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	Docket No. 50-0219-LR
AMERGEN ENERGY COMPANY, LLC	ASLBP No. 06-844-01-LR
(Oyster Creek Nuclear Generating Station)	November 20, 2006

MEMORANDUM AND ORDER
(Denying Citizens' Motion for Reconsideration)

I. INTRODUCTION

On October 10, 2006, this Board granted, in part, a petition to file new contentions submitted by six organizations[1] – hereinafter referred to collectively as Citizens – opposing an application by AmerGen Energy Company, LLC ("AmerGen") to renew its operating license for the Oyster Creek Nuclear Generating Station ("Oyster Creek") for twenty years beyond the current expiration date of April 9, 2009. See LBP-06-22, 64 NRC __ (slip op.) (Oct. 10, 2006). More specifically, this Board admitted one of seven new contentions proffered by Citizens; namely, their assertion that AmerGen's scheduled UT monitoring frequency in the sand bed region of the drywell shell during the renewal period is insufficient to maintain an adequate safety margin (LBP-06-22, 64 NRC at __, __ (slip op. at 9, 14)).

[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.

On October 20, 2006, Citizens filed a motion asking that we reconsider our decision as to four of the contentions we rejected. See Motion for Leave to File for Reconsideration and Motion for Reconsideration of Order Partially Granting Petition to File a New Contention (Oct. 20, 2006) [hereinafter Citizens' Motion for Reconsideration].[2]

For the reasons discussed below, we deny Citizens' Motion for Reconsideration.

II. ANALYSIS

A. Regulatory Standard Governing Motions For Reconsideration

Motions seeking reconsideration are evaluated under 10 C.F.R. § 2.323(e), which provides that such motions "may not be filed except upon 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 have reasonably been anticipated, that renders the decision invalid." The Commission adopted this standard as part of the 2004 amendments to the adjudicatory Rules of Practice. See Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2207 (Jan. 14, 2004).

Previously, the standard for granting a motion for reconsideration was defined under NRC case law, which allowed a Board to "reexamine existing evidence that may have been

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[2] AmerGen and the NRC Staff oppose Citizens' Motion for Reconsideration. See AmerGen's Answer in Opposition to Citizens' October 20, 2006 Motion for Reconsideration (Oct. 30, 2006) [hereinafter AmerGen's Opposition]; NRC Staff Response to Citizens' Motion for Reconsideration (Oct. 31, 2006) [hereinafter NRC Staff's Opposition].

misunderstood or overlooked, or to clarify a ruling on a matter" (69 Fed. Reg. at 2207). In adopting 10 C.F.R. § 2.323(e), the Commission admonished that – pursuant to the "compelling circumstances" standard embodied in the regulation – reconsideration is "an extraordinary action and should not be used as an opportunity to reargue facts and rationales which were (or should have been) discussed earlier" (ibid.). Section 2.323(e) thus creates "a higher standard than the existing case law [and] is intended to permit reconsideration only where manifest injustice would occur . . . and the claim could not have been raised earlier" (ibid.). Accord, e.g., Pacific Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-06-27, 64 NRC __, __ (slip op. at 2) (Nov. 9, 2006) (Commission reiterates that the "compelling circumstances" standard is to be applied "strictly").

B. Citizens Have Not Satisfied The Requirements For Seeking Reconsideration

Citizens assert (Citizens' Motion for Reconsideration at 4-10) that this Board should reconsider its denial of the following four contentions: (1) AmerGen's acceptance criteria are inadequate; (2) AmerGen's scope of UT monitoring is insufficient; (3) AmerGen's quality assurance for UT measurements is inadequate; and (4) AmerGen's methods of analyzing UT results are flawed.

AmerGen and the NRC Staff argue (AmerGen's Opposition at 3-10; NRC Staff's Opposition at 5-10) that Citizens' Motion for Reconsideration should be denied because it fails to show a "clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid" (10 C.F.R. § 2.323(e)). We agree.

