

February 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 MOTION FOR LEAVE TO ADD CONTENTIONS OR
SUPPLEMENT THE BASIS OF THE CURRENT CONTENTION

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby answers the Motion for Leave to Add Contentions or Supplement the Basis of the Current Contention filed by 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 "NIRS"). For the reasons discussed below, NIRS's motion should not be granted.

BACKGROUND

In its request for hearing and petition to intervene, NIRS proposed a contention that AmerGen's license renewal application ("LRA") for the Oyster Creek Nuclear Generating Station ("OCNGS") was deficient:

by failing to adequately and reasonably assure the continued integrity...[of] the drywell liner or drywell shell, by providing confirmatory ultrasonic testing (UT) measurements at all critical areas of the known degraded component to determine the actual remaining wall thickness.

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

Subsequently, NIRS filed a motion requesting leave to add contentions or supplement the basis of NIRS’s pending contention in two areas. See “Motion for Leave to Add Contentions or Supplement the Basis of the Current Contention,” dated February 7, 2006 (“Motion”). The Atomic Safety and Licensing Board (“Board”) has not yet ruled on whether NIRS has standing or whether its original proposed contention is admissible and, thus, NIRS has not been admitted as a party to the proceeding.

DISCUSSION

NIRS’s Motion is an impermissible attempt to reframe and bolster its original contention by circumventing the Commission’s contention admissibility and late-filing requirements. The conference call NIRS cites as basis for its new contentions provides no basis for addition of new contentions or supplementation of the bases of NIRS’s original proposed contention.

For a number of independent reasons, NIRS’s Motion¹ should be denied. First, NIRS has not pointed to any new information, previously unavailable, as support for its new and supplemented contentions. Second, NIRS did not comply with the late-filing requirements in

¹ The Staff notes that, as a matter of procedure, it is not clear that the Board should treat NIRS’s request as a motion. As a general rule, one must be a party to a proceeding to file a motion. See 10 C.F.R. §§ 2.309(a), (i), 2.315(a), 2.323(a)-(c); see also, e.g., *Vermont Yankee Nuclear Power Corporation* (Vermont Yankee Nuclear Power Station) *et. al.*, CLI-76-18, 4 NRC 470, 473 n.1 (1976). NIRS is not a party to this proceeding. In addition, the Board in another proceeding noted that the intervenors’ late-filed contentions could not be properly considered a motion and that, instead, the Board should examine the request and use its discretion to select an appropriate time period for the Staff and applicant to respond. See *Exelon Generation Co.* (Early Site Permit for Clinton ESP Site), “Memorandum (Clarifying the Board’s April 25, 2005 Order)” (May 4, 2005). Therefore, the Staff questions the efficacy of treating NIRS’s request as a motion for procedural purposes. In a telephone call with Staff counsel on February 10th, counsel for NIRS raised the issue of whether the NRC’s regulations would permit NIRS to file a reply to answers to its Feb. 7th motion. To the extent that the Board considers NIRS’s request as a motion, a reply is not contemplated by NRC regulations, see 10 C.F.R. § 2.323(c), and the Staff objects to any such reply.

10 C.F.R. § 2.309(c)(1), and does not meet the requirements for late filing, including good cause. Third, NIRS's new contentions and bases do not meet the requirements of 10 C.F.R. § 2.309(f)(1) and, therefore, cannot be admitted, even if found to be timely or if NIRS is found to have met the late-filing requirements.

A. NIRS Has Not Pointed to Any New, Previously Unavailable Information.

If the Board concludes that NIRS may amend or supplement its contention under § 2.309(f)(2)², NIRS has not offered any new information that meets the criteria of § 2.309(f)(2). Section 2.309(f)(2) provides for the filing of new or amended contentions based on the Staff release of an environmental impact statement or environmental assessment “if there are data or conclusions . . . that differ significantly” from the data or conclusions in the applicant's documents, or, with leave of the presiding officer, upon a showing that:

- (i) The information upon which the amended or new contention is based was not previously available;

² The Staff notes that in the case cited by Petitioners, *Vermont Yankee*, the intervenors had been granted party status, had an admitted contention, and had received advance leave of the Board to file to amend under 10 C.F.R. § 2.309(f)(2). See *Entergy Nuclear Vermont Yankee, LLC & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-05-32, __ NRC __, (December 2, 2005). None of those things is true in this case and, therefore, it is not clear that the Board's decision in *Vermont Yankee* is applicable here.

