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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

| | | |
|--|---|-------------------|
| In the Matter of: |) | March 6, 2006 |
| AmerGen Energy Company, LLC |) | Docket No. 50-219 |
| (License Renewal for Oyster Creek Nuclear Generating Station) |) | |

AMERGEN BRIEF IN SUPPORT OF APPEAL FROM LBP-06-07

INTRODUCTION

In a February 27, 2006 “Memorandum and Order (Denying New Jersey’s Request for Hearing and Petition to Intervene and Granting NIRS’s Request for Hearing and Petition to Intervene),” LBP-06-07 (“Memorandum and Order”), the Atomic Safety and Licensing Board (“Board”) in the above-captioned license renewal proceeding admitted a contention submitted by six organizations¹ (“Petitioners”) relating to potential corrosion of the Oyster Creek Nuclear Generating Station (“OCNGS”) drywell shell. The Board’s decision to admit Petitioners’ contention was not unanimous: Judge Abramson dissented. For the reasons discussed below, AmerGen Energy Company, LLC (“AmerGen”) agrees with Judge Abramson that the Board erred as a matter of law in finding that Petitioners have met the standards for admission of this contention.

¹ The six organizations are Nuclear Information and Resource Service (“NIRS”), Jersey Shore Nuclear Watch, Inc. (“JSNW”), Grandmothers, Mothers and More for Energy Safety (“GRAMMES”), New Jersey Public Interest Research Group (“NJPIRG”), New Jersey Sierra Club (“NJ Sierra Club”), and New Jersey Environmental Federation (“NJEF”).

In particular, AmerGen believes that the Board erred in concluding that Petitioners have: (1) provided a sufficient basis for their contention; and (2) demonstrated the existence of a genuine dispute of material law or fact, contrary to 10 C.F.R. § 2.309(f). Accordingly, pursuant to 10 C.F.R. § 2.311(c), AmerGen respectfully requests that the Commission overturn the Board's decision and deny admission of Petitioners' contention.

BACKGROUND

The contention at issue in this Appeal relates to the OCNGS drywell shell.² The OCNGS drywell shell is a steel pressure vessel fabricated of carbon steel in the shape of an inverted light bulb. *See* Request for Hearing and Petition for Leave to Intervene (Nov. 14, 2005) ("Petition") at 4; OCNGS License Renewal Application (License No. DPR-16) ("Application") at 3.5-19. It is approximately 100 feet tall with a spherical bottom section and an upper cylindrical section. The area outside the lower portion of the spherical region (spanning from about the 9 foot to the 13 foot elevation), which is within the reactor basemat area, previously was filled with sand and is referred to as the "sand bed region" of the drywell. Petitioners' Exh. 1, at Fig. 1. For reasons discussed below, the sand in the sand bed region of the OCNGS drywell was removed over a decade ago.

Specifically, OCNGS's prior owner identified corrosion on the outside of the drywell shell about 20 years ago, with the "most severe corrosion [] found in the sand bed region." Petition at 4-5 (*quoting* NRC Information Notice 86-99, Degradation of Steel Containments, Supp. 1 (Feb. 4, 1991)). It performed about 1,000 UT measurements of the drywell shell, including the sand bed region, to locate where thinning had occurred. Petition at 5 ("143 UT measurements at [the sand bed] level"); Application at 3.5-19 ("As a result of the presence of

² The term "shell" is synonymous with "liner." *See* Petition at 3 ("drywell liner or drywell shell"). AmerGen uses the term "shell," consistent with the OCNGS License Renewal Application. *See e.g.*, Application at 3.5-18 to -22.

water in the sand bed region, extensive UT thickness measurements (about 1000) of the drywell shell were taken”). The NRC issued an Information Notice to the industry about this generic issue in 1986, with a supplement in 1991. Petition at 4-6 (discussing Information Notice No. 86-99 (Dec. 8, 1986) and Information Notice No. 86-99 Supplement 1 (Feb. 14, 1991)). The NRC also issued a Generic Letter in 1987. *See* Generic Letter 87-05, “Request For Additional Information Assessment Of Licensee Measures To Mitigate And/Or Identify Potential Degradation Of Mark I Drywells.”

