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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
E. Roy Hawkins, Chair
Dr. Paul B. Abramson
Dr. Anthony J. Baratta

In the Matter of:	)	December 12, 2005
AmerGen Energy Company, LLC	)	Docket No. 50-219
(License Renewal for Oyster Creek Nuclear Generating Station)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the following documents were served this day upon the persons listed below, by E-mail and first class mail:

1. AmerGen's Answer Opposing NJDEP's Request for Hearing and Petition to Intervene;

2. AmerGen's Answer Opposing NIRS et al. Request for Hearing and Petition to Intervene; and

3. Notices of Appearance of Donald J. Silverman, Kathryn M. Sutton, Alex S. Polonsky, and J. Bradley Fewell.

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SECY-02

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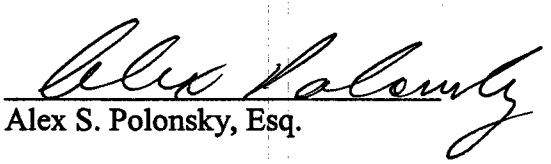

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In the Matter of:	December 12, 2005
AmerGen Energy Company, LLC	Docket No. 50-219
(License Renewal for Oyster Creek Nuclear Generating Station)	

AMERGEN'S ANSWER OPPOSING NJDEP'S REQUEST FOR HEARING AND PETITION TO INTERVENE

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.309(h), AmerGen Energy Company, LLC ("AmerGen"), licensee in the above-captioned matter, hereby files its Answer to the "Request for Hearing and Petition for Leave to Intervene" ("Petition") filed on November 14, 2005 by the State of New Jersey Department of Environmental Protection ("NJDEP"). The Petition responds to the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") "Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing," published in the *Federal Register* on September 15, 2005 (70 Fed. Reg. 54,585) ("Hearing Notice") concerning AmerGen's application to renew the

Oyster Creek Nuclear Generating Station ("OCNGS") operating license.[1] As discussed below, the Petitioner has not satisfied the Commission's requirements to intervene in this matter, having failed to proffer at least one admissible contention. Therefore, pursuant to 10 C.F.R. § 2.309, the Petition should be denied.[2]

II. BACKGROUND

On July 22, 2005, AmerGen submitted an application to the NRC to renew the OCNGS operating license (License No. DPR-16) for an additional 20 years ("Application"). 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 in the proceeding 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. at 54,585 (Sept. 15, 2005). This proceeding will be conducted in accordance with the informal hearing procedures in 10 C.F.R. Part 2, Subpart L.

In response to the Hearing Notice, NJDEP apparently faxed its Petition to the NRC Office of the Secretary after the close of business on November 14, 2005. NJDEP did not serve a copy of its Petition on counsel for AmerGen, as is required by both the Hearing Notice (70 Fed. Reg. at 54,586) and the Commission's Rules of Practice

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1 Both the Commission's Hearing Notice and the Order Establishing the Licensing Board for this proceeding identify the applicant as the "American Energy Company LLC." The correct name of the Applicant is "AmerGen Energy Company, LLC."

2 Even if the Petition is denied, NJDEP could request participation in any hearing on the Application as an "interested State" under 10 C.F.R. § 2.315.

(10 C.F.R. § 2.302(b)). Nevertheless, AmerGen has filed this Answer within the time period allowed under 10 C.F.R. §§ 2.309(h)(1) and 2.306.[3]

To be admitted as a party to this proceeding, NJDEP must submit at least one admissible contention related to the Application. NJDEP is not required to address the Commission's requirements for legal standing because OCNGS is located within its boundaries. 10 C.F.R. § 2.309(d)(2). The following section of this Answer first discusses the standards governing the admissibility of proposed contentions, and then demonstrates why NJDEP has failed to identify a single admissible contention.

III. NJDEP'S PROPOSED CONTENTIONS ARE INADMISSIBLE

A. Applicable Legal Standards

1. NJDEP Must Submit At Least One Admissible Contention With An Adequate Basis

To intervene in an NRC licensing proceeding, a petitioner 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).

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[3] In addition to the instant Petition, six organizations jointly filed with the NRC an additional Request for Hearing and Petition to Intervene in response to the Hearing Notice. This Answer only responds to NJDEP's Petition. AmerGen is filing with the NRC a separate Answer opposing the Request for Hearing filed by the six organizations. *See* AmerGen's Answer Opposing NIRS et al. Request For Hearing And Petition To Intervene (Dec. 12, 2005).

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). Finally, "Government entities seeking to litigate their own contentions are held to the same pleading rules as everyone else." *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, slip op. at 18 (Oct. 26, 2005).

2. Proposed Contentions Must Satisfy the Requirements of 10 C.F.R. § 2.309 to be Admissible

Section 2.309(f)(1) requires a petitioner to "set forth with particularity the contentions sought to be raised," and with respect to each contention proffered, address six criteria, discussed in detail below. A contention that fails to meet any one of these requirements must be dismissed. *Id.* at 17-18.

The Commission has described the agency's contention standard, now found in Section 2.309(f), as "strict by design."[4] This strict rule serves several purposes:

> First, it focuses the hearing process on real disputes susceptible of resolution in an adjudication. For example, a petitioner may not demand an adjudicatory hearing to attack generic NRC requirements or regulations, or to express generalized grievances about NRC policies. Second, the rule's requirement of detailed pleadings puts other parties in the proceeding on notice of the Petitioners' specific grievances and thus gives them a good idea of the claims they will be either supporting or opposing. Finally,

[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.

> the rule helps to assure that full adjudicatory hearings are triggered only by those able to proffer at least some minimal factual and legal foundation in support of their contentions.

Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 NRC 328, 334 (1999) (citations omitted); *see also Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001). Sections (a) through (f) below summarize the requirements of Section 2.309(f)(1) as they have been further developed by NRC case law.

a. NJDEP Must Specifically State the Issue of Law or Fact to Be Raised

Section 2.309(f)(1)(i) requires that petitioners "provide a specific statement of the issue of law or fact to be raised or controverted." The Commission has held that this criterion imposes upon the petitioner the burden to "'articulate at the outset the specific issues they wish to litigate as a prerequisite to gaining formal admission as parties.'" *Dominion Nuclear Conn., Inc.*, CLI-01-24, 54 NRC at 359 (quoting *Duke Energy Corp.*, CLI-99-11, 49 NRC at 388).

b. NJDEP Must Briefly Explain the Basis for the Contention

Pursuant to Section 2.309(f)(1)(ii), a petitioner also 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 3, 19-20 (2001).

c. Contentions Must Be Within the Scope of the Proceeding

In accordance with 10 C.F.R. § 2.309(f)(1)(iii), a petitioner must demonstrate "that the issue raised in the contention is within the scope of the proceeding." The scope

of permissible contentions is bounded by the issues specified in the Notice of Opportunity for Hearing. *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000).

In the case of reactor license renewal proceedings in particular, the Commission has held that "[t]he scope of [such] proceedings is narrow." *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 290 (2002). Under the Atomic Energy Act, a license renewal proceeding is limited to "a review of the plant structures and components that will require an aging management review for the period of the extended operation and the plant's systems, structures and components that are subject to an evaluation of time-limited aging analyses." *Id.* (citations omitted). In addition, under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, the scope of a license renewal proceeding is limited to the issues specified in 10 C.F.R. §§ 51.71(d) and 51.95(c):

> We likewise specifically limited the proceeding's scope under [NEPA] to issues specified in 10 CFR §§ 51.71(d) and 51.95(c) (identifying which environmental issues are exempt from consideration in the Staff's site-specific environmental impact statement). Our regulations divide environmental review for such applications into generic ("Category 1") and plant-specific ("Category 2") components, based on an extensive study of potential environmental consequences of operating a nuclear power plant for an additional 20 years. Under our regulations, applicants must include in their environmental reports analyses of the plant-specific Category 2 issues only (e.g., impact of extended operation on endangered or threatened species); they are generally not required to provide analyses of Category 1 issues (e.g., impacts from principal noise sources). However, the applicant must provide additional analysis of even a Category 1 issue if new and significant information has surfaced that may bear on the applicability of the Category 1 finding at the plant that is the subject of the application.

Id. (citations omitted). A contention that raises matters that are not within this scope cannot be admitted. *See, e.g., Dominion Nuclear Conn., Inc.,* CLI-05-24, slip op. at 22; *Portland Gen. Elec. Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n.6 (1979); *see also Public Serv. Co. of Ind., Inc.* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976).

d. Contentions Must Raise a Material Issue

A petitioner also must 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." 10 C.F.R. § 2.309(f)(1)(iv). As the Commission has observed, "[t]he dispute at issue is 'material' if its resolution would 'make a difference in the outcome of the licensing proceeding.'" *Duke Energy Corp.*, CLI-99-11, 49 NRC at 333-34; *see also Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process*, 54 Fed. Reg. 33,168, 33,172 (Aug. 11, 1989). In this regard, "[e]ach contention must be one that, if proven, would entitle the petitioner to relief." *USEC, Inc.* (American Centrifuge Plant), CLI-04-30, 69 Fed. Reg. 61,411, 61,412 (Oct. 18, 2004). In addition, contentions alleging a deficiency or error in an application also must "indicate some significant link between the claimed deficiency and either the health and safety of the public or the environment." *Louisiana Energy Svcs., L.P.* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 56 (2004), *aff'd in part by* CLI-04-25, 60 NRC 223 (2004).

e. Contentions Must Be Supported by Facts or Expert Opinions

A petitioner also must provide "a concise statement of the alleged facts or expert opinions which support the []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 petitioner intends to rely to support its position on the issue." 10 C.F.R. § 2.309(f)(1)(v). A contention "will be ruled inadmissible if the petitioner 'has offered no tangible information, no experts, no substantive affidavits, but instead only 'bare assertions and speculation.'" *Fansteel, Inc.* (Muskogee, Oklahoma, Site), CLI-03-13, 58 NRC 195, 203 (2003) (quoting *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 208 (2000)). "[V]ague, unparticularized issues" (*Pacific Gas and Elec. Co.* (Diablo Canyon Power Plant, Units 1 and 2), CLI-03-2, 57 NRC 19, 27 (2003)) and "open-ended or ill-defined contentions lacking in specificity or basis" (*Dominion Nuclear Conn., Inc.*, CLI-01-24, 54 NRC at 359) are not admissible.

As the Commission has observed, a petitioner "must do more than submit 'bald or conclusory allegation[s]' of a dispute with the applicant." *Id.* at 358 (quoting 54 Fed. Reg. at 33,171). If a petitioner fails to provide the requisite support for its contentions, then a Licensing Board may neither make factual assumptions that favor the petitioner, nor supply information that is lacking. *Louisiana Energy Svcs., L.P.*, LBP-04-14, 60 NRC at 56 (citing *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001)).

f. 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 explains:

> [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).

