

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)	June 5, 2006

MEMORANDUM AND ORDER
(Denying NIRS's Motion to Apply Subpart G Procedures)

I. INTRODUCTION

On February 27, 2006, this Board granted a hearing request submitted by six organizations¹ – hereinafter referred to collectively as NIRS – 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-06-07, 63 NRC 188 (2006). This Board admitted one contention for litigation; namely, NIRS's challenge to AmerGen's aging management program for measuring corrosion in the sand bed region of Oyster Creek's drywell liner (LBP-06-07, 63 NRC at 217). Our Order stated that the proceeding “shall be conducted in accordance with the informal adjudicatory procedures prescribed in Subpart L of 10 C.F.R. Part 2” (id. at 228).

¹ The six organizations are: Nuclear Information and Resource Service (“NIRS”); 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 May 5, 2006, NIRS filed a motion requesting that the Board order this proceeding be conducted pursuant to the formal hearing requirements under 10 C.F.R. Part 2, Subpart G, in accordance with 10 C.F.R. § 2.310(d). See [NIRS] Motion to Apply Subpart G Procedures at 1 (May 5, 2006) [hereinafter NIRS Motion].²

For the reasons discussed below, we deny NIRS's Motion.

II. ANALYSIS

A. Regulatory Standard For Permitting A Subpart G Hearing In Licensing Proceedings

In January 2004, the Commission amended its Rules of Practice for adjudicatory proceedings to address its "longstanding concern that the adjudicatory . . . process in 10 C.F.R. part 2, subpart G, associated with licensing . . . actions, is not as effective as it could be" (Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2182 (Jan. 14, 2004)). As part of its effort to "make the NRC's hearing process more effective and efficient" (ibid.), the Commission adopted 10 C.F.R. § 2.310(d), which revised 10 C.F.R. Part 2 to no longer require formal hearings under Subpart G for cases involving the "grant, renewal, licensee-initiated amendment, or termination of licenses or permits for nuclear power reactors" (10 C.F.R. § 2.310(d)). Such proceedings ordinarily will be conducted under the Subpart L informal hearing procedures, unless the presiding officer "by order" finds that (ibid.):

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

² AmerGen and the NRC Staff filed Answers opposing NIRS's Motion. See AmerGen Answer Opposing [NIRS's] Motion to Apply Subpart G Procedures (May 16, 2006) [hereinafter AmerGen Answer]; NRC Staff Response to Motion to Apply Subpart G Procedures (May 16, 2006) [hereinafter NRC Staff Answer].

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.

As relevant here, the language in the 2004 amendments and the Commission's Statement of Consideration accompanying them make clear that 10 C.F.R. § 2.310(d) only requires a Subpart G hearing in two circumstances (69 Fed. Reg. at 2222): (1) the contention involves an issue of material fact concerning the occurrence of a past activity, and the credibility of an eyewitness may reasonably be expected to be at issue; or (2) the contention involves an issue where the motive or intent of a party or eyewitness is material to the resolution of the contested matter. See also Entergy Nuclear Vermont Yankee, L.L.C. (Vermont Yankee Nuclear Power Station), LBP-04-31, 60 NRC 686, 694 (2004).

These two regulatory standards for permitting Subpart G hearings are consistent with judicial case law, which recognizes that a formal evidentiary hearing – which includes the right to cross-examine witnesses – is “best used to resolve issues where ‘motive, intent, or credibility are at issue, or if there is a dispute over the occurrence of a past event’” (69 Fed. Reg at 2205) (quoting Union Pac. Fuels v. FERC, 129 F.3d 157, 164 (D.C. Cir. 1997)).

In the instant case, NIRS grounds its request for a Subpart G hearing exclusively on the first standard in section 2.310(d). See NIRS Motion at 1-2. Because NIRS has *not* argued that a Subpart G hearing is warranted pursuant to the second standard in section 2.310(d), we need not consider that issue.³

³ Even if NIRS's motion could reasonably be construed as requesting a Subpart G

B. NIRS Fails To Satisfy The Standard For A Subpart G Hearing

NIRS asserts that this Board should conduct a Subpart G hearing in this proceeding because AmerGen is not trustworthy (NIRS Motion at 1-2). In support of its assertion, NIRS recounts the following two categories of alleged misbehavior that, according to NIRS, impugn the credibility of AmerGen: (1) alleged misconduct by AmerGen's parent company, Exelon (NIRS Motion at 2-4), and (2) alleged misconduct by AmerGen (id. at 4-7).

As we now show, NIRS's reliance on the above events to support its Subpart G hearing request is not tenable.

