

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:)

AmerGen Energy Company, LLC)

(License Renewal for Oyster Creek Nuclear)
Generating Station))
_____)

) Docket No. 50-219

AMERGEN BRIEF OPPOSING CITIZENS' NOTICE OF APPEAL OF LBP-06-11

Donald J. Silverman
Kathryn M. Sutton
Alex S. Polonsky
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004

J. Bradley Fewell
Assistant General Counsel
Exelon Business Services Company
200 Exelon Way
Kennett Square, Pennsylvania 19348

Counsel for AmerGen Energy Company, LLC

April 7, 2006

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of:)	
)	April 7, 2006
AmerGen Energy Company, LLC)	
(License Renewal for Oyster Creek Nuclear)	Docket No. 50-219-LR
Generating Station))	
)	
)	

AMERGEN BRIEF OPPOSING CITIZENS NOTICE OF APPEAL OF LBP-06-11

INTRODUCTION

Six environmental groups¹—who now collectively refer to themselves as “Citizens”—filed a Petition to Intervene in this license renewal proceeding for the Oyster Creek Nuclear Generating Station (“OCNGS”). *See* Request for Hearing and Petition for Leave to Intervene (Nov. 14, 2005) (“Petition to Intervene”). Citizens’ sole contention related to corrosion monitoring of the upper and “sandbed” regions of the Oyster Creek drywell shell. *Id.* In LBP-06-07, the presiding Atomic Safety and Licensing Board (Board) granted standing to Citizens and admitted their sole contention, but limited it to the sandbed region. *See* Memorandum and Order “(Denying New Jersey’s Request for Hearing and Petition to Intervene, and Granting NIRS’ Request for Hearing and Petition to Intervene)” (Feb. 27, 2006).

¹ The six groups 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”).

Nearly three months after filing their Petition to Intervene, on February 7, 2006, Citizens filed with the Licensing Board a “Motion for Leave to Add Contentions or Supplement the Basis of the Current Contention” (“Late-Filed Motion”). This Late-Filed Motion was triggered by a January 31, 2006 public telephone conference call hosted by the NRC Staff, the subject of which was proposed Interim Staff Guidance (“ISG”) regarding the generic consideration of drywell shell corrosion in Mark I containments. Petitioners erroneously characterized the generic discussions regarding the proposed ISG as constituting new material facts relevant to their pending contention in the Oyster Creek license renewal proceeding. In LBP-06-11, the Licensing Board denied this Motion in its entirety, concurring with the rationale set forth in both AmerGen’s and the Staff’s oppositions to Citizens’ Late-Filed Motion.

Citizens now impermissibly seek interlocutory review of LBP-06-11. As explained below, their attempt to seek review at this time is blatantly contrary to Commission regulations and precedent. It also wastes the parties’ and the Commission’s resources, as Citizens have simultaneously and impermissibly asked the Licensing Board to “reconsider” LBP-06-11. *See* Motion for Reconsideration of Motion to Add New Contentions or Supplement the Basis of the Current Contention and Leave to File Such a Motion (April 6, 2006). In fact, Citizens rely on the same brief for both their appeal to the Commission and their request to the Board for reconsideration. Such blatant disregard for the Commission’s rules of practice should be summarily rejected.

ARGUMENT

Citizens’ attempt to secure an appeal is rife with deficiencies which render it unsupportable and subject to immediate rejection. Turning first to their purported bases for

appeal, Citizens cite 10 C.F.R. §§ 2.311 and 2.341. Quite simply, neither of these regulations affords Citizens the relief they seek.

As its title states, Section 2.311 is reserved for “interlocutory review of rulings on requests for hearing/petitions to intervene and selection of hearing procedures.” LBP-06-11 is not a ruling on Citizens’ Petition to Intervene, but rather a denial of late-filed contentions. Therefore, Section 2.311 is irrelevant, inapposite, and unavailable as a procedural vehicle for Citizens and their claims.

The other regulation cited by Citizens—Section 2.341—is a similarly deficient basis for Citizens’ “appeal.” First, Commission regulations unambiguously prohibit a party from simultaneously filing an appeal with the Commission and a motion for reconsideration with the presiding Board. *See* 10 C.F.R. § 2.341(b)(6) (“A petition for review will not be granted as to issues raised before the presiding officer on a pending motion for reconsideration”). Yet this is precisely what Citizens have done. The appeal should be rejected for this reason alone.²

Second, looking past these procedural deficiencies, Citizens’ *reason* for seeking interlocutory appeal is wholly inadequate to justify Commission review. Citizens state that they seek appeal “[o]ut of an overabundance of caution, and in order to ensure their rights are preserved.” Citizens Notice of Appeal of LBP-06-11 at 1. This rationale turns a blind eye to the fundamental fairness consideration pursuant to which the Commission “continues[s] to disfavor [interlocutory] appeals, largely due to [its] general unwillingness to engage in ‘piecemeal interference in ongoing Licensing Board proceedings.’” *Exelon Generation Co.* (Early Site Permit for the Clinton ESP Site), CLI-04-31, 60 NRC 461, 465-66 (2004) (*quoting Duke Cogema Stone and Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7,

² We note for the Commission that Citizens are represented by competent counsel and are not proceeding *pro se*.

