

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

E. Roy Hawkens, Chairman
Dr. Paul B. Abramson
Dr. Anthony J. Baratta

In the Matter of

AMERGEN ENERGY COMPANY, LLC

(License Renewal for Oyster Creek Nuclear
Generating Station)

Docket No. 50-0219-LR

ASLBP No. 06-844-01-LR

September 12, 2007

MEMORANDUM AND ORDER

(Ruling on Motion to Conduct Cross-Examination
and Motions in Limine)

Before this Licensing Board are three motions. On August 24, 2007, Intervenors in the above-captioned proceeding (six organizations hereinafter referred to collectively as Citizens¹), submitted a Motion to cross-examine Mr. Peter Tamburro, an employee of AmerGen Energy Company, LLC ("AmerGen").² On August 27, AmerGen and the NRC Staff each filed a Motion

¹ The six organizations are 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.

² [Citizens] Motion to Cross-Examine Peter Tamburro and for an Extension of Time Regarding NRC's Errata (Aug. 24, 2007) [hereinafter Citizens Motion]. AmerGen and the NRC Staff both oppose Citizens' motion to cross-examine Mr. Tamburro. See AmerGen's Answer Opposing Citizens' Motion to Cross-Examine Peter Tamburro (Aug. 30, 2007) [hereinafter AmerGen Answer]; NRC Staff Answer in Opposition to Citizens' Motion to Cross-Examine Peter Tamburro (Aug. 30, 2007) [hereinafter NRC Staff Answer].

in Limine seeking to strike – or in the alternative, accord no weight to – portions of Citizens’ written response and prefiled rebuttal testimony and exhibits.³

For the reasons set forth below, we deny Citizens’ Motion to Cross-Examine Mr. Tamburro, and we deny AmerGen’s and the NRC Staff’s Motions in Limine.

I. ANALYSIS

A. Citizens’ Motion To Cross-Examine Mr. Peter Tamburro

1. Legal Standards Governing Motions to Conduct Cross-Examination

Under 10 C.F.R. Part 2, Subpart L, cross-examination by the parties is allowed only where the presiding officer determines it is “necessary to ensure the development of an adequate record for decision” (10 C.F.R. § 2.1204(b)(3)). The Commission, in its 2004 revision to Part 2, made clear that cross-examination by the parties should be permitted only “where the presiding officer finds . . . that his or her questioning of witnesses will not produce an adequate record for decision” (Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2196 (Jan. 14, 2004)). Because the presiding officer “is ultimately responsible for the preparation of an initial decision on the . . . contested matter,” the Commission concluded that he or she will be “best able to assess the record information as the hearing progresses, and determine where the record requires further clarification or explanation” (*ibid.*). See also Citizens Awareness Network, Inc. v. NRC, 391 F.3d 338, 351 (1st Cir. 2004).

³ AmerGen’s Motion in Limine Regarding Portions of Citizens’ Rebuttal (Aug. 27, 2007) [hereinafter AmerGen Motion]; NRC Staff Motion in Limine Regarding Citizens’ Response to Board Question 12 (Aug. 27, 2007) [hereinafter NRC Staff Motion]. The NRC Staff filed an answer in support of AmerGen’s Motion, while Citizens filed an answer opposing both AmerGen’s and the NRC Staff’s Motions. NRC Staff Answer to AmerGen Motion in Limine Regarding Citizens’ Rebuttal (Aug. 31, 2007); Citizens’ Opposition to AmerGen and NRC Motions in Limine (Aug. 31, 2007) [hereinafter Citizens Answer].

2. Citizens Fail to Demonstrate Cross-Examination is Necessary to Ensure the Development of an Adequate Record

Citizens claim that unless they are permitted to cross-examine Mr. Tamburro, alleged inconsistencies in documents he has authored will remain unexplained and, as a consequence, “Citizens will be unable to learn whether Mr. Tamburro is actually sure that the drywell shell meets the safety requirements” (Citizens Motion at 2). According to Citizens, statements made by Mr. Tamburro in Calculation No. C-1302-187-5320-024, Rev. 2 (“Calc. 24”) – submitted as AmerGen Prefiled Exhibit 16 – “directly contradict[] an affidavit sworn by Mr. Tamburro, which was submitted by AmerGen in support of summary disposition” (*id.* at 3). Additionally, statements made by Mr. Tamburro in Assignment Report 00461639 – submitted as Citizens Prefiled Exhibit 3 – allegedly demonstrate Mr. Tamburro “had serious concerns about the safety justification for the drywell shell, which he subsequently decided to overlook” (*id.* at 3-4). Citizens assert that the Board lacks the “nuanced understanding” of the evidentiary record – particularly with respect to Calc. 24 – that is necessary to resolve these inconsistencies and to create a full and adequate record for decision (*id.* at 6-7).