As a result of its own investigations and in response to the Generic Letter, the former owner of OCNCS worked between 1988 and 1992 to address the corrosion of the drywell shell, including removing the sand itself and the corrosion products from the outside of the drywell shell in the sand bed region. Petition at 8; Application at 3.5-20. In December 1992, with approval from the NRC, the licensee applied a multi-layered protective epoxy coating to the outside surface of the drywell in the sand bed region to prevent additional corrosion in that area. Petition at 10; Petitioners’ Exh. 4 at 1 & Encl. 2 at 6; Application at 3.5-20.

In addition, the licensee took UT measurements of specific locations of the drywell shell, including the sand bed region, during the 15th refueling outage in September 1994. Petition at 10; Petitioners’ Exh. 6 at 1. The licensee reported to the NRC that, after 21 months of service (between Dec. 1992 and Sept. 1994), the UT measurements showed “no evidence of ongoing corrosion in the upper elevations of the drywell and that corrosion has been arrested in the sandbed region” Petitioners’ Exh. 6 at 1. The licensee also noted that “the [epoxy] coating [in the sand bed region] is performing satisfactory with no signs of deterioration such as blisters, flakes, or discoloration, etc.” Petition at 10; Petitioners’ Exh. 6 at 2.

In September 1995, based upon the extensive corrective actions to address the prior corrosion issue, the licensee sought NRC permission to change its drywell corrosion monitoring

program. Petitioners' Exh. 6. On November 1, 1995, the NRC approved the requested changes. Petition at 13; Petitioners' Exh. 9. For the upper drywell shell (*i.e.*, above the sand bed region), the NRC approved performing UT measurements during the 16th refueling outage scheduled for September 1996, and then only during every other refueling outage thereafter. Petitioners' Exh. 9 at 4. The NRC also permitted the licensee to perform UT measurements in the sand bed region during the 16th refueling outage, but *visual* inspections of the sand bed region thereafter. *Id.*

Pursuant to this approved program, UT measurements at critical locations of the upper drywell have been taken during every other refueling outage at OCNGS, most recently in 2004. Petition at 12; Application at 3.5-21. Similarly, the former licensee performed UT measurements in the sand bed region in 1996 and AmerGen visually inspected the epoxy coating since then, during refueling outages in 2000 and 2004. Petitioners' Exh. 6 at 2 (commitment to perform UT measurements in the sand bed during the 16th refueling outage); Application at 3.5-20 (2000 and 2004 visual inspections).

STATEMENT OF THE CASE

This case arises from the July 22, 2005 application by AmerGen to renew the OCNGS operating license (License No. DPR-16) for an additional 20 years. In the Application, AmerGen describes the two-decade history of the drywell shell corrosion issue, including the conclusion, based on years of measurements and inspections, that corrosion of the drywell shell in the sand bed region has been arrested. Application at 3.5-20 to -21, and B-76 (Aging Management Program ("AMP") for ASME Section XI, Subsection IWE). Moreover, the Application identifies three AMPs applicable to the sand bed region of the drywell shell, including a coatings program that calls for the continued visual inspections of the epoxy coating that covers the drywell shell in the sand bed region. UT measurements are proposed in

accordance with ASME Section XI for critical areas of the drywell shell that are above the sand bed region.³

Since submitting its Application, AmerGen has docketed a commitment to take one-time UT measurements of the drywell shell in the sand bed region prior to the start of the period of extended operation. *See* AmerGen Exhibit 1. In addition, in response to comments made by NRC Staff license renewal audit team members, AmerGen has committed to perform UT measurements in the sand bed region once every ten years during the extended period of operation. AmerGen will be formally docketing this commitment and will notify the Board, Commission, and parties to this proceeding when it has done so.

The Commission's Hearing Notice stated that any person whose interest may be affected by this proceeding and who wishes to participate as a party must file a petition for leave to intervene by November 14, 2005, in accordance with the provisions of 10 C.F.R. § 2.309. 70 Fed. Reg. 54,585 (Sept. 15, 2005). As reflected in that Hearing Notice, the scope of the proceeding on a license renewal application is whether:

actions have been identified and have been or will be taken with respect to: (1) Managing the effects of aging during the period of extended operation on the functionality of structures and components that have been identified as requiring aging management review, and (2) time-limited aging analyses that have been identified as requiring review, such that the activities authorized by the renewed license will continue to be conducted in accordance with the current licensing basis (CLB), and that any changes made to the plant's CLB comply with the Act and the Commission's regulations.

