

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS

Dale E. Klein, Chairman
Gregory B. Jaczko
Peter B. Lyons
Kristine L. Svinicki

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

CLI-08-13

MEMORANDUM AND ORDER

This Memorandum and Order responds to a stay motion filed by Nuclear Information and Resources 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 (together, Citizens) on April 11, 2008.¹ We deny the request for several reasons. First, the Motion is moot in part, because Citizens requested that the proceeding be held open pending its decision to file a new contention, and Citizens have now filed such a contention (along with a motion to reopen). The Motion also fails to meet the standard for either a stay of this adjudicatory proceeding or to stay issuance of a renewed license.

¹ Motion by Nuclear Information and Resources 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 to Stay License Renewal Proceedings for Oyster Creek Nuclear Power Plant Pending Resolution of the Significant New Issue Notified by Staff (Apr. 11, 2008) (Motion).

I. BACKGROUND

Citizens' Motion comes many months after the record closed in the proceeding before the Board.² AmerGen Energy Company, LLC (AmerGen) filed its license renewal application in July 2005. Citizens intervened in the proceeding at the outset, and was granted a hearing on a single contention concerning the drywell liner.³ After a September, 2007, evidentiary hearing on the sole contested issue, the Board issued an Initial Decision in AmerGen's favor.⁴ The Commission is considering Citizens' petition for review.⁵

On April 3, 2008, the NRC Staff notified the Commission, the Board, and the parties that it had recently become aware of a question concerning the conservatism of a calculation used by several license renewal applicants — including AmerGen — to determine the effects of metal fatigue on certain reactor components.⁶ The Staff stated that it intended to ask AmerGen to submit a confirmatory analysis showing that its metal fatigue calculation remained valid and conservative. On April 29, 2008, the Staff formally issued a request for additional information (RAI), and AmerGen submitted its RAI response on May 1, 2008.⁷ This new information does not pertain to the contested issues addressed in the evidentiary hearing before the Board.

² The record in this proceeding closed (subject to transcript corrections) at the conclusion of the September 25, 2007, hearing. See Tr. 878.

³ *AmerGen Energy Co. (Oyster Creek Nuclear Generating Station)*, LBP-06-7, 63 NRC 188 (2006).

⁴ *AmerGen Energy Co. (Oyster Creek Nuclear Generating Station)*, LBP-07-17, 66 NRC 327 (2007).

⁵ Citizens' Petition for Review of LBP-07-17 and Interlocutory Decisions in the Oyster Creek Proceeding (Jan. 14, 2008).

⁶ Memorandum from Samson S. Lee to Commissioners, Board and parties, "Notification of Information in the Matter of Oyster Creek Nuclear Generating Station License Renewal Application" (Apr. 3, 2008) (ADAMS accession number ML080940688).

⁷ Letter from Alex S. Polonsky to Dale E. Klein notifying Commission of AmerGen's filing enclosed RAI response on metal fatigue analysis (May 1, 2008) (ADAMS accession number ML081290455).

Following the notification, Citizens asked that the Commission stay “its final decision ... until the Staff has resolved the metal fatigue issue and Citizens have had a reasonable opportunity to request a hearing on the issue.”⁸

II. DISCUSSION

A. Insofar as the Motion Requests Time to File a New Contention, it is Moot.

The stay motion requested the Commission to refrain from making a final decision on the issuance of a renewed license until the Staff had completed its review of the confirmatory analysis and Citizens had had “a reasonable time to review the confirmatory analysis and decide whether to move to add a new contention in this proceeding.”⁹ But Citizens have now filed their Motion to Reopen the Record and Admit New Contention.¹⁰ We referred the Motion to Reopen, together with associated pleadings related to the same motion, to the Licensing Board.¹¹ Insofar as the Motion requests a stay of the adjudicatory proceeding to allow Citizens time to file a motion to reopen the record and submit a new contention, it is moot and no stay is necessary.

B. Citizens Have Not Met Standards to Support Stay With Respect to Issuance of a Renewed License

Citizens have not demonstrated that a stay of a final license renewal decision is

⁸ Motion at 11.

⁹ Motion at 2.

¹⁰ Motion 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 to Reopen the Record and for Leave to File a new Contention, and Petition to Add a New Contention (Apr. 18, 2008)(Motion to Reopen).

¹¹ Order of the Secretary of the Commission (May 9, 2008) (unpublished). In its motion, Citizens requested the Commission order AmerGen to forward a non-proprietary version of the metal fatigue analysis to the parties in this proceeding. The applicant has since provided its RAI response. To the extent that this request remains unaddressed, the issue should be resolved by the Board in connection with the Motion to Reopen. *Id.*

necessary to prevent them from suffering immediate and irreparable harm. Commission rules of procedure do not provide for a motion to stay issuance of a license while proceedings are pending before the Board. In practice, however, we have held that a motion to stay issuance of a license might be granted where the factors usually considered in granting emergency injunctive relief are satisfied.¹² These standards are set forth in our rule allowing a motion to stay the effect of a Board decision pending appeal.¹³ The moving party must show that four factors weigh in its favor: “likelihood of success on the merits, irreparable harm, absence of harm to others, and the public interest.”¹⁴ The first two factors are the most important.¹⁵ If a movant cannot show irreparable harm, it must make an “overwhelming showing that it is likely to succeed on the merits.”¹⁶

Citizens do not address the four stay factors in their Motion, which is reason enough to deny it.¹⁷ In any event, application of the factors to the facts in this case does not weigh in Citizens’ favor. First, there is no threat of immediate and irreparable harm to Citizens, because the issuance of Oyster Creek’s license renewal is not imminent. The Staff has not completed its review of the metal fatigue issue. And the Staff has not requested our authorization to issue the

¹² *Entergy Nuclear Vermont Yankee and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237 n.4 (2006).

