

October 31, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
AMERGEN ENERGY COMPANY, LLC) Docket No. 50-0219-LR
(Oyster Creek Nuclear Generating Station))
)

NRC STAFF RESPONSE TO CITIZENS' MOTION FOR RECONSIDERATION

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the Staff of the Nuclear Regulatory Commission ("Staff") hereby answers Citizens' "Motion for Leave to File for Reconsideration and Motion for Reconsideration of Order Partially Granting Petition to File a New Contention," dated October 20, 2006 ("Motion").¹ For the reasons set forth below, the Staff respectfully submits that the Motion fails to demonstrate circumstances that compel the Board to reconsider its ruling.

BACKGROUND

On November 14, 2005, six organizations (collectively "Citizens") filed a request for hearing and petition to intervene in this case, alleging that the license renewal application ("LRA") filed by AmerGen Energy Co. LLC, ("AmerGen") for the Oyster Creek Nuclear Generating Station was deficient for, *inter alia*, its failure to include periodic ultrasonic testing ("UT") measurements in the sand bed region of the drywell liner. Request for Hearing and Petition for Leave to Intervene," dated November 14, 2005. On February 27, 2006, the Atomic Safety and Licensing Board ("Board") granted the hearing request. LBP-06-07, 63 NRC 188 (February 27, 2006). On December 9, 2005, AmerGen docketed a commitment to perform a set

¹The Staff received the Motion via e-mail on Friday, October 20, 2006 at 5:04 pm. Pursuant to 10 C.F.R. § 2.306, the Staff's response date is extended by one business day.

of one-time UT measurements in the sand bed region prior to the period of extended operation. Letter from C.N. (Bud) Swenson, AmerGen, to NRC, (Dec. 9, 2005) (“December 9 Commitment”). On April 4, 2006, AmerGen docketed a second commitment to perform periodic UT measurements in the sand bed region of the drywell liner throughout the period of extended operation. Letter from Michael P. Gallagher, AmerGen, to NRC (Apr. 4, 2006) (“April 4 Commitment”).

Subsequently, AmerGen filed a motion to dismiss Citizens’ sole contention, arguing that its commitment to perform a set of UT examinations in the sand bed region prior to the period of extended operation and every ten years thereafter during the period of extended operation rendered the contention moot. See AmerGen’s “Motion to Dismiss Drywell Contention as Moot and to Suspend Mandatory Disclosures” at 3 (Apr. 25, 2006). The Board dismissed Citizens’ contention, but allowed them 20 days to raise a challenge to AmerGen’s new periodic UT program for the sand bed region. LBP-06-16, 63 NRC 737, 744-45 (2006).

On June 20, 2006, AmerGen filed a third commitment to perform an additional set of UT measurements two refueling outages after the initial UT measurements, with subsequent inspection frequency to be established as appropriate, not to exceed 10-year intervals. Letter from Michael P. Gallagher, AmerGen, to NRC, Encl. 2, at 2 (June 20, 2006) (“June 20 Commitment”). AmerGen also committed to monitor the sand bed region drains daily during refueling outages and quarterly during the plant operating cycle throughout the period of extended operation. *Id.* Three days later, Citizens filed a “Petition to Add a New Contention” (“June 23 Petition”), which was supplemented on July 25, 2006 to include discussion of the June 20 Commitment (“July 25 Supplement”).

On October 10, 2006, the Board issued LBP-06-22, in which it divided Citizens’ contention into seven discrete challenges:

1. AmerGen's acceptance criteria are inadequate to ensure adequate safety margins.
2. AmerGen's scheduled UT monitoring frequency in the sand bed region is insufficient to maintain an adequate safety margin.
3. AmerGen's monitoring in the sand bed region for moisture and coating integrity is inadequate.
4. AmerGen's response to wet conditions and coating failure in the sand bed region is inadequate.
5. AmerGen's scope of UT monitoring is insufficient to systematically identify and sufficiently test all the degraded areas in the sand bed region.
6. AmerGen's quality assurance for the measurements in the sand bed region is inadequate.
7. AmerGen's methods for analyzing UT results in the sand bed region are flawed.

64 NRC ___, slip op. at 9. The Board admitted Challenge 2 and denied admission of the other six challenges. *Id.* at 10. On October 20, 2006, Citizens sought reconsideration of the Board's ruling with respect to Challenges 1, 5, 6 and 7. See Motion at 4-10. For the reasons set forth below, Citizens fail to demonstrate that the Board should reconsider its ruling.