Id.

Petitioners have had multiple opportunities to adequately support their sole contention. In response to the Hearing Notice, they filed their Petition on November 14, 2005, and a Reply to

³ The areas of the drywell shell above the sand bed region are inaccessible.

AmerGen and the NRC Staff's Answers on December 19, 2005. *See* Combined Reply to the Answers of AmerGen and the NRC Staff ("Reply"). When AmerGen filed a Motion to Strike various new arguments and exhibits that Petitioners impermissibly presented for the first time in their Reply, Petitioners took the opportunity to answer that Motion as well. *See* Petitioners' Opposition to AmerGen Motion to Strike (Jan. 13, 2006). Finally, Petitioners responded to a Board Order requesting supplemental briefing on their drywell contention. *See* Petitioners' Briefing on Scope of Proceeding (January 17, 2006), *responding to* Order (Directing Supplemental Briefing on Hearing Requests), ASLBP No. 06-844-01-LR (Jan. 10, 2006).

The Board issued its decision on standing and contentions, admitting Petitioners and their sole contention on February 27, 2006.

LEGAL STANDARDS

The legal standards applicable to this appeal and the admission of contentions are described below.

A. LEGAL STANDARDS GOVERNING INTERLOCUTORY APPEAL

Pursuant to 10 C.F.R. § 2.311(c), an applicant may appeal an order granting a Request for Hearing and Petition to Intervene on the grounds that the petition/request should have been wholly denied. Inherent in this standard is that there was an "error of law or abuse of discretion." *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 637 (2004) (*quoting Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 265 (2000)). In considering an appeal brought under Section 2.311(c), the Commission has the option to consider all the points of error raised on appeal, rather than simply whether the petition should have been denied. *See Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-02, 53 NRC 9, 18 (2001).

B. LEGAL STANDARDS GOVERNING ADMISSIBILITY OF CONTENTIONS

To intervene in an NRC licensing proceeding, Petitioners must propose at least one admissible contention. 10 C.F.R. § 2.309(a). The NRC will deny a petition to intervene and request for hearing from a petitioner who has standing but has not proffered at least one admissible contention. *Florida Power & Light Co.* (Turkey Point Nuclear Power Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 5 (2001). As the Commission has observed, “[i]t is the responsibility of the Petitioner to provide the necessary information to satisfy the basis requirement for the admission of its contentions and demonstrate that a genuine dispute exists within the scope of this proceeding.” *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-14, 48 NRC 39, 41 (1998). In addition, “[a] contention’s proponent, not the licensing board, is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions.” *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998); *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 364 n.10 (2001). Further, a licensing board may not make factual inferences on a petitioner’s behalf. *Arizona Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149 (1991).

The agency’s contention standard requires the petitioner to “set forth with particularity the contentions sought to be raised,” and demonstrate “that there has been sufficient foundation assigned for it to warrant further exploration.” See *Pulic Serv. Co. of N.H.* (Seabrook Station, Units 1 and 2), ALAB-942, 32 NRC 395, 428 (1990) (footnote omitted). The contention rules “bar contentions where petitioners have only ‘what amounts to generalized suspicions, hoping to substantiate them later.’” *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 424 (2003) (citing *Duke Energy Corp.*

(Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 337-39 (1999)). The Commission has described the agency’s contention standard as “strict by design.”⁴

With respect to each contention proffered, Petitioners must address six requirements. 10 C.F.R. § 2.309(f)(1). A contention that fails to meet *any* one of these six requirements must be dismissed. *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 567 (2005). In this Appeal, AmerGen is challenging the Board’s determinations with respect to two of the six contention admission requirements—the requirement to provide an adequate basis and the requirement to demonstrate the existence of a genuine dispute of material law or fact. As a result, AmerGen addresses the legal standards that are relevant only to those two requirements below.