If the petitioner does not believe that the application adequately addresses a relevant issue, then the petitioner is required to explain why the application is deficient. *Florida Power & Light Co.*, CLI-01-17, 54 NRC at 16. Additionally, in such cases, the petitioner must provide "supporting grounds" for its contention that the application must, but does not, consider some information required by law. *Id.* Furthermore, a contention that does not directly controvert a position taken in the application is subject to dismissal, as is a contention that mistakenly asserts that the application fails to address a relevant issue. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181 (1998); *Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993), *review declined*, CLI-94-2, 39 NRC 91 (1994); *Texas Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992).

3. Contentions May Not Challenge NRC Rules and Regulations

Finally, an adjudicatory proceeding is not the proper forum for challenging the validity of previously-issued NRC rules and regulations. 10 C.F.R. § 2.335 (2005); *Florida Power & Light Co.*, CLI-01-17, 54 NRC at 16; *Yankee Atomic Elec. Co.*, CLI-96-7, 43 NRC 235, 252 (1996). The NRC will reject as inadmissible any contention that attacks applicable statutory requirements or Commission regulations (*Private Fuel Storage*, CLI-04-22, 60 NRC at 129), as well as any contention that seeks to impose stricter requirements than those set forth by the regulations. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-87-12, 26 NRC 383, 395 (1987).

B. NJDEP's Proposed Contentions Are Not Admissible

NJDEP has proposed the following three contentions in its Petition:

Contention 1. "Severe Accident Management Alternatives";

Contention 2. "Metal Fatigue"; and

Contention 3. "Combustion Turbine."

Each of these contentions either lacks an adequate basis, fails to raise a material dispute of law or fact, is not supported by sufficient facts or expert opinions, misinterprets or impermissibly challenges NRC regulations, or raises issues that are outside the scope of a license renewal proceeding. Because none of the contentions is admissible, the Petition must be rejected.

1. Contention 1. "Severe Accident Management Alternatives"

a. The Contention and Its Basis

Contention 1 is based on NEPA and challenges the scope and adequacy of AmerGen's analysis of severe accident mitigation alternatives ("SAMAs") in the

Application.[5] Petition at 1.[6] In particular, NJDEP alleges that the SAMA analysis in the Application does not include a plant-specific analysis of the Design Basis Threat ("DBT"), "including aircraft impacts and spent fuel pool vulnerability," and that "Interim Compensatory Measures" established by the Commission after the events of September 11, 2001 are not adequate for the renewed license term. Petition at 1-3. NJDEP alleges that Section 102 of NEPA (and 10 C.F.R. § 51.53(c)(3)(ii)(L) which implements NEPA in part) requires these analyses and measures. Accordingly, NJDEP does not challenge the detailed SAMA analysis that AmerGen included in the Application, but instead argues that the analysis improperly omits consideration of aircraft attacks, spent fuel pool-related events, and "long-term" compensatory measures. Petition at 1-4.

Finally, NJDEP requests "that information related to the specific design of Oyster Creek and its ability to withstand aircraft attacks, as well as the specific vulnerability of the spent fuel pool be made available to agency officials with sufficient clearance." Petition at 4.

b. Contention 1 Fails to Identify Any Genuine Dispute of Material Fact or Law, Raises Matters Outside the Scope of the Proceeding, and is an Impermissible Challenge to NRC Regulations

NJDEP quotes 10 C.F.R. § 51.53(c)(3)(ii)(L) as part of the basis for its contention. That provision states:

> If the staff has not previously considered severe accident mitigation alternatives [SAMAs] for the applicant's plant in an environmental impact statement or related supplement

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[5] The Petition refers to "management" alternatives, but it is clear from the contention that NJDEP is referring to "mitigation" alternatives.

[6] The Petition has a cover letter and nine unnumbered pages of contentions. AmerGen's citations to the pages of the Petition begin with the nine pages of contentions.

> or in an environmental assessment, a consideration of alternatives to mitigate severe accidents must be provided.

Since the NRC Staff had not previously considered SAMAs in conjunction with the original licensing of OCNGS, AmerGen is required, and has indeed provided, the analysis called for in the above-referenced regulation. In Appendix F to AmerGen's Environmental Report ("ER") which was submitted as part of its Application, AmerGen provided a detailed, 280 page, site-specific analysis of alternatives to mitigate severe accidents. Appendix F identifies external and internal initiating events and then considers 138 mitigating alternatives. *See also* ER § 4.20. Through this extensive discussion, AmerGen has complied with 10 C.F.R. § 51.53(c)(3)(ii)(L). NJDEP has not objected to any of the details of that analysis, nor demonstrated how the analysis fails to meet regulatory requirements.

Aircraft Attacks. NJDEP argues, however, that a "specific analysis of the expected performance of the Oyster Creek design" as a result of the "[a]ircraft attack scenario" was omitted from AmerGen's SAMA analysis and must be provided. Petition at 2. There is no factual dispute as to whether AmerGen's SAMA analysis addressed the impacts of potential aircraft attacks on the facility. It did not, and as discussed below, there is no requirement for it to do so. Thus, NJDEP's contention regarding aircraft attacks raises no genuine dispute of material law or fact.

This aspect of NJDEP's contention also is beyond the scope of this proceeding. In four separate NRC licensing proceedings, the Commission has unambiguously ruled that the effects of terrorist attacks need not be considered under NEPA. *See Private Fuel Storage, L.L.C.* (Independent Fuel Storage Installation), CLI-02-25, 56 NRC 340 (2002); *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-02-27, 56

NRC 367 (2002); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-24, 56 NRC 335 (2002); *Duke Power Corp.* (McGuire Nuclear Station, Units 1 and 2), CLI-02-26, 56 NRC 358, 365 (2002). As the Commission stated:

> In our view, an [Environmental Impact Statement] is not an appropriate format to address the challenges of terrorism. The purpose of an EIS is to inform the decisionmaking agency and the public of a broad range of environmental impacts that will result, with a fair degree of likelihood, from a proposed project, rather than to speculate about "worst-case" scenarios and how to prevent them.

Private Fuel Storage, L.L.C., CLI-02-25, 56 NRC at 347.

Indeed, with respect to license renewal proceedings in particular, the Commission has ruled that contentions related to terrorism need not be considered under NEPA. As the Commission stated in the *McGuire* case: "NEPA imposes no legal duty on the NRC to consider intentional malevolent acts, such as the [September 11, 2001, terrorist attacks], on a case-by-case basis in conjunction with commercial power reactor license renewal applications." *Duke Power Corp.*, CLI-02-26, 56 NRC at 358.[7]

The Commission has further explained that "[s]ecurity issues at nuclear power reactors, while vital, are simply not among the aging-related questions at stake in a license renewal proceeding" (*Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 638 (2004)); that terrorism contentions "are, by their very nature, directly related to security and are, therefore, under our rules,

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7 Before and since the terrorist attacks of September 11, 2001, the NRC directed operators of nuclear power plants—including AmerGen—to secure their plant sites and to protect security-related information. AmerGen has implemented these directives, including appropriate responses to the revised DBT. These directives and AmerGen's implementation of them, including "compensatory measures," however, are not within the scope of the environmental analyses required for license renewal.

unrelated to 'the detrimental effects of aging'" (*Duke Power Corp.*, CLI-02-26, 56 NRC at 364); and that these types of contentions "are beyond the scope of, not 'material' to, and inadmissible in a license renewal proceeding." *Id.* Thus, to the extent that NJDEP is asserting that AmerGen's SAMA analysis must address the impacts of terrorist attacks under NEPA and 10 C.F.R. Part 51, its request is outside the scope of this proceeding.[8]

Spent Fuel Pool Vulnerability. NJDEP then goes on to assert that the AmerGen SAMA analysis must consider "spent fuel pool vulnerability" from the DBT, and that "design basis accidents for spent fuel pools" also must be considered in the SAMA analysis. Petition at 1, 2-3. To the extent that NJDEP is asserting that AmerGen is required to evaluate the impacts of terrorist attacks on the OCNGS spent fuel pool, for the reasons described above, its contention again raises no genuine dispute of material law or fact, and raises matters beyond the scope of this proceeding.

As for NJDEP's assertion that design basis *accident* impacts on the spent fuel pool also must be considered, its contention constitutes an impermissible challenge to NRC regulations. Those regulations specifically provide that AmerGen need not include an assessment of the environmental impacts of spent fuel pool storage in its ER. Section 51.53(c)(3)(i) specifies that "[t]he environmental report for the operating license renewal stage is not required to contain analyses of the environmental impacts of the license renewal issues identified as Category 1 issues [*i.e.*, "small" impacts] in Appendix B to subpart A of this part."

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[8] Even if Contention 1 is construed as a safety concern, it is also outside the scope of this license renewal proceeding because it does not address age-related degradation. Under the Atomic Energy Act, a license renewal proceeding is limited to "a review of the plant structures and components that will require an aging management review for the period of extended operation and the plant's systems, structures and components that are subject to an evaluation of time-limited aging analysis." *Duke Energy Corp.*, CLI-02-14, 55 NRC at 290.

Appendix B to 10 C.F.R. Part 51 provides the results of the Commission's generic analysis of the environmental impacts associated with granting a renewed nuclear plant operating license. Table B-1 of Appendix B summarizes the Commission's findings on the scope and magnitude of those environmental impacts, and designates "On-site spent fuel" and "Uranium Fuel Cycle and Waste Management" as Category 1 issues. Thus, NJDEP's assertion that AmerGen's SAMA analysis must address spent fuel pool accidents under NEPA and 10 C.F.R. Part 51 constitutes an impermissible challenge to NRC regulations. Indeed, NJDEP itself seems to recognize this when it states that "[w]hile traditional analysis for SAMA includes accidents that lead to core melt, it does not look at design basis accidents for spent fuel pools." Petition at 3.

Long-Term Compensatory Measures. NJDEP next claims that AmerGen must implement "long-term," as opposed to "interim compensatory measures" to address the new DBT imposed by the Commission. *Id.* at 3. The Commission has issued orders requiring nuclear power plant licensees, including AmerGen, to implement interim compensatory measures to address the revised DBT. *See* All Operating Power Reactor Licensees; Order, Modifying License (Effective Immediately), EA03-086, (68 Fed. Reg. 24,517) (May 7, 2003). It also has initiated a rulemaking to codify those updated security requirements. Proposed Rule; Design Basis Threat, 70 Fed. Reg. 67,380 (Nov. 7, 2005). The Commission has stated that "[i]t has long been agency policy that Licensing Boards 'should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission.'" *Duke Energy Corp.*, CLI-99-11, 49 NRC at 345 (quoting *Potomac Elec. Power Co.* (Douglas Point Nuclear

Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974)). NJDEP's concern is properly addressed in that rulemaking, not in this licensing proceeding.

