

January 17, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
AMERGEN ENERGY COMPANY, LLC) Docket No. 50-219-LR
)
(Oyster Creek Nuclear Generating Station))

NRC STAFF'S RESPONSE TO LICENSING BOARD'S ORDER
DIRECTING SUPPLEMENTAL BRIEFING

INTRODUCTION

As relevant hereto, on January 10, 2006, the Board issued an Order (Directing Supplemental Briefing on Hearing Requests) ("Order") directing AmerGen Energy Company, LLC ("AmerGen"), the U.S. Nuclear Regulatory Commission Staff ("Staff"), the New Jersey Department of Environmental Protection ("NJDEP"), and NIRS¹ to file supplemental briefs with respect to two matters: first, whether NIRS's single proposed contention, concerning the drywell liner corrosion management program, see Order at 1, is within the scope of these proceedings; and second, regarding NJDEP's contention concerning the combustion turbines that would provide alternate, alternating current (AC) in the event of station blackout at Oyster Creek, the Board directed the participants to provide additional information related to AmerGen's contractual agreement with First Energy, the effect of unavailability of the combustion turbines, and an explanation of the sufficiency of the Commission's regulations in ensuring adequate backup power. Order at 2-3. The Staff hereby files its response to that Order.

¹ For purposes of this document, petitioners Nuclear Information and Resource Service, Jersey Shore Nuclear Watch, Grandmothers, Mothers, and More for Energy Safety, New Jersey Public Interest Research Group, New Jersey Sierra Club, and New Jersey Environmental Federation are collectively referred to as "NIRS").

DISCUSSION

A. The NIRS Contention

In its Order, the Board directed the participants to provide “additional briefing...that explains in further detail the **legal basis** for concluding that [the NIRS] contention falls within or without the scope of this license renewal proceeding.” See Order at 2 (emphasis in original).

Specifically, the Order required that the briefs:

- (1) relying with specificity on applicable caselaw, describe with precision the **legal framework** for defining the scope of the proceeding as it relates to the drywell liner corrosion management program; and
- (2) explain why or why not **as a matter of law** the drywell liner corrosion management program falls within this legal framework.

See Order at 2 (emphasis in original). The Board further requested that the participants provide “illustrative examples of contentions concerning plant systems, structures, and components that fall within and without” the license renewal safety review standard, and that the participants compare these examples to NIRS’s proposed contention. *Id.* n.1.

The Staff notes at the outset that, under the Commission’s Rules of Practice, it is a petitioner who bears the burden of demonstrating that its contention is within the scope of the proceeding. See 10 C.F.R. § 2.309(f)(1)(iii); see also *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-05-24, 62 NRC 551, 567 (2005); *Balt. Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-14, 48 NRC 39, 41 (1998). Despite the clear language in the Commission’s regulations, NIRS’s petition to intervene fails to offer any basis explaining why its contention falls within the scope of these proceedings.

See “Request for Hearing and Petition to Intervene,” dated November 14, 2005. (“Petition”)

As has been often noted, the admissibility requirements of contentions establish an evidentiary threshold more demanding than a mere pleading requirement and are “strict by design.”

Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24,

54 NRC 349, 358 (2001). Thus, a petitioner's failure to comply with any of these requirements, including a demonstration that the issue raised in the contention is within the scope of the proceeding, is grounds for dismissing a contention. See *Millstone*, CLI-05-24, 62 NRC at 567.

1. Legal Framework for Determining the Scope of License Renewal

Whether a contention falls within the scope of a particular proceeding is directly controlled by the scope of the Commission's review in the proceeding. See Final Rule, Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. 22,461, 22,482 n.2 (1995); *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-06, 53 NRC 138, 152 (2001), *aff'd*, CLI-01-17, 54 NRC 3 (2001). In the context of license renewal, the scope of the review is expressly set forth at 10 C.F.R. § 54.4.

Part 54 "centers the license renewal review on the most significant overall safety concern posed by extended reactor operation – the detrimental effects of aging." *Turkey Point*, CLI-01-17, 54 NRC at 7. To that end, license renewal reviews focus on systems, structures, and components that are:

- (1) Safety-related systems, structures, and components which are those relied upon to remain functional during and following design-basis events . . . ;
- (2) All nonsafety-related systems, structures, and components whose failure could prevent satisfactory accomplishment of any of the functions identified in paragraphs (a)(1)(i), (ii), or (iii) of this section; and
- (3) All systems, structures, and components relied on in safety analyses or plant evaluations to perform a function that demonstrates compliance with the Commission's regulations for fire protection . . . , environmental qualification . . . , pressurized thermal shock . . . , anticipated transients without scram . . . , and station blackout....

See 10 C.F.R. § 54.4. Applicants must demonstrate that these important systems, structures, and components ("SSCs") will continue to perform their intended function in the period of extended operation by taking into account the effects of aging and any additional actions on the

part of the licensee necessary to manage those effects. *See Turkey Point*, CLI-01-17, 54 NRC at 8; 60 Fed. Reg. at 22,462. In addition, some safety reviews or analyses made during the original term of the license may have been based on a particular time period, for example, an assumed service life of a certain number of years. *Id.* Before the NRC will grant a license renewal application, an applicant must reassess these “time-limited aging analyses,” (“TLAAs”) and demonstrate that the effects of aging will be adequately managed for the period of extended operation. *Id.*; 10 C.F.R. §§ 54.21(c), 54.29(a)(2).

Conversely, safety concerns that are monitored, reviewed, and resolved by ongoing regulatory oversight, often referred to as a licensee’s “current licensing basis,” are outside the scope of license renewal. *Turkey Point*, CLI-01-17, 54 NRC at 8. Only those concerns “for which ongoing [regulatory] activities and requirements may not be sufficient to manage the effects of aging in the period of extended operation” are within the scope of the Commission’s license renewal regulations and, accordingly, a renewal proceeding. *See Turkey Point*, CLI-01-17, 54 NRC at 10 (quoting 60 Fed. Reg. at 22,469).

As a policy matter, the scope of review of license renewal is designed to be both “efficient, avoiding duplicative assessments where possible, and effective, allowing the NRC staff to focus its resources on the most significant safety concerns at issue during the renewal term.” *See Turkey Point*, CLI-01-17, 54 NRC at 7. Accordingly, license renewal reviews are not intended to “duplicate the Commission’s ongoing review of operating reactors” or revisit every safety issue that was reviewed when the facility was first licensed. *Id.* (quoting Final Rule, Nuclear Power Plant License Renewal, 56 Fed. Reg. 64,943, 64,946 (1991)).

The scope of license renewal, therefore, is limited to (1) managing the effects of aging of certain systems, structures, and components; (2) review of time-limited aging evaluations; and (3) any matters for which the Commission itself has waived the application of these rules. *Turkey Point*, LBP-01-06, 53 NRC at 152; 10 C.F.R. §§ 54.4, 54.21(a) & (c), 54.29(a)(2).

The Commission has not, in an adjudicatory context, determined the scope of license renewal contentions as it applies to specific SSCs, and the Staff is not in a position to put itself in the posture of a petitioner and speculate regarding what might, as a purely hypothetical matter, constitute an acceptable SSC-related contention within the scope of license renewal. Nevertheless, the Staff below summarizes Commission rulings on non-SSC-related contentions to the extent they might assist the Board with regard to the scope of matters that might, in general, be admissible in a license renewal proceeding.

a. Emergency Planning

The Commission has considered and determined that emergency planning considerations are outside the scope of license renewal. See *Turkey Point*, CLI-01-17, 54 NRC at 10. In the *Turkey Point* proceeding, the Commission concluded that because emergency planning issues are the focus of the ongoing regulatory process and do not concern the effects of aging on safety-related systems, structures, or components, such concerns are outside the scope of license renewal. *Id.*

b. Onsite Spent Fuel Storage

A more relevant example was also raised in the *Turkey Point* proceeding. There, a petitioner proposed a contention concerning spent-fuel storage. Although the Commission acknowledged that “[t]here are in fact a number of spent fuel pool structural components and related systems subject to the Part 54 aging management review for license renewal,” it held that, because the petitioner’s concerns did not “relate to managing the aging of systems, structures, and components or to any time-limited aging analyses,” those concerns were outside the scope of license renewal and the petitioner’s contention was, therefore, inadmissible. *Turkey Point*, CLI-01-17, 54 NRC at 23-24. The Commission did explain, however, that the petitioner, having identified a safety-related SSC, could possibly have made his contention admissible by referencing deficiencies in the licensee’s renewal application. See *id.* at 23. The

petitioner's failure to even refer to the application, however, was ultimately fatal to his argument.

Id.

c. Terrorism

The Commission has also rejected consideration of contentions related to terrorism in license renewal proceedings. See *Duke Energy Corporation* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-26, 56 NRC 358, 364 (2002). There, the Commission held that "terrorism contentions are, by their very nature, directly related to security and are therefore, under our rules, unrelated to the detrimental effects of aging. Consequently, they are beyond the scope of, not material to, and inadmissible in, a license renewal proceeding." (internal citations omitted)

As a general proposition, an example of a contention that would be within the scope of license renewal would be a contention that alleged that a license renewal application failed to demonstrate, as required by 10 C.F.R. § 54.21(a)(3), that the effects of aging would be adequately managed for a particular safety-related system, structure, or component found to be within the scope of license renewal. Assuming that a petitioner could provide the requisite basis and specificity called for by 10 C.F.R. § 2.309, such a contention could take the form of a contention of omission, alleging that the license renewal application omitted a particular system, structure, or component from consideration, or did not contain a program to manage the system, structure, or component. The contention could also identify a particular effect of aging that was not accounted for or not accounted for adequately by a licensee's proposed program. Additionally, a contention that alleged that a particular time-limited aging analysis was not provided, or did not demonstrate that the effects of aging would be adequately managed for the renewal period, would also fall within the scope of a renewal proceeding. See 10 C.F.R. § 54.21(c). These contentions would be within the scope of a license

renewal proceeding, and would be admissible if they met the Commission's other contentions requirements. See 10 C.F.R. § 2.309(f)(1).

In sum, the Commission has repeatedly emphasized that the scope of a license renewal proceeding is confined to the applicant's proposals "to manag[e] the aging of systems, structures, and components or to any time-limited aging analyses." *Turkey Point*, CLI-01-17, 54 NRC at 23-24.

2. NIRS's Proposed Contention

The Board requested an explanation as to whether or not the drywell liner corrosion management program is within the scope of license renewal. See Board Order at 2. The drywell liner is a component relied on for safety which is addressed in the Oyster Creek License Renewal Application by an aging management program. See LRA at 3.5-18 to 3.5-21. In addition, the Oyster Creek LRA identifies corrosion of the drywell shell as a TLAA and addresses it as such in that portion of the LRA. See LRA at 3.5-21; 4-54 to 4-55. To the extent that the drywell corrosion management program manages the effects of aging, or concerns a time-limited aging analysis, it is within the scope of renewal. Accordingly, to the extent that NIRS's contention shows a genuine dispute of material law or fact regarding whether the drywell liner corrosion management program adequately manages the effects of aging for the term of extended operation, or demonstrates a genuine factual or legal dispute concerning a TLAA, it is within the scope of this license renewal proceeding.

However, while NIRS addresses the drywell corrosion management program, it does not refer specifically to the effects of aging anywhere in the Petition or implicate the LRA's TLAA. Nor does the memorandum offered in support of NIRS's contention mention the effects of aging. Thus, NIRS's proposed contention does not raise any issue with respect to the effects of aging. NIRS, therefore, has not met its burden of demonstrating that the contention is within the scope of license renewal. In other words, although the drywell liner is within the scope of license

renewal and subject to an aging management review and a TLAA, see LRA at 3.5-18 to 3.5-21; 4-54 to 4-55, lacking an explanation of just how the LRA fails to adequately address aging issues related to the drywell liner, NIRS has not established that its contention is within the scope of the proceeding.²

Under the Commission's rules, "[i]t is the responsibility of the Petitioner to provide the necessary information to . . . demonstrate that a genuine dispute exists within the scope of [the] proceeding." *Calvert Cliffs*, CLI-98-14, 48 NRC at 41; see also *Millstone*, LBP-04-15, 60 NRC at 90. In a license renewal proceeding, the scope is limited to "managing the effects of aging of certain systems, structures, and components" and a "review of time-limited aging evaluations." *Turkey Point*, LBP-01-06, 53 NRC at 152; 10 C.F.R. §§ 54.4, 54.21(a) & (c). Therefore, in this case, petitioners must demonstrate that their contention concerns aging management issues. Because the Petition does not demonstrate this, NIRS has not

² Even if the Board concludes that the NIRS has in fact demonstrated that its contention is within the scope of reactor license renewal, the Staff maintains that NIRS's proposed contention is inadmissible, as it lacks basis and support, does not entitle Petitioners to relief, and does not establish a genuine dispute on a material factual or legal issue. See "NRC Staff Answer to Request for Hearing and Petition to Intervene", dated December 14, 2005, at 12-17; 10 C.F.R. § 2.309(f)(1). This is not an argument concerning the contention's technical validity, but an argument that as a matter of law the Petition fails to comport with the Commission's pleading requirements.

established that the proposed contention is within the scope of this proceeding.

B. The NJDEP Contention

The Board set forth three matters to be addressed concerning NJDEP's contention challenging the adequacy of AmerGen's arrangements for providing backup alternating current (AC) in the event of station blackout. First, the Board directs the participants to provide additional information related to AmerGen's contractual agreement with First Energy demonstrating that AmerGen can rely on First Energy to maintain, inspect, and test the combustion turbines in accordance with AmerGen's aging management plan. Order at 2-3. Second, the Board asks the participants to "explicitly state what would happen . . . if the combustion turbines become unavailable, or if AmerGen's aging management plan for the combustion turbines is not properly implemented." *Id.* at 3. Finally, the Board directs the participants to explain why the regulatory requirements of 10 C.F.R. § 50.63 and General Design Criteria ("GDC") 17 are sufficient to ensure that OCNCS will have an adequate source of backup power. *Id.*

1. AmerGen's Contractual Arrangement with First Energy

The Order requested that the participants identify "with specificity the contractual agreement (or its equivalent) which demonstrates that AmerGen can rely on First Energy to maintain, inspect, and test the combustion turbines in accordance with AmerGen's aging management plan." Order at 2-3 (emphasis removed). Because the contractual agreement is not publicly available and has not been made available to the NRC Staff at this time, the Staff is unable to respond more specifically to the Board's request. The obligation to meet the requirements of 10 C.F.R. § 50.63 is AmerGen's. In any event, however, the Staff's concern is that the substantive obligation to maintain, inspect, and test the turbines is met; it is not impermissible, and indeed unremarkable, that it be met through contracted services. In this regard, the information relied upon by the Staff in connection with its review is provided in the

Oyster Creek LRA and in AmerGen's Response to the NRC's Request for Additional Information, which contain information about the combustion turbines and proposed aging management programs.³ Beyond that, the Board, in its request for supplemental information, has not identified any specific aspect of the information provided by AmerGen that would cause the Staff to question the means by which AmerGen intends to fulfill its regulatory obligations.

2. Result of Unavailability of Combustion Turbines or Failure of Aging Management Plan

In the event that the combustion turbines on which AmerGen relies to meet the requirements of 10 C.F.R. § 50.63 become unavailable, AmerGen may be in violation of that regulation. Similarly, failure to ensure that the aging management plan is implemented for those components would also violate conditions in the renewed license. The Staff would consider, in either instance, taking appropriate enforcement or other regulatory action against the licensee, as it would against any licensee for a violation of the Commission's regulations or the conditions of the license.

3. Sufficiency of 10 C.F.R. § 50.63 and GDC 17 to Ensure Backup Power

With respect to the Board's final request that the participants explain why

³ See Letter from C.N. Swenson, Site Vice President, OCGNS, and enclosed "Response to Request for Additional Information RAI 2.5.1.19-1, Oyster Creek Nuclear Generating Station, License Renewal Application," (October 12, 2005) (ADAMS Accession No. ML052910091); see *also* Oyster Creek LRA at section 2.5.1.19.

10 C.F.R. § 50.63 and GDC 17 are or are not sufficient to ensure that OCNGS will have an adequate source of backup power, the Staff respectfully suggests that the Board does not need to make such a determination. To the extent that NJDEP's contention alleges that 10 C.F.R. § 50.63 and GDC 17 are insufficient to ensure an adequate source of backup power, the contention is inadmissible, as it impermissibly challenges Commission regulations.

See 10 C.F.R. § 2.335.

Respectfully submitted,

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Dated at Rockville, Maryland
this 17th Day of January, 2006