- (ii) The information upon which the amended or new contention is based is materially different than information previously available;
- (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

10 C.F.R. § 2.309(f)(2). The only information pointed to by NIRS is the public conference call on January 31, 2006, between nuclear industry representatives, the NRC, and members of the public. At the outset, the Staff notes that permitting contentions to be based on an untranscribed conference call and the oral responses of individual NRC staff members to questions from the public is not workable in that it relies solely on unreliable hearsay. This is evidenced by the fact that the NRC staff's representations and statements during the call, as documented by Staff counsel's notes, greatly differ from, and in some cases, directly contradict, NIRS's characterization of the call in its motion.³ An untranscribed conference call not

³ For example, on page 3 of its motion, NIRS asserts that the "NRC staff [has] concluded that corrosion of the Mark I reactor drywell liner is a major safety-related issue that has not received sufficient attention to date." The Staff, however, made no technical conclusions but has identified corrosion due to leakage as a potential avenue of concern for some Mark I plants and is considering recommending further evaluation by licensees. On page 4, NIRS asserts that Hansraj Ashar, an NRC staff member, "clarified that for the inaccessible areas where there was a potential for corrosion, ultrasound testing ("UT") of the thickness of the drywell would be required." In fact, Mr. Ashar, an NRC Senior Structural Engineer, in response to a question from the public, merely noted that UT testing is one thing that licensees can do in order to identify possible corrosion. On page 11, NIRS asserts that "NRC's technical staff have now

concerning the facility or proceeding at issue should not serve as the sole basis for a contention, as it constitutes unreliable hearsay and cannot be subjected to the necessary scrutiny.

concluded that, where corrosion is a possibility, ultrasonic (“UT”) testing of the drywell liner in inaccessible areas is required to detect and monitor corrosion that is potentially occurring in these areas.” In fact, the NRC staff made no such conclusion or representation at the conference call, the subject of which was whether to propose guidance for performing further evaluation to determine the *source* of corrosion, if corrosion is detected in the inaccessible area of the drywell. The Staff points these discrepancies out only to demonstrate the unworkability of basing contentions on unreliable hearsay statements such as those at issue. The NRC Staff will issue a meeting summary with respect to the conference call in the near future.

In addition, the conference call in question did not concern Oyster Creek specifically or seek to address the subject of NIRS's contention. The purpose of the call was to communicate to stakeholders a possible License Renewal Interim Staff Guidance ("LR-ISG") and revision to the Generic Aging Lessons Learned ("GALL") report, NUREG-1801, to recommend analysis be performed to determine the cause of leakage that has the potential to cause drywell liner corrosion at some Mark I plants. The subject of the call was not the conducting of ultrasonic testing, the subject of NIRS's proposed contention.⁴ NIRS, in its motion, claims that industry representatives on the conference call did not dispute that corrosion was a problem at Oyster Creek. See Motion at 4, 13. This is because the subject of the call was a generic issue and was not intended to address corrosion in a plant-specific manner.

The GALL report is an agency guidance document and does not constitute an NRC requirement or regulation, as NIRS suggests in its Motion. See Motion at 9. Even if the proposed LR-ISG were issued and the GALL report revised, it would not constitute a binding requirement on any plant. Oyster Creek and any other plants that had submitted their license renewal applications at the time of issuance of new guidance would be able to avail themselves of the guidance to the extent practicable. In addition, the GALL report revision would have no bearing on NIRS's contention, which urges UT measurements of the drywell liner to manage corrosion for the renewal period and makes no mention of determining any possible source of leakage in the contention, the bases, or the supporting information. Nor would it have any

⁴ Although this topic may have been brought up by NIRS in the public comment/ question period of the call, this can hardly be said to bring the entire conference call within the scope of NIRS's contention.

bearing on NIRS's first proposed new contention, which concerns the embedded portion of the drywell, not the source of potential leakage at Oyster Creek.

