

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

**Before Administrative Judges:
E. Roy Hawkens, Chair
Dr. Paul B. Abramson
Dr. Anthony J. Baratta**

In the Matter of:)	
)	April 25, 2006
AmerGen Energy Company, LLC)	
)	Docket No. 50-219-LR
(License Renewal for Oyster Creek Nuclear)	
Generating Station))	
)	
)	

**AMERGEN’S MOTIONS TO DISMISS DRYWELL CONTENTION AS MOOT
AND TO SUSPEND MANDATORY DISCLOSURES**

Pursuant to 10 CFR § 2.323, AmerGen Energy Company, LLC (AmerGen) hereby moves to dismiss as moot Citizens’¹ contention related to monitoring of potential corrosion in the “sand bed” region of the Oyster Creek Nuclear Generating Station (OCNGS) drywell on the basis of new monitoring commitments made to the Nuclear Regulatory Commission (NRC) since the filing of the proposed contention. In addition, AmerGen moves to suspend the mandatory disclosure process pending the Atomic Safety and Licensing Board’s (Board) determination on the Motion to Dismiss.²

¹ Citizens are comprised of the Nuclear Information and Resource Service (“NIRS”), Jersey Shore Nuclear Watch, Inc. (“JSNW”), Grandmothers, Mothers and More for Energy Safety (“GRAMMES”), New Jersey Public Interest Research Group (“NJPIRG”), New Jersey Sierra Club (“NJ Sierra Club”), and New Jersey Environmental Federation (“NJEF”).

² AmerGen has consulted with the parties on the above Motions in accordance with 10 CFR § 2.323(b). NRC Staff concurs with the Motion to Suspend Mandatory Disclosures, but could not concur or object to the Motion to Dismiss pending review of that Motion. Citizens object to both Motions.

INTRODUCTION

On November 14, 2005, Citizens submitted a “Request for Hearing and Petition to Intervene” in which they proposed the admission of one contention in the OCNGS license renewal proceeding. Citizens’ proposed contention related to the monitoring of corrosion in the OCNGS drywell. As admitted by the Board, Citizens’ drywell contention states:

AmerGen’s License Renewal Application fails to establish an adequate aging management plan for the sand bed region of the drywell liner, because its corrosion management program fails to include periodic UT measurements in that region throughout the period of extended operation and, thus, will not enable AmerGen to determine the amount of corrosion in that region and thereby maintain the safety margins during the term of the extended license.

Memorandum and Order (Denying New Jersey’s Request for Hearing and Petition to Intervene and Granting NIRS’ Request for Hearing and Petition to Intervene), LBP-06-7, slip op. at 33 (2006) (Memorandum and Order).

At the time that Citizens submitted their Petition to Intervene, AmerGen’s License Renewal Application (LRA) contained no provisions for any future ultrasonic testing (UT) measurements in the sand bed region of the drywell shell, based upon its conclusion that corrosion in that area has been arrested, and that the planned, continued visual inspections of the multi-layered epoxy coating covering the drywell shell in the sand bed region would be adequate.³ By letter dated December 9, 2005, AmerGen formally docketed a commitment to perform a one-time UT examination of the sand bed region prior to the period of extended operation under the renewed license. *See* “AmerGen’s Answer Opposing NIRS et al. Request for Hearing and Petition to Intervene” (December 12, 2005) at Exhibit 1. On April 4, 2006,

³ OCNGS License Renewal Application (License No. DPR-16) (LRA) at 3.5-19 to 21. (For a summary of AmerGen’s prior UT program and of the NRC’s previous concurrence that no further UT
(footnote continued)

AmerGen docketed a further commitment to perform additional UT examinations in the sand bed region of the drywell *once every ten years during the period of extended operation*. At that time, AmerGen also committed to formally incorporate the increased UT examination program into Table A-5 of its LRA.⁴ See Letter from Michael P. Gallagher to NRC Document Control Desk (April 4, 2006), served on the Board and all of the parties by Letter from Alex S. Polonsky to the Secretary (April 5, 2006).⁵

For the reasons discussed below, AmerGen believes that its commitments to perform a set of UT examinations in the sand bed region prior to the period of extended operation and then every ten years thereafter during the period of extended operation moot Citizens' contention as admitted by the Board, and that therefore the contention should be dismissed.

In addition, in the interest of efficiency and appropriate use of the parties' and the Board's resources, AmerGen also moves to suspend the mandatory disclosure process commenced pursuant to 10 CFR § 2.336 pending a decision by the Board on AmerGen's Motion to Dismiss.

CITIZENS' CONTENTION IS NOW MOOT

Citizens' drywell corrosion contention is now moot because it is a contention of "omission" that has been cured by AmerGen's additional commitments for periodic UT

examinations were required in this region, see "AmerGen's Answer Opposing NIRS et al. Request for Hearing and Petition to Intervene" (December 12, 2005) at 19-21).

⁴ AmerGen also is preparing to docket two further commitments to perform one-time UT measurements in the sand bed region prior to the period of extended operation. First, it will perform a set of one-time UT measurements of the drywell shell in the area that is accessible from the trenches in the bottom of the drywell. Second, it will perform a set of one-time UT inspections of certain specified areas of the drywell shell in the sand bed region identified through measurements taken in 1992 from the exterior of the drywell shell.

⁵ During the April 10, 2006 scheduling conference call between the Board and the parties, AmerGen advised the Board and the parties of its intent to shortly file the instant Motions. On April 13, 2006 counsel for AmerGen agreed, at the request of counsel for Citizens, not to file the Motions before April 24, the first business day after Citizens' counsel's return from vacation. Counsel for AmerGen and counsel for Citizens discussed the Motions on April 25, 2006.

measurements during the period of extended operation. As admitted by the Board, the contention only challenges the fact that AmerGen’s “corrosion management program *fail[ed] to include periodic UT measurements* in [the sand bed] region throughout the period of extended operation.” Memorandum and Order at 33 (emphasis added). Thus, the admitted contention, on its face, simply alleges a failure or omission in the LRA.

Moreover, in rejecting the portion of Citizens’ original contention relating to the upper region of the drywell, the Board stated:

We limit NIRS’s contention to the sand bed region *because, contrary to NIRS’s assertion, AmerGen is performing, and will continue to perform during the renewal period, UT measurements* at critical locations in the upper region of the drywell liner For this reason, NIRS’s contention – to the extent it includes the upper region of the drywell liner – lacks an adequate basis.

Memorandum and Order at 23 n.27 (emphasis added). This passage makes clear that one of the fundamental distinctions drawn by the Board between the upper region of the drywell (which was excluded from the contention) and the sand bed region (which was included in the admitted contention) was the fact that AmerGen had an aging management program to perform UT measurements during the period of extended operation in the former region, but not the latter. That circumstance has now clearly changed. There can now be no legitimate dispute that AmerGen has committed to perform UT measurements in the sand bed region during the period of extended operation, and that these measurements are “periodic.” AmerGen’s selection of a ten year cycle for performing these additional UT examinations fully addresses Citizens’ contention calling for “periodic” UT measurements in the sand bed region.⁶

⁶ See, e.g., Letter from Graham B. Wallis, Advisory Committee on Reactor Safeguards (ACRS), to Chairman Nils J. Diaz (March 23, 2006) (“Report on the Safety Aspects of the License Renewal
(footnote continued)

Under applicable NRC case law, when an applicant cures an alleged omission in its application which served as the basis for a contention, the contention is rendered moot. The Commission’s principal decision with respect to “contentions of omission” is *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373 (2002) (*Duke Energy*), in which the Commission stated:

The Intervenors’ original contention, by its own terms, challenged Duke’s failure to discuss the Sandia study at all The Intervenors’ previous concern was Duke’s failure to acknowledge the Sandia study. Now their concern relates to *how* [emphasis in original] Duke and the NRC Staff applied the Sandia information in their latest SAMA analyses. This is a new concern

There is, in short, a difference between contentions that merely allege an “omission” of information and those that challenge *substantively and specifically* [emphasis added] how particular information has been discussed in a license application. Where a contention alleges the omission of particular information or an issue from an application and the information is later supplied by the applicant ... the contention is moot. . . .

By contrast, a valid contention challenging how specific substantive information is discussed in an application ... must identify “each [such] failure,” [footnote omitted] setting forth both the Applicant’s – or Staff’s – position and the “Petitioner’s opposing view.”

Id. at 382-83.

Application for the Browns Ferry Nuclear Plant Units 1, 2, and 3”); Letter from William D. Crouch to NRC Document Control Desk (April 4, 2006) (“Browns Ferry Nuclear Plant – Units 1, 2, and 3 – License Renewal Application – Unit 1 Lower Drywell Liner Inspections, Unit 1 Periodic Inspection Program, and Residual Heat Removal Service Water Piping Inspections”). In the former letter, the ACRS suggested that the applicant commit to “periodic” inspections of the drywell liner in the sand bed region. The applicant responded by docketing a commitment to perform UT at ten year intervals during the period of extended operation.

In *Duke Energy*, the Commission remanded to the Board the issue as to whether the Intervenor's contention was moot. The Board subsequently dismissed the contention as moot.⁷

In the instant case, Citizens have asserted that AmerGen has failed to include periodic UT measurements of the sand bed region in its LRA. The language of the admitted contention is clearly that of a contention of omission since AmerGen's LRA did not include *any* further program for UT measurements in that region during the period of extended operation. Furthermore, Citizens have not provided any specific or particularized information on what frequency of such UT measurements is sufficient, nor any "opposing view" other than their view that some "periodic" UT measurements are necessary. As such, the contention as admitted only alleges the absence of periodic UT measurements in the LRA. It is thus a contention of omission that has been mooted by AmerGen's subsequent commitment.

However, even if *arguendo*, the contention is not construed as a contention of omission, it has still been mooted by AmerGen's additional monitoring commitments. Under this interpretation of the contention, Citizens asserted not just the mere absence of any periodic UT examinations during the period of extended operation, but that some number of such examinations must be performed to ensure appropriate safety margins are maintained during the period of extended operation. In their original Petition to Intervene, Citizens did

⁷ *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), 2003 WL 549228 (Feb. 4, 2003) (unpublished order); *see also Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 NRC 1, 10-11 (2002). On the issue of mootings of omissions, *see also USEC, Inc.* (American Centrifuge Plant), CLI-06-09, ___ NRC ___, slip op. at 14 (2006); *Duke, Cogema, Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-04-9, 59 NRC 286, 293 (2004); *Private Fuel Storage* (Independent Spent Fuel Storage Installation), LBP-02-2, 55 NRC 20, 29 (2002); *Private Fuel Storage* (Independent Spent Fuel Storage Installation), LBP-01-26, 54 NRC 199, 207 (2001); and *Private Fuel Storage* (Independent Spent Fuel Storage Installation), LBP-01-23, 54 NRC 163, 170-71 (2001).

state generally that “an adequate number of confirmatory UT measurements” should be performed, but never quantified their request. Petition to Intervene at 3.

Pursuant to AmerGen’s newly docketed commitments, it will first perform a set of UT examinations prior to the period of extended operation. See April 4, 2006 Gallagher letter, Enclosure at 1. It will then, regardless of the results of those examinations, perform UT measurements on a frequency of every 10 years during the period of extended operation. *Id.* As required by AmerGen’s docketed commitments, if *any* of those examinations produce “[s]tatistically significant deviations from the 1992, 1994, and 1996 UT results”⁸ then “corrective actions” will be taken. *Id.* Those corrective actions would include:

- *Performing additional UT measurements* to confirm the readings.
- *Notifying NRC within 48 hours* of confirmation of the identified condition.
- Conducting visual inspection of the external surface in the sand bed region in areas where any unexpected corrosion may be detected.
- Performing engineering evaluation to assess the extent of condition and to *determine if additional inspections* are required to assure drywell integrity.
- Performing operability determination and justification for operation *until next inspection*.
- Completing the above actions prior to restart from the associated outage.

Id. at 2-3 (emphasis added).

These docketed commitments fully and satisfactorily address the concept of an “adequate number” of UT measurements. AmerGen has gone well beyond a mere commitment to perform UT examinations once every ten years. What it has done instead, is

to commit to a minimum baseline program of at least three sets of UT examinations, and to expand that program as necessary if monitoring results warrant. All inspection results will be compared to prior test results to identify any statistically significant deviations. If any such deviations exist, AmerGen has committed that such deviations “will result” in corrective actions, including among other things: additional UT measurements; prompt notification of the NRC; and engineering evaluations to determine if “additional inspections” are required. Furthermore, all of these actions, along with operability determinations to determine if adequate justification exists to operate until the next inspection, “will be completed prior to restart from the associated outage.” *Id.* at 2.

Thus, AmerGen has committed to an Aging Management Program and a *process* that will ensure that any identified deviations or deficiencies will be dispositioned before restart from the associated outage, and that will ensure that it can maintain adequate safety margins during the term of the extended license. This process obviates the need to attempt to further define in advance any specific additional number of UT examinations to be performed, and instead provides a mechanism to ensure that whatever number of such tests that may be required are in fact performed. This, coupled with the NRC Staff’s ongoing inspection and enforcement program, is sufficient to moot Citizens’ contention.

**FURTHER MANDATORY DISCLOSURES SHOULD BE SUSPENDED
PENDING A BOARD DETERMINATION ON THE MOTION TO DISMISS**

The parties exchanged initial mandatory disclosures as required by 10 CFR § 2.336 on April 3, 2006. For AmerGen, identifying and reviewing the documents to include in the initial disclosures posed a significant burden. Documents relevant to the drywell contention

⁸ The record clearly shows that inspection results since 1992 indicate that corrosion in the sand bed region has been arrested. LRA at 3.5-20; *see also* Petitioners’ Exhibit 6 at 1 (filed with Petition to Intervene).

date back over twenty years, and AmerGen's initial disclosures alone amounted to seventeen separate indices totaling more than 120 pages, listing thousands of potentially relevant documents by category and location.⁹ These documents include records maintained by AmerGen, its corporate parent, and individual employees, contractors, consultants, and counsel in at least four separate locations. The format of these records includes microfilm, microfiche, videotapes in various formats, photographs, emails, electronic documents in native and .pdf formats, and hard copies.

Yet the mandatory disclosure process is only just beginning. For many of these documents, AmerGen expects to have to provide additional details to the parties and/or allow the parties to inspect these documents prior to requesting copies. AmerGen will also face the additional and significant burden of producing these documents and periodically updating the mandatory disclosures. The extent of this burden, of course, will depend on the number of documents requested by the parties, but the burden has the potential to greatly exceed the already substantial costs incurred in preparing the initial disclosures. These expenses may include producing transferable electronic files and/or printing those files, and reviewing the hundreds of documents catalogued in AmerGen's electronic document management system for the first time.¹⁰

If the Board grants the pending Motion to Dismiss without having suspended discovery, then all of the parties would have irreversibly incurred significant (and

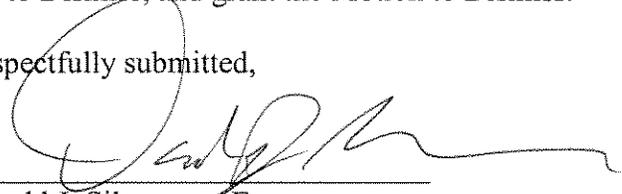
⁹ See Letter from Alex S. Polonsky to Richard Webster (April 3, 2006) ("Disclosures Pursuant to 10 CFR § 2.336; *AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), Docket No. 50-219"). A courtesy copy of this Letter, with the attached initial disclosures, is being separately provided to each Judge in this proceeding as Attachment 1 to these Motions. The parties to this proceeding already possess this voluminous document.

¹⁰ See *id.* ("Because of the large volume of records, AmerGen has not reviewed every document identified in these attachments to confirm its relevance or to determine whether it contains proprietary information. This is especially the case for documents stored electronically, on microfiche/film, or offsite.")

unnecessary) costs. Suspending the process now will conserve the parties' resources. AmerGen therefore requests that the Board rule on its Motion to Suspend Mandatory Disclosures expeditiously, and independently from the Motion to Dismiss.

For the foregoing reasons, AmerGen requests that the Board suspend discovery under 10 CFR § 2.336, pending a ruling on the Motion to Dismiss, and grant the Motion to Dismiss.

Respectfully submitted,



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Dated in Washington, D.C.
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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of:)	April 25, 2006
AmerGen Energy Company, LLC)	
(License Renewal for Oyster Creek Nuclear Generating Station))	Docket No. 50-219
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CERTIFICATE OF SERVICE

I hereby certify that copies of AmerGen's Motions to Dismiss Drywell Contention as Moot and to Suspend Mandatory Disclosures were served this day upon the persons listed below, by E-mail and first class mail, unless otherwise noted.

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