¹³ 10 C.F.R. § 2.342(e).

¹⁴ *Vermont Yankee Nuclear Power Station*, CLI-06-8, 63 NRC at 237.

¹⁵ *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6-8 (1994).

¹⁶ *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-98-5, 47 NRC 119, 120 (1998), *citing Kerr-McGee Chemical Corp.* (West Chicago Rare Earth Facility), ALAB-928, 31 NRC 263, 269 (1990).

¹⁷ See *State of Illinois* (Amendment No. 1 to Section 274 Agreement Between NRC and Illinois), CLI-90-11, 32 NRC 333, 334 (1990).

license renewal.¹⁸ In that respect, the motion for a stay is premature.¹⁹ In any case, Citizens would not be irreparably harmed even if the license were at the point of issuance. A license renewal may be set aside (or appropriately conditioned) even after it has been issued, upon subsequent administrative or judicial review.²⁰

Absent a showing of irreparable harm, the movant must show that success on the merits is a virtual certainty.²¹ Citizens, however, have not shown a likelihood of success on the merits. AmerGen had not yet submitted its confirmatory analysis at the time Citizens filed its motion for stay. AmerGen has now responded to the Staff's RAI. Citizens' Motion to Reopen is pending before the Board. At this preliminary stage, prior to the admission of any late-filed contention, we do not yet know whether there is a disputed issue for hearing, let alone whether there is a basis for concluding that Citizens would prevail on the merits of any such issue. Therefore, this important factor does not favor Citizens' request.

Citizens' failure to show irreparable harm or a likelihood of success on the merits makes it unnecessary to consider the remaining stay factors: balance of harms and the public interest. Here, we are confident that the review of the metal fatigue issue that the NRC Staff initiated will result in a full consideration of the issue and appropriate licensing action once all the facts are known and reviewed. As we indicated above, Citizens have filed their own late-filed contention

¹⁸ In accordance with established practice, the Staff will issue a renewed license in contested proceedings only after notice to and authorization by the Commission. See, e.g., Memorandum from Annette Vietti-Cook, Secretary, to William D. Travers, Executive Director of Operations re: Staff Requirements – SECY 02-0088 – Turkey Point Nuclear Plant, Units 3 and 4, Renewal of Full-Power Operating Licenses (June 5, 2002).

¹⁹ See *Entergy Nuclear Vermont Yankee* (Vermont Yankee Nuclear Power Station), CLI-07-3, 65 NRC 13, 22 & n.37 (2007).

²⁰ See 10 C.F.R. § 54.27(c); cf. *Vermont Yankee*, CLI-06-8, 63 NRC at 238.

²¹ *Nuclear Fuel Services, Inc.* (Erwin, Tennessee), LBP-04-2, 59 NRC 77, 80 (2004), citing *Sequoia Fuels*, CLI-94-9, 40 NRC at 7.

on metal fatigue and we have referred it to the Board. There is no reason for a stay or for other Commission action related to metal fatigue at this time.

C. No Need to Stay Proceedings Pending Resolution of Court Appeal

As an additional ground for staying the issuance of a final decision on renewing Oyster Creek's license, Citizens urge us to wait until the U.S. Court of Appeals for the Second Circuit decides a pending lawsuit challenging a 2006 NRC rulemaking decision relating to license renewal.²² In the challenged decision, the NRC denied a rulemaking petition²³ that sought to expand the scope of issues reviewed in a license renewal application. Two of the organizations making up the Citizens group – New Jersey Sierra Club and New Jersey Environmental Federation – have sought judicial review of that denial in the Second Circuit.²⁴

Again, considering a stay at this time is premature. There is currently a Motion to reopen the record in this proceeding before the Board and for leave to file a new contention. In accordance with established practice, the Staff will issue a renewed license in contested proceedings only after notice to and authorization by the Commission.²⁵ Without imminent issuance of Oyster Creek's license renewal, there is no threat of immediate and irreparable harm to Citizens. Nor has Citizens demonstrated a likelihood of success on the merits. As mentioned above, absent a demonstration of irreparable harm or likelihood of success on the merits, the Commission finds no basis upon which to grant a stay at this time.

²² Denials of Petition for Rulemaking, 71 Fed. Reg. 74,848 (Dec. 13, 2006).

²³ 10 C.F.R. § 2.802 provides a procedure whereby interested parties may ask the Commission to "issue, rescind or amend" a regulation.

²⁴ *Spano v. NRC*, Nos. 07-0324 & 07-1276 (2d Cir.).

²⁵ See *supra* note 18.

III. CONCLUSION

For the foregoing reasons, the Motion is denied.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, MD
This 17th day of June, 2008