

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))	May 5, 2006

MOTION TO APPLY SUBPART G PROCEDURES

PRELIMINARY STATEMENT

In this Motion, 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") show that AmerGen's credibility, and the credibility of its parent, Exelon, is in question. Citizens submit this Motion to request that the Atomic Safety Licensing Board ("ASLB" or "Board") order this proceeding to be conducted pursuant to the rules of 10 C.F.R. Part 2, Subpart G, in accordance with 10 C.F.R. § 2.310(d). This Section states that a formal Subpart G proceeding will be used "where the credibility of an eyewitness may reasonably be expected to be at issue." At other plants, AmerGen/Exelon has failed to disclose critical information to regulators and has submitted false data to the NRC. With regard to Oyster Creek, AmerGen/Exelon made misleading statements about various issues to this Board, to the press, and to elected officials, has used unjustifiable excuses to conceal the 1996 UT results for as long

as possible, and has accepted and relied upon the 1996 UT results, despite obvious deficiencies in the data that were rapidly identified by Citizens' expert.

Unless the ASLB grants a Subpart G hearing, Citizens will be placed in a catch-22. Under the curtailed discovery allowed by Subpart L, Citizens will not be able to tell if witnesses are telling the whole truth or if documents have been falsified. If the ASLB were to require that the credibility of each individual witness or document must be shown to be at issue before granting a Subpart G hearing and allowing full discovery, it would mean that Citizens would be deprived of the very means of testing the credibility of the witnesses and documents.

AmerGen/Exelon has put its credibility and the credibility of its employees and agents at issue through its pattern of questionable conduct related to this proceeding and at other plants. Even Exelon's President has admitted that it has lost credibility. Therefore, Citizens no longer have the confidence, which is required by Subpart L proceedings, that AmerGen's employees and agents have and will conduct themselves in an appropriate manner in this proceeding and related matters. Thus, the ASLB should grant this motion, and require that this proceeding go forward under Part 2, Subpart G.

HISTORICAL BACKGROUND

AmerGen, and its parent company Exelon, have a long history of making false or misleading statements and being less than credible to the public in general, and to Citizens. Thus, relevant information abounds. Citizens present several instances, both in general, and specific to Oyster Creek, where AmerGen exemplified its lack of credibility.

Undisclosed Tritium Leaks at Exelon's Braidwood Nuclear Facility

The State of Illinois filed suit on March 16, 2006 against Exelon for its failure to properly maintain its Braidwood nuclear power plant. The State of Illinois alleges that Exelon allowed its

power plant to repeatedly leak radioactive wastewater contaminated with tritium, in violation of the Illinois Clean Water Act, and without any authorizing permit. Ex. A at p. 2-4. The alleged leaks of contaminated wastewater began in at least 1996, and totaled at least several million gallons. Id. at ¶ 15-20. The contaminated water affected the surrounding groundwater. Id. at ¶ 12. Illinois also alleges that Exelon had knowledge of the releases, but that it failed to notify the Illinois EPA. Id. at ¶¶ 17, 19, 21. Exelon's violations are made even more egregious by the fact that some of the releases occurred while Exelon was undergoing a discharge permit renewal process with the Illinois EPA. Ex. B at 1. James Glasgow, the Will County State Attorney representing Will County as a plaintiff in the litigation, characterized Exelon's handling of the spills and inadequate maintenance of its facility as stemming from a "culture of greed and deception." Ex. C at 1.

Further, Citizens cannot be expected to assume the credibility of AmerGen and its documents when Exelon's own President and Chief Nuclear Officer, Mr. Christopher Crane admitted that Exelon has suffered a loss of credibility. Despite the high monetary price that Exelon will have to pay as a result of the tritium spills in Illinois, Mr. Crane stated that, "[t]he more damaging issue here is the credibility loss." Ex. D at 1.