1. Petitioners Must Provide An Adequate Basis for the Contention

Pursuant to Section 2.309(f)(1)(ii), a petitioner must provide “a brief explanation of the basis for the contention.” A petitioner must provide a clear statement as to the basis for the contention and the submission of supporting information and references to specific documents and sources that establish the validity of the contention. *Florida Power & Light*, CLI-01-17, 54 NRC at 19-20. Finally, the “intervenor must do more than submit ‘bald or conclusory allegation(s)’ of a dispute with the applicant.” *Dominion Nuclear Conn., Inc.* CLI-01-24, 54 NRC at 358. Speculation that a safety issue will arise during the renewed license term is not an adequate basis for an admissible contention. *Id.*

⁴ In January 2004, the Commission adopted substantial revisions to 10 C.F.R. Part 2, the NRC’s Rules of Practice, which became effective on February 13, 2004. *See Changes to Adjudicatory Process*, 69 Fed. Reg. 2,182, 2,183 (Jan. 14, 2004). In the Statements of Consideration accompanying the Final Rule, however, the Commission noted that the contention standard set forth in new Section 2.309(f)(1) is the same standard that has been in effect since 1989 (*i.e.*, the same standard that was set forth in former 10 C.F.R. § 2.714(b) and developed in NRC case law prior to the adoption of the current rule). *Id.* at 2,189-90.

2. Contentions Must Raise a Genuine Dispute of Material Law or Fact

Section 2.309(f)(1)(vi) requires a petitioner to 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.

Thus, for a contention to be admissible, it must refer to those portions of the license application that the petitioner disputes and indicate supporting reasons for each dispute. *Florida Power & Light Co.*, CLI-01-17, 54 NRC at 19. As the Commission explained:

[r]equiring the substance and presentation of contentions to be concrete and specific to the license application helps ensure that individual license applicants are not put into the position of defending the policies and decisions of the Commission itself. It also precludes an intervenor from making general allegations, with the hope of generating through discovery sufficient facts to show there is a genuine dispute.

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 130 (2004). Finally, the petitioner must provide "supporting grounds" for its contention that the application must, but does not, consider most information required by law. *Florida Power & Light Co.*, CLI-01-17, 54 NRC at 19.

DISCUSSION

A. **THE BOARD ERRED IN ADMITTING THE CONTENTION BECAUSE PETITIONERS FAILED TO PROVIDE AN ADEQUATE BASIS**

As admitted by the Board, Petitioners' contention is as follows:

AmerGen's License Renewal Application fails to establish an adequate aging management plan for the sand bed region of the drywell liner, because its corrosion management program fails to include periodic UT measurements in that region throughout the period of extended operation and, thus, will not enable AmerGen

to determine the amount of corrosion in that region and thereby maintain the safety margins during the term of the extended license.

Memorandum and Order, slip op. at 33. In its Memorandum and Order, the Board explains its rationale for concluding that Petitioners have met the basis requirements set forth in 10 C.F.R. §2.309(f)(1)(ii). *See id.* at 33-34. For the reasons set forth below, this rationale is legally and factually deficient. Petitioners' original contention lacks adequate basis and specificity, and does not meet the legal standards governing its admissibility in this proceeding.

The Commission's regulations establish the need for a license renewal applicant to identify components subject to an aging management review and demonstrate that the effects of aging on these components will be adequately managed "so that the intended function(s) will be maintained consistent with the [current licensing basis] for the period of extended operation." 10 C.F.R. § 54.21(a)(1) and (3). Consistent with these regulations, AmerGen identified the drywell shell as a component subject to aging management review. *See* Application at 2.4-5 (Table 2.4.1).

