

October 31, 2007

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))

NRC STAFF ANSWER TO AMERGEN’S MOTION TO STRIKE PORTIONS
OF CITIZENS’ PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.1204 and 2.323, the Staff of the U.S. Nuclear Regulatory Commission (“Staff”) hereby answers AmerGen’s “Motion to Strike Portions of Citizens’ Findings of Fact” (Oct. 22, 2007) (“Motion”). For the reasons set for below, the Staff agrees with AmerGen’s objections to Citizens’ proposed findings but does not think that AmerGen’s motion is necessary.

DISCUSSION

In order to preserve its objections for any appeal, AmerGen moves to strike identified portions of “Citizens’ Post-Hearing Proposed Findings of Fact and Conclusions of Law” (Oct. 10, 2007) (“Citizens’ Proposed Findings of Fact and Conclusions of Law”) because those portions contain facts and analysis that are not part of the evidentiary record, as well as arguments that exceed the scope of the proceeding. See Motion at 1.

The Staff agrees with AmerGen that the record in this proceeding was closed on September 25, 2007, subject only to motions for transcript corrections, See Transcript of AmerGen Energy Company Oyster Creek Evidentiary Hearing at 603, and that presentation of

new facts, exhibits, and arguments for the first time in post-hearing findings deprives interested parties of an opportunity to respond. See *Union Electric Co.*, (Callaway Plant, Unit 1), ALBA-740, 18 NRC 343, 349-50 (rejecting new arguments made in findings as depriving interested parties of a meaningful opportunity to respond to crucial facts); *Inquiry into Three Mile Island Unit 2 Leak Rate Data Falsification*, LBP-87-14, 25 NRC 671, 687-88 (1987) (refusing to consider materials attached to proposed findings which had not been offered (or attempted to be offered) before the hearing record was closed). NRC proceedings must provide both an opportunity to submit evidence and to challenge evidence as to any and all material facts. See *Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1444-45 (D.C. Cir. 1984).

The Staff also agrees with AmerGen that, although 10 C.F.R. Subpart L contains its own provision for findings of fact and conclusions of law (10 C.F.R. § 2.1209), proposed findings of fact and conclusions of law in Subpart L proceedings should conform with the requirements of 10 C.F.R. § 2.712(c) in Subpart G, *i.e.*, “proposed findings of fact must be confined to the material issues of fact presented on the record, with exact citations to the transcript of record and exhibits in support of each proposed finding,” particularly because § 2.1209, in contrast to § 2.712(c), does not authorize reply findings. To allow otherwise in a Subpart L proceeding would be contrary to case law and the Administrative Procedure Act. See LBP-87-14, 25 NRC at 687-88; 5 U.S.C. § 556(e).

Although the Staff agrees that Citizens’ Proposed Findings of Fact and Conclusions of Law impermissibly contain new facts, exhibits, and arguments that are not already part of the record, the Staff is confident that, in accordance with Commission case law, the Board’s initial decision will be based solely on factual material that has been introduced and admitted into evidence and that its findings will be supported by probative and substantial evidence on the

record.¹ See *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Unit 2), ALAB-254, 8 AEC 1184, 1187 (1975). For the Board to do otherwise would be in error. See *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-580, 11 NRC 227, 230-31 (vacating a licensing board decision that was not supported by evidence in the record).

In addition, the Staff is confident that the Board is aware of both AmerGens' and the Staff's objections to Citizens' arguments regarding continuous UT thickness monitoring and derivation of AmerGen's wall thickness acceptance criteria as beyond the scope of this proceeding, see e.g., Memorandum and Order (Ruling on Motions in Limine and Motion for Clarification) (Aug. 9, 2007) at 5-7, and that the Board's decision will not address issues beyond the scope of the admitted contention.

¹ The Board may, however, apply known engineering principles to and make mathematical calculations from facts in the record whether or not any witness purported to attempt this exercise. *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-229, 8 AEC 425, 437, rev. on other grnds., CLI-74-40, 8 AEC 809(1974). If the Board applies engineering principles or performs calculations, it must adequately explain the basis for its conclusions. *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 66 (1977).

CONCLUSION

For the reasons stated above, the Staff agrees with AmerGen's objections to Citizens' Proposed Findings of Fact and Conclusions of law, but submits that AmerGen's motion is unnecessary.

/RA/

Mary C. Baty
Counsel for NRC Staff

Dated at Rockville, Maryland
this 31st day of October, 2007

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NOTICE OF WITHDRAWAL

Notice is hereby given that, effective October 31, 2007, the undersigned counsel withdraws her appearance in the captioned proceeding. All mail and service lists in this proceeding should be amended appropriately.

Respectfully submitted,

/RA/

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Dated at Rockville, Maryland
this 31st day of October, 2007

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NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter in accordance with 10 C.F.R. § 2.314(b).

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Respectfully submitted,

/RA/

Kimberly A. Sexton
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 31st day of October, 2007

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF ANSWER TO AMERGEN'S MOTION TO STRIKE PORTIONS OF CITIZENS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW," "NOTICE OF WITHDRAWAL" of Mitzi A. Young, and "NOTICE OF APPEARANCE" of Kimberly A. Sexton, 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, 2007.

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