1. The Alleged Misconduct By Exelon Does Not Justify A Subpart G Hearing

NIRS asserts that a Subpart G hearing is warranted in light of misconduct by Exelon employees at the Braidwood and Quad Cities nuclear facilities in Illinois. Regarding the Braidwood facility, NIRS avers that "Exelon allowed its power plant to repeatedly [and unlawfully] leak radioactive wastewater contaminated with tritium [into the groundwater]" (NIRS Motion at 2-3). Regarding the Quad Cities facility, NIRS avers that two Exelon technicians recently "falsified inspection documentation while calibrating local instrumentation" (id. at 3).

hearing based on the second standard in section 2.310(d) – and we do not believe that it can – we would still deny the request, because NIRS did not address, much less show, that the admitted contention implicates "issues of motive or intent of the party or eyewitness material to the resolution of the contested matter" (10 C.F.R. § 2.310(d); 69 Fed. Reg. at 2222).

The above allegations, however, plainly fail to satisfy the regulatory standards for a Subpart G hearing, because: (1) NIRS fails to show that the putative misconduct by Exelon employees at the Braidwood and Quad Cities facilities is related to the “resolution of issues of material fact relating to the occurrence of a past activity” that has been placed in dispute by the contention in this case (10 C.F.R. § 2.310(d)); and (2) NIRS fails to show that any of the individuals involved in the alleged events at the Braidwood and Quad Cities facilities will likely be an “eyewitness [whose credibility] may reasonably be expected to be at issue” in this case (ibid.). Each of these failures, standing alone, is fatal to NIRS’s request for a Subpart G hearing. See Vermont Yankee, LBP-04-31, 60 NRC at 703.

NIRS argues that, because it does not know the witnesses AmerGen may call in this proceeding, this Board should consider the historical misconduct of Exelon employees as evidence of AmerGen’s lack of credibility (NIRS Motion at 8). The short answer to this argument is that AmerGen and Exelon are separate corporate entities, and in the absence of evidence to the contrary (and none has been presented here), the “credibility of employees of different corporate entities will not be assumed across organizations” (AmerGen Answer at 7 n.12; cf. Vermont Yankee, LBP-04-31, 60 NRC at 702 (“unless the allegations concern an individual who continues to work for [the licensee] and is identified as an eyewitness here, we cannot conclude that 10 C.F.R. § 2.310(d) has been satisfied”).

2. The Alleged Misconduct by AmerGen Does Not Justify A Subpart G Hearing

NIRS also asserts that a Subpart G hearing is warranted because “AmerGen has been untruthful on [four] occasions in the statements it has made regarding Oyster Creek” (NIRS Motion at 4). First, NIRS alleges that AmerGen made a “misleading” statement in its Answer to NIRS’s Petition to Intervene regarding corrosion in the upper region of the drywell liner (ibid.). Second, NIRS alleges that AmerGen made “inconsistent[] represent[at]ions” to NIRS regarding the proprietary nature of a 1996 inspection of the drywell liner (ibid.). Third, NIRS alleges that

the drywell measurements AmerGen submitted to the NRC Staff “show a systematic bias in AmerGen’s favor” that AmerGen failed to correct (id. at 5). Finally, NIRS asserts that AmerGen made false statements regarding the radiological consequences of an airplane crash into the Oyster Creek reactor building (id. at 5-7).

None of the above incidents – whether viewed individually or collectively – satisfies the standard for a Subpart G hearing.

The first two incidents – the “misleading” statement AmerGen allegedly made in its Answer to NIRS’s Petition to Intervene regarding corrosion in the upper region of the drywell liner (NIRS Motion at 4), and the “inconsistent[] represent[at]ions[]” AmerGen allegedly made to NIRS regarding the proprietary nature of a 1996 inspection of the drywell liner (ibid.) – arguably pertain to the adjudication of issues in this proceeding. However, the standard in 10 C.F.R. § 2.310(d) for a Subpart G hearing is not satisfied simply because a party has made a misstatement or a misrepresentation regarding an incident that has some general nexus to issues in the proceeding. Rather, section 2.310(d) requires NIRS to show that the alleged incident concerns an “issue[] of material fact [in the contention] relating to the occurrence of a past activity” (10 C.F.R. § 2.310(d)). NIRS has not made such a showing.

Even if NIRS had made that showing, however, the two incidents would not justify a Subpart G hearing, because NIRS has not alleged that anyone involved in the incidents will likely testify as an “eyewitness,” much less as an eyewitness whose “credibility . . . may reasonably be expected to be at issue” (10 C.F.R. § 2.310(d)). The first incident – which involved an allegedly misleading statement in a pleading submitted by AmerGen’s counsel – does not seriously impugn counsel’s credibility. Although we “require truthfulness from all parties in all aspects of our proceedings[,] . . . the fact that a party’s [counsel] . . . emphasizes those facts supporting its position and minimizes the relevance of opposing facts, does not shock us, nor does it require a Subpart G hearing under either criterion of 10 C.F.R. § 2.310(d)” (Vermont

Yankee, LBP-04-31, 60 NRC at 700). Nor does the second incident – which involved an apparent discovery dispute – raise a serious question regarding counsel’s credibility. Our mandatory disclosure process requires parties to disclose “all documents and data compilations . . . that are relevant to the contentions” (10 C.F.R. § 2.336(a)(2)(i)). If a party fails, without excuse, to comply with its disclosure obligations, this Board will impose appropriate sanctions (see 10 C.F.R. § 2.336(e); Vermont Yankee, LBP-04-31, 60 NRC at 698). But our regulations do not contemplate that a single alleged discovery dispute will give rise to the imposition of a Subpart G hearing procedure as a sanction.⁴

⁴ In light of this Board’s authority to enforce a party’s obligation to comply with discovery requirements, NIRS need not harbor concerns about its ability to build a case while relying on “paper discovery from an untrustworthy source” (NIRS Motion at 9). We note, moreover, that AmerGen has submitted a proposed Protective Order and Nondisclosure Affidavit that, once executed by NIRS’s representative, will afford NIRS access to relevant proprietary information. See AmerGen Answer at 9.

NIRS also argues that a Subpart G hearing is warranted because the drywell measurements submitted by AmerGen to the NRC Staff “show a systematic bias in AmerGen’s favor” (NIRS Motion at 5). Although this assertion arguably implicates an “issue[] of material fact relating to the occurrence of a past activity” that is relevant to this proceeding (10 C.F.R. § 2.310(d)), the resolution of any such issue – i.e., the determination of the existence vel non of a systematic bias in drywell measurements – would *not* be resolved by “eyewitness” testimony (ibid.). Rather, such an issue is an example of a classic, technical disagreement that would be resolved through the use of *expert* witnesses. As explained in Vermont Yankee, LBP-04-31, 60 NRC at 700, “expert witnesses may testify as to the validity of the various technical assumptions and calculations, but they are not eyewitnesses” whose testimony is based on first-hand knowledge of the past activity. Rather, expert witnesses “simply provid[e] an opinion based upon the testimony of others” (69 Fed. Reg. at 2222). To the extent that disagreements exist among competing expert witnesses, they are properly resolved via Subpart L procedures (10 C.F.R. § 2.310(a); accord 69 Fed. Reg. at 2222 (Subpart G hearing is not warranted for proceedings involving testimony by “expert witness[es] who have no first-hand knowledge”).⁵

⁵ “Although we ‘reasonably may expect’ battles over the opinions of the opposing experts . . . unless they are also testifying as fact eyewitnesses with first-hand knowledge of a material and disputed past activity, Subpart G procedures are not dictated under 10 C.F.R. § 2.310(d)” (Vermont Yankee, LBP-04-31, 60 NRC at 700) (quoting 69 Fed. Reg. at 2222).

Finally, NIRS's request for a Subpart G hearing based on the allegedly false statements made by AmerGen regarding the radiological consequences of an airplane crash into the Oyster Creek reactor building is insubstantial, because NIRS fails to show how that event relates to the present contention, nor does NIRS attempt to show that any person involved in that putative misconduct will likely be an eyewitness in this proceeding.⁶

III. CONCLUSION

For the foregoing reasons, we deny NIRS's Motion to hold a Subpart G hearing in this proceeding.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD⁷

[Original Signed By]

E. Roy Hawkens, Chairman
ADMINISTRATIVE JUDGE

[Original Signed By]

Dr. Paul B. Abramson
ADMINISTRATIVE JUDGE

[Original Signed By]

Dr. Anthony J. Baratta
ADMINISTRATIVE JUDGE

⁶ NIRS asserts that where the "credibility [of an AmerGen eyewitness] is at issue a Subpart G hearing is required for the proceedings to meet the requirements of the [Administrative Procedure Act (APA)]" (NIRS Motion at 9). Even assuming the accuracy of that assertion (but cf. 69 Fed. Reg at 2205) (Commission observes that "neither the [Atomic Energy Act] nor the APA require the use of the procedures provided in Subpart G"), NIRS has failed to show that the APA requires a Subpart G hearing *here*, because NIRS has *not* shown that "the credibility of an eyewitness may reasonably be expected to be at issue" (10 C.F.R. § 2.310(d)).

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

Rockville, Maryland
June 5, 2006