AmerGen then identified in the Application that the aging effect at issue—"Loss of Material" of the outside of the drywell shell in the sand bed region—will be managed via implementation of three AMPs: (1) 10 C.F.R. Part 50, Appendix J; (2) ASME Section XI, Subsection IWE; and (3) AmerGen's Protective Coating Monitoring and Maintenance Program ("Coatings Program"). *See* Application at 3.5-55, -56 (Table 3.5.2.1.1).⁵ These AMPs, which do not require UT measurements for the drywell shell in the sand bed region, are discussed in Appendix B of the Application. *See* Application §§ B.1.27, 29, and 33 (referenced in Table 3.5.2.1.1). The Application also includes cross-references to NRC guidance in NUREG-1801,

⁵ Although Table 3.5.2.1.1 includes an AMP for Time-Limited Aging Analysis ("TLAA") for the drywell shell, a TLAA is not relevant to the sand bed region; it is only relevant to the inaccessible portion of the drywell shell (*i.e.*, the upper region). *See* Application at 4-54 (§ 4.7.2 "Drywell Corrosion")

Vol. 2 (the Generic Aging Lessons Learned (“GALL”) Report) to demonstrate that inclusion of these AMPs is consistent with that guidance. *See* Application at 3.5-55, -56 (Table 3.5.2.1.1) (referencing GALL Report Item II.B1.1-2(C-19)).

In admitting the contention, the Board erred because Petitioners have not provided an adequate basis to challenge the three AMPs governing drywell shell corrosion in the sand bed region for the period of extended operation as set forth in the Application. Petitioners never assert that the Application violates or is inconsistent with the requirements in 10 C.F.R. § 54.21(a)(1) and (3). Petitioners reference the Application’s discussion of the Part 50 (Appendix J) and ASME Section XI (Subsection IWE) AMPs, but fail to argue in any meaningful way that they are inadequate—much less offer a basis for any purported deficiency. Petition at 7. Petitioners also do not challenge the AMPs’ consistency with the NRC guidance in the GALL Report.

Petitioners fail to plead with the requisite level of specificity that these AMPs are inadequate for purposes of aging management under the rules or guidance applicable to this license renewal proceeding. Petitioners’ failure to challenge these AMPs as set forth in the Application—a requirement under the Commission’s contention standard—is evidence that they lack an adequate basis for their contention. *See Nuclear Management Co., LLC* (Pallisades Nuclear Plant), LBP-06-10, slip op. at 40 (March 7, 2006) (“Petitioners do not, however, explain at all how such a conclusion would be reached *on NMC’s License Renewal Application itself.*”) (emphasis in original).

Moreover, to the extent that Petitioners are indirectly claiming that Part 50 (Appendix J) or ASME Section XI (subsection IWE) are inadequate to monitor corrosion of the drywell shell, they are impermissibly attacking NRC regulations in an adjudicatory proceeding. 10 C.F.R.

§ 2.335(a);⁶ *Duke Energy Corp.*, CLI-99-11, 49 NRC at 334; *see also Dominion Nuclear Conn., Inc.*, CLI-01-24, 54 NRC at 364. Such an attack does not provide an adequate basis for a contention.⁷

As explained below, the Board’s discussion of Petitioners’ bases does not demonstrate that those bases are adequate to support admitting the contention because:

- the corrosion happened in the past;
- the corrosion in the sand bed region has been arrested;
- Petitioners’ allegation about the presence of water in the sand bed region is unsupported by the record; and
- Petitioners’ allegation about the integrity of the epoxy coating is impermissibly generic and speculative.

1. Past Events Are Not An Adequate Basis

The first part of the Board’s rationale is based on past events, and does not provide an adequate basis for the contention. The Board first notes that, according to Petitioners, the OCNGS drywell shell “experienced” moisture intrusion that “resulted” in severe corrosion, and that most of the corrosion “occurred” in the sand bed region of the drywell shell. Memorandum and Order at 33. As described in the Background section above, while corrosion did occur in the sand bed region of the OCNGS drywell shell, steps were taken to remove the corrosion in the sand bed region, and to prevent further corrosion as part of ongoing plant maintenance under the current license. These steps have included the application of an epoxy coating to the exterior of

⁶ “The Oyster Creek program complies with Subsection IWE for steel containments (Class MC) of ASME Section XI, 1992 Edition including 1992 Addenda in accordance with the provisions of 10 CFR 50.55a.” Application at B-75 (ASME Section XI, Subsection IWE, “Program Description”).