Furthermore, none of the information communicated at the conference call in question is in any way new. The information distributed by the NRC to participants contained only information that was previously publicly available (with the exception of the proposed addition to the GALL report), much of which NIRS referenced in its original Petition. See, e.g., NIRS Exhibits 1-4; see also U.S. NRC, "Request for Additional Information Assessment of Licensee Measures to Mitigate and/or Identify Potential Degradation of Mark I Drywells (Generic Letter 87-05)", dated March 12, 1987 (ADAMS Accession No. 031140335) ("GL 87-05"). Therefore, even if the conference call could be considered proper grounds for an amended or new contention, it provided no information that was not previously available to NIRS.⁵ Petitioners have an "ironclad obligation" to review all publicly available information and state their contention and bases at the outset. See *Duke Energy Corp. (Catawba Nuclear Station, Units 1 & 2)*, LBP-04-4, 59 NRC 129, 146-47, (citing 54 Fed. Reg. 33,168, 33,170 (quoting from *Duke Power Co. (Catawba Nuclear Station, Units 1 & 2)*, ALAB-687, 16 NRC 460, 468 (1982)), *vacated in part on other grounds*, CLI-83-19, 17 NRC 1041 (1983)) They may not make use of Staff interest in an issue to bolster or add to already submitted contentions.

The only arguably new information to which NIRS did not have access before the conference call was the NRC's interest in including in the GALL report a root cause analysis to identify possible sources of leakage into the drywell liner at Mark I plants. But a petitioner may

⁵ For example, in his Memorandum supporting NIRS's motion, Dr. Hausler opines that removal of the sand from the sand bed region shifted the area of greatest corrosion to the embedded portion of the drywell liner. However, the exhibits provided by NIRS in its original Petition to Intervene show that NIRS was fully aware, through publicly available information, of the removal of the sand between 1988 and 1992. See Petition at Exh. 4, 9. In addition, information regarding leakage of the refueling seal as the possible cause of the corrosion was similarly publicly available at the time of NIRS's Petition to Intervene, see Petition at Exh. 1; GL 87-05, as was information regarding the condition of the concrete floor, see Petition at Exh. 4, both of which were identified in Dr. Hausler's Memorandum as information supporting

not piggyback on the Staff's interest in exploring an issue as a basis for concluding that an application is deficient in some way. The Commission has stated this principle numerous times concerning requests for additional information ("RAIs"), and the principle is the same here. See, e.g., *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11,

49 NRC 328, 336; *Sacramento Municipal Utility Dist.* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 146-47 (1993). The Staff's interest in an issue or a proposed revision to a generic guidance document, standing alone, cannot serve as basis or support for the proposition that a particular application is deficient. In this case, the Petitioner's contention does not even mention, nor does its scope encompass, the component that is the subject of the Staff's proposed ISG. Because NIRS has offered no new information at all in support of its amended and supplemented contentions, it has not met the requirements of § 2.309(f)(2).

B. NIRS Did Not Comply With the Late-Filing Requirements of Section 2.309(c), and Does Not Meet Those Requirements.

In addition, NIRS's request cannot be granted because it has not pleaded the requirements for late filing in § 2.309(c), and does not meet those requirements. Even if 10 C.F.R. § 2.309(f)(2) is applicable to NIRS's request, NIRS must still make a showing on the late-filing factors in § 2.309(c)(1).⁶ If a petitioner fails to address the criteria in 10 C.F.R. § 2.309(c)(1) that govern late-filed contentions, a petitioner does not meet its burden to establish the admissibility of such contentions. *Baltimore Gas and Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), LBP-98-26, 48 NRC 232, 241 (1998); *Louisiana Energy Services* (National Enrichment Facility), LBP-04-14, 60 NRC 40 (2004). Because NIRS has not

⁶ See *Private Fuel Storage*, LBP-01-13, 53 NRC at 324; *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-83-42, 18 NRC 112, 116-17 (1983); *Duke Power Co.* (Catawba Nuclear Power Station, Units 1 & 2), ALAB-813, 22 NRC 59, 82 (1985); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-28, 52 NRC 226, 233-34 (2000); *Duke Power Co.* (Catawba Nuclear Power Station, Units 1 & 2), CLI-83-19, 17 NRC 1041, 1045 (1983); [Final Rule], Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,172 (1989). Although these cases were decided under the NRC's old section 2.714 and rules of practice, not § 2.309, the new rules include no indication in the statements of consideration or text that the Commission wished to alter the longstanding practice of applying the late-filing factors in situations in which the amended or new contentions were based on new information or documents. See 69 Fed. Reg. at 2221.