After alleging that AmerGen is required to consider the impacts of aircraft attacks, potential spent fuel pool vulnerabilities, and long term security-related compensatory measures, NJDEP requests that certain specific security-related information be made available to NJDEP "officials with sufficient clearance." Petition at 4. In particular, it seeks access to non-public "information related to the specific design of Oyster Creek and its ability to withstand aircraft attacks, as well as the specific vulnerability of the spent fuel pool." *Id.* NJDEP's request for access to non-public information does not constitute an admissible contention. It does not identify any error or omission in AmerGen's Application or any noncompliance with applicable NRC requirements. Instead, all it does is seek access to information that has been protected for security reasons. As such, it does not raise a valid contention.

Furthermore, NJDEP had the opportunity to seek access to such information but failed to do so. The NRC's September 15, 2005 Hearing Notice provided specific advice to the public about how to access such non-public information. The Hearing Notice provided that:

> To the extent that the application contains attachments and supporting documents that are not publicly available because they are asserted to contain safeguards or proprietary information, petitioners desiring access to this information should contact the applicant or applicant's counsel to discuss the need for a protection order.

70 Fed. Reg. at 54,586, n.1. NJDEP did not request this information from AmerGen during that 60-day period, nor does NJDEP in its Petition explain why it could not have sought the information during that period of time. Its request is now, therefore, late and

should be denied. The fact that it is a state agency, as opposed to a private intervenor, that is requesting this information is not significant. As the Commission recently reiterated, "Government entities seeking to litigate their own contentions are held to the same pleading rules as everyone else." *Dominion Nuclear Conn., Inc.,* CLI-05-24, slip op. at 18.

In any event, NJDEP does not need access to this information to clarify or otherwise amend its SAMA contention. As stated above, NJDEP's contention is outside the scope of this proceeding. That conclusion would not change even if NJDEP were given access to non-public security information, which the NRC has classified as "safeguards" information.

The NRC also need not prepare a summary of the information to be made available to the public, as NJDEP suggests. As the Commission explained only two months ago when it vacated a Board's Redaction Order, the Commission need not balance public interest against protection of safeguards information:

> To provide guidance for the future, we remind our licensing boards that section 147 of the Atomic Energy Act gives NRC authority over protecting safeguards information from unauthorized disclosure. The protection of safeguards information, where warranted, is absolute; there is no balancing of the government's duty to protect safeguards information against the public interest in disclosure.

Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), CLI-05-22, slip op. at 3 (Oct. 19, 2005) (citations omitted).

In short, NJDEP's SAMA contention fails to meet the Commission's standards for admissibility set forth in 10 C.F.R. § 2.309. It raises no genuine dispute of material law or fact, ignores multiple Commission precedents regarding consideration of the

impacts of terrorism under NEPA, raises matters outside the scope of the proceeding, constitutes a challenge to NRC regulations, and improperly addresses matters that are the subject of ongoing rulemakings. As a result, Contention 1 must be dismissed.

2. Contention 2. "Metal Fatigue"

a. The Contention and Its Basis

Contention 2 alleges that, contrary to 10 C.F.R. §§ 50.55a(c)(4) and 54.21(a)(3), AmerGen's use of a cumulative usage factor ("CUF")[2] of 1.0 for evaluation of metal fatigue is outside the OCNGS Current Licensing Basis ("CLB"). In particular, it alleges that because AmerGen did not utilize the 0.8 CUF "specified by the [ASME] Code Edition and Addenda that were required by Commission regulations *at the time of issuance of the Construction permit*," AmerGen has exceeded the OCNGS CLB. Petition at 4-5 (emphasis added). In essence, NJDEP believes that AmerGen must apply the edition of the ASME Code that was required at the time the NRC issued the OCNGS construction permit in December 1964, that a 0.8 CUF was specified in that Code, and that AmerGen is not permitted to use a more recent edition of the Code for purposes of preparing the time-limited aging analyses ("TLAAs") in the Application. It bases this belief on Section 50.55a(c)(4), which states:

> For a nuclear power plant whose construction permit was issued prior to May 14, 1984 the applicable Code Edition and Addenda for a component of the reactor coolant pressure boundary continue to be that Code Edition and Addenda that were required by Commission regulations for such component at the time of issuance of the construction permit.

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[2] The cumulative usage factor (CUF) describes the level of damage from fatigue that a component accumulates during the component's operating life. The damage accumulates as operating load cycles occur. The level of damage for each operating load is determined using a ratio of the anticipated number of load cycles to the number of load cycles permitted by the ASME code.

10 C.F.R. § 50.55a(c)(4). Based on its reading of this provision, NJDEP concludes that AmerGen is "in violation" of 10 C.F.R. § 54.21(a)(3) because the Application does not demonstrate that aging effects will be appropriately managed so that their intended function will be maintained consistent with the plant's CLB. Petition at 4.

b. Contention 2 Is Inadmissible Because It Fails to Identify a Material Dispute of Law or Fact and Constitutes An Impermissible Challenge to Commission Regulations

As discussed below, the ASME Code in effect when OCNGS was first constructed did not require a CUF of 0.8, AmerGen is not required to continue to follow the version of the ASME Code that was in effect when OCNGS was first constructed, and AmerGen has not exceeded its CLB.

First, NJDEP's allegation that 0.8 CUF was "specified by the [ASME] Code Edition and Addenda that were required by Commission regulations at the time of issuance of the Construction permit" (Petition at 4) is factually incorrect. The OCNGS reactor vessel was "designed in accordance with ASME Code Sections I and VIII." *Id.* (quoting Application at 4-24). The Petition does not demonstrate that these Sections of the Code in 1964 contained a CUF of 0.8. In fact, the CUF of 0.8 was a specification provided by the General Electric Company, the vessel's manufacturer. *See* Petition at 5 (referencing the RPV purchase specification) and at 6 (citing to "associated GE Specifications"). NJDEP's mistake does not raise a material issue of law or fact.

NJDEP's contention is not admissible even if the 1964 edition of ASME Code Sections I and VIII did require a CUF of 0.8. Section 50.55a incorporates by reference portions of the ASME *Boiler and Pressure Vessel Code* (the "Code") and requires that applicants and licensees conduct certain activities in accordance with its provisions. The

NRC has periodically amended Section 50.55a to endorse more recent editions of the Code.

NJDEP relies on 10 C.F.R. § 50.55a(c)(4). Under 10 C.F.R. § 50.55a(c)(1) components which are part of the reactor coolant pressure boundary generally must meet certain requirements of Section III of the Code which covers *construction and design activities*. However, that regulation provides several exceptions. One of those is set forth in section 50.55a(c)(4). That provision states that "[f]or a nuclear power plant whose construction permit was issued prior to May 14, 1984" the Code edition and addenda that were required "at the time of issuance of the construction permit" are applicable.

The purpose of this provision was not to impose requirements on holders of operating licenses as NJDEP has alleged. Instead, it was to provide relief to older construction permit holders such as OCNGS from the general requirement of section 50.55a(c)(1) to comply with the construction and design criteria in Section III. *See* 50 *Fed. Reg.* 20,574, 20,574-75 (1985). Indeed, the OCNGS construction permit was issued before the NRC adopted ASME Section III.

Once a plant is operational, however, NRC regulations authorize application of Section XI of the Code, which specifies *inservice requirements*—including inspection, testing, repair, and replacement—for certain structures, systems, and components, such as the ones at issue here. 10 C.F.R. § 50.55a(g). In this regard, the Commission has explained that "for operating plants, § 50.55a permits licensees to use the original construction code during the operational phase or voluntarily update to a later version which has been endorsed by 10 CFR 50.55a." Industry Codes and Standards; Amended Requirements; Final Rule, 64 Fed. Reg. 51,370, 51,381 (Sept. 22, 1999) (emphasis

added). Accordingly, the NRC allows holders of operating licenses to change a plant's CLB by using more recent Code editions and addenda, so long as they are incorporated by reference in Section 50.55a, and subject to certain provisions in Section XI.

Regarding NJDEP's proposed contention, Section XI, and in particular, Subsection IWB, provides the inservice inspection and testing and repair or replacement requirements for Class 1 components, which includes reactor coolant pressure boundary components. 10 C.F.R. § 50.55a(g)(1). Subsection IWB allows a licensee to use Appendix L of Section XI to assess the effects of thermal and mechanical fatigue on components to determine if they are acceptable for continued service. IWB-3740, "Operating Plant Fatigue Assessments" (Attached as AmerGen Exhibit 2). Appendix L, in turn, states that "the reactor coolant system or primary pressure boundary component is acceptable for continued service throughout the evaluation if the CUF . . . is less than or equal to 1.0." ASME Code, Section XI, Appendix L, ¶ L-2220 (emphasis added) (attached as AmerGen Exhibit 3). This is the provision that allows AmerGen to use a CUF greater than 0.8.

These standards have been endorsed by the NRC in Section 50.55a. In its 1999 rulemaking, the NRC incorporated by reference the 1995 Code edition and addenda through 1996 of Section XI, into Section 50.55a.[10] 64 Fed. Reg. 51,370. Section 50.55a(g)(4) specifically references Section XI. In fact, the NRC specifically noted:

> Appendix L...permits a licensee to demonstrate that a component is acceptable with regard to cumulative fatigue effects by performing a flaw tolerance evaluation of the component as an alternative to meeting the fatigue requirements of Section III. The

[10] AmerGen uses the 1995 edition of Section XI with addenda through 1996. Application at 4-26.

> NRC has reviewed Appendix L and determined that its use is generally acceptable.

Id. at 51,386. Thus, the NRC has accepted a licensee's use of Appendix L in Section 50.55a. Accordingly, for the past six years, Section 50.55a has allowed licensees to use Appendix L of Section XI to evaluate the fatigue of reactor coolant pressure boundary components.

Furthermore, the NRC Staff's Standard Review Plan for Review of License Renewal Applications for Nuclear Power Plants recognizes the Code CUF limit of 1.0 for an initial 40 years, and explains that it evaluated the acceptability of this same limit throughout a 20-year period of extended operation. NUREG-1800 Rev. 1, at § 4.3.2.1.1.2 (Sept. 2005). The NRC Staff also notes in its Generic Aging Lessons Learned Report, that "ASME Section XI programs provide processes for identifying degradation that is attributable to applicable aging effects and are therefore acceptable for managing the effects of aging during the period of extended operation." NUREG-1801, Vol. 2, Rev. 1, at I-1 (Sept. 2005)(the guidance specifically discusses metal fatigue of the reactor coolant pressure boundary in Section X.M1).