1. Citizens Fail To Show That This Board Should Reconsider Its Rejection Of Their Contention Challenging The Adequacy Of AmerGen's Acceptance Criteria

Citizens argue (Citizens' Motion for Reconsideration at 4-6) that this Board clearly erred in rejecting as nontimely their contention challenging the adequacy of AmerGen's acceptance

criteria for the drywell shell. See LBP-06-22, 64 NRC at __-__ (slip op. at 10-14)).[3] The crux of Citizens' argument is that they could not have challenged the acceptance criteria for the sand bed region prior to AmerGen's April 2006 commitment to take additional UT measurements during the period of extended operation.

Citizens' argument is fatally undercut by their own conduct, because in their February 2006 motion to add new contentions, they unsuccessfully attacked – using information from material accompanying their November 2005 Petition to Intervene – the adequacy of AmerGen's acceptance criteria for UT measurements (LBP-06-22, 64 NRC at __ (slip op. at 13)). Although Citizens allege that they did not challenge AmerGen's acceptance criteria in their February 2006 motion (Citizens' Motion for Reconsideration at 5), their allegation cannot be reconciled with the motion's plain language, which argued that "some measurements taken in 1992 were less than [0.736 inches]. Thus, new acceptance criteria must be developed to ensure that the currently unacceptable areas do not grow to levels where they threaten the structural integrity of the drywell [shell]." See [Citizens'] Motion for Leave to Add Contentions or Supplement the Basis of the Current Contention at 12 (Feb. 7, 2006).

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[3] As relevant to Citizens' challenge, the acceptance criteria for the sand bed region of the drywell shell is the minimum required thickness to ensure its ability to withstand a buckling load, which long has been, and remains, 0.736 inches. Citizens have known of this acceptance criteria since they filed their Petition to Intervene in November 2005. See LBP-06-22, 64 NRC at __ (slip op. at 12).

Moreover, as AmerGen and the NRC Staff correctly observe (AmerGen's Opposition at 4; NRC Staff's Opposition at 5-6), in LBP-06-22, we rejected as nontimely the precise argument now advanced by Citizens, ruling that the information underlying Citizens' challenge to AmerGen's acceptance criteria was neither new nor previously unavailable (LBP-06-22, 64 NRC at __ (slip op. at 12)). We therefore summarily reject Citizens' effort here to seek reconsideration based on nothing more than a recyled argument. See 69 Fed. Reg. at 2207 (Commission adjures that reconsideration "should not be used as an opportunity to reargue facts . . . which were . . . discussed earlier").[4]

[4] As we explained in LBP-06-22, the acceptance criteria used by AmerGen have been in effect for years and have long been publicly available (LBP-06-22, 64 NRC at __-__ (slip op. at 12-13)). The criteria were used to assess the 1992, 1994, and 1996 UT results, and they were discussed in AmerGen's License Renewal Application (ibid.). Thus, Citizens' "challenge to the adequacy of AmerGen's acceptance criteria should have been made at the time [they] filed their initial Petition to Intervene [in November 2005]" (id. at 14).

Additionally, although unnecessary to the instant decision, our review of the record persuades us that Citizens' challenge to AmerGen's acceptance criteria – in addition to being nontimely – is inadmissible for the additional reason that it does not satisfy 10 C.F.R. § 2.309(f)(1)(v) or (vi). Citizens' principal assertions in this regard are that newer, more sophisticated, and more complete techniques are available for deriving the acceptance criteria. See [Citizens'] Supplement to Petition to Add a New Contention at 18-19 (July 25, 2006). Neither these assertions nor their accompanying expert opinion are sufficient to support this proposition,

even to the limited extent necessary for contention admissibility. Rather, we find the assertions underlying Citizens' contention to be speculative and unsupported. Citizens' assertion that AmerGen must conduct additional modeling to determine the adequacy of the acceptance criteria for areas that are thinner than 0.736 inches likewise is speculative and unsupported.

2. Citizens Fail To Show That This Board Should Reconsider Its Rejection Of Their Contention Challenging The Sufficiency Of The Scope Of AmerGen's UT Monitoring

Citizens assert (Citizens' Motion for Reconsideration at 6-7) that this Board clearly erred in rejecting as nontimely their contention that the spatial scope of AmerGen's UT monitoring program is insufficient to identify and test all the degraded areas of the drywell shell in the sand bed region. Citizens argue that they could not previously have challenged the spatial scope of AmerGen's UT monitoring program, because it was not until April 2006 that AmerGen agreed to take additional UT measurements during the period of extended operation.

