion in Limine at 8-9. Citizens' argument in its Rebuttal is simple and relevant. If the facility does not currently meet the acceptance criteria, then it will not meet those same criteria on the first day of any period of extended operation.

**J. The Record Contains Support for Dr. Hausler's Discussion of Galvanic Corrosion.**

Incredibly, AmerGen argues that because Dr. Hausler's memorandum at Citizens' Exhibit 39 does not include support for the definition he provides of galvanic corrosion, that it should be accorded no weight. AmerGen Mot. in Limine at 9. Citizens maintain that the Board, itself comprised of experts, can assess Dr. Hausler's academic credentials and his professional experience to determine how much weight should be given to the definition of galvanic corrosion.

**II. Dr. Hausler Is Suitably Qualified to Respond to Board Question 12 and NRC Staff's Motion in Limine Should Be Denied**

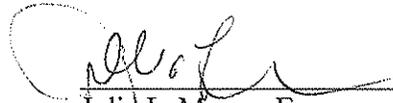
NRC Staff have moved the Board to exclude Dr. Hausler's response to Board question number 12 on the grounds that he is not qualified. NRC Staff Motion in Limine at 2. NRC Staff arrive at this conclusion by seizing on Dr. Hausler's statement made in his pre-filed rebuttal testimony that he is not a structural engineer. *Id.* Thus, NRC Staff appears to suggest that only a structural engineer is qualified to answer Board question 12. *Id.* This argument is specious. First, it is absurd to suggest that only a structural engineer is qualified to answer Board question 12, which attempts to elicit discussion on the operation of the GE

model. Second, the Board is fully aware by this time of Dr. Hausler's experience, education, and expertise and can assess his response to the question it directed the parties to answer. Mem. and Order at 11-12 (Aug. 9, 2007).

**CONCLUSION**

For the foregoing reasons, AmerGen's and NRC Staff's Motions in Limine should be denied entirety.

Respectfully submitted,



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