

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 21, 2007

**MEMORANDUM AND ORDER**  
(Ruling on Motions in Limine)

On September 18, 2007, AmerGen Energy Company, LLC (“AmerGen”) and the NRC Staff submitted to the Licensing Board in the above-captioned proceeding motions to strike portions of Citizens’<sup>1</sup> written sur-rebuttal reply, the sur-rebuttal written testimony of Dr. Rudolf H. Hausler, and certain prefiled exhibits.<sup>2</sup> Citizens oppose both motions, the NRC Staff supports AmerGen’s Motion in part, and AmerGen supports the NRC Staff’s Motion in full.<sup>3</sup>

For the reasons set forth below, we deny AmerGen’s and the NRC Staff’s Motions in Limine.

---

<sup>1</sup> Citizens are comprised of 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.

<sup>2</sup> AmerGen’s Motion in Limine to Exclude Portions of Citizens’ Sur-Rebuttal (Sept. 18, 2007) [hereinafter AmerGen Motion]; NRC Staff Motion in Limine Regarding Citizens’ Reply (Sept. 18, 2007) [hereinafter NRC Staff Motion].

<sup>3</sup> Citizens’ Opposition to AmerGen and NRC Motions in Limine (Sept. 19, 2007) [hereinafter Citizens Answer]; NRC Staff Response to AmerGen’s Motion in Limine Regarding Citizens’ Presentation on Drywell Contention (Sept. 19, 2007); NRC Staff Motion at 3 (noting AmerGen supports the Staff’s motion).

**I. ANALYSIS**

**A. AmerGen's Motion In Limine**

AmerGen asserts that the Board must exclude or accord no weight to: (1) Section I of Citizens' Reply to AmerGen and NRC Staff Rebuttal Testimony (Sept. 14, 2007) [hereinafter Citizens Sur-Rebuttal Reply]; (2) Answer No. 7 of the Prefiled Sur-Rebuttal Written Testimony of Dr. Rudolf H. Hausler Regarding Citizens' Drywell Contention (Sept. 13, 2007) [hereinafter Hausler Sur-Rebuttal Testimony]; and (3) Sections II and III of Citizens Prefiled Exhibit 61, Memorandum from Dr. Rudolf H. Hausler (Sept. 13, 2007). According to AmerGen, this information "does not respond to material in AmerGen's or the Staff's Rebuttal Testimony, Brief, or associated rebuttal exhibits. . . . [and] deprive[s] AmerGen and the Staff of the opportunity to respond, and def[ies] [the] Board's directions regarding rebuttal testimony" (AmerGen Motion at 2).

More specifically, AmerGen contends that Answer No. 7 of Dr. Hausler's Sur-Rebuttal Testimony, and Sections II and III of Citizens Prefiled Exhibit 61 improperly respond to information contained in AmerGen's Prefiled Exhibit 16, Calculation No. C-1302-187-5320-024, Rev. 2, which was submitted by AmerGen with its direct testimony. Thus, AmerGen states, "any responses from Citizens should have been filed with their rebuttal testimony" (*ibid.*). Similarly, AmerGen urges the Board to accord no weight to Section I of Citizens' Sur-Rebuttal Reply, in which Citizens seek to address Question No. 11(a) of the Board's August 9 Memorandum and Order (Ruling on Motions in Limine and Motion for Clarification) (unpublished), in light of Question No. 1 of our September 12 Memorandum and Order (Hearing Directives) (unpublished) [hereinafter Hearing Directives Order]. According to AmerGen, Citizens' answer includes no "reference or response to the rebuttal submittals of the other parties," and it seeks to apply an "irrelevant body of case law to NRC proceedings" relating to toxic tort litigation and the interpretation of DNA evidence (*id.* at 3).

As we stated in our September 12 Memorandum and Order (Ruling on Motion to Conduct Cross-Examination and Motions in Limine) at 6 (unpublished) [hereinafter September 12 Order on Motions in Limine], neither the fact that Citizens or Dr. Hausler re-emphasize their opinions, “nor [their] failure to include a plethora of specific references, renders the exhibit [or testimony] inadmissible.” To the extent the Board finds arguments contained in Citizens’ Sur-Rebuttal Reply,<sup>4</sup> Dr. Hausler’s Sur-Rebuttal Testimony, or in Citizens Prefiled Exhibit 61 to be iterative, we will give those arguments the weight they merit. In addition, contrary to AmerGen’s interpretation of Question No. 1 of our Hearing Directives Order, although the Board expressed interest in the opinion of the NRC Staff on the issue of reasonable assurances, the Board welcomes the relevant views of all parties on any question it raises.<sup>5</sup> We will, therefore, consider Citizens’ statements in the context of the question posed, and accord them the weight they merit.

**B. NRC Staff’s Motion In Limine**

In addition to arguing that Citizens’ response to the Board’s September 12 question on reasonable assurance should be excluded from the record – which we reject for the reasons stated in Part I.A., above – the NRC Staff asserts that: (1) Dr. Hausler’s Answer 10 of his Sur-Rebuttal Testimony “impermissibly challenges the . . . spatial scope of AmerGen’s UT program” (NRC Staff Motion at 2); (2) the contour plots contained in Citizens Prefiled Exhibits 13 and 39 (Memoranda from Dr. Hausler) should be excluded because Dr. Hausler states in Answer No. 5

---

<sup>4</sup> As noted in the Hearing Directives Order, because statements of counsel in the written briefs are “not evidence in this proceeding and will not be submitted as an exhibit, to the extent statements made therein are irrelevant or otherwise inadmissible, we will accord those statement whatever weight they merit and will not require them to be deleted” (Hearing Directives Order at 2 n.2).

<sup>5</sup> In this regard, we note it is the Board, not AmerGen, that will determine whether a party’s submittal “utterly fails to respond to [a] *Board* request” (AmerGen Motion at 3 n.2) (emphasis added).

of his Sur-Rebuttal Testimony that the contour plots in Prefiled Exhibit 61 “should be regarded as definitive” (ibid.) (quoting Hausler Sur-Rebuttal Testimony at 3); (3) Dr. Hausler’s Answer No. 27 of his Sur-Rebuttal Testimony should be excluded as speculative, because Dr. Hausler provides no evidence “that the condition of the epoxy coating on the floor of the sand bed demonstrates the existence of a corrosive environment or that the epoxy coating on the drywell shell will behave similarly” (ibid.); and (4) Dr. Hausler’s Answer No. 31 of his Sur-Rebuttal Testimony should be excluded, or accorded no weight, because “Citizens have not demonstrated that Dr. Hausler is qualified by knowledge, training, or experience to provide expert opinion regarding the application, performance, or expected life span of an epoxy coating on the exterior of a drywell shell” (id. at 2-3).

First, we reject the NRC Staff’s interpretation of Dr. Hausler’s Answer No. 10 as challenging the spatial scope of AmerGen’s UT program. Instead, we view Dr. Hausler’s statements as addressing whether there is reasonable assurance that the acceptance criteria will not be violated during the period of extended operation. Second, with respect to Dr. Hausler’s most recent contour plots and their impact on prior contour plots offered in Citizens Prefiled Exhibits 13 and 39, “th[is] Board is fully capable of according all of Dr. Hausler’s plots and AmerGen’s analysis of the same data the weight they are due” (Citizens Answer at 5).<sup>6</sup> Third, as we have stated previously, to the extent any parties’ statements are speculative, or without sufficient support, “the Board is fully capable of determining their reliability and the appropriate weight they should be accorded” (September 12 Order on Motions in Limine at 8). Finally, as we indicated in our August 9 Memorandum and Order on Motions in Limine and our September 12 Order on Motions in Limine, “Dr. Hausler’s opinions may assist the Board in

---

<sup>6</sup> We also reject the NRC Staff’s conclusion that Dr. Hausler’s statement regarding his most recent contour plots automatically renders “his previously submitted plots [to be] in accurate [sic] and unreliable” (NRC Staff Motion at 4).

understanding Citizens' arguments and evidence on the matters properly at issue in this proceeding" (September 12 Order on Motions in Limine at 9) (internal quotation marks omitted).

**II. CONCLUSION**

For the foregoing reasons, we deny AmerGen's and the NRC Staff's motions in limine.

It is so ORDERED.

THE ATOMIC SAFETY  
AND LICENSING BOARD<sup>7</sup>  
***/RA/***

---

E. Roy Hawkens, Chairman  
ADMINISTRATIVE JUDGE  
***/RA by T.S. Moore for:/***

---

Dr. Paul B. Abramson  
ADMINISTRATIVE JUDGE  
***/RA by T.S. Moore for:/***

---

Dr. Anthony J. Baratta  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
September 21, 2007

---

<sup>7</sup> 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.