pleaded the late-filing requirements, as petitioners are required to do when offering late-filed contentions, NIRS's request should be dismissed.⁷

Additionally, NIRS does not meet the requirements for late filing. Under Commission regulations, a late-filed contention may be admitted only upon the presiding officer's determination that it should be admitted after balancing the following eight factors, all of which must be addressed in the petitioner's filing:

⁷ See also *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 625, where the Commission has held that attempts to amend and supplement unadmitted contentions must meet the late-filing factors in § 2.309(c)(1).

- (i) Good cause, if any, for the failure to file on time;
- (ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
- (iii) The nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding;
- (iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;
- (v) The availability of other means whereby the requestor's/petitioner's interest will be protected;
- (vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;
- (vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and
- (viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

10 C.F.R. § 2.309(c).⁸ Petitioners seeking admission of a late-filed contention bear the burden of showing that a balancing of these factors weighs in favor of admittance, and the Commission has summarily dismissed petitioners who failed to address the late-filing factors. *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 347 (1998).

⁸ Although this regulation was revised recently, see Changes to Adjudicatory Process [Final Rule], 69 Fed. Reg. 2182 (January 14, 2004), the revisions incorporate the substance of the Commission's long-standing late-filed contention requirements. See 69 Fed. Reg. at 2221; *also compare* 10 C.F.R. § 2.309(c) and (f)(2) *with* 10 C.F.R. §§ 2.714(a)(1)(i)-(v), (b)(2), (d) (2004).

The first and most important of the requirements, good cause, is normally shown by a demonstration that the contention is based on new information and, therefore, could not have been filed in a timely manner. See, e.g., *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-14, 51 NRC 301, 308-09 (2000); *Private Fuel Storage*, LBP-01- 13, 53 NRC at 324; *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), 44 NRC 8, 25-26 (1996); see also *Louisiana Energy Services* (National Enrichment Facility), “Memorandum and Order (Ruling on NIRS/PC Late-Filed Contention Amendments),” ___ NRC ___ (June 30, 2005). As discussed above, NIRS does not have good cause because its additional contentions and bases are not based on any new information. All the information upon which NIRS relies was publicly available at the time of the application and, therefore, NIRS’s concerns regarding root-cause analysis of the leakage and the embedded portion of the drywell could have been brought in a timely fashion.

For example, NIRS strenuously argues, as a basis for its inclusion of the embedded portion of the drywell within the scope of its contention, that removal of the sand from the sand bed region caused a situation in which the embedded portion became more vulnerable to corrosion. See Motion at Exh. C. However, NIRS does not have good cause for raising this issue at this time. NIRS and Dr. Hausler had access to publicly available information that clearly set out the fact that the sand had been removed from the sand-pocket region at the time the LRA was submitted and the NIRS Petition to Intervene was filed. See Petition at Exh.1-4, 9. Therefore, knowing that the sand had been removed, NIRS could have included the embedded portion of the drywell in its contention in its Petition to intervene. NIRS chose not to do so, but has not pointed to any new information concerning the embedded portion of the drywell that would lend it good cause to raise the issue now. The information about leakage being a potential cause of corrosion and failure of the refueling seal being the potential cause of the leakage was similarly publicly available and known to NIRS at the time of its Petition. See

Petition at Exh. 1; GL 87-05. NIRS therefore cannot now claim good cause for raising the root cause analysis issue at this time. In fact, all the information discussed in the conference call was publicly available long before the conference call. See section A, above. The only thing presented at the conference call new to NIRS in any way was the Staff's interest in revising its GALL report. As discussed above, this does not directly relate to NIRS's contention, does not provide a basis for NIRS's new contention, and in no way affected NIRS's ability to raise the issue in a timely fashion. Therefore, good cause has not been shown, since NIRS's concerns could have been raised in a timely manner based on the information publicly available at the time. See *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 & 2), LBP-85-11, 21 NRC 609, 628-29 (1985), *rev'd and remanded on other grounds*, CLI-86-8, 23 NRC 241 (1986); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 & 2), ALAB-828, 23 NRC 13, 21 (1986).

The first and most compelling factor is whether good cause exists. *Private Fuel Storage*, LBP-01-13, 53 NRC at 324. The absence of good cause requires a compelling showing to be made on the other factors. *Id.* NIRS has not attempted to demonstrate those factors at all. Therefore, NIRS does not meet the requirements for late filing.

C. Even if NIRS's Additional and Supplemented Contentions Are Timely and NIRS Meets the Late-Filing Requirements, NIRS's Proposed Additional Contentions Do Not Meet the NRC's Contentions Requirements in Section 2.309(f)(1).

Even if the Board were to find that NIRS's additional and supplemented contentions meet the criteria of § 2.309(f)(2) and that NIRS meets the late-filing requirements, NIRS's request should not be granted because NIRS's proposed additions do not comply with the NRC's contentions requirements in § 2.309(f)(1). In addition to fulfilling the late-filing requirements, a petitioner must also show that the late-filed contention meets the contention requirements of § 2.309(f)(1)(i)-(vi). Section 2.309(f)(1) requires a petitioner to:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and
- (vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

10 C.F.R. § 2.309(f)(1). Significantly, a late-filed contention must refer to specific documents and be accompanied by a concise statement of the alleged facts or expert opinion which support the proposed contention. See *Calvert Cliffs*, CLI-98-25, 48 NRC at 348. Failure to comply with any of the requirements may be grounds for dismissing a contention. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999). In its Motion, NIRS states that it addresses “four legal requirements for each contention; a specific statement of the contention, an explanation of basis, a

demonstration that it is within the scope of the proceedings,⁹ and a demonstration of materiality.” Motion at 4.

1. NIRS’s First Proposed New Contention

NIRS argues in its Motion that its original contention included the embedded portion of the drywell, although, in support, it references its reply brief and not its original Petition to Intervene. See Motion at 10. New arguments may not be raised for the first time in a reply brief. See *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224-25 (2004). NIRS states, in the alternative, that if the Board decides that the information originally submitted did not provide sufficient basis for including inaccessible areas within the initial contention, and that it cannot supplement the basis with the new information, Petitioners seek leave to add a new contention alleging that the proposed corrosion management of inaccessible areas of the drywell liner is inadequate. See Motion at 10-11.

⁹ In its motion, NIRS mischaracterizes the NRC Staff’s position regarding scope by stating that “NRC staff conceded that aging of the drywell liner was within the scope of the proceeding, but attempted to draw a distinction between aging and corrosion.” See Motion at 6. In fact, the Staff, in its response to the Board’s Order of January 10, 2006, agreed that the effects of aging on the drywell liner during the period of extended operation were within the scope of license renewal but argued that NIRS had not met its burden of demonstrating that its contention was within the scope of renewal. See “NRC Staff’s Response to Licensing Board’s Order Directing Supplemental Briefing,” dated January 17, 2006.

In support of its new contention, NIRS provides a new memorandum from Dr. Hausler. Dr. Hausler's memorandum opines that removal of the sand "probably shifted the location where the highest rate of corrosion is occurring to the embedded area of the liner below the concrete floor." Motion at 11, at Exh. C. NIRS's new contention states that UT measurements in inaccessible areas should be carried out. Motion at 12. However, Dr. Hausler's memorandum contradicts this contention by stating that UT inspections "can only be done for a fraction of the areas in question." Motion at Exh. C. Therefore, by requesting relief that their own expert states will be ineffectual, if not impossible, NIRS's new contention does not raise a genuine issue of fact or law material to license renewal.

In addition, NIRS's first proposed new contention lacks adequate basis and support. Dr. Hausler asserts that removal of the sand "probably shifted the location of the highest rate of corrosion to the embedded area of the liner below the concrete floor" without any supporting reference or explanation. Motion at Exh. C. Dr. Hausler asserts that "there is every reason to believe that such leakage is still occurring," that "it is equally reasonable to believe that water is still penetrating into the sand bed region," and that "corrosion has probably developed at the concrete/steel boundary on the outside of the liner in the area," *see id*, all without any support, explanation, or reference to technical documentation, ignoring the documentation referenced by NIRS in its original Petition to Intervene, which stated that "corrosion of the sandbed region has been arrested" and that the licensee would commit to perform additional inspections of the drywell within 3 months of the detection of any additional leakage. See Petition, Exh. 9. Dr. Hausler's unsupported opinions of what is "probably" occurring simply do not provide any basis or support for NIRS new contention that UT testing at the embedded portion of the drywell is necessary, and it is impossible to tell from Dr. Hausler's memorandum whether he even believes that such testing is possible. Therefore, this contention is not admissible.

2. NIRS's Second Proposed New Contention

NIRS also seeks leave of the Board to contend that, “in addition to direct testing of the thickness of the drywell liner, AmerGen must conduct a root cause analysis of the corrosion problem and implement a verifiable program to eliminate leakage of water onto the drywell liner.” Motion at 13. In support of this contention, NIRS references the NRC proposed ISG, which, if adopted, would revise the GALL report and “recommend[] root cause analysis and further evaluation, when potential for corrosion is indicated in the accessible areas of the drywell.” See Motion Exh. B. NIRS also references Dr. Hausler’s memorandum in support of its new contention.

For several reasons, the Staff’s proposed ISG and GALL report revisions cannot be said to support NIRS’s request for root cause analysis. First, the Staff’s proposal is a proposal only. The Staff has not yet changed any guidance document or concluded that such change is necessary. Second, even if the GALL report were revised and an ISG issued, NIRS has not shown that it would apply to Oyster Creek, which submitted its license renewal application in accordance with NRC’s existing guidance at the time of submission. Third, the GALL report is a guidance document and is intended to provide guidance only - each renewal applicant bears the responsibility of adequately managing the effects of aging for necessary components, and following the GALL report is only one way to accomplish that goal. Fourth, the Staff’s revisions, if adopted, would recommend root cause analysis and further evaluation only, not mandate some specific finding. Fifth, root cause analysis and further evaluation would only be recommended “when potential for corrosion is indicated in the inaccessible areas of the drywell,” and it is not clear that this would apply to Oyster Creek. The NRC Staff noted at the conference call that the first step for each licensee, if the proposed changes were adopted, would be to evaluate their plants and reach a conclusion as to whether corrosion of inaccessible areas as a result of leakage would be a potential problem at that particular plant. If an individual

plant were to demonstrate that such corrosion was unlikely to occur for whatever reason, further evaluation would not necessarily be recommended. See Motion at Exh. B, pp. 11-12.

NIRS argues that its second new contention is material “because, if correct, additional requirements would have to be included in the license renewal conditions, which to date do not contain a requirement for root cause analysis of the corrosion problem.” Motion at 14. This is not the case. The NRC’s license renewal regulations require that applicants demonstrate that they will adequately manage the effects of aging for the period of extended operation but do not dictate, generally speaking, how that is to be accomplished. NIRS merely points to a proposed revision in a generic guidance document. NRC guidance documents, such as the GALL report, serve merely as guidance and do not constitute requirements or regulations. See *Curators of the University of Missouri* (Trump-S Project), CLI-95-1, 41 NRC 71, 98 (1995) (citation omitted). Such documents cannot prescribe requirements and, although conformance with regulatory guides will often result in compliance with specific regulatory requirements, nonconformance to such guides does not equate to noncompliance with the regulations. *Id.* NIRS offers no explanation, basis, or support at all for the proposition that the effects of aging will not be adequately managed for the period of extended operation without a root cause analysis of corrosion at Oyster Creek specifically. NIRS may not simply rely on the Staff’s interest in generically exploring an issue further as a basis for its contention regarding the license renewal application of a specific plant without some further support or documentation. Therefore, NIRS’s second proposed contention is not admissible.

CONCLUSION

For the foregoing reasons, the Board should deny NIRS’s request.

Respectfully Submitted,

Daniel Hugo Fruchter
Counsel for NRC Staff

Dated at Rockville, Maryland
this 17th day of February, 2006