Moreover, Citizens assert that their Motion should be granted, because otherwise the Board’s questioning of Mr. Tamburro “would be divided among three [witness] panels . . . [which] would ha[ve] two adverse consequences” (*id.* at 7). First, the Board’s questions “would have to be spaced out in time, reducing the intensity of the focus on the document,” and second, “other witnesses on the panels may seek to prevent Mr. Tamburro from fully expressing his views” (*ibid.*).

Citizens fall woefully short of demonstrating that, unless they have an opportunity to cross-examine Mr. Tamburro, the Board will fail to develop an adequate record. We begin by rejecting Citizens’ assertion that this Board lacks the requisite understanding of the evidentiary record to adequately question Mr. Tamburro. This Board – which is comprised of a legal judge,

a technical judge, and a judge who is both technically and legally trained – is fully capable of eliciting testimony from Mr. Tamburro and resolving any alleged inconsistencies in his prior statements regarding the Oyster Creek drywell shell. See AmerGen Answer at 3-4; NRC Staff Answer at 4-5. Moreover, Citizens have provided the Board with proposed questions that – without divulging the substance of those questions (10 C.F.R. § 2.1207(a)(3)(iii)) – establish a thorough line of questioning for the Board to pursue with Mr. Tamburro.

Nor is there any basis for Citizens’ assumption that the use of witness panels will impair the effective questioning of Mr. Tamburro or the veracity of his answers. As AmerGen correctly observes, the Board “is free to question Mr. Tamburro on any aspect of his testimony at *any* stage of the hearing,” notwithstanding any particular panel format that is employed (AmerGen Answer at 5). We therefore reject Citizens’ argument that “breaking up [the] questioning [of Mr. Tamburro’s] testimony into a number of witness panels,” will “effectively deny Citizens the ability to find out why [Mr. Tamburro] has been so inconsistent” (Citizens Motion at 3). We likewise reject Citizens’ wholly unsupported allegation that other panel witnesses may seek to inappropriately influence Mr. Tamburro or otherwise encourage him not to testify truthfully (id. at 7).

B. AmerGen’s Motion In Limine

AmerGen asserts that the Board “must exclude, or, in the alternative, accord no weight to” (AmerGen Motion at 2) selected portions of (id. at 1): (1) Citizens’ Response to AmerGen and NRC Staff Initial Testimony (Aug. 17, 2007) [hereinafter Citizens’ Response]; (2) the Prefiled Rebuttal Written Testimony of Dr. Rudolf H. Hausler Regarding Citizens’ Drywell Contention (Aug. 16, 2007) [hereinafter Hausler Rebuttal Testimony]; and (3) Citizens’ Prefiled Exhibits 38 and 39, which are memoranda from Dr. Hausler dated August 16, 2007. According to AmerGen, the specified portions must be stricken for the following reasons (id. at 2): (1) Citizens impermissibly challenge the Oyster Creek current licensing basis (“CLB”); (2) Citizens impermissibly presume that AmerGen will violate its regulatory commitments; (3) Citizens’

Prefiled Exhibit 39 does not respond to the direct testimony of either AmerGen or the NRC Staff; (4) Citizens present arguments outside the scope of this proceeding; (5) Citizens present unreliable arguments that lack an evidentiary basis; and (6) Citizens impermissibly challenge the application of the acceptance criteria during the current licensing term. Because we find AmerGen's arguments to be without merit, we deny its Motion.⁴

1. Citizens do not Impermissibly Challenge the Oyster Creek CLB

AmerGen asserts that Section II of Citizens' Response must be accorded no weight because it (1) challenges whether the buckling acceptance criteria are part of the Oyster Creek CLB, and (2) offers Citizens' opinion about what the appropriate acceptance criteria should be (AmerGen Motion at 3-4). What AmerGen fails to recognize is that Question No. 12(e) of the Board's August 9 Order specifically asked the parties to "discuss whether consideration of a different modeling or elementization would constitute . . . a challenge to the CLB" (Licensing Board Memorandum and Order (Ruling on Motions in Limine and Motion for Clarification) at 11-12 (Aug. 9, 2007) (unpublished) [hereinafter August 9 Order]; see also Citizens Answer at 2-3). We will consider Citizens' response in the context of the question posed, and accord it the weight it merits.