DISCUSSION

A. Legal Standards Governing Motions for Reconsideration

A motion for reconsideration may not be filed except with leave of the Licensing Board, "upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not reasonably have been anticipated, that renders the decision

invalid.”² 10 C.F.R. § 2.323(e); *see also Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622 n.12 (2004).

In promulgating changes to Part 2, the Commission explained that the new “compelling circumstances” standard was intended to permit reconsideration only where manifest injustice would occur in the absence of reconsideration, and the claim could not have been raised earlier. See Final Rule: “Changes to Adjudicatory Process,” 69 Fed. Reg. 2,182, 2,207 (Jan. 14, 2004). The new, higher standard was meant to replace that which had evolved under previous case law, whereby reconsideration motions could simply address existing evidence that may have been misunderstood or overlooked, or seek to clarify a ruling on a matter. *Id.* Reconsideration should not be used as an opportunity to reargue facts and rationales which were (or should have been) discussed earlier. *Id.*

A successful reconsideration motion “cannot simply ‘republish’ prior arguments, but must give the [adjudicator] a good reason to change its mind.” *Louisiana Energy Services*, 60 NRC at 622 n.13 (citing *Ahmed v. Ashcroft*, 388 F.3d 247, 249 (7th Cir. 2004)). Further, as the Commission reaffirmed in its statement of consideration for the Part 2 amendments, a motion for reconsideration may not rely on an entirely new thesis or include new arguments, unless they relate to a Board concern that could not reasonably have been anticipated. 69 Fed. Reg.

² When discussing findings of fact, the Commission has described “clear error” as a finding “that is not even plausible in light of the record viewed in its entirety.” *Private Fuel Storage L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-19, 62 NRC 403, 411 (2005).

2,207; *see also Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), LBP-04-22, 60 NRC 379, 380-81 (2004); *affirmed*, CLI-04-36, 60 NRC 631, 641 (2004).

As explained below, Citizens' Motion fails to demonstrate compelling circumstances requiring the Board to revisit its ruling, and should be denied.

B. Citizens' Motion for Reconsideration Should Be Denied

1. Citizens' Motion Fails to Apply the Proper Standard for Reconsideration

Citizens' Motion fails to apply the correct regulatory standard for reconsideration.

See 10 C.F.R. § 2.323(e). The Motion states that it is "primarily based on: i) the ASLB's misinterpretation of the law on timeliness and availability of new information, and ii) the ASLB's failure to note that Citizens could not have known how AmerGen was going to conduct tests that it had not even proposed at the time Citizens' filed their initial petition." Motion at 8-9. However, as discussed above, the Commission has stated clearly that the new "compelling circumstances" standard in section 2.323(e) was meant to allow for such a motion only where manifest injustice would occur in the absence of reconsideration and the claim could not have been raised earlier. 69 Fed. Reg. 2,207. Citizens never assert that they will be subject to manifest injustice absent reconsideration, nor do they ever assert that their arguments could not have been raised earlier, even though that requirement is plainly stated in 10 C.F.R.

§ 2.323(e).³ *See generally* Motion. The requirement is crucial because, as the Commission stated, "reconsideration should be an extraordinary action and should not be used as an opportunity to reargue facts and rationales which were (or should have been) discussed earlier."

69 Fed. Reg. 2,207. By declining to even discuss whether their arguments were or should

³ Citizens' argument more closely follows the case law that the Commission explicitly superceded. See 69 Fed. Reg. 2,207. Under the prior standard, in seeking reconsideration, the movant could simply "identify errors or deficiencies in the presiding officer's determination indicating the questioned ruling overlooked or misapprehended (1) some legal principle or decision that should have controlling effect; or (2) some critical factual information." *See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, LBP-01-38, 54 NRC 490, 493 (2001).

have been discussed earlier, Citizens' Motion fails to meet the Commission's standard for reconsideration.