55 NRC 207, 213 (2002)). That is why the Commission's regulations require that, in the absence of a Board certifying or referring an issue to the Commission:

[a] petition for interlocutory review will be granted *only* if the party demonstrates that the issue for which the party seeks interlocutory review:

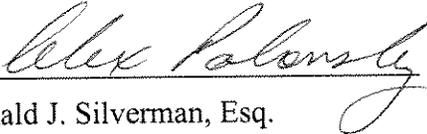
- (i) Threatens the party adversely affected by it with *immediate and serious irreparable impact* which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or
- (ii) Affects the *basic structure* of the proceeding in a *pervasive or unusual manner*.

10 CFR § 2.341(f)(2) (emphasis added). *See also Exelon Generation Co.*, CLI-04-31, 60 NRC at 466. Citizens ignore these standards and allege no immediate and serious irreparable impact from the Board's decision. Nor do they allege a pervasive or unusual change to the basic structure of the proceeding.

Nor can such impact or change even be reasonably inferred from their Notice of Appeal. There is no serious irreparable impact because Citizens can appeal the Board's denial of their late-filed contentions at the conclusion of the proceeding. Similarly, "[c]laims that a board has wrongly rejected a contention . . . are commonplace; such claims cannot be said to affect a proceeding's 'basic structure.'" *Exelon Generation Co.*, CLI-04-31, 60 NRC at 467. Although the Commission may accept interlocutory review "as an exercise of [its] inherent supervisory authority over agency adjudicatory proceedings" (*Duke Energy Corp. (Catawaba Nuclear Station, Units 1 and 2)*, CLI-04-21, 60 NRC 21, 27 (2004)), a "Board's routine ruling on contention admissibility provides no occasion for [the Commission] to invoke" that authority (*Exelon Generation Co.*, CLI-04-31, 60 NRC at 466).

Thus, Citizens' rationale for their appeal is wholly inadequate. It appears that Citizens simply are seeking to preserve some undefined, unsupported right to appeal. They are expressly prohibited from doing under Sections 2.311 and 2.341. Such legally-deficient action is wasteful of NRC and party resources, and thus, Citizens' appeal should be summarily rejected.

Respectfully submitted,



Donald J. Silverman, Esq.
Kathryn M. Sutton, Esq.
Alex S. Polonsky, Esq.
MORGAN, LEWIS & BOCKIUS, LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004
Phone: (202) 739-5502
E-mail: dsilverman@morganlewis.com
E-mail: ksutton@morganlewis.com
E-mail: apolonsky@morganlewis.com

J. Bradley Fewell
Assistant General Counsel
Exelon Business Services Company
200 Exelon Way
Kennett Square, Pennsylvania 19348
Phone: (610) 765-5580
E-mail: Bradley.Fewell@exeloncorp.com

COUNSEL FOR
AMERGEN ENERGY COMPANY, LLC

Dated in Washington, D.C.
this 7th day of April 2006

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of:)	
)	April 7, 2006
AmerGen Energy Company, LLC)	
(License Renewal for Oyster Creek Nuclear)	Docket No. 50-219
Generating Station))	
)	
)	

CERTIFICATE OF SERVICE

I hereby certify that copies of AmerGen's Brief Opposing Citizens' Notice of Appeal of LBP-06-11 were served this day upon the persons listed below, by E-mail and first class mail, unless otherwise noted.

Secretary of the Commission*
U.S. Nuclear Regulatory Commission
Attn: Rulemakings and Adjudications Staff
One White Flint North
11555 Rockville Pike
Rockville, Maryland 20852-2738
(E-mail: HEARINGDOCKET@nrc.gov)

Administrative Judge
E. Roy Hawkens, Chair
Atomic Safety and Licensing Board Panel
Mail Stop – T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(E-mail: erh@nrc.gov)

Administrative Judge
Paul B. Abramson
Atomic Safety and Licensing Board Panel
Mail Stop – T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(E-mail pba@nrc.gov)

Administrative Judge
Anthony J. Baratta
Atomic Safety and Licensing Board Panel
Mail Stop – T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(E-mail: ajb5@nrc.gov)

John A. Covino
Ellen Barney Balint
Valerie Anne Gray
Caroline Stahl
Division of Law
Environmental Permitting and Counseling Section
P.O. Box 093
Hughes Justice Complex
Trenton, NJ 08625
(E-mail: john.covino@dol.lps.state.nj.us)
(E-mail: Ellen.Balint@lps.state.nj.us)
(E-mail: Valerie.Gray@dol.lps.state.nj.us)
(E-mail: Caroline.Stahl@lps.state.nj.us)

Suzanne Leta
NJPIRG
11 N. Willow Street
Trenton, NJ 08608
(E-mail: sleta@njpirg.org)

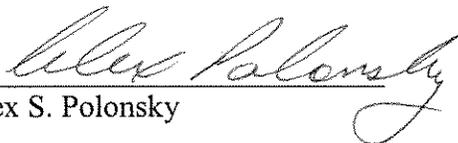
Ann P. Hodgdon
Office of the General Counsel, 0-15D21
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
(E-mail: aph@nrc.gov)

Office of Commission Appellate
Adjudication**
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Richard Webster
Rutgers Environmental Law Clinic
123 Washington Street
Newark, NJ 07102-5695
(E-mail: rwebster@kinoy.rutgers.edu)

Paul Gunter
Nuclear Information and Resource Service
1424 16th Street, NW
Suite 404
Washington, DC 20036
(E-mail: pgunter@nirs.org)

* Original and 2 copies
** First Class Mail only


Alex S. Polonsky