2. Citizens do not Impermissibly Presume AmerGen will Violate its Commitments

According to AmerGen (AmerGen Motion at 4-5), Dr. Hausler's statement that AmerGen might be unable to "stem[] the leakage from the reactor cavity during refueling . . . even after the required tape and strippable coating [are] applied to the fuel cavity liner" (Hausler Rebuttal Testimony at 9 (A.20)), is the equivalent of asserting that AmerGen will violate its regulatory commitments and, under governing precedent, must be disregarded.

⁴ The NRC Staff supports AmerGen's motion in its entirety (NRC Staff Answer to AmerGen Motion in Limine Regarding Citizens' Rebuttal).

AmerGen is quite correct that, in the absence of compelling countervailing evidence, a Board will not assume that a licensee will violate its regulatory requirements. Contrary to AmerGen's assertion, however, that principle does not apply here. The Board interprets Dr. Hausler's statement (as well as those in Citizens' written response cited by AmerGen) as permissibly asserting that (1) AmerGen's proposed commitment to apply the strippable coating is not sufficient for its intended purpose of preventing leakage from the reactor cavity during refueling, and (2) AmerGen's proposed commitment to apply the strippable coating during refueling outages might not extend to all outages in which the reactor cavity is flooded. See Citizens Answer at 3-4.⁵

3. Citizens' Prefiled Exhibit 39 is Responsive to the Direct Testimony of AmerGen and the NRC Staff

AmerGen argues that Citizens' Prefiled Exhibit 39 is "nothing more than an essay in which Dr. Hausler rehashes his opinions on a variety of topics, with almost no specific references to the direct testimony of the other parties" (AmerGen Motion at 5).

Although Citizens' Prefiled Exhibit 39 re-emphasizes some of Dr. Hausler's opinions, neither that, nor his failure to include a plethora of specific references, renders the exhibit inadmissible. Rather, in our view, the exhibit is properly characterized as an admissible response to testimony provided by AmerGen and the NRC Staff.⁶

⁵ See also, e.g., AmerGen Prefiled Exh. 10, Letter from Michael Gallagher, AmerGen, to NRC (Feb. 15, 2007), Encl. at 2 (AmerGen has committed to apply the strippable coating "during periods when the reactor cavity is flooded," with an implementation schedule limited to "[r]efueling outages . . . during the period of extended operation") (emphasis added) (cited in AmerGen Motion at 4 n.15).

⁶ AmerGen laments that the putative "lack of specificity" in the challenged exhibit renders it difficult to determine whether Citizens are impermissibly offering new arguments (AmerGen Motion at 6). Despite this alleged difficulty, we nevertheless find it significant that AmerGen fails to identify any new arguments.

4. Citizens' Arguments are not Beyond the Scope of this Proceeding

AmerGen asks the Board to accord no weight to several of Citizens' statements on the ground that they are beyond the scope of this proceeding.

First, AmerGen asserts that Citizens' statements regarding the use of epoxy in the inaccessible areas of the sand bed region are an impermissible challenge to the scope of AmerGen's ultrasonic testing ("UT") monitoring program and Protective Coating Monitoring and Maintenance Program (AmerGen Motion at 6). We disagree. Citizens raise a permissible challenge to whether "ongoing corrosion in these areas could cause the drywell shell to corrode faster than currently predicted by AmerGen" (Citizens Answer at 4).

Next, AmerGen contends that Citizens' and Dr. Hausler's discussion of "'extreme value statistics' . . . go[es] far beyond the scope of what the Board has allowed – namely criticism of the 'manner in which AmerGen has applied its statistical analysis' and 'organizing and displaying AmerGen's data through the use of contour plots'" (AmerGen Motion at 7 (quoting August 9 Order at 4)). AmerGen is incorrect. The Board, in Question No. 10 of its August 9 Order, specifically asked the parties to discuss the "use of mean versus extreme value statistics" (August 9 Order at 10). We view Citizens' answer as falling comfortably within the scope of that question, as well as questions of reasonable assurance.