Section 4.3 of the Application explains that the CUF values for the extended period of operation are less than 1.0. AmerGen will be documenting this change in the CLB from a CUF limit of 0.8 to a limit of 1.0 by changing the Updated Final Safety Analysis Report. *See* Letter from AmerGen to NRC, Re: Additional Commitments Associated with Application for Renewed Operating License – Oyster Creek Generating Station (Dec. 9, 2005) (attached as AmerGen Exhibit 1). The TLAAs at issue, associated with the reactor coolant pressure boundary components, comply with Section 50.55a and are consistent with NRC guidance in NUREG-1800, Rev. 1. NJDEP provides no reason

for the Board to find that AmerGen's approach fails to comply with applicable requirements.

Thus, NJDEP's misinterpretation of NRC regulations does not raise a genuine issue of material law or fact, and Contention 2 should be rejected on that basis alone. 10 C.F.R. § 2.309(f)(1)(iv).

Contention 2 also should be rejected because it constitutes an impermissible challenge to NRC regulations. *See* 10 C.F.R. § 2.335(a). As described above, the NRC regulation at issue in this proposed contention—10 C.F.R. § 50.55a—authorizes the use of more recent versions of the ASME Code in general, and use of a CUF of 1.0 in particular. To the extent NJDEP is challenging the substantive content of this regulation, it must do so through 10 C.F.R. §§ 2.206 or 2.802. *See, e.g., Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-02-23, 56 NRC 230, 237, nn.13 & 14 (citations omitted).

In short, NJDEP's Contention 2 misinterprets Commission regulations, raises no genuine dispute of material law or fact, and constitutes an impermissible attack on Commission regulations. As a result, the Contention must be dismissed.

3. Contention 3. "Combustion Turbine"

a. The Contention and Its Basis

The Forked River Combustion Turbines ("CTs") at OCNGS, located on AmerGen's property, but owned by First Energy, are designed to provide alternate, alternating current ("AC") power to certain safety-related equipment in the event of a station blackout ("SBO"). Contention 3 alleges that AmerGen's agreement with First Energy for operation and maintenance of the CTs is inadequate. In particular, NJDEP alleges that the agreement is inadequate to assure:

(1) continued operation of the CTs for ensuring compliance with 10 C.F.R. § 50.63, "Loss of All Alternating Current Power;"

(2) appropriate maintenance, inspection, and testing of the CTs in accordance with AmerGen's aging management plan; and

(3) that deficiencies encountered by First Energy during the course of maintaining, inspecting, and testing will be entered into a corrective action program that meets the quality assurance requirements of 10 C.F.R. Part 50, Appendix B.

Petition at 7. NJDEP contends that the "arrangement with First Energy proposed in the [Application] does not demonstrate that AmerGen will ensure that the Combustion Turbines will continue to perform their intended function for the period of extended operation." *Id.* at 8.

NJDEP further explains that, in proffering this contention, it "is relying on statements made in the [Application] regarding the combustion turbines and the contractual relationship established with First Energy regarding these combustion turbines to support the Oyster Creek Nuclear Generating Station. The referenced contract or agreement between AmerGen and First Energy cannot be cited in this contention." *Id.*

b. Contention 3 is Inadmissible Because It Lacks a Supporting Basis And Is Based on Speculation

NJDEP fails to provide any support for its proposed contention. It proffers no facts or expert opinion in support of its belief that the contract at issue "is not a suitable arrangement to assure that the combustion turbines will be available if required to fulfill the offsite power needed to meet the requirements of 10 CFR 50.63." *Id.* at 9.

NJDEP refers to First Energy as a "competitor" of AmerGen, but offers no explanation of why the contract is suspect. Such speculation is akin to an assumption that a licensee will intentionally violate NRC regulations, which the Commission has declared inadmissible in licensing proceedings. *GPU Nuclear Inc., et al.* (Oyster Creek Nuclear Generator Station), CLI-00-06, 51 NRC 193, 207 (2000) ("NIRS also fails to offer documentary support for its argument that AmerGen is likely to violate our safety regulations. Absent such support, this agency has declined to assume that licensees will contravene our regulations"). NJDEP therefore fails to provide the required adequate basis for a valid contention under 10 C.F.R. § 2.309(f)(1).

As for NJDEP's inability to actually cite the agreement with First Energy to support its Contention, as noted above, the Commission's Hearing Notice provided specific advice regarding access to non-public information during the allotted 60-day period. 70 Fed. Reg. at 54,586, n.1. Yet, NJDEP did not contact AmerGen to request a copy of the agreement which is the subject of the contention, but instead speculates as to the content and implications of the agreement.

In addition to these general deficiencies, AmerGen addresses below the deficiencies in the three specific elements of the contention.

1. Operation of the CTs During the Extended Period of Operation

First, NJDEP claims that the agreement with First Energy will not ensure continued operation in compliance with 10 C.F.R. § 50.63. The NRC reviewed and approved the transfer of the OCNGS license to AmerGen in June 2000. *See GPU Nuclear, Inc., and Jersey Cent. Power & Light Co.* (Oyster Creek Nuclear Generating Station); Order Approving Transfer of License and Conforming Amendment, 65 Fed.

Reg. 37,417 (June 14, 2000). In the license transfer application, AmerGen explained that OCNGS would continue to rely on the CTs as an alternative source of AC power "through appropriate contractual arrangements." Letter, AmerGen and GPU to NRC, Application for Order and Conforming Administrative Amendments for License Transfer, Encl. 1 at 22 (Nov. 5, 1999) (NRC Accession No. ML993140189).

The NRC Staff reviewed the proposed interconnection agreement, including a proposed SBO agreement, and conforming changes to the plant's UFSAR. It concluded that AmerGen would be in compliance with the SBO requirements and that the agreement "for availability of the switchyard and the gas turbine SBO power constitutes no change to the current licensing basis of Oyster Creek." Memorandum, Response to Task Interface Agreement Regarding the Acceptability of GPUN, Inc., Proposed Agreement with Combustion Turbines Buyer for Availability of Station Blackout Power, and Other Issues (Nov. 15, 1999). (NRC Accession No. ML993280408). The SBO agreement between Jersey Central Power and Light Company/GPU Energy and AmerGen was executed on April 14, 2000, just prior to the license transfer.

The contractual agreement for SBO service represents the current licensing basis for SBO alternate AC power at OCNGS and will continue into the extended period of operation in accordance with 10 C.F.R. § 54.33(d).

Thus, this first element of the Contention fails because NJDEP has provided no factual or legal basis for questioning either the adequacy of the existing SBO agreement, the interconnection agreement, or the NRC Staff's prior conclusions as to the acceptability of those agreements to support license renewal. To the extent NJDEP is challenging AmerGen's use of these agreements for the current licensing basis of

OCNGS, its challenge is outside the scope of this license renewal proceeding. *See* 10 C.F.R. §§ 2.309(f)(1)(ii)-(iii); and 2.335(a). NJDEP must seek relief instead through 10 C.F.R. §§ 2.206 or 2.802.

2. Aging Management of the CTs During the Extended Period of Operation

In this element of its Contention, NJDEP challenges AmerGen's reliance on another entity to "manage and perform this work with little opportunity for AmerGen to oversee any of it." Petition at 7. NJDEP provides no basis for its assertion. On the contrary, as AmerGen explained in the Application and in its response to NRC Staff Requests for Additional Information, First Energy coordinates its maintenance activities with AmerGen, maintains records of its activities, and makes these records available for AmerGen and NRC review. Application at B-118, B-119.[11] The SBO Agreement affords AmerGen sufficient opportunity to ensure that First Energy performs its activities, both during the current term and continuing into the extended term of operation.

In addition, NJDEP cites no regulatory requirement that prohibits a licensee from relying on another entity to implement all or portions of an aging management program. Yet NRC license renewal guidance recognizes the adequacy of aging management programs performed by others, including the Federal Energy Regulatory Commission ("FERC") or the U.S. Army Corps of Engineers. *See* NUREG-1801, "Generic Aging

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11 Note that AmerGen has divided the CT aging management program ("AMP") into two electrical AMPs: structural and mechanical. *See* AmerGen to NRC, "Response to NRC Request for Additional Information (RAI 2.5.1.19-1), Dated September 28, 2005, Related to Oyster Creek Generating Station License Renewal Application (Oct. 12, 2005) (NRC Accession No. ML052910091); and AmerGen to NRC, "Supplemental Response to NRC Request for Additional Information (RAI 2.5.1.19-1), Dated September 28, 2005, Related to Oyster Creek Generating Station License Renewal Application (Nov. 11, 2005) (NRC Accession No. ML053200475).

Lessons Learned (GALL) Report," Vol. 2, Rev. 1 (Sept. 2005), § XI.S7 (dam inspection and maintenance). And the NRC specifically accepted FERC inspections of dams for certain aspects of aging management programs in renewing the licenses for Oconee and Peach Bottom (*see* NUREG-1723 and NUREG-1769, respectively). In addition, NRC regulations contemplate that licensees may rely on outside entities to conduct activities at a nuclear power plant, with the level of licensee oversight appropriate to the activity. *E.g.,* 10 C.F.R. Part 21, "Reporting of Defects and Noncompliance" (establishing reporting requirements for suppliers of nuclear safety-related components and services).

NJDEP has provided no basis for its contention that AmerGen's aging management program for the CTs will not adequately monitor age-related degradation simply because portions of the program activities are performed by an outside entity.

3. Quality Assurance Requirements for Corrective Action Program Addressing Deficiencies Identified by First Energy

Finally, NJDEP again speculates that the agreement with First Energy may not assure that all deficiencies First Energy encounters in the course of operating, maintaining, inspecting, and testing the CTs will be entered into a corrective action program that meets the quality assurance requirements of 10 C.F.R. Part 50, Appendix B. Petition at 7. This element of the proposed Contention is flawed for several reasons.

First, NJDEP fails to cite any regulation that would require the CT aging management programs to comply with Appendix B. In fact, as explained below, that assertion is contrary to NRC license renewal guidance.

Second, as AmerGen explains in the Application, "First Energy maintains compliance with Appendices A and B of NRC Regulatory Guide 1.155 and Appendix B of NUMARC 87-00, which provide criteria to meet SBO requirements." Application at B-117. Regulatory Guide 1.155, Appendix A, sets forth quality assurance guidance for non-safety systems and equipment used to meet the requirements of 10 C.F.R. § 50.63, such as the CTs. The NRC has accepted this approach. NRC to GPU, "Supplemental Safety Evaluation (SSE) Oyster Creek Nuclear Generating Station Blackout Rule" (Feb. 12, 1992) (NRC Accession Nos. 9202140320 & 9202140322); and NRC to GPU, "Supplemental Safety Evaluation (SSE) Oyster Creek Nuclear Generating Station Blackout Rule" (Nov. 23, 1992) (NRC Accession Nos. 9212020135 & 9212020141).