Once again, Citizens are merely rearguing facts we addressed and rejected in LBP-06-22, where we found that the information underlying the spatial scope of AmerGen's UT monitoring program was neither new nor previously unavailable. As we stated in that decision: "Given that Citizens knew well before AmerGen docketed its December 9[, 2005] commitment when and where the UT measurements were taken, and given further that the December 9 commitment made clear that the one-time set of UT measurements would be taken at the same locations as previously performed, the appropriate time for a challenge by Citizens to the spatial scope of AmerGen's UT measurements was promptly after AmerGen had docketed its

December commitment" (LBP-06-22, 64 NRC at __-__ (slip op. at 29-30)). This they failed to do, thus rendering their contention nontimely.[5]

Citizens attempt to navigate around the nontimeliness shoal by asserting that this Board would have rejected their effort to proffer a contention challenging the spatial scope of AmerGen's UT measurements based on its December 2005 commitment, because such measurements would be taken before the renewal period and, thus, would be considered part of Oyster Creek's current licensing basis ("CLB") and outside the scope of this proceeding (Citizens' Motion for Reconsideration at 6). Citizens' conjectural assertion falls far short of establishing a "clear and material error . . . that renders the decision invalid" (10 C.F.R. § 2.323(e)). The NRC Staff's license renewal review – and, therefore, the scope of this proceeding – includes docketed written commitments concerning aging management of the drywell shell. See 10 C.F.R. § 54.21(a)(3); see also Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. 22,461, 22,473 (May 8, 1995) (the license renewal review includes a review of written commitments that are part of the CLB and encompass systems, structures, and components identified in 10 C.F.R. § 54.21(a) integrated plant assessment and 10 C.F.R. § 54.21(c) time-limited aging analysis). Notably, the subject line of AmerGen's December 2005 commitment letter – "Additional Commitments Associated with Application for Renewed Operating License" – demonstrates that

[5] Citizens concede that they were "aware of the scope of the past UT program on November 14, 2005, when they submitted their initial Petition [to Intervene]," but they assert they could not raise a contention on that basis at that time, because they were "unaware of any proposal to take UT measurements in the future" (Citizens' Motion for Reconsideration at 6). This is true, but it is also beside the point. AmerGen's December 2005 commitment to take future UT measurements provided Citizens with notice and a basis for proffering a timely contention shortly thereafter, which they failed to do.

the commitment supports the License Renewal Application, thus providing credible support for a conclusion that such commitments would *not* have fallen outside the scope of this proceeding. Citizens' speculative claim to the contrary fails to satisfy the strict standard for reconsideration. See AmerGen's Opposition at 6; NRC Staff's Opposition at 7.

3. Citizens Fail To Show That This Board Should Reconsider Its Rejection Of Their Contention Challenging The Adequacy Of AmerGen's Quality Assurance For UT Measurements

In LBP-06-22, this Board rejected Citizens' contention challenging the adequacy of AmerGen's quality assurance ("QA") plans for the UT measurements because (LBP-06-22, 64 NRC at __-__ (slip op. at 30-33)): (1) the contention was nontimely; (2) the contention was beyond the scope of this proceeding; and (3) Citizens failed to demonstrate that the contention raised a genuine factual dispute. Citizens assert that each of these rationales was "clearly erroneous" and, accordingly, we must grant reconsideration and admit their contention (Citizens' Motion for Reconsideration at 7-9). We disagree.

First, Citizens fail to show that our conclusion regarding the nontimeliness of their contention was error, much less clear error. They argue that we found they "fail[ed] to make a timely request for [pertinent] information, when in fact they made such a request and were improperly denied by AmerGen" (Citizens' Motion for Reconsideration at 8). Contrary to Citizens' argument, our decision was not based on a finding that Citizens failed to make a timely request for information. We expressly acknowledged Citizens' argument that AmerGen "refused [a request] to provide the [pertinent information]" (LBP-06-22, 64 NRC at __ n.27 (slip op. at 32 n.27) (internal quotation marks omitted)). We nevertheless concluded that this argument – in addition to being "unsupported and unexplained" (ibid.) – was "simply too late. If Citizens wanted to advance such a argument, they should have done so [in November 2005] when they submitted their Petition to Intervene" (ibid.). Citizens neglect to address this aspect of our decision. This analytic omission on their part is fatal to their assertion that our decision was clear error that warrants reconsideration.

Moreover, reconsideration is not warranted for the alternative reason that Citizens fail to show that this Board clearly erred in rejecting their contention as beyond the scope of this proceeding. Citizens aver that this Board incorrectly concluded that they were launching an

impermissible attack on the CLB, when in fact they were "challenging the [QA program] for the measurements to be taken during any extended licensing period . . . [which is not an] attack on the CLB" and, thus, is within the scope of this proceeding (Citizens' Motion for Reconsideration at 8-9). But Citizens ignore that the Commission has concluded that a licensee's QA program – even for activities undertaken during the period of extended operation – is excluded from license renewal review and, accordingly, is outside the scope of a license renewal proceeding. See 60 Fed. Reg. at 22,475 (quoted in LBP-06-22, 64 NRC at __ (slip op. at 33)); AmerGen's Opposition at 9; NRC Staff's Opposition at 9.

Finally, Citizens' request to reconsider must also be denied because they do not raise a serious challenge to the Board's conclusion that the contention "fail[ed] to make any 'reference[] to [the] specific portion[] of the application . . . that [they] dispute[] and the supporting reasons for each dispute'" and, accordingly, failed to raise a genuine factual dispute (LBP-06-22, 64 NRC at __ (slip op. at 33) (quoting 10 C.F.R. § 2.309(f)(1)(vi)). They merely assert – without supporting citation – that AmerGen and the NRC Staff have acknowledged that the 1996 UT results "are actually erroneous," and that "AmerGen even offered improvement to the [QA] program in the New Information" (Citizens Motion for Reconsideration at 9). This type of "bald [and] conclusory allegation" would not suffice to support a contention in the first instance (Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Sation, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001)), and it falls far short of satisfying the demanding "compelling circumstances" standard for seeking reconsideration (10 C.F.R. § 2.323(e)).

In sum, Citizens fail to demonstrate clear error in any, much less in all, of the three rationales underlying our rejection of their contention. Their request for reconsideration is therefore denied.

4. Citizens Fail To Show That This Board Should Reconsider Its Rejection Of Their Contention Challenging AmerGen's Methods For Analyzing UT

Results

Citizens also assert (Citizens' Motion for Reconsideration at 9-10) that this Board clearly erred in rejecting as nontimely their contention challenging the statistical methods AmerGen adopted for its UT monitoring program. Even assuming arguendo that Citizens were correct, they would not be entitled to reconsideration, because they neglected to address our alternative reason for rejecting their contention: namely, they "fail[ed] to reference, much less discuss, the 'specific portions of the application' that they dispute, nor d[id] they adequately identify a 'material issue of . . . [disputed] fact'" (LBP-06-22, 64 NRC at __ n.29 (slip op. at 36 n.29) (quoting 10 C.F.R. § 2.309(f)(1)(vi)).

Moreover, Citizens fail, in any event, to show that this Board's nontimeliness finding is clearly erroneous. As we explained in LBP-06-22, if Citizens had wished to raise a timely contention challenging AmerGen's statistical techniques for analyzing its UT results, they should have done so in their November 2005 Petition to Intervene, because those publicly available techniques were submitted to the NRC Staff as early as 1990 and are referenced in the License Renewal Application (LBP-06-22, 64 NRC at __-__ (slip op. at 34-35)).[6]

[6] Citizens assert that an earlier challenge was "impossible," because AmerGen might have decided to "use more rigorous techniques" in the future (Citizens' Motion for Reconsideration at 9). Plainly, this speculative assertion fails to provide a basis for reconsideration.

III. CONCLUSION

For the foregoing reasons, we deny Citizens' Motion for Reconsideration.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD[7]

/Original signed by/

E. Roy Hawkens, Chairman
ADMINISTRATIVE JUDGE

/Original signed by/

Dr. Paul B. Abramson
ADMINISTRATIVE JUDGE

/Original signed by
E. Roy Hawkens for/

Dr. Anthony J. Baratta
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 20, 2006

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