2. Reconsideration of the Board's Ruling on Challenge 1 is Not Warranted

With respect to Citizens' first challenge, the Board held that the proper time to challenge AmerGen's acceptance criteria was at the time Citizens filed their initial Petition to Intervene. LBP-06-22, slip op. at 14. Citizens argue that they could not have been expected to make such a challenge before AmerGen made a commitment to perform UT measurements. Motion at 4-5. Instead of pleading manifest injustice or explaining why the Board's decision could not reasonably have been anticipated, Citizens' Motion seeks reconsideration based upon an argument the Board previously considered. See June 23 Petition at 16 ("The April 4, 2006 commitment is materially different information" because "'something' (a UT testing plan) cannot be materially the same as 'nothing' (no UT testing plan at all)."⁴ The Commission has clearly stated that motions for reconsideration are not an opportunity to reargue facts and rationales that were (or should have been) argued earlier. 69 Fed. Reg. 2,207; see also *Louisiana Energy Services*, 60 NRC at 622 n.13. By relying on the same arguments set forth in their Petition, Citizens fail to demonstrate circumstances compelling the Board to reconsider its decision.

Even assuming, *arguendo*, that Citizens' argument is correct, they fail to adequately explain why this challenge was not raised in response to AmerGen's December 9 Commitment to perform UT and compare the results to results from previous testing in the 1990s. Citizens assert that the December 9 Commitment failed to state which acceptance criteria would be applied. Motion at 5. However, the use of acceptance criteria was implied in this commitment to perform testing and, as the Board notes, AmerGen's LRA states that the aging management

⁴ Citizens makes a similar argument with respect to Challenges 5 and 7, that it could not raise its challenge until AmerGen had a UT testing plan for the sand bed region. See Motion at 6-7, 10. This argument fails with respect to those challenges for the same reason it fails here.

program for the drywell shell will demonstrate the minimum required shell thickness is in accordance with the ASME Code. See LBP-06-22, slip op. at 13 (citing LRA at 3.5-18). At the latest, this challenge should have been raised in response to the December 9 Commitment. The Board also acknowledged that Citizens directly challenged AmerGen's acceptance criteria in their February 2006 motion to add new contentions. LBP-06-22, slip op. at 13 (citing [Citizens'] Motion for Leave to Add Contentions or Supplement the Basis of the Current Contention at 12 (Feb 7, 2006) ("new acceptance criteria must be developed")). Citizens fail to adequately explain why they should not have been expected to raise this challenge in response to the December 9 Commitment, and thus fails to show that the decision is invalid.

3. Reconsideration of the Board's Ruling on Challenge 5 is Not Warranted

The Board found that Challenge 5, on the spatial scope of the monitoring, was not timely, holding that the proper time to make this claim was following the December 9 Commitment.⁵ LBP-06-22, slip op. at 29-30. Citizens argue that this commitment relates to the facility's current operation and, thus it could not be challenged because the "[d]ecision makes clear" that "the scope of this proceeding does not extend to matters that relate to the current licensing basis ('CLB')." Motion at 6. This is an incorrect representation of the Board's ruling. See LBP-06-22, slip op. at 32-33. As the Commission has stated, the license renewal review encompasses written commitments that are a part of the CLB and concern the capability of systems, structures, and components identified in 10 C.F.R. § 54.21(a). Final Rule "Nuclear Power Plant License Renewal," 60 Fed. Reg. 22,461, 22,473 (May 8, 1995).

⁵ Initially, the Staff did not oppose admission of this challenge (see "NRC Staff Answer to Petition to Add a New Contention and Petition Supplement," dated August 21, 2006 at 11), but Citizens have not shown that the Board's decision was clearly erroneous.

As Citizens acknowledge, AmerGen’s December 9 Commitment, while relevant to current operation, is related to license renewal. See Motion at 6 (“[I]t is not at all clear that these [commitments] relate *solely* to the license renewal decision”) (emphasis added). However, this commitment was intended to provide support for the Staff’s license renewal decision. See 60 Fed. Reg. 22,473. Its relation to license renewal was clearly indicated by the subject line and text of the cover letter. See December 9 Commitment at 1. The spatial scope of this monitoring was described in the December 9 Commitment and a challenge thereto could have been raised in response. Further, as discussed above with respect to Challenge 1, Citizens’ argument regarding timeliness was previously propounded in their June 23 Petition and may not simply be republished in a motion for reconsideration. See 69 Fed. Reg. 2,207.