Third, NRC guidance regarding quality assurance for aging management programs specifies that, for non-safety-related structures and components subject to an aging management review ("AMR") and absent a commitment by the applicant to expand the scope of its 10 C.F.R. Part 50, Appendix B, Quality Assurance Program to include non-safety-related structures and components subject to an AMR for license renewal, the aging management programs "applicable to non-safety-related structures and components are to include alternative means to address corrective actions, confirmation process, and administrative controls," and that "[s]uch alternate means would be subject to review by NRC on a case-by-case basis." NUREG-1801, Vol. 2, Rev. 1, at A-1. Specific to SBO equipment in license renewal applications, the NRC has provided the following guidance:

> An aging management program for SBO equipment that is within the scope of license renewal should address the 10 attributes described in the Standard Review Plan for License Renewal. For the attributes that address corrective action, confirmation process, and administrative controls, the staff has determined that 10 CFR Part 50, Appendix B is acceptable. However, Appendix A

> "Quality Assurance Guidance for Non-Safety Systems and Equipment" of Regulatory Guide 1.155, "Station Blackout" may be used subject to the staff review if and when a specific SBO aging management program is submitted by the applicant.

NRC to Nuclear Energy Institute and Union of Concerned Scientists, Staff Guidance on Scoping of Equipment Relied on to Meet the Requirements of the Station Blackout (SBO) Rule (10 C.F.R. 50.63) for License Renewal (Apr. 1, 2002) (emphasis added). (NRC Accession No. ML020920464).

Regarding corrective actions, AmerGen provided the following information in the Application:

> In accordance with the Interconnection Agreement, maintenance activities are scheduled such that at least one combustion turbine will remain available at all times, and OCGS must be notified immediately if both combustion turbines become unavailable. If test acceptance criteria are not met, or any other deviation from proper operation during testing is noted, an Issue Report is initiated to document the concern in accordance with plant administrative procedures. The corrective actions program ensures that the conditions adverse to quality are promptly corrected. If the deficiency is assessed to be significantly adverse to quality, the cause of the condition is determined and an action plan is developed to preclude recurrence. The SBO agreement ensures that the SBO equipment is covered by an appropriate quality assurance program consistent with the OCGS commitments to classify and include the []CTs in an appropriately graded quality assurance program, consistent with the applicable guidance in NRC Regulatory Guide 1.155. The NRC accepted this approach in its SBO supplemental safety evaluation dated February 12, 1992.

Application at B-118, B-119.

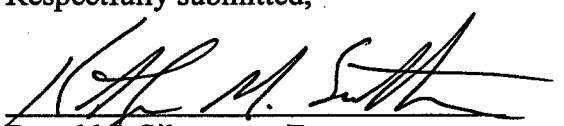
AmerGen's approach for corrective actions described in the Application for the CT aging management program is consistent with NRC license renewal guidance regarding quality assurance. NJDEP fails to explain why such an approach would be inadequate, and thus fails to raise a genuine issue of material law or fact.

In short, NJDEP's Contention 3 is based upon speculation and therefore lacks an adequate factual basis, raises matters outside the scope of the proceeding, and misinterprets applicable NRC regulations. Accordingly, Contention 3 must be dismissed.

IV. CONCLUSION

For the foregoing reasons, NJDEP's three proposed contentions do not satisfy the requirements governing the admissibility of contentions. Accordingly, AmerGen respectfully requests that NJDEP's Request for Hearing and Petition to Intervene be denied.

Respectfully submitted,



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COUNSEL FOR
AMERGEN ENERGY COMPANY, LLC

Dated in Washington, D.C.
this 12th day of December 2005

AMERGEN EXHIBIT 1

AmerGen

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10 CFR 50
10 CFR 51
10 CFR 54

2130-05-20238

December 9, 2005

U. S. Nuclear Regulatory Commission
ATTN: Document Control Desk
Washington, DC 20555

Oyster Creek Generating Station
Facility Operating License No. DPR-16
NRC Docket No. 50-219

Subject: Additional Commitments Associated with Application for Renewed Operating License – Oyster Creek Generating Station

Reference: Letter from C. N. Swenson (AmerGen Energy Company, LLC) to USNRC "Application for Renewed Operating License" dated July 22, 2005

This letter formalizes AmerGen's commitment to perform two specific activities that are related to renewal of the Oyster Creek Generating Station operating license. AmerGen previously discussed its intent to perform these activities with the NRC Audit team in October 2005, during the Aging Management Program Audit at the Oyster Creek site. The two activities discussed below will be implemented prior to the proposed period of extended operation.

First, AmerGen will revise the Oyster Creek UFSAR to incorporate an updated metal fatigue analysis limit for reactor coolant pressure boundary components, consistent with the current requirements of 10CFR 50.55a for operating plants, into the Oyster Creek current licensing basis. Specifically, this revision will change the cumulative usage factor from 0.8 to 1.0 in accordance with ASME Section XI, Appendix L.

Second, AmerGen will perform one-time inspection of the drywell shell in the sand bed region, conducting ultrasonic testing (UT) thickness measurements. These one-time UT measurements will be taken from inside the drywell at locations tested in the 1990s such that the new measurements can be compared with the earlier testing results. The last UT measurements in the sand bed region, taken during the 16th Refueling Outage in 1996, along with the UT measurements taken in 1994, confirmed that the surface coating applied to the liner in that region in 1992 had arrested corrosion that was previously occurring. Based upon our discussions with the Staff, AmerGen will take these additional measurements to provide a high degree of assurance that the surface coating applied to the liner has arrested corrosion that was previously occurring there. This will confirm that periodic inspections of the coating condition, already planned as part of the aging management program for the containment, will ensure the long-term integrity of the drywell shell in the sand bed region.

Specific details describing these commitments are provided in the Enclosure to this letter.

If you have any questions regarding this information, please contact Fred Polaski, Manager, License Renewal, at 610-765-5935.

I declare under penalty of perjury that the foregoing is true and correct.

Respectfully,

Executed on 12/9/2005

C. N. Swenson
Site Vice President, Oyster Creek
Generating Station
AmerGen Energy Company, LLC

Enclosure: Summary of Commitments

cc: Regional Administrator, USNRC Region I
NRC Project Manager, NRR - License Renewal, Safety
NRC Project Manager, NRR - License Renewal, Environmental
NRC Project Manager, OCGS, Part 50
NRC Senior Resident Inspector, OCGS
Bureau of Nuclear Engineering, New Jersey Department of Environmental Protection
Oyster Creek File No. 05040

Enclosure

Summary of Commitments

The following table identifies commitments made in this document. Any other actions discussed in the submittal represent intended or planned actions. They are described to the NRC for the NRC's information and are not regulatory commitments.

Commitment	Committed Date or Outage	One-Time Action (Yes/No)	Programmatic (Yes/No)
1. AmerGen will revise the Oyster Creek UFSAR to update the current licensing basis to reflect that a cumulative usage factor of 1.0 will be used in fatigue analysis for reactor coolant pressure boundary components, as endorsed by the NRC in 10 CFR 50.55a.	Prior to period of extended operation	Yes	No
2. AmerGen will perform a set of one-time thickness measurements in an area of the containment structure (drywell) known as the "sand bed region" to confirm that the surface coating applied to this region of the containment has arrested corrosion. These measurements will be performed using ultrasonic testing from inside the drywell. The locations of these measurements will be a sample of areas previously inspected (in the 1990s) and identified as having exhibited corrosion. Inspecting the same locations will allow comparison of results in order to confirm that the surface coating applied in 1992 has arrested corrosion that had previously occurred.	Prior to period of extended operation	Yes	No

the effects of the out-of-limit condition on the structural integrity of the Reactor Coolant System.

(b) Appendix E provides procedures and criteria that may be used to evaluate the integrity of the reactor vessel beltline for the out-of-limit condition.

(c) The evaluation procedures shall be the responsibility of the Owner and shall be subject to acceptance by the regulatory authority having jurisdiction at the plant site.

IWB-3730 FRACTURE TOUGHNESS CRITERIA FOR PROTECTION AGAINST FAILURE

(a) During reactor operation, load and temperature conditions shall be maintained to provide protection against failure due to the presence of postulated flaws in the ferritic portions of the reactor coolant pressure boundary. Appendix G provides procedures that may be used to define these load and temperature conditions.

(b) For reactor vessels with material upper shelf Charpy impact energy levels less than 50 ft-lb, service and test conditions may be evaluated, using current geometry and material properties, to provide protection against ductile failure. Appendix K contains procedures that may be used to demonstrate protection against ductile failure.

(c) The procedures used to define protection against failure due to the presence of postulated flaws shall be the responsibility of the Owner and shall be subject to acceptance by the regulatory authority having jurisdiction at the plant site.

IWB-3740 OPERATING PLANT FATIGUE ASSESSMENTS A96

(a) Appendix L provides procedures that may be used to assess the effects of thermal and mechanical fatigue concerns on component acceptability for continued service.

(b) Appendix L provides procedures that may also be used when the calculated fatigue usage exceeds the fatigue usage limit defined in the original Construction Code.

APPENDIX L
OPERATING PLANT FATIGUE ASSESSMENT

ARTICLE L-1000
INTRODUCTION

L-1100 SCOPE

This Appendix provides methods for performing fatigue assessments to determine acceptability for continued service of reactor coolant system and primary pressure boundary components subjected to thermal and mechanical fatigue loads.

L-1200 EVALUATION METHODS

(a) One or both of the following evaluation methods shall be used to determine acceptability for continued service of reactor coolant system and primary pressure boundary components:

(1) The fatigue usage factor evaluation procedures and acceptance criteria in L-2000.

(2) The flaw tolerance evaluation procedures and acceptance criteria in L-3000.

(b) The evaluations of L-1200(a)(1) and L-1200(a)(2) shall be documented in accordance with the requirements of L-4000.

L-1300 NOMENCLATURE

The following nomenclature is used:

a = general depth dimension for the postulated flaw, in.

a_c = minimum critical flaw depth (size)

a_i = minimum critical flaw size for emergency and faulted conditions, in.

a_f = maximum depth by which the postulated flaw in L-3200 is calculated to grow by the end of the evaluation period, in.

a_o = maximum allowable flaw depth for normal (including upset and test) conditions, in.