⁷ Any allegation that the third AMP—AmerGen’s Coatings Program—is inadequate because it does not include UT measurements, would be a back-door attack on the Part 50 (Appendix J) or ASME Section XI (subsection IWE) AMPs, because the latter govern whether UT measurements should be taken while the former governs only visual inspections.

the drywell shell in the sand bed region in 1992, UT inspections in 1994 and 1996 to confirm that the coating had arrested corrosion, and subsequent periodic visual inspections of the coating to confirm its integrity. These steps are discussed in the Application. Application at 3.5-19 to -21.

The Board's past tense references to problems identified and addressed in the current license term (*e.g.*, the drywell shell "experienced" moisture and corrosion "occurred") refer to a past problem. Such references to the past cannot be an adequate basis for a contention challenging the adequacy of license renewal AMPs. Nothing here, therefore, calls into question the integrated plant assessment in the Application, much less the adequacy of AmerGen's AMPs for the sand bed region of the drywell shell for the extended period of operation.

The Board next concludes that Petitioners provided an adequate basis when they alleged that "in some areas of the sand bed region, there is as little as 0.064 inches of safety margin before the liner violates the *buckling* criterion [citation omitted] and there are several locations where the measured thickness is less than that criterion." Memorandum and Order at 34 (emphasis added). Once again, the fact that corrosion has, in the past, resulted in some thinning of the drywell does not in any way call into question the adequacy of AmerGen's planned AMPs for the period of extended operation. There is simply no nexus to the aging management issues which are the appropriate subject of a license renewal proceeding and, thus, no adequate basis for Petitioners' contention.

The Board also erred when it admitted "buckling" as part of the basis for the contention. *Id.* at 46. As the Board itself pointed out, "every participant in the adjudicatory process[] has an obligation to fully develop its arguments." *Id.* at 41, n.34 (citations omitted). Further, a licensing board may not make factual inferences on a petitioner's behalf. *Arizona Pub. Serv. Co.*, CLI-91-12, 34 NRC at 149. Petitioners merely mentioned the word buckling in passing in

their petition. *See* AmerGen Motion to Strike at 5-6 (citing Petition at 8, 10). This is clearly insufficient to meet the Commission’s pleading standards.

But the Board also erred in not granting a portion of AmerGen’s Motion to Strike. Petitioners impermissibly waited until their Reply to *argue* the issue of buckling. *See id.* The Board should have stricken this late attempt to introduce an argument that properly belonged in the initial Petition. As Judge Abramson correctly stated in his dissent, Petitioners failed to “present any discussion or offer any expert analysis or testimony to support an argument that the reduction in the liner thickness caused by this corrosion increases the potential for buckling failure.” Memorandum and Order, Dissenting Opinion at 3, n.10.

The Board also made a significant and decision-changing factual error regarding whether corrosion in the sand bed region of the drywell shell is ongoing. The Board states that “Oyster Creek’s prior licensee conceded in 1993 that corrosion would continue in the drywell liner, albeit at a ‘low’ rate.” Memorandum and Order at 35, n.29 (*citing* Petition at Exhibit 4, at 2). The Board, however, apparently misreads Petitioners’ Exhibit. The cited exhibit states:

GPUN concluded that (1) sand removal was successfully completed in refueling outage 14R, (2) external drywell surface in sand bed region was cleaned and coated, (3) *corrosion in sand bed region is now stopped*, . . . and (6) *low corrosion rates in sphere and cylinder portions of the drywell, in conjunction with pressure reduction approval*, will ensure containment integrity for the full licensed life of the plant.

Petitioner’s Exhibit 4, at 2 (emphasis added). It is clear from the above that the former OCNGS owner stated that corrosion in the sand bed region had “stopped” and that its reference to continuing “low” corrosion rates referred to areas other than the epoxy-coated sand bed region.⁸ As the Board acknowledged elsewhere, the “pressure reduction” only applied to the area above the sand bed. *See* Memorandum and Order at 32, n.27. Thus, the cited portions of Petitioners’

⁸ The Board also cites Petitioners’ Exhibit 1, which is the NRC’s 1986 Information Notice prepared years before the sand was removed and the epoxy coating was applied. *See* Memorandum and Order at 35, n.29.

exhibits do not support the Board's conclusion, and cannot form an adequate basis for the contention.⁹

2. Speculation About the Future Is Not An Adequate Basis

The second part of the Board's rationale rests on speculation about the future. The Board states that "visual inspections alone of the sand bed region may not detect a gradual, continuing, thinning of the liner . . . especially if corrosion is occurring underneath the epoxy coating, which may mask such corrosion." Memorandum and Order at 34. The Board apparently relies on Petitioners' allegation that:

the applicant does not indicate whether visual coating inspections since the original application [of the epoxy] have been made specifically for pinhole leaks in the coating which could allow for water seepage behind the epoxy coating resulting in corrosion behind the coating on the exterior surface of the already degraded component.

Petition at 10. For this allegation, Petitioners rely solely on their proffered expert, Dr. Rudolf Hausler, who states that:

Epoxy resins in contact with water can, depending on the nature of the epoxy and the prevailing temperature, deteriorate over time. Furthermore, the application of epoxy resins on metal surfaces may result in holidays (pinholes) depending on surface preparation, the curing process, and general cleanliness. There is, therefore, no guarantee that the epoxy coating prevented further growth of existing pits.

Hausler Memorandum at 2 (Nov. 10, 2005) (unnumbered exhibit to Petition).

This opinion, however, lacks an adequate basis. First, Dr. Hausler's opinion is impermissibly generic. Dr. Hausler does not reference OCNGS. He makes only a general

⁹ Similarly, the Board also states that "corrosion-causing moisture continues to enter the drywell liner" citing various portions of Petitioners' original Petition to Intervene and its Reply. Memorandum and Order at 34. A careful review of those references, however, makes clear that none of them provides any factual support for the assertion that moisture *will* continue to enter the area between the drywell liner and the concrete shield wall. *See id.*, citing the Petition at 6, 11 and 13, and Petitioners' Reply at 17-18. In any event, the presence of water would not be an adequate basis for a contention on corrosion monitoring of the sand bed region when the drywell shell in that region is covered by an epoxy coating.

statement about the generic application of “epoxy resins on metal surfaces.” Dr. Hausler does not even know what the coating is made of. *See id.* at 1 (“little is known about the nature of the coating”). This is despite the fact that Petitioners’ own Exhibits include a detailed description of the multi-layered coating, which is comprised of one pre-primer coat, two top coats, and a caulked interface. *See* Petitioners’ Exh. 4, Encl. 2 at 6. Dr. Hausler’s opinion therefore does not provide an adequate basis for the contention.

Second, Dr. Hausler’s opinion is no more than unsupported speculation. He hypothesizes that application of epoxy resins “may” result in pinholes. There is no basis other than speculation for Dr. Hausler to state that there are pinholes beneath the coating and that gradual thinning of the drywell in this area may still be occurring. Speculation, of course, is not an adequate basis for a contention. *See, e.g., Dominion Nuclear Conn., Inc.,* CLI-01-24, 54 NRC at 358-59. Dr. Hausler ignores the fact that the former owner of OCNGS performed UT measurements in the sand bed region during outages in 1994 and 1996; *after* the coating application in 1992. The former owner concluded that corrosion in this area had been arrested.

The Board also appears to agree with Petitioners’ allegation that “both the NRC Staff and the Oyster Creek licensee have stated that UT measurements of the drywell liner are necessary ‘for the life of the plant’ to assure public safety.” Memorandum and Order at 34 (*quoting* Petition at 14). This quoted language comes from a 1992 NRC Safety Evaluation cited by Petitioners. *See* Petition at 6-7, n.5 & 6. Three years later, however, as reflected in the Petition itself, the NRC agreed to “discontinue UT measurements at the former sand bed region based on UT examination during the 15th refueling outage.” Petition at 12-13 & n.16 (*citing* Letter from NRC to GPUN re: Changes in the Oyster Creek Monitoring Program (TAC No. M93658)

November 1, 1995). Thus, since 1995, no such UT measurements have been required by the NRC.¹⁰

The Board concludes that, on the record before it, Petitioners' contention is admissible to the extent it requests that "periodic UT inspections must be employed in the sand bed region during the license renewal period to confirm the actual remaining wall thickness of this vital safety structure." Memorandum and Order at 34. As discussed above, this conclusion simply does not follow from the string of unsupported and inaccurate bases presented by Petitioners.

B. THE BOARD ERRED IN ADMITTING THE CONTENTION BECAUSE PETITIONERS FAILED TO DEMONSTRATE THE EXISTENCE OF A GENUINE DISPUTE OF MATERIAL LAW OR FACT

The Board's treatment of this aspect of the contention admissibility requirements appears to rely almost exclusively on the bases which have been discussed above and which have been shown to be inadequate to warrant admission of the contention. The Board begins simply by stating its finding or conclusion that "a genuine dispute exists regarding" the adequacy of AmerGen's AMPs. Memorandum and Order at 38. This conclusion, however, is based on nothing but Petitioners' speculation. The Board then dismisses a prior assertion made by AmerGen that its commitment to a one-time UT inspection prior to the period of extended operations should be adequate. *Id.* at 38-39.

Regardless of whether such a one-time UT inspection is adequate, the question is whether Petitioners have met their burden to demonstrate the existence of a genuine dispute of material law or fact. For there to be such a dispute, Petitioners must have provided facts that put in legitimate issue the adequacy of AmerGen's AMPs for the period of extended operation. As discussed above, Petitioners have not met this burden.

¹⁰ AmerGen has voluntarily committed to certain additional UT measurements in that region. *See p. 5 supra.*

The Board also discusses the appropriate scope of a license renewal proceeding, noting that issues related to a plant's current licensing basis "are ordinarily beyond the scope of a license renewal review because 'those issues already [are] monitored, reviewed, and commonly resolved as needed by ongoing regulatory oversight.'" Memorandum and Order at 7, citing *Florida Power & Light Co.*, CLI-01-17, 54 NRC at 8. The Board adds that "license renewal reviews focus 'on plant systems, structures, and components for which current [regulatory] activities and requirements may not be sufficient to manage the effects of aging in the period of extended operation,'" again citing *Florida Power & Light Co.*, 54 NRC at 10.

Petitioners' failure to provide any factual basis that corrosion of the epoxy-covered drywell shell could occur in the extended period of operation: (1) places their concerns squarely in the context of ongoing activities undertaken pursuant to the plant's current licensing basis; and (2) demonstrates that they have failed to provide a basis to show that "current [regulatory] activities and requirements may not be sufficient to manage the effects of aging in the period of extended operation." *Id.* (citing Nuclear Power Plant License Renewal; Revisions; Final Rule, 60 Fed. Reg. 22461, 22469 (1995)).

Finally, the Board states:

[W]e might be persuaded that drywell liner corrosion during the renewal period was not age-related degradation if the record clearly established that (1) corrosion-causing moisture no longer occurred in the drywell liner, and (2) corrosion of the drywell liner in the sand bed region had been totally arrested. In our judgment, however, NIRS has made a sufficient showing to put these material facts in genuine dispute.

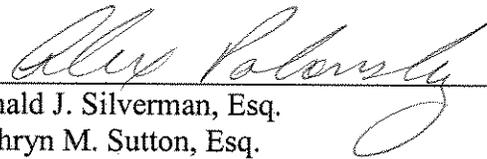
Memorandum and Order at 43. As discussed above, AmerGen does not believe that the potential for moisture generally in the drywell satisfies Petitioners' burden, in the absence of evidence in the record of continuing corrosion behind the epoxy coating and a showing that such corrosion will not be managed by the three AMPs identified in the Application. Moreover, and also as

discussed above, the former owner of OCNGS performed UT measurements in the sand bed region during outages in 1994 and 1996—*after* the coating application in 1992—and concluded that corrosion in this area had been arrested. Accordingly, Petitioners have not provided the required evidence or made the required showing.

CONCLUSION

The Board erred when it admitted Petitioners' contention. The contention as proposed by Petitioners lacks an adequate basis and fails to demonstrate the existence of a genuine dispute of material law or fact, contrary to 10 C.F.R. § 2.309(f). Accordingly, AmerGen respectfully requests that the Commission overturn the Board's decision and deny admission of Petitioners' contention.

Respectfully submitted,



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this 14th day of March 2006

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