4. Reconsideration of the Board’s Ruling on Challenge 6 is Not Warranted

Citizens’ Challenge 6 asserts that AmerGen’s quality assurance plans for the UT measurements in the sand bed region are inadequate. Citizens Petition at 11. The Board denied admission of this challenge for three distinct reasons. LBP-06-22, slip op. at 30. First, like the other three challenges for which Citizens seeks reconsideration, the Board found the challenge untimely. *Id.* However, the Board also found that the challenge is beyond the scope of this proceeding and fails to demonstrate the existence of a genuine dispute with AmerGen on an issue of material fact. *Id.* (citing 10 C.F.R. § 2.309(f)(1)(iii) and (iv)).

The Board first found the challenge untimely, noting that “petitioners have an affirmative obligation to obtain documentation in support of a proffered contention to the extent such documentation is part of the LRA or contained in the LRA as an attachment or a supporting document.” LBP-06-22, slip op. at 31 (citing *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC at ___ n.71 (slip op. at 13 n.71)). Citizens argue that the Board’s order accuses them of “failing to make a timely request for the information, when in fact

they made such a request and were improperly denied by AmerGen.” Motion at 8. In their August 18 Reply to AmerGen, Citizens argued that AmerGen “consistently refused to provide the 1996 data to Citizens.” Citizens Reply to AmerGen at 16. The Board acknowledged this argument, but held that the claim that AmerGen improperly withheld the 1996 results “is simply too late” and should have been raised in Citizens’ Petition. LBP-06-22, slip op. at 32 n.27. The Motion fails to address this aspect of the Board’s decision, and so cannot demonstrate that it is erroneous.⁶

The Motion fails to accurately represent the Board’s second rationale for denying admission of this challenge, stating that the Board “asserts that Citizens are attempting to attack the CLB with this challenge.” See Motion at 8. Citizens respond by claiming that their challenge addresses the quality assurance program for testing during the period of extended operation, does not attack the CLB, and thus, is admissible. *Id.* at 8-9. Contrary to Citizens’ representation, the Board, relying on the Commission’s statement of consideration for the license renewal rule, held that those aspects of the CLB not subject to physical aging processes, such as quality assurance plans, are outside the scope of license renewal proceedings. LBP-06-22, slip op. at 33 (citing 60 Fed. Reg. 22,475). Regardless of whether the

⁶ Citizens claim that their Exhibit RC 1 shows they made a request for the 1996 test results on September 6, 2005 and AmerGen denied the request on October 10, 2005 because the data were proprietary. Motion at 8. In addition to being improper in a motion for reconsideration, this exhibit does not contain the initial requesting e-mail and so it is unclear which documents were requested.

testing involved is before or during the period of extended operation, the Commission has made clear that quality assurance plans are not within the scope of license renewal.

The third reason the Board denied admission of this challenge is that Citizens failed to demonstrate a genuine dispute of a material fact. LBP-06-22, slip op. at 33. Citizens respond by arguing that “both AmerGen and the NRC Staff have now acknowledged that while they initially accepted the 1996 results as valid, they are actually erroneous.” Motion at 9. Citizens provide no citation to support this assertion or the claim that “AmerGen even offered improvements to the quality assurance program in the New Information.”⁷ *Id.* Thus, Citizens’ arguments fail to show that the June 23 Petition demonstrated the existence of a genuine dispute. Citizens fail to demonstrate any of the Board’s three rationales are erroneous.

5. Reconsideration of the Board’s Ruling on Challenge 7 is Not Warranted

With respect to Challenge 7, regarding statistical analysis, the Motion makes the same argument it raised for Challenges 1 and 5 and in its June 23 Petition, that “until AmerGen proposed measurements during the license renewal period and specified how it would analyze the results of those measurements, Citizens could not have formed a contention about the

⁷ In its June 23 Petition, Citizens argued that the Staff had questioned the 1996 results, but said nothing about AmerGen acknowledging their invalidity. June 23 Petition at 11. The Motion’s reference to the Staff is merely a republication of its prior argument, and is inappropriate in a motion for reconsideration. See *Louisiana Energy Services*, CLI-04-35, 60 NRC at 622, n.13. On the other hand, the reference to AmerGen, in addition to having no citation or explanation, is an improper new argument, which should have been, but was not, raised before. See 69 Fed. Reg. at 2,207. Further, no citation is provided for the “New Information” to which Citizens refers.

statistical treatment of those results.” Motion at 10. However, as the Board noted, AmerGen’s statistical techniques for analyzing UT results, referenced in its LRA, have been a matter of public record since 1990. See LBP-06-22, slip op. at 34-35 (citing LRA at 3.5-18). Citizens claim to “have shown that AmerGen merely assumed the corrosion rates in the sand bed would be zero thereafter, but did not obtain sufficient valid data to justify this.” Motion at 9. This argument is irrelevant to the Board’s timeliness decision. Citizens’ concern about the assumed corrosion rate does not obviate the requirement to raise the challenge in a timely manner.

Further, the Motion ignores the Board’s other reason for denying admission of Challenge 6, that “Citizens fail to reference, much less discuss, the ‘specific portions of the application’ that they dispute, nor do they adequately identify a ‘material issue of . . . [disputed] fact.’” LBP-06-22, slip op. at 36, n.29 (citing 10 C.F.R. § 2.309(f)(1)(vi)). Citizens cannot demonstrate that the Board’s decision was erroneous while ignoring one of its two rationales.

CONCLUSION

For the foregoing reasons, the Board should deny Citizens’ motion for reconsideration.

Respectfully submitted,

/RA/

Steven C. Hamrick
Counsel for NRC Staff

Dated at Rockville, Maryland
this 31st day of October 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
AMERGEN ENERGY COMPANY, LLC) Docket No. 50-219-LR
)
(Oyster Creek Nuclear Generating Station))

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S RESPONSE TO CITIZENS' MOTION FOR RECONSIDERATION" in the above-captioned proceeding have been served on the following by electronic mail with copies by deposit in the NRC's internal mail system or, as indicated by an asterisk, by electronic mail, with copies by U.S. mail, first class, this 31st day of October, 2006.

E. Roy Hawkens, Chair
Administrative Judge
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
ERH@nrc.gov

Anthony J. Baratta
Administrative Judge
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
AJB5@nrc.gov

Paul B. Abramson
Administrative Judge
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
PBA@nrc.gov

Jill Lipoti, Director*
New Jersey Department of
Environmental Protection
Division of Environmental Safety and Health
P.O. Box 424
Trenton, NJ 08625-0424
Jill.Lipoti@dep.state.nj.us

Kathryn M. Sutton, Esq.*
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Ave., NW
Washington, DC 20004

Office of the Secretary
ATTN: Docketing and Service
Mail Stop: O-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
HEARINGDOCKET@nrc.gov

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
OCAAMail@nrc.gov

Debra Wolf
Law Clerk
Atomic Safety and Licensing Board
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
DAW1@nrc.gov

Lisa P. Jackson, Acting Commissioner*
New Jersey Department of
Environmental Protection
P.O. Box 402
Trenton, NJ 08625-0402
Lisa.Jackson@dep.state.nj.us

ksutton@morganlewis.com

Ron Zak*
New Jersey Department of
Environmental Protection
Nuclear Engineering
P.O. Box 415
Trenton, NJ 08625-0415
Ron.Zak@dep.state.nj.us

Suzanne Leta*
New Jersey Public Interest Research Group

11 N. Willow St.
Trenton, NJ 08608
sleta@njpirg.org

Donald Silverman, Esq.*
Morgan, Lewis, & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
dsilverman@morganlewis.com

Alex S. Polonsky, Esq.*
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Ave., N.W.
Washington, DC 20004
apolonsky@morganlewis.com

Paul Gunter, Director*
Reactor Watchdog Project
Nuclear Information
And Resource Service
1424 16th Street, NW, Suite 404
Washington, DC 20036
pgunter@nirs.org

J. Bradley Fewell, Esq.*
Exelon Corporation
200 Exelon Way, Suite 200
Kennett Square, PA 19348
bradley.fewell@exeloncorp.com

John A. Covino, Esq.*
Valerie Anne Gray, Esq.
Deputy Attorneys General
Division of Law
Environmental Permitting and Counseling
Section
Hughes Justice Complex
Trenton, NJ 08625
john.covino@dol.lps.state.nj.us
Valerie.Gray@dol.lps.state.nj.us

Richard Webster, Esq.*
Rutgers Environmental Law Clinic
123 Washington Street
Newark, NJ 07102-5695
rwebster@kinoy.rutgers.edu

/RA/

Steven C. Hamrick
Counsel for NRC Staff