ℓ = general length dimension for the postulated flaw, in.

ℓ_f = maximum postulated flaw length at the end of the evaluation period, in.

P = operating period calculated for the postulated flaw in L-3200 to grow to the maximum depth allowed in L-3312, L-3320 (in the course of preparation), L-3332, or L-3342, yr.

ARTICLE L-2000
FATIGUE USAGE EVALUATION

L-2100 SCOPE

This Article provides requirements for performing fatigue usage factor evaluations for reactor coolant system or primary pressure boundary components in operating plants.

L-2200 EVALUATION PROCEDURES AND ACCEPTANCE CRITERIA

L-2210 EVALUATION PROCEDURES

(a) The Section III, Class 1 fatigue usage factor evaluation procedures shall be used to determine a cumulative fatigue usage factor (CUF) at the end of the evaluation period.

(b) Editions and Addenda of Section III later than the Construction Code may be used.

(c) The loadings in the Design Specification, plant specific loading cycles consistent with the plant design and operating practices, or actual plant operating data, shall be used, as appropriate.

L-2220 ACCEPTANCE CRITERIA

The reactor coolant system or primary pressure boundary component is acceptable for continued service throughout the evaluation period if the CUF in L-2210 is less than or equal to 1.0.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
E. Roy Hawkins, Chair
Dr. Paul B. Abramson
Dr. Anthony J. Baratta

In the Matter of:	December 12, 2005
AmerGen Energy Company, LLC	Docket No. 50-219
(License Renewal for Oyster Creek Nuclear Generating Station)	

AMERGEN'S ANSWER OPPOSING NIRS ET AL.
REQUEST FOR HEARING AND PETITION TO INTERVENE

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.309(h), AmerGen Energy Company, LLC ("AmerGen"), licensee in the above-captioned matter, hereby files its Answer to the "Request for Hearing and Petition for Leave to Intervene" ("Petition") jointly filed on November 14, 2005, by six organizations ("Petitioners").[1] The Petition responds to the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") "Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing," published in the *Federal Register* on September 15, 2005 (70 Fed. Reg. 54,585) ("Hearing Notice")

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

concerning AmerGen's application to renew the Oyster Creek Nuclear Generating Station ("OCNGS") operating license.[2] As discussed below, Petitioners have not satisfied the Commission's requirements to intervene, having failed to demonstrate standing and proffer at least one admissible contention. Therefore, pursuant to 10 C.F.R. § 2.309, the Petition should be denied.

II. BACKGROUND

On July 22, 2005, AmerGen submitted an application to the NRC to renew the OCNGS operating license (License No. DPR-16) for an additional 20 years ("Application"). 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 in the proceeding 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). This proceeding will be conducted in accordance with the informal hearing procedures in 10 C.F.R. Part 2, Subpart L.

In response to the Hearing Notice, Petitioners apparently filed their Petition with the NRC Office of the Secretary on November 14, 2005 via e-mail. Petitioners served their Petition on counsel for AmerGen in two packages, both, according to the Certificates of Service, on Monday, November 14, 2005. The first package contained the Petition, seven supporting Declarations, and Petitioners' expert Memorandum. It did not, however, include Petitioners' Exhibits. Ms. Michele Donato certified that this first package was served via First Class Mail, although it arrived via Federal Express. The

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2 Both the Commission's Hearing Notice and the Order Establishing the Licensing Board for this proceeding identify the applicant as the "American Energy Company LLC." The correct name of the Applicant is "AmerGen Energy Company, LLC."

second package contained nine Exhibits and one new Declaration (Donald Warren) and was both certified and actually served by First Class Mail. AmerGen has filed this timely Answer pursuant to 10 C.F.R. §§ 2.309(h)(1) and 2.306.[3]

To be admitted as a party to this proceeding, Petitioners must have standing and submit at least one admissible contention related to the Application. 70 Fed. Reg. at 54,585. Petitioners have done neither.

Section III below summarizes the legal standards governing standing and demonstrates why Petitioners have failed to establish any basis for standing to intervene in this proceeding. Section IV describes the standards governing the admissibility of proposed contentions, and then demonstrates why Petitioner's sole contention is inadmissible. For the reasons discussed below, the Petition must be denied.

III. PETITIONERS HAVE FAILED TO DEMONSTRATE STANDING

A. Applicable Legal Standards

Each petitioner is required to set forth "with particularity" not only its interests in the proceeding but also how those interests may be affected by the results of the proceeding. *Id.* In addition to providing its name, address, and telephone number, a petitioner also must set forth: (1) the nature of its right under the Atomic Energy Act ("AEA") to be made a party to the proceeding; (2) the nature and extent of its property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order that may be issued in the proceeding on its interest. These requirements are

[3] In addition to the instant Petition, the New Jersey Department of Environmental Protection ("NJDEP") filed with the NRC a separate Request for Hearing and Petition to Intervene in response to the Hearing Notice, to which AmerGen has responded in a separate Answer. This Answer only responds to the joint Petition filed by the six organizations.

contained in both the Commission's Hearing Notice for this proceeding and in its general Rules of Practice. *Id.*; 10 C.F.R. § 2.309(d)(1).

To determine whether each petitioner has established the requisite interest to intervene in a proceeding, the NRC applies judicial concepts of standing. *U.S. Dept. of Energy* (Plutonium Export License), CLI-04-17, 59 NRC 357, 363 (2004); *Georgia Inst. of Tech.* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995). Petitioners must demonstrate either that they satisfy each of the four traditional elements of standing or that they have presumptive standing based on their proximity to a radioactive source with an obvious potential for offsite consequences. *Exelon Generation Co., LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC __, __ (slip op. at 3-4) (Oct. 26, 2005). Each of these standards is discussed below.

1. Traditional Standing

The elements that constitute the "irreducible constitutional minimum" requirements for standing in federal courts also apply to NRC proceedings (*Bennett v. Spear*, 520 U.S. 154, 167 (1997); *Department of the Army* (Aberdeen Proving Ground, Maryland), LBP-99-38, 50 NRC 227, 229 (1999)):

> [T]he asserted injury must be "distinct and palpable," and "particular [and] concrete," as opposed to being "conjectural...[,] hypothetical," or "abstract"... [W]hen future harm is asserted, it must be "threatened," "certainly impending," and "real and immediate."

Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Unit 1), LBP-92-4, 35 NRC 114, 121 (1992) (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)); *Shieldalloy Metallurgical Corp.* (Cambridge, Ohio Facility), CLI-99-12, 49

NRC 347, 353 (1999). An injury in fact showing also "requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972).

Each petitioner must demonstrate that its injury falls within the zone of interests protected by the statutes governing this proceeding. *U.S. Enrichment Corp.* (Paducah, Kentucky Gaseous Diffusion Plant), CLI-01-23, 54 NRC 267, 272 (2001). The governing statutes are the AEA and the National Environmental Policy Act of 1969 ("NEPA"). 42 U.S.C. §§ 4321 *et seq.*

Each petitioner must establish that the injury is fairly traceable to the proposed activity – in this case, the approval of the Application. *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 (1994). Although a petitioner is not required to demonstrate that the injury flows directly from the challenged action, it must nonetheless show that the "chain of causation is plausible." *Id.*

Finally, each petitioner is required to show that "its actual or threatened injuries can be cured by some action of" the NRC. *Sequoyah Fuels Corp.* (Gore, Oklahoma Site) CLI-01-2, 53 NRC 9, 14 (2001). In other words, each petitioner must demonstrate that the injury can be redressed by a decision in this proceeding. Furthermore, "it must be likely, as opposed to merely speculative that the injury will be redressed by a favorable decision." *Sequoyah Fuels Corp.*, CLI-94-12, 40 NRC at 76 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (internal quotations omitted)).

2. Standing Based On Geographic Proximity

Under NRC case law, a petitioner may in some instances be presumed to have fulfilled the judicial standards for standing based on his or her geographic proximity to a facility or source of radioactivity. *Exelon Generation Co., LLC,* CLI-05-26, slip op. at 3.

If the proximity presumption is applicable, then the appropriate radius is decided on a "case-by-case basis." *Id.* The Commission determines the radius beyond which there is no longer an "obvious potential for offsite consequences" by taking into account "the nature of the proposed action and the significance of the radioactive source." *Id.*

The Commission has not, to date, approved the application of a proximity presumption to license renewal proceedings. Indeed, the Commission has twice expressly declined to address this issue. *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 333 n.2 (1999) ("Because the Petitioners' standing is not an issue on this appeal, the Commission finds it unnecessary to consider the validity of the Board's view on the 50-mile presumption question"); *Florida Power & Light Co.* (Turkey Point Nuclear Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 26 n.20 (2001) ("Because the Commission has found [petitioner's] contentions inadmissible, we do not decide whether the Board's application of a proximity presumption was correct"). Thus, there is no binding precedent establishing a proximity presumption in NRC license renewal proceedings.[4]

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[4] Licensing Boards have addressed the issue. In dicta, one Licensing Board stated that the 50-mile proximity presumption "should also apply to reactor license extension cases." *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), LBP-98-33, 48 NRC 381 n. 1 (1999). Another Licensing Board applied a proximity presumption, but indicated that the 50-mile radius may not be applicable in all license renewal cases. *Florida Power & Light Co.* (Turkey Point Nuclear Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 148-49 (2001). That Licensing Board did not address the question because the petitioners' homes were within 15 and 20 miles of the facility. *Id.* at 149. A third Licensing Board concluded that petitioners had standing "by virtue of providing the affidavits of members who (1) reside in the *immediate area* of [the plants], [and] (2) express concerns that plant aging and possible unsafe operation of the plants will pose risks to the environment as well as to their health and welfare . . . ." *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 and 2), LBP-02-4, 55 NRC 49, 62 (2002), *rev'd in part on other grounds*, CLI-02-14, 55 NRC 278 (2002), *aff'd in part and rev'd in part on other grounds*, CLI-02-17, 56 NRC 1 (2002) (emphasis added). That Licensing Board did not explain why it applied a proximity presumption or identify the applicable radius. In contrast to the *Oconee* and *Turkey Point* proceedings, the Commission did not mention the proximity presumption when it reviewed the *McGuire* and *Catawba* Licensing Board decision.

The burden, therefore, is on individual petitioners to demonstrate that "the kind of action at issue, when considered in light of the radioactive sources at the plant, justifies a presumption that the licensing action 'could plausibly lead to the offsite release of radioactive fission products from ... the ... reactors.'" *Exelon Generation Co., LLC*, CLI-05-26, slip op. at 4. If a petitioner fails to show that a particular licensing action raises an "obvious potential for offsite consequences," then the petitioner must demonstrate standing under the traditional judicial concepts (*i.e.*, injury, causation, and redressability). *Id.* This is a burden that Petitioners have not met.