Finally, AmerGen argues that Citizens' statements expressing uncertainty as to whether AmerGen has measured the thinnest spots on the drywell shell "go to the scope, rather than the frequency of UT measurements [and a]s a result, they must be accorded no weight" (AmerGen Motion at 8). We disagree, and we accept Citizens statements in the context in which they were offered; namely, as addressing "the issue of margins," and whether there is reasonable assurance that the acceptance criteria will not be violated during the period of extended operation (Citizens Answer at 6).

5. The Board will Determine the Reliability of Citizens' Statements and Accord Them the Weight they Merit

AmerGen asks the Board to accord no weight to Citizens' and Dr. Hausler's allegedly "unreliable" statements regarding (AmerGen Motion at 8): (1) the condition of the trough below the reactor cavity; and (2) the use of a corrosion rate of up to 10 mils per year after new water is introduced onto the interior floor. AmerGen also asserts that the Board should accord no weight to Dr. Hausler's definition of galvanic corrosion – "defined as occurring between dissimilar metals" (Citizens Prefiled Exhibit 39, at 2) – because he provides no support (AmerGen Motion at 9). We deny AmerGen's requests.

First, with respect to Citizens' and Dr. Hausler's statements, the Board is fully capable of determining their reliability and the appropriate weight they should be accorded. Second, with respect to Dr. Hausler's definition of galvanic corrosion, the Board finds that the definition provided is not only correct (see Nuclear Engineering Handbook 11-123 (Harold Etherington, ed., 1958) ("[g]alvanic attack can occur when dissimilar metals are in contact")), but well-established. We thus take official notice (10 C.F.R. § 2.337(f)) that galvanic corrosion is defined as occurring between dissimilar metals.

6. Citizens do not Impermissibly Challenge How the Acceptance Criteria are Applied During the Current Licensing Term

AmerGen asserts that the Board should accord no weight to Dr. Hausler's statements that the drywell shell does not currently meet the acceptance criteria, on the ground that these statements constitute an impermissible challenge to the manner in which the acceptance criteria are applied during the current licensing term (AmerGen Motion at 8-9). We disagree. Dr. Hausler is simply addressing the existing margin of the drywell shell – as compared to the

acceptance criteria – which goes directly to the question of whether there will be sufficient margin during the period of extended operation.⁷

C. NRC Staff's Motion In Limine

The NRC Staff argues that the Board should exclude or otherwise not consider Dr. Hausler's response to Question No. 12 of the Board's August 9 Order because "Dr. Hausler explicitly stated in his August 16, 2007 testimony that he is not qualified to respond to Board question number 12" (NRC Staff Motion at 2).

We deny the NRC Staff's motion. As the Board indicated in its August 9 Order, "Dr. Hausler's opinions may assist the Board in understanding Citizens' arguments and evidence on the matters properly at issue in this proceeding" (August 9 Order at 3).

⁷ In the Board's August 9 Order, we provided examples of Citizens' impermissible challenges to the acceptance criteria. See August 9 Order at 6 n.7 (citing Citizens Initial Statement Regarding Relicensing of Oyster Creek Nuclear Generating Station at 9, 31 (July 20, 2007)). For example, Citizens impermissibly asserted in their Initial Statement (at 31) that "a more stringent criterion [should be] applied" to certain areas of the sand bed region, and that AmerGen is "violat[ing] the version of the local area acceptance criterion that Citizens assert the Board should apply."

II. CONCLUSION

For the foregoing reasons, we deny Citizens' Motion to cross-examine Mr. Peter Tamburro, and we deny AmerGen's and the NRC Staff's motions in limine.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD⁸

/RA/

E. Roy Hawkens, Chairman
ADMINISTRATIVE JUDGE

/RA by E. Roy Hawkens for:/

Dr. Paul B. Abramson
ADMINISTRATIVE JUDGE

/RA/

Dr. Anthony J. Baratta
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 12, 2007

⁸ Copies of this Memorandum and Order were sent this date by Internet e-mail to counsel for: (1) AmerGen; (2) Citizens; (3) the NRC Staff; and (4) New Jersey.