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. 50-219
AMERGEN ENERGY COMPANY, LLC	)	
OYSTER CREEK NUCLEAR	)	
GENERATING STATION	)	
	)	January 13, 2006
Regarding the Renewal of Facility Operating	)	
License No. DPR- 16 for a 20-Year Period	)	
	)	

PETITIONERS' OPPOSITION TO AMERGEN MOTION TO STRIKE

PRELIMINARY STATEMENT

Instead of trying to address the valid concerns of 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 "Petitioners") regarding corrosion in a vital safety system, American Energy Company LLC ("AmerGen") is seeking to avoid adjudication of this matter by eviscerating Petitioners' reply brief. This brief shows that AmerGen's hyper technical justifications for such action are without merit. Contrary to AmerGen's assertions, Petitioners permissibly refuted the flawed arguments presented by AmerGen's response to the Petition to Intervene and legitimately amplified the arguments they made in their initial brief. Moreover, even if AmerGen's

technical interpretations of the requirements for such pleadings were correct, the public interest and the evidence presented in the Petition would still require a full adjudicatory hearing on the contention raised. Anything less will lead to an appearance of a cover up regarding a critical safety issue.

BACKGROUND

Petitioners contend that the testing of the extent of corrosion at all levels of the drywell liner proposed in AmerGen's license renewal application is inadequate to assure the continued integrity of this safety-critical structure for the period of the license extension. Petition at 3. Petitioners then set forth various approaches to remedy this defect, including further periodic ultrasonic testing at all levels of the drywell liner conducted in accordance with ASME standards. Id.

To support this contention, Petitioners showed that the drywell liner is a safety-related structure that acts both as a pressure boundary and as a structural support. Id. at 4. Petitioners then showed that water leakage into the drywell liner has caused significant corrosion, particularly in the sand bed region, where the NRC regarded the corrosion as a "threat to drywell integrity." Id. at 4-6. Petitioners then showed that NRC in 1986 regarded UT testing of the sand bed region and other accessible areas of the drywell liner as "essential . . . for the life of the plant." Id. at 7. The reactor operator also identified corrosion on the upper surfaces of the drywell liner as an issue. Id.

Petitioners then showed that current temperatures could allow corrosion to occur and the margins of safety in 1992 were as little as 0.064 inches. Id. at 8-9. In view of this narrow margin the plant operator agreed to monitor the drywell using UT measurements "for the life of the plant." Id. at 9. Petitioners asserted that the thickness

of the sand bed region was last tested using UT in September 1994 at which time the operator conceded that corrosion in the upper region and the sand bed region was still ongoing.[1] Id. at 10, 11-13. Petitioners then relied on their expert's opinion to support their argument that visual inspection of an epoxy coating that had been applied was not sufficient, given the extremely narrow safety margins. Id. Petitioners further pointed out that the coated areas were not inspected for pinhole leaks, and the coating had reached the end of its nominal life. Id. at 10-11, 13. Thus, Petitioners concluded that wet conditions occurring over the last twelve years could have caused additional corrosion since 1992. Id. at 11, 13.

ARGUMENT

I. Legal Standard

At this preliminary stage, Petitioners do not have to submit admissible evidence to support their contention, rather they have to "provide a brief explanation of the basis for the contention," 10 C.F.R. § 2.309(1)(ii), and "a concise statement of the alleged facts or expert opinions which support the petitioner's position." 10 C.F.R. § 2.309(1)(v). As AmerGen's answer acknowledged, this rule ensures that "full adjudicatory hearings are triggered only by those able to offer minimal factual and legal foundation in support of their contentions." Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), 49 NRC 328, 334 (1999) (emphasis added). Thus, AmerGen's Motion to Strike is pointless, because even if it were successful, Petitioners would still have the minimal factual and legal foundations required to obtain a full adjudicatory hearing.

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[1] AmerGen's Answer clarified that the last UT measurements of the sand bed region were in fact taken around ten years ago in 1996, AmerGen Answer at 30, although even after diligent searching Petitioners have been unable to obtain any of the results obtained.

In the Motion to Strike, AmerGen correctly points out that entirely new arguments may normally not be raised in reply. The primary reason for this is to avoid unfairness, where a party is deprived of the right to respond to a particular argument. However, the very decision cited by AmerGen shows that in reply petitioners may refute legal or logical arguments and legitimately amplify issues presented in the initial petition. Louisiana Energy Services., L.P. (National Enrichment Facility), 60 N.R.C. 223, 224-25 (2004). As this brief shows, this is all that Petitioners did in reply.

II. No New Arguments Were Presented on Reply

AmerGen incorrectly alleges that three new arguments were presented in reply, as follows:

1) The embedded portion of the drywell liner is also subject to corrosion;

2) Inspection of the epoxy coating was inadequate;

3) Drywell shell could buckle.

In fact, all of these arguments were raised in the initial petition, and were legitimately amplified in the reply to refute illogical arguments offered by AmerGen.

A. The Embedded Portion of the Drywell Liner is Also Subject to Corrosion

Petitioners originally contended that all parts of the drywell liner needed to be tested for corrosion, including the sand bed region and "additional UT measurements [must] be greatly expanded into areas not previously inspected." Intervention Petition at 3-4. Further, Petitioners presented extensive information on the corrosion in the sand bed region and stated that testing should include areas beyond the sand bed region. Id. at 5-13. As discussed above, Petitioners further stated that water had found its way onto the drywell liner and the temperatures were conducive to corrosion.

In the Motion to Strike, AmerGen suggests that its response to the Petition assumed that only the sand bed and upper regions were at issue. Motion to Strike at 4. Contrary to this assertion, the AmerGen response specifically quoted the passage in the Petition calling for long term testing of all critical levels and for a great expansion of the UT testing program into areas not previously tested. AmerGen Answer at 22-23. AmerGen then put forth the logical argument that the term critical areas was not sufficiently defined and attempted to limit it to the sand bed region. Thus, AmerGen clearly understood that the embedded area below the sand bed region, among others, was included in the contention.

In their reply, Petitioners properly refuted AmerGen's attempt to limit the term critical areas to the sand bed region by offering a logical counter-argument. Because the embedded portion of the drywell liner is immediately adjacent to the sand bed, water could have reached into this area and caused similar corrosion to that already observed in the sand bed region. Reply at 14. Thus, Petitioners argued that this should be a critical area subject to long term testing. Id. This type of logical refutation of an opponents answer is quintessentially what reply briefs consist of. Far from raising a new argument, it is actually legitimately reinforcing and clarifying the original argument, as the briefing process is supposed to do.

B. Inspection of the Epoxy Coating Was Inadequate

As AmerGen concedes, Petitioners asserted that the inspections of the epoxy coating were inadequate. In fact, Petitioners specifically asserted that inspections for pinhole leaks were required, but had not been done, as follows:

> However, the Petitioners point out that the application does not indicate that the coated areas were ever inspected

> specifically for pinhole leaks in the coating at any time since the application in 1992. As such, Petitioners further contend that wet conditions occurring over the past 12 years behind the coating can reasonably contribute to corrosion.
>
> * * *
>
> The Petitioners further submit that the applicant has not provided reasonable assurance that the epoxy coating has been monitored for all possible methods of leakage behind the coating including pinhole leaks that could provide a pathway for water intrusion and subsequent corrosion.

Petition at 11, 13.

Thus, from the Petition, AmerGen knew that Petitioners were asserting that "all possible methods of leakage" through the epoxy coating should be checked. In response, AmerGen asserted that visual inspections have shown no failure of the epoxy coating in the sand bed region. AmerGen Answer at 22. The Reply gave examples of two standard commonly used coating integrity tests commonly used in industry. Reply at 5. This example legitimately amplifies the argument made in the Petition, that AmerGen should go beyond visual testing to check the integrity of the epoxy coating. They also serve to contradict AmerGen's argument that visual inspections of protective coatings are adequate. Their inclusion in the reply brief is thus entirely appropriate.

C. Drywell Shell Could Buckle

AmerGen suggests that potential buckling of the drywell liner is a new argument raised on reply. This is entirely incorrect. The Petition itself stated that the drywell liner serves both structural and pressure containment purposes. Petition at 3. In evaluating margins of safety, the Petition used a critical thickness in the sand bed region of 0.736 inches. Petition Exhibit 5, Page 12 stated "the basis for evaluation is a shell thickness of 0.736 inch where buckling is the governing criterion." Further, as AmerGen concedes,

page ten of the Petition stated that the 0.736 inch thickness criterion was "determined by buckling calculations for the drywell liner" and cited Exhibit 6 Table 1, which stated that the critical thickness in the sand bed region is 0.736" which is "controlled by buckling." Motion to Strike at 6.

In response AmerGen erroneously asserted that a reduction in the pressure rating of the vessel resulted in a decrease in the allowable thickness, allowing a significantly increased margin of safety. AmerGen Answer at 25. Rather ironically, AmerGen suggested that Petitioners had failed to diligently investigate this issue before including it in the Petition. Id. at 26. That the operator of this reactor appears not to know the basis of the critical thicknesses in the drywell liner gives Petitioners great concern and is symptomatic of AmerGen's emphasis of rhetoric over cold hard facts.

Unfortunately, rhetoric cannot make the drywell liner thicker, cannot stop corrosion, and cannot reduce the minimum thickness of the liner. To show that AmerGen's answer was specious, the Reply restated that the basis for the allowable thickness was buckling, which AmerGen should have known before the Petition or should have gathered from the Petition.

Once again, all Petitioners have done on reply is to refute AmerGen's erroneous and illogical argument. In doing so, they took the chance to legitimately amplify their original argument that the drywell liner is a critical safety component by noting that failure of the drywell liner could lead to a Loss-of-Coolant-Accident. Reply at 8. This is entirely permissible and is indeed routine for reply briefs. Far from being a new argument, this is a logical consequence of drywell liner failure, which is at the heart of Petitioners contention.

D. New Exhibits Were Permissible

AmerGen cites absolutely no reason why additional exhibits should not be added at the reply stage. Reply briefs may permissibly use additional exhibits to refute erroneous arguments asserted in answers and may legitimately amplify the original arguments. In any event, where the documents presented are already part of the administrative record, there is no danger of surprise, because all parties already had access to them.

AmerGen also incorrectly alleges that none of the exhibits to the Petition indicated water was preset in the sand bed region after 1992. AmerGen Motion to Strike at 6. In fact the exhibits to the Petition showed that water was present in the sand bed region both before and after 1992. Exhibits 1 and Exhibit 2 showed that water leakage had occurred before 1986 and 1991, respectively. Exhibits 3 and 4 stated that the operator would monitor for water leakage during refueling cycles after 1993 and "take corrective action as appropriate." Exhibit 9, dated November 1, 1995, states "water leaking from the pools above the reactor cavity has been the source of corrosion." Exhibit 9 further stated that NRC would only accede to the operator's request for reduced testing, if the operator would commit to additional testing within approximately 3 months after discovery of water leakage. Drawing a reasonable inference from this set of documents showing that water leakage was an ongoing issue up to at least 1995, the Petition alleged that "wet conditions occurring over the past 12 years behind the epoxy coating can reasonably contribute to corrosion." Petition at 11. Dr. Hausler in his evaluation merely assumed that "water could and can enter" behind the drywell liner. Hausler opinion at 2.

In response AmerGen did not assert that water has not been in contact with the liner, merely that the exhibits attached to the Petition did not provide sufficient support for wet conditions. To illustrate further the reasonableness of the inference initially drawn by Petitioners and that the administrative record in this matter fully supported that inference, the Reply attached additional exhibits on these issues. Exhibits 10 and 11 provided correspondence between the reactor operator and NRC regarding Exhibit 9, which was included in the Petition. In Exhibit 10, dated December 15, 1995, the operator proposed a clarification that the requirement additional inspections after leakage "was not meant to address minor leakage associated with normal refueling activities." Pet. Ex. 10. NRC staff in turn responded on February 15, 1996 defining minor leakage as 12 GPM. Pet. Ex. 11. Exhibit 12 is a structural assessment that shows cracking in the concrete that forms the drywell shield wall above the dry well liner. The Reply used these exhibits to legitimately amplify the basis for original inference that water has come into contact with the drywell liner after 1992.

Normally, the main concern about the inclusion of new material in reply briefs in the danger that other parties could be sandbagged by the new material. That danger is simply not present here. All of the additional exhibits attached to the Reply were already in the possession of the other parties prior to the Petition being filed. Thus, the Petition properly set forth the claim regarding water leakage and the support for it at the outset, and then used the reply to legitimately show that even more support for the leakage claim existed in the administrative record. AmerGen provides no argument for why these documents, which are already part of the record, should be stricken from the reply brief.

The Reply itself also responded to AmerGen's argument that that no leakage had been shown after 1992 by stating that the potential for water intrusion obviously existed so the testing regime in the license had to take account of this potential, irrespective of whether it has actually been realized. Reply at 18. Thus, the Reply identified a logical flaw in AmerGen's argument. Showing that wet conditions had actually occurred was not and is not a necessary antecedent condition for the contention that the proposed testing regime is inadequate. As Dr. Hausler recognized in his opinion, all that is required is a showing that the potential for wet conditions existed. The original exhibits to the Petition amply showed that this potential was real and ongoing.

Finally, AmerGen's zeal to cover up or suppress inconvenient facts reaches its height when it requests that the memorandum of Dr. Hausler be stricken from the Reply brief merely because it was signed electronically, rather than in ink. This request is entirely pointless, because exactly the same memorandum was attached to the Petition and no party moved to strike it from the record. Furthermore, at the preliminary stage, Petitioners do not have to submit admissible evidence to support their contention, rather they have to "provide a brief explanation of the basis for the contention," 10 C.F.R. § 2.309(1)(ii) and "a concise statement of the alleged facts or expert opinions which support the petitioner's position." 10 C.F.R. § 2.309(1)(v). As AmerGen's answer acknowledged, this rule ensures that "full adjudicatory hearings are triggered only by those able to offer minimal factual and legal foundation in support of their contentions." Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), 49 NRC 328, 334 (1999) (emphasis added). Signed or unsigned, the memorandum of Dr. Hausler is a concise

statement of his opinion and, coupled with the Petition itself, provides a brief explanation of the basis for the contention. It is therefore properly before this Board.

Finally, AmerGen cites various provisions requiring original submissions signed in ink. However, these rules apply to pleadings and other formal submissions, such as affidavits, not supporting documents. For example, there is no requirement to submit original exhibits signed in ink. Similarly, no such requirement pertains to Dr. Hausler's memorandum. Moreover, if this Board would like the original of the memorandum signed in ink, Petitioners would be pleased to supply it.

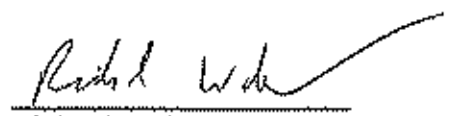
III. 10 C.F.R. § 2.309(f)(2) Is Irrelevant

10 C.F.R. § 2.309(f)(2) deals with amended or new contentions. As shown above, Petitioners did not amend their core contention in the Reply. They did not even submit new arguments in favor of the contention. Instead they merely legitimately amplified their original arguments and refuted erroneous arguments put forward in the answers. Illustrating that AmerGen does not actually believe that the contention changed, page 10 of AmerGen's Answer and page 2 of the Motion to Strike quote precisely the same words for the contention. Thus, even AmerGen is not arguing that the contention changed, merely that the bases for the contention changed. See also Motion to Strike at 8-9 (alleging that the bases for the contention changed). For this reason, 10 C.F.R. § 2.309(f)(2) is irrelevant.

CONCLUSION

For the forgoing reasons, AmerGen's Motion to Strike should be denied.

Respectfully submitted



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Dated: January 13, 2006

UNITED STATES OF AMERICA
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AMERGEN ENERGY COMPANY, LLC OYSTER CREEK NUCLEAR GENERATING STATION	
	January 13, 2006
Regarding the Renewal of Facility Operating License No. DPR- 16 for a 20-Year Period	

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Notice of Appearance was sent this 13th day of January, 2006 via email and U.S. Postal Service as designated to each of the following:

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