3. Standing of Organizations

An organization that wishes to intervene in a proceeding may do so either in its own right (by demonstrating injury to its organizational interests), or in a representational capacity (by demonstrating harm to the interests of its members). *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998). To intervene in a proceeding in its own right, an organization must allege – just as an individual petitioner must allege – that it will suffer an immediate or threatened injury to its organizational interests that can be fairly traced to the proposed action and redressed by a favorable decision. *Georgia Inst. of Tech.*, CLI-95-12, 42 NRC at 115.

To invoke representational standing, an organization must show that at least one of its members has standing in his or her own right (*i.e.*, by meeting the burden of proximity standing or by demonstrating injury within the zone of protected interests, causation, and redressability) and has authorized the organization to represent his or her interests. *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 250 (2001); *Power Auth. of the State of N.Y.* (James A. Fitzpatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 293 (2000).

B. Petitioners Have Not Established Standing to Intervene

The Petition begins with eight numbered paragraphs that appear to represent the entirety of Petitioners' standing argument. In those paragraphs, Petitioners merely identify themselves as organizations of various kinds, assert that they have an unspecified number of members who reside, work, or recreate within 50 miles of OCNGS , and reference Declarations of members who allegedly support intervention of the Petitioners in this proceeding. Petition at 1-3.

Petitioners appear to assert representational standing to intervene in this proceeding based solely on the geographic proximity of their members to OCNGS. Specifically, they very generally allege that they are "organization intervenors" who "believe that their members' interests will not be adequately represented without this action to intervene." Petition, ¶ 8. Because Petitioners have made no effort to demonstrate standing on the basis of their organizational interests, AmerGen can only assume they exclusively rely on representational standing.

Petitioners rely on individual members to demonstrate their representational standing, and attach Declarations from these individuals "identifying his or her affiliation with each of the petitioning organizations."[5] Petition, ¶ 7. Absent from the Petition and

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[5] *See* Declaration of William deCamp Jr. in Support of Petition to Request a Hearing and Leave to Intervene on the Oyster Creek License Renewal Application (Nov. 14, 2005) [hereinafter deCamp Decl.]; Declaration of Edith Gbur in Support of Petition to Request a Hearing and Leave to Intervene on the Oyster Creek License Renewal Application (Nov. 14, 2005) [hereinafter Gbur Decl.]; Declaration of Donald Warren in Support of Petition to Request a Hearing and Leave to Intervene on the Oyster Creek License Renewal Application (Nov. 14, 2005) [hereinafter Warren Decl.]; Declaration of New Jersey Public Interest Research Group in Support of Petition to Request a Hearing and Leave to Intervene on the Oyster Creek License Renewal Application (Nov. 14, 2005) [hereinafter Leta Decl.]; Declaration of Amy Goldsmith as a Member of the New Jersey Environmental Federation in Support of Petition to Request a Hearing and Leave to Intervene on the Oyster Creek License Renewal Application (Nov. 14, 2005) [hereinafter Goldsmith Decl.]; Declaration of Paula Gotsch in Support of Petition to Request a Hearing and Leave to Intervene on the Oyster Creek License Renewal Application (Nov. 14, 2005) [hereinafter
(footnote continued)

all of the Declarations is any express statement by any member authorizing the organization to represent his or her interests in this proceeding. Instead, each Declaration merely states that the individual's "interests will not adequately be represented without this action to intervene and the opportunity of the Petitioner to participate as a full party in this proceeding on my behalf." (Emphasis added).

As explained below, the individual members have not demonstrated that they have standing to intervene in this proceeding in their own right, under either the proximity presumption or traditional concepts of standing.

1. Petitioners Have Not Demonstrated Standing Based on Geographic Proximity

The Petitioners appear to be seeking presumptive standing for their members exclusively on the basis that a number of their members are located within fifty miles of OCNGS. Petition, ¶¶ 1-6. Each of the supporting Declarations includes a statement that the individuals reside, work, or recreate within a certain distance of the plant. Three of the Declarations (covering JSNW and NIRS) specify a distance between "within 10 miles" and 18 miles of the plant. The Declarations for NJPIRG, NJEF, GRAMMIES and NJ Sierra Club state only that they are "within 50 miles." All of the Declarations also include the members' identifying information and the general statement (at ¶ 3) that if the OCNGS license is renewed, the plant "may operate unsafely and pose an unacceptable risk to the environment, thereby jeopardizing the health and welfare of the respective

Gotsch Decl.]; Declaration of Janet Tauro in Support of Petition to Request a Hearing and Leave to Intervene on the Oyster Creek License Renewal Application (Nov. 14, 2005) [hereinafter Tauro Decl.]; Declaration of Greg Auriemma in Support of Petition to Request a Hearing and Leave to Intervene on the Oyster Creek License Renewal Application (Nov. 14, 2005) [hereinafter Auriemma Decl.].

Petitioners'-Intervenors' members who live, recreate and have business within the vicinity of the nuclear power reactor."

Because, as discussed above, there is no recognized proximity presumption applicable to license renewal cases, the burden is on Petitioners to demonstrate that such a presumption should be applied in this proceeding. They must establish this by considering the radioactive sources at the plant, and by showing that renewal of the OCNGS operating license "could plausibly lead to the offsite release of radioactive fission products" from the reactor. *Exelon Generation Co., LLC*, CLI-05-26, slip op. at 4. Petitioners have made no attempt at such a showing. Absent from the Petition and the accompanying Declarations is any justification whatsoever for the application of a proximity presumption to this proceeding.

Nor have Petitioners offered any basis for their apparent assumption that the appropriate radius for such a presumption in this proceeding is 50 miles. As discussed above, assuming that a proximity presumption applies, the Commission determines the appropriate radius "beyond which . . . here is no longer an 'obvious potential for offsite consequences'" on a "case-by-case basis," taking into account "the nature of the proposed action and the significance of the radioactive source." *Id.*

Here, four of the six petitioning organizations (NJPIRG, NJEF, GRAMMIES, and NJ Sierra Club) ambiguously base their standing upon members who live "within 50 miles" of OCNGS.[6] A fifth organization, NIRS, bases its standing on Mr. William de Camp, Jr. who claims his home is 18 miles from OCNGS. The sixth organization,

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[6] Leta Decl. ¶ 2 (NJPIRG); Goldsmith Decl. ¶ 2 (NJEF); Gotsch Decl. ¶ 2 (GRAMMIES); Tauro Decl. ¶ 2 (GRAMMIES); Auriemma Decl. ¶ 2 (N.J. Sierra Club). Although each declarant

(footnote continued)

JSNW, bases its standing on Ms. Edith Gbur and Mr. Donald Warren who claim to live "within 10 miles" and "within 10 to 15 miles" of OCNGS, respectively.[7]

All the declarants have made only the most basic and generalized statements of possible risks to the environment and their health. They have not shouldered the burden of demonstrating how the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences at their geographic locations relative to OCNGS.

Accordingly, because Petitioners have failed to meet their burden to demonstrate that the renewal of the OCNGS operating license has an obvious potential for offsite consequences that extends out to a 50-mile radius, Petitioners cannot rely solely on their geographic proximity to the plant as a basis for standing. Consequently, to intervene in this proceeding, they must demonstrate standing under the traditional injury in fact, causation, and redressability standards.

2. Petitioners Have Not Demonstrated Standing Under Traditional Standing Concepts

With one exception, the individual members state in their respective Declarations (at ¶ 3) that their concerns focus on the possibility that if OCNGS's license is renewed without resolving the stated safety issue, a nuclear accident could result that could cause the death or sicken the member or the member's family."[8] Such vague, generalized statements about hypothetical future injuries do not satisfy the requirement for Petitioners

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provides his home and/or work address, it is not AmerGen's burden to determine the distance of these addresses to OCNGS. Rather, the pleading burden is on the Petitioners.

7 Gbur & Warren Decls. ¶ 2.

8 The Declaration of Ms. Gbur (President of JSNW), however, does not state that she would be personally injured by the licensing action.

to demonstrate a distinct and palpable harm. *Shieldalloy Metallurgical Corp.*, CLI-99-12, 49 NRC at 353. Nor have the individual declarants even attempted to address the "causation" or "redressability" elements of the standing analysis.

In short, even if proximity coupled with a showing that there is a significant source of radiation with an obvious potential for offsite consequences is determined to be a sufficient basis for standing in a license renewal proceeding, allowing Petitioners in this proceeding to participate as parties based on nothing more than the locations of their members' residences would contravene the Commission's standards. In this case, the members' minimalist declarations do not meet the Commission's requirements.

IV. PETITIONERS' ONE PROPOSED CONTENTION IS INADMISSIBLE

A. Applicable Legal Standards

1. Petitioners Must Submit at Least One Admissible Contention with an Adequate Basis

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).

2. Proposed Contentions Must Satisfy the Requirements of 10 C.F.R. § 2.309 to be Admissible

Section 2.309(f)(1) requires a petitioner to "set forth with particularity the contentions sought to be raised," and with respect to each contention proffered, address six criteria, discussed in detail below. A contention that fails to meet any one of these requirements must be dismissed. *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC __, __, slip op. at 16 (Oct. 26, 2005).

The Commission has described the agency's contention standard, now found in Section 2.309(f), as "strict by design."[2] This strict rule serves several purposes:

> First, it focuses the hearing process on real disputes susceptible of resolution in an adjudication. For example, a petitioner may not demand an adjudicatory hearing to attack generic NRC requirements or regulations, or to express generalized grievances about NRC policies. Second, the rule's requirement of detailed pleadings puts other parties in the proceeding on notice of the Petitioners' specific grievances and thus gives them a good idea of the claims they will be either supporting or opposing. Finally, the rule helps to ensure that full adjudicatory hearings are triggered only by those able to proffer at least some minimal factual and legal foundation in support of their contentions.

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[2] 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.

Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 NRC 328, 334 (1999); *see also Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001). Sections (a) through (f) below summarize the requirements of Section 2.309(f)(1) as they have been further developed by NRC case law.

a. Petitioners Must Specifically State the Issue of Law or Fact to Be Raised

Section 2.309(f)(1)(i) requires that petitioners "provide a specific statement of the issue of law or fact to be raised or controverted." The Commission has held that this criterion imposes upon the Petitioner the burden to "'articulate at the outset the specific issues they wish to litigate as a prerequisite to gaining formal admission as parties.'" *Dominion Nuclear Conn., Inc.*, CLI-01-24, 54 NRC at 359 (quoting *Duke Energy Corp.*, CLI-99-11, 49 NRC at 388).

b. Petitioners Must Briefly Explain the Basis for the Contention

Pursuant to Section 2.309(f)(1)(ii), a petitioner must also 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 source that establish the validity of the contention. *Florida Power & Light*, CLI-01-17, 54 NRC at 19-20.

c. Contentions Must Be Within the Scope of the Proceeding

In accordance with 10 C.F.R. § 2.309(f)(1)(iii), a petitioner must demonstrate "that the issue raised in the contention is within the scope of the proceeding." The scope of permissible contentions is bounded by the issues specified in the Notice of Opportunity for Hearing. *Florida Power & Light Co.* (Turkey Point Nuclear Generating

Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000); *Georgia Inst. of Tech.* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 118 (1995). "The scope of license renewal proceedings is narrow." *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 290 (2002). Under the Atomic Energy Act, a license renewal proceeding is limited to "a review of the plant structures and components that will require an aging management review for the period of the extended operation and the plant's systems, structures and components that are subject to an evaluation of time-limited aging analyses." *Id.* (citations omitted). [10]

A contention that raises matters that are not within this scope cannot be admitted. *See, e.g., Dominion Nuclear Conn., Inc.*, CLI-05-24, slip op. at 22; *Portland Gen. Elec. Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n.6 (1979); *see also Public Service Co. of Ind., Inc.* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976).

d. Contentions Must Raise a Material Issue

A petitioner also must 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." 10 C.F.R. § 2.309(f)(1)(iv). As the Commission has observed, "[t]he dispute at issue is 'material' if its resolution would 'make a difference in the outcome of the licensing proceeding.'" *Duke Energy Corp.*, CLI-99-11, 49 NRC at 333-34; *see also Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the*

[10] Certain contentions based upon NEPA also are permitted. However, Petitioners' one proposed contention is not based upon NEPA.

Hearing Process, 54 Fed. Reg. 33,168, 33,172 (Aug. 11, 1989). In this regard, "[e]ach contention must be one that, if proven, would entitle the petitioner to relief." *USEC, Inc.* (American Centrifuge Plant), CLI-04-30, 69 Fed. Reg. 61,411, 61,412 (Oct. 18, 2004). In addition, contentions alleging a deficiency or error in an application also must "indicate some significant link between the claimed deficiency and either the health and safety of the public or the environment." *Louisiana Energy Svcs., L.P.* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 56 (2004), *aff'd in part by* CLI-04-25, 60 NRC 223 (2004).

e. Contentions Must Be Supported by Facts or Expert Opinions

A petitioner must provide "a concise statement of the alleged facts or expert opinions which support the []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 []petitioner intends to rely to support its position on the issue." 10 C.F.R. § 2.309(1)(v). A contention "will be ruled inadmissible if the petitioner 'has offered no tangible information, no experts, no substantive affidavits, but instead only 'bare assertions and speculation.'" *Fansteel, Inc.* (Muskogee, Oklahoma, Site), CLI-03-13, 58 NRC 195, 203 (2003) (quoting *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 208 (2000)). "[V]ague, unparticularized issues" (*Pacific Gas and Elec. Co.* (Diablo Canyon Power Plant, Units 1 and 2), CLI-03-2, 57 NRC 19, 27 (2003)) and "open-ended or ill-defined contentions lacking in specificity or basis" (*Dominion Nuclear Conn., Inc.*, CLI-01-24, 54 NRC at 359) are not admissible. As the Commission has observed, a petitioner "must do more than submit 'bald or conclusory allegation[s]' of a dispute with the applicant." *Id.* at 358 (quoting 54 Fed.

Reg. at 33,171). If a petitioner fails to provide the requisite support for its contentions, then a Licensing Board may neither make factual assumptions that favor the petitioner, nor supply information that is lacking. *Louisiana Energy Svcs., L.P.,* LBP-04-14, 60 NRC at 56 (citing *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001)).

f. 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 explains:

> [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).

If the petitioner does not believe that the application adequately addresses a relevant issue, then the petitioner is required to explain why the application is deficient. *Florida Power & Light*, CLI-01-17, 54 NRC at 16. Additionally, in such cases, the petitioner must provide "supporting grounds" for its contention that the application must, but does not, consider some information required by law. *Id.* Furthermore, a contention that does not directly controvert a position taken in the application is subject to dismissal, as is a contention that mistakenly asserts the application fails to address a relevant issue. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181 (1998); *Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993), *review declined*, CLI-94-2, 39 NRC 91 (1994); *Texas Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992).

3. Contentions May Not Challenge NRC Rules and Regulations

Finally, an adjudicatory proceeding is not the proper forum for challenging the validity of previously-issued NRC rules and regulations. 10 C.F.R. § 2.335 (2005); *Florida Power & Light Co.*, CLI-01-17, 54 NRC at 16; *Yankee Atomic Elec. Co.*, CLI-96-7, 43 NRC 235, 252 (1996). The NRC will reject as inadmissible any contention that attacks applicable statutory requirements or Commission regulations, (*Private Fuel Storage*, CLI-04-22, 60 NRC at 129) as well as any contention that seeks to impose stricter requirements than those set forth by the regulations. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-87-12, 26 NRC 383, 395 (1987).

B. Petitioners' Sole Contention Is Inadmissible

1. The Contention

Petitioners' contention alleges that the Application is 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.

Petition at 3. The purported bases supporting the contention are not numbered and run on for approximately 11 pages. Rather than serve as a basis in fact or law, those pages merely attempt to summarize over two decades of historical events related to corrosion of the OCNGS drywell shell discussed in various publicly-available NRC documents (some of which Petitioners include as Exhibits). The same information is summarized in the Application and below.

2. Background

The OCNGS drywell shell is a steel pressure vessel fabricated of carbon steel in the shape of an inverted light bulb. Petition at 4; 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.

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)). About 1,000 UT measurements of the drywell shell, including the sand bed region, were taken 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 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); 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.

Between 1988 and 1992, work to address the corrosion of the OCNGS drywell shell included 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, a protective epoxy coating was applied to the outside surface of the drywell in the sand bed region to prevent additional corrosion in that area. Petition at 12; Petitioners' Exh. 4 at 1; Application at 3.5-20.

UT measurements of specific locations of the drywell shell, including the sand bed region, were taken 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 satisfactorily 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 efforts and success in addressing 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.* The NRC did require the licensee to commit to conduct additional inspections *if* it discovered water leakage from pools above the reactor cavity onto the external surface of the drywell. Petition at 13; Petitioners' Exh. 9 at 1.

Pursuant to this approved program, UT measurements at critical locations of the upper drywell have been taken during every other refueling outage, most recently in 2004. Petition at 12; Application at 3.5-21. Similarly, UT measurements were taken in the sand bed region in 1996 and the epoxy coating has been visually inspected 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). Based on these measurements and inspections, AmerGen concluded that corrosion of the drywell shell has been arrested, including in the sand bed region. Application at 3.5-20 to -21.

Petitioners acknowledge that inspections have shown no failure of the epoxy coating in the sand bed region or signs of deterioration. *Id.* Petitioners do not agree with AmerGen's conclusion, however, "that the corrosion in the sand bed region has been arrested." Petition at 11; Application at 3.5-20 to -21. Rather, "Petitioners contend that confirmatory UT inspections with state of the art equipment must be employed so as to ascertain the actual remaining wall thicknesses of this safety structure." Petition at 11.

Petitioners seek the following remedies:

1. "[T]hat as part of this licensing proceeding that [AmerGen] be required to conduct an adequate number of confirmatory UT measurements using state of the art equipment at all levels of the drywell liner,[11] including multiple measurements at the area formerly known as the 'sand bed region'";
2. AmerGen should be required "to submit the results [of these confirmatory UT measurements] to the [NRC] as publicly available documents as part of this licensing proceeding for the Petitioners' independent review and analysis";
3. The measurements "shall concur with ASME standards governing the safety limitations of the known degraded drywell liner"; and
4. In addition to these near-term UT measurements, "UT measurements be taken periodically for the life of the reactor at all critical levels of the drywell liner including the area formerly known as the 'sand bed region' . . . and that additional UT measurements be greatly expanded into areas not previously inspected."

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11 Petitioners use the term "liner" synonymously with "shell." Petition at 3 ("drywell liner or drywell shell"). This Answer uses the term "shell," consistent with the Application. *See e.g.*, Application at 3.5-18 to -22.

Petition at 3-4 (emphasis in original). The Petition does not define the term "critical levels."

Although Petitioners seek UT measurements "at all levels of the drywell liner," *Id.* at 3 (emphasis in original), they appear to be primarily concerned with the sand bed region, and the fact that AmerGen only has committed to visual inspections in that region. *Id.* at 3, 13. The expert "Memorandum" they attach to the Petition focuses solely on the sand bed region of the drywell. Memorandum from Dr. R. Hausler, Corro-Consulta, to P. Gunter, NIRS, Re: Oyster Creek Drywell Liner Corrosion (Nov. 10, 2005).

3. Petitioners' Contention Does Not Raise A Genuine Dispute of Law or Fact, Lacks An Adequate Basis and Fails to Provide Supporting Expert Opinion.

Upper Region of the Drywell. There is no genuine dispute of material law or fact regarding the upper region of the drywell. Contrary to the contention, and as described on p. 21 above, AmerGen *is* performing UT measurements at critical locations in the upper region of the drywell in accordance with an NRC-approved monitoring program. Section 3.5.2.2.1.4 of the Application includes a detailed discussion of the drywell shell both above and within the sand bed region.[12] This section begins by acknowledging that

[12] Petitioners are required to include references to specific portions of the Application that they dispute and the supporting reasons for each dispute. Petitioners' references to the Application, however, are materially deficient. Petitioners first reference "Section 3.5 1-13" of the Application. Petitioner at 7. There is, however, no such section number. An additional reference to the Application in footnote 7 of the Petition lists only the title of the Application and its publication date. No specific page reference is included. Petitioners also reference Subsection 3.5.2.2.1.4 as a source for normal drywell operating temperatures, but those temperatures are not listed there. *Id.* at 8. Petitioners also ambiguously reference "the Application" in several places in the text of the Petition with no other information to guide the reader. The burden is on Petitioners to identify those portions of the Application that are defective and explain why they are defective. 10 C.F.R. § 2.309(f)(1)(vi); *Florida Power & Light*, CLI-01-17, 54 NRC at 19-20. It is not AmerGen's or the Board's burden to guess. 10 C.F.R. § 2.309(f)(1)(vi) ("This information must include references to specific portions of the application . . . that the petitioner disputes").

loss of material due to pitting and crevice corrosion could occur in inaccessible areas of the steel containment shell for all types of Pressurized Water Reactor ("PWR") and Boiling Water Reactor ("BWR") containