

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 | ) |                       |
| Nuclear Generating Station)           | ) | October 26, 2007      |
|                                       | ) |                       |

**MOTION TO STRIKE ERRONEOUS TESTIMONY**

**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”) submit this Motion because after the close of the record new information has come to light that shows that some of the critical testimony regarding the potential for epoxy coatings to fail was incorrect and other testimony on this topic was based on incomplete knowledge and gives a misleading impression.<sup>1</sup> Directly contradicting AmerGen’s testimony, end of life failure of an epoxy coating has been observed at Oconee Nuclear Power Plant (“Oconee”). Because this information could materially affect the decision of the Atomic Safety and Licensing Board (the “Board”) in this proceeding, the

<sup>1</sup> Citizens consulted both AmerGen and NRC Staff regarding this Motion. AmerGen opposes, while NRC has not yet taken a position.

Board should strike the offending testimony from the record and take account of the error when evaluating the rest of AmerGen's testimony on this topic. In its discretion the Board should also reopen the record and allow Citizens and the other parties to provide further testimony about how the end of life coating failure of the epoxy coat at Oconee relates to the potential for a similar failure at Oyster Creek Nuclear Generating Station ("Oyster Creek").

## ARGUMENT

### **I. The Board Should Strike Erroneous Testimony From The Record**

#### **A. Additional Information Demonstrating AmerGen's Testimony Regarding Epoxy Coating Failure Is Incorrect and Lacks Foundation**

On October 12, 2007, Citizens' counsel came into possession of an NRC Office of Inspector General ("OIG") audit of NRC's license renewal program. NRC Office of the Inspector General, Audit of NRC's License Renewal Program, September 6, 2007 *available at* ML072490486. The report primarily concentrates on widespread failures to effectively report how, or indeed if, license renewal applications were properly reviewed by NRC Staff. However, the report also details problems with a containment coating at Oconee, which has been degrading since 1995. *Id.* at 22. The report included a 2004 photograph showing extensive coating failure. *Id.* It also states that a quick review of the operating experience at Oconee would have demonstrated that licensee assertions about the implementation of the coating aging management program were incorrect. *Id.* at 23. Despite this, the Oconee license renewal inspection report erroneously concluded that the aging management program was properly implemented. *Id.*

To verify that the Oconee coating situation is relevant to this proceeding, Citizens have found that the Oconee coating is epoxy applied on top of an inorganic zinc primer,

which in turn has been applied to the welded steel plates that comprise the containment liner. Oconee License Renewal Application at 2.3-6, *available at* <http://www.nrc.gov/reactors/operating/licensing/renewal/applications/oconee.html>; Oconee Corrective Action Audit (*available at* ML071790169) at 57. Despite a licensee assurance in 1998 that the coatings were regularly inspected, severely delaminated coatings were found in Oconees 1, 2, and 3 during the fall of 2003 and early 2004. April 26, 2004 Inspection Report (*available at* ML041180451) at 19. In July 2006, another inspection report showed that thousands of square feet of coating had delaminated in Unit 2. July, 2004 Inspection Report (*available at* ML042050511) at 32. Oconee units 1 and 2 started operating in 1973 and Oconee unit 3 commenced operation in 1974. Oconee LRA at 1.2-1. Thus, the Oconee coatings are probably currently around 33 years old. Because degradation was first observed in 1995, this means that end of life deterioration of the Oconee coatings was first observed when they were approximately 22 years old. At Oyster Creek the epoxy coating on the exterior of the drywell is 15 years old.

**B. AmerGen's Erroneous And Unfounded Testimony**

The additional information regarding the end of life failure of the coating at Oconee is directly relevant to Citizens' admitted contention, which raises significant safety issues. The additional information shows that AmerGen's expert Mr. Cavallo gave incorrect testimony that no "end of life" failures of coatings inside containments had occurred. In addition, Mr. Cavallo's assurances about the life of the epoxy coating at Oyster Creek were given without any knowledge of the coating failure issues at Oconee.

In particular, Mr Cavallo, AmerGen's coating expert, testified that he had participated in a 1996 EPRI survey of epoxy coatings "then in use at nuclear power plants

throughout the United States.” AmerGen Ex. B Part 5 at A.7 (pages 8-9). Mr. Cavallo stated “to the best of my knowledge, not a single epoxy coating in an atmospheric environment applied at a nuclear power plant has reached its end-of-life.” *Id.* at Page 9. Mr. Cavallo further stated “I know from my research and experience in the industry that many U.S. nuclear plants are coated inside the primary containment . . . with similar coatings [to that at Oyster Creek] that are decades old. No ‘end of life’ failures have been observed.” Finally, at the hearing Mr. Cavallo stated unequivocally that “we have not seen end of life failure in epoxy coatings in nuclear plants due to age.” Hearing Tr. 457:11-12.

Because Oconee has an epoxy coating on the interior of the containment that is experiencing ‘end of life’ failure, Mr. Cavallo’s testimony regarding end of life failure is erroneous and must be struck from the record. In addition, his opinions about the life of the Oyster Creek coating must be given little to no weight because they failed to take account of the Oconee coating failure. Indeed, Mr. Cavallo’s lack of knowledge of the coating failure at Oconee severely undercuts his claims that he is knowledgeable about the use of protective coatings at nuclear plants.

## **II. Citizens Should Not Be Prejudiced By The Errors Of Other Parties**

### **A. All Parties Have A Duty Of Candor**

All attorneys practicing before the Board have an affirmative duty to disclose facts that are relevant to this proceeding to allow the Board to reach an informed result. *Nuclear Management Company, LLC (Palisades Nuclear Plant)*, LBP-06-90, 62 (March 7, 2006) (available at ML060660560) citing *e.g.*, *RKO General, Inc., v. FCC*, 670 F.2d 215, 232 (D.C. Cir. 1981) (referring to the duty of candor as “an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate,” which is “basic,

and well known”); *Jaskiewicz v. Mossinghoff*, 822 F.2d 1053, 1057 & n.15 (Fed. Cir. 1987) (referring to the possibility of sanctions against an attorney for breach of a duty of candor and good faith imposed by a rule of the Patent and Trademark Office, or violation of a rule of the ABA Model Code of Professional Responsibility). That duty includes the “degree of candor necessary for effective disposition of cases . . . that counsel owes as an officer of the court.” *Cunningham v. Sears, Roebuck & Co.*, 854 F.2d 914, 916 (6th Cir. 1988).

**B. NRC Staff Should Have Disclosed The Oconee Documents To Citizens And Should Have Alerted The Board To The Oconee Situation**

Because NRC itself generated most of the documents that Citizens rely upon to show that the testimony of AmerGen's expert is erroneous, Citizens find it very surprising that NRC Staff did not see fit to notify the Board of the facts. Citizens presume that all the attorneys who have appeared before this Board have proceeded according to the duty of candor. Thus, it appears that all the attorneys were unaware of the coating failure at Oconee before the record closed. Generally, Commission proceedings are governed by a cardinal rule of fairness. *Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1)*, ALAB-565, 10 N.R.C. 521, 524 (1976). Here, the only party that assuredly knew about the coating failure at Oconee during the hearing was the NRC Staff, but they apparently failed to make the connection between this proceeding and Oconee. It would be fundamentally unfair if the Board allowed Citizens to be prejudiced by the NRC Staff's failure to correct the testimony before this Board. Thus, to avoid such an outcome, and to avoid making a factual finding based on erroneous evidence, this Board should correct the record by striking the incorrect testimony and giving the rest of Mr. Cavallo's testimony less weight.

**C. Once It Became Aware Of The Issue, AmerGen Should Have Withdrawn The Incorrect Testimony**

AmerGen rejected Citizens' request that it voluntarily withdraw the erroneous testimony. AmerGen has justified this refusal on the grounds that although the coating at Oconee has indisputably had problems, it has not exhibited "end of life" failure. AmerGen bases this argument on a Duke Energy document which states that the coating failure was "due to improper application during original construction." ML053630166 at 6.

According to AmerGen, this indicates that the coating at Oconee did not reach its "end of life." Such an argument is pure legal sophistry. It is clear that the life of any coating will depend on many variables, including how it is applied, what it consists of, and what conditions it experiences during its life. The coating at Oconee failed progressively between 1995 (after around twenty years of life) and the present day. Thus, the Oconee coating clearly reached the end of its life. Therefore, by any reasonable technical definition, it experienced "end of life" failure.

Moreover, any attempt to characterize the progressive failure of a coating after twenty years of service as anything other than "end of life failure" contradicts NRC Staff's testimony that failures due to incorrect application normally occur within the first few years. Hearing Tr. at 457:22-458:4. In addition, the document upon which AmerGen is relying is a presentation from Duke Energy which gives no specific reference to any supporting documentation and does not come with the same imprimatur of reliability as NRC Staff documents. Thus, AmerGen does not have a good justification for its refusal to withdraw its erroneous testimony regarding "end of life" failures of epoxy coatings at nuclear plants, further illustrating the need for the Board to expunge the testimony from the record.

### **III. The Board May Take Notice Of The Additional Information Without Reopening The Record**

Other parties may seek to argue that the Board cannot act on the additional information provided because it is not in the record. This argument is incorrect because most of the documents upon which Citizens rely are NRC-generated documents that are available on ADAMS.<sup>2</sup> Where important issues are at stake, the Commission has allowed parties to rely upon public records without having them in the record or covered by a sworn affidavit. *See e.g. IMA Northeast Nuclear Energy Company*, 53 N.R.C. 75, 78 (2001) (noting the Commission did not strictly enforce the formal requirement for an affidavit to accompany a motion to reopen the record). The Board in *IMA Northeast* noted that because the information upon which that motion was based was a matter of public record, an affidavit would “consist of little more than unnecessary paperwork.” *Id.* Indeed, in this very proceeding Judge Abramson has noted that the Board may take notice of official NRC documents, such as a transcript from an ACRS meeting. Hearing Tr. 537:8-20. Moreover, it would be manifestly unfair and contrary to fundamental principles of justice if the Board allowed a decision in this case to be based on erroneous testimony just because Citizens were unaware of information that contradicted that testimony at the time the hearing took place.

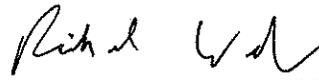
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<sup>2</sup> The only exception is the license renewal application for Oconee, which is only used to illustrate undisputed facts, like the age of the reactor.

**CONCLUSION**

For the forgoing reasons, the ASLB should and grant Citizens' motion to strike. In the alternative, the Board should use its discretion to reopen the record and hear further testimony on the coatings issue. Finally, the Board should consider whether any further relief is warranted.

Respectfully submitted,



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Dated: October 26, 2007

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I, Richard Webster, of full age, certify as follows:

I hereby certify that on October 26, 2007, I caused Citizens' Motion To Strike Erroneous

Testimony to be served via email and U.S. Postal Service (as indicated) on the following:

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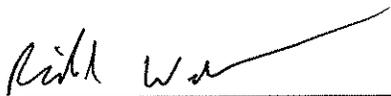
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