Falsification of Records at Exelon's Quad Cities Nuclear Power Station

The NRC Office of Investigations initiated an investigation on March 8, 2004, in which it determined that two Exelon technicians "deliberately falsified inspection documentation while calibrating local instrumentation." Ex. E, Synopsis. More specifically, Exelon personnel "falsified maintenance alteration logs to indicate that required concurrent or independent verifications were performed on torus temperature indicators, residual heat removal (RHR) suction and discharge pressure indicators, RHR service water pump discharge indicators, and secondary containment differential

pressure indicators after the alteration and restoration of these instruments.” Id. at 1. The report of the NRC Office of Investigations states that the “matter was identified and immediately investigated by Exelon,” and that Exelon took numerous “[c]orrective actions” after uncovering the falsification. Id. While Citizens acknowledge Exelon’s actions to identify and correct the falsification, this does not change the fact that Exelon employees falsified maintenance records, such as the ones upon which Citizens would be forced to rely in a Subpart L hearing. The veracity of documents submitted by AmerGen cannot be ascertained by Citizens without an opportunity to engage in full discovery, which is only afforded by a proceeding under the Part 2, Subpart G regulations.

Lack of Candor at AmerGen’s Oyster Creek Nuclear Generating Station

Citizens also observe that AmerGen has been untruthful on several occasions in the statements it has made regarding Oyster Creek. First, within the confines of this proceeding, AmerGen has submitted misleading information for the Board’s consideration. In its Answer, AmerGen stated that it “concluded that corrosion of the drywell shell has been arrested, including in the sand bed region.” Answer at 21. However, this representation was in direct conflict with the record, which clearly shows that corrosion is ongoing in the upper drywell, above the sand bed region. E.g. License Renewal Application at 3.5-20 to 21. On March 23, 2006, AmerGen notified Citizens that it agreed with Citizens position that a statement in AmerGen’s Answer to the initial Petition “could cause confusion” and subsequently notified the Board of the need to correct the pleading. See Ex. F.

Second, AmerGen has inconsistently represented to Citizens the character of certain information. On September 6, 2005, Citizens requested copies of the 1996 inspections of the Oyster Creek drywell liner. Ex. G. On October 10, 2005, AmerGen refused Citizens’ information request, claiming that the request was for “proprietary business information.” Ex. H. However, on April 6,

2006, AmerGen submitted the averaged results of the 1996 inspections to the NRC, and did not include any claim that the information was proprietary. Ex. I. AmerGen did not make this claim to the NRC, because the information is not proprietary. AmerGen's initial claim was made as an excuse to deny Citizens' information request. While Citizens acknowledge that they now have access to some the requested information, they note that AmerGen's behavior, claiming that certain information is proprietary when Citizens have no ability to contest the claim, but then later not even attempting to make the claim when Citizens could challenge it, is one more example of its lack of credibility.

Third, the 1996 Oyster Creek dry well measurements that AmerGen submitted to the NRC show a systematic bias in AmerGen's favor. Ex. J at 2. In 1994, nineteen areas in the sand bed region were measured. Id. at 1. Then, two years later in 1996, similar measurements were taken at the same locations on the dry well. Id. at 2. Incredibly, the records submitted show that while the thickness of the dry well at most measured locations decreased from 1992 to 1994, as would be anticipated if corrosion was occurring, the thickness at these locations then *increased* between 1994 and 1996. Id. at 2. These records are troubling for a number of reasons. First the measurements reported are "physically impossible," as "metal simply does not spontaneously get thicker." Id. at 2. Second, the deviation from the previous results exceeded AmerGen's own estimate of random error by large margins. Id. Third, AmerGen neither noted this systematic error nor made any effort to correct it. Id.

Finally, AmerGen claims that at Oyster Creek "it is highly unlikely that the crash [of an airplane into the reactor building] would cause any significant damage to the used fuel pool," Ex. M, and that "a study . . . found that even if such an event [an aircraft impact] did occur . . . there would not be a catastrophic release of radioactivity." Ex. K at 2. In sharp contrast, the National Academy of Sciences ("NAS") found that a direct hit by an aircraft on a reactor like Oyster Creek could cause "severe

damage of the pool wall” that “could have severe consequences,” such as “2,000 to 6,000 cancer deaths.” Ex. L at 2. Further, NAS cautioned that “[t]errorist attacks on spent fuel pools are . . . a credible threat,” and fuel pools “cannot be dismissed as targets for such attacks because it is not possible to predict the behavior and motivations of terrorists.” Id. at 1. While AmerGen has asserted that they are “certainly able to defend the facility,” Ex. K at 2, NAS stated “there are currently no requirements in place to defend against the kind of . . . attacks that were carried out on September 11, 2001.” Ex. L at 6.

Instead of the NAS Report, AmerGen cites to a National Energy Institute and Electric Power Research Institute (“NEI-EPRI”) study to support its assurances that “[t]hese structures are designed for safety with multiple barriers to protect the fuel.” Ex. K at 2. Again, in direct contradiction, the NAS cautioned “the spent fuel pool [in GE Mark I Boiling Water Reactors like Oyster Creek] is located well above ground level. Most designs have thin steel superstructures. The superstructures and pools were not, however, specifically designed to resist terrorist attacks.” Ex. L at 2.

In another effort to downplay the significant security concerns, on April 7, 2006, AmerGen issued a public relations package to mayors in the local townships surrounding the Oyster Creek facility. Ex. M (excerpt). In it, AmerGen insists that “it is highly unlikely that [an airplane] crash would cause any significant damage to the fuel stored in the Used Fuel pool,” as the “steel framing, the pool’s massive concrete structure and supporting columns would protect the pool from impact damage and the contained water would provide protection to the fuel from impact and fire effects.” Id.

AmerGen made similar assertions based on the NEI-EPRI study stating that “[the NEI-EPRI] study . . . found that even if such an event [an aircraft impact] did occur . . . there would not be a catastrophic release of radioactivity.” Ex. K at 2. However, AmerGen failed to discuss or note the

several serious shortcomings of this study that erode support for its claims that there would be no serious consequences. For example, the State of New Jersey stated that “the [NEI-EPRI] study does not appear to have taken into account the thermal and structural consequences and collateral damage of the explosion and resulting fire that would also occur from the impact of a commercial aircraft.” Ex. N at 1. Further, “it appears that the structural models used to evaluate impact damage were based on ‘representative’ (not site-specific), structures, which were considered by NEI to be typical to those that exist across the nuclear power industry.” Id. at 2.

In addition to contradicting the NAS study, AmerGen completely disregards the study by Robert Alvarez (the “Alvarez Study”) whose conclusions were supported by the NAS. Ex. O (providing an excerpt from the NAS Report). According to the NAS, the Alvarez Study concluded that the consequences of a fire resulting from a “loss-of-pool-coolant event that drained the spent fuel pool” would result in “long-term contamination consequences that were worse than those from the Chernobyl accident.” Id. at 45. The State of New Jersey has repeatedly quoted the Alvarez Study when it expresses its concerns about Oyster Creek’s vulnerability to aircraft attack. E.g. Ex. N at 2.

ARGUMENT

I. AmerGen’s Credibility Is At Issue

The Nuclear Regulatory Commission regulations require that a formal proceeding be conducted when the credibility of a witness may reasonably be expected to be at issue.¹ The Part 2 rules were

¹ 10 C.F.R. § 2.310(d) states, in pertinent part, that:

In proceedings for the grant, renewal, licensee-initiated Amendment, or termination of licenses or permits for nuclear power reactors, where the presiding officer by order finds that resolution of the contention or contested matter necessitates resolution of issues of material fact relating to the occurrence of a past activity, *where the credibility of an eyewitness may reasonably be expected to be at issue*, and/or issues of motive or intent of the party or eyewitness material to the resolution of the contested matter, the hearing for resolution of that contention or contested matter will be conducted under

promulgated in 2004. The Board has already recognized its authority to grant motions for Subpart G hearings under the current Part 2 rules. In the Matter of Entergy Nuclear Vermont Yankee LLC (Vermont Yankee Nuclear Power Station), 2005 NRC LEXIS 52 (2005). The Board also recognizes that when a party finds that its adversary is “shown to be of questionable veracity under oath,” generally behaving in a way that puts its credibility at issue, such behavior poses a challenge. Id. at 3. The Board has acknowledged these challenges in the past and recently stated that, “[t]his situation demonstrates the difficulty the petitioner faces under the new rules in demonstrating, in its initial request for hearing, that a specific contention raises reasonable concerns about the credibility of an eyewitness to a material past activity. See 10 C.F.R. §§ 2.309(g) and 2.310(d). At this stage, the petitioners do not even know the identity of the witnesses that Entergy may call.” In the Matter of Entergy Nuclear Vermont Yankee, LLC, (Vermont Yankee Nuclear Power Station), 2004 NRC LEXIS 263, *31 (2004). In the present case, even Exelon’s President has conceded that it has “lost credibility.” Ex. D at 1. Therefore, the Board should recognize that Citizens have done more than raise a reasonable concern as to AmerGen’s credibility and direct this proceeding to move forward under the procedures provided by Subpart G.

The Board has also acknowledged that petitioners may rely on past experiences with the other party to form the basis for credibility concerns. 2004 NRC LEXIS 263 at *31. The Board stated, “we reject the notion that the demonstration of questions about an eyewitness's credibility cannot be historical, [as] [a]t this early juncture in the proceeding, historical information is one of the few bases upon which a petitioner can argue, and this Board assess, the credibility of a potential eyewitness” Id. at *31-2. In this case, Citizens have demonstrated that questions as to credibility arise from both

subpart G of this part. (emphasis added).

historical information and current events. In light of AmerGen's mountain of mistakes, falsifications, and general lack of candor, the Board should find that AmerGen's credibility is at issue, and conduct a Subpart G hearing.

II. Denying Citizens' Request for a Subpart G Hearing Would Impinge on Citizens Statutory Rights

One of the primary purposes of the Subpart G rules is to allow full discovery when the curtailed discovery allowed under Subpart L may be insufficient. Curtailed discovery is insufficient when a party lacks credibility. A petitioner cannot be reasonably expected to properly build its case by relying solely on paper discovery from an untrustworthy source. In this case, statements of witnesses and accuracy of documents cannot be deemed presumptively true.

Citizens acknowledge that the Subpart L rules, allowing reduced formality, limited discovery, and limited right to cross-examination, may be facially valid and in accordance with Administrative Procedure Act ("APA"). Citizens Awareness Network, Inc. v. Nuclear Regulatory Commission, 391 F.3d 338, 344 (2004). Citizens are aware that these rules reflect the "NRC's commitment to expeditious adjudication," and are intended to simplify the hearing process in order to increase efficiency. Id. at 344. However, if the practical effect of the Part 2 rules is to keep every petitioning party from accessing a formal hearing, they would be invalid as applied. As the First Circuit duly noted, "[s]hould the agency's administration of the new rules contradict its present representations or otherwise flout this principle, nothing in this opinion will inoculate the rules against future challenges." Id. In this case, where AmerGen's lack of credibility is at issue, the desire for simplicity and speed afforded by Subpart L proceedings do not outweigh the need to properly adjudicate facts material to the resolution of this matter. Thus, a Subpart G hearing is required for the proceedings to meet the requirements of the APA.

III. AmerGen's Lack of Credibility Requires the Board to Conduct a Subpart G Hearing

AmerGen's actions, both within this proceeding and in other fora, demonstrate that its credibility is at issue, thus, it is imperative that the Board grant the motion and conduct a Subpart G hearing. In the absence of cross-examination and full discovery, Citizens will be unable to discern whether AmerGen's witnesses and documents are truthful. The resolution of the issues at the core of the contention can only be done under the auspices of a hearing conducted under the Subpart G rules, which "resemble those associated with judicial proceedings," including traditional rules of discovery, and the ability to cross-examine witnesses. 391 F.3d at 344 (2004).

AmerGen's untruthfulness is not an isolated incident. Citizens present the Board with several instances from AmerGen's history, and the current proceeding, which together illustrate a pattern demonstrating that the credibility of eyewitnesses in this proceeding, namely AmerGen employees, "may reasonably be expected to be at issue." 10 C.F.R. § 2.310(d). The Board, in light of the information provided by Citizens, must find that AmerGen's lack of credibility is sufficient to warrant that "the hearing for resolution of [this] contention or contested matter [] be conducted under subpart G." 10 C.F.R. § 2.310(d).

CONCLUSION

For all of the forgoing reasons, the ASLB should grant Citizens' motion, find AmerGen's credibility to be at issue, and order the hearing to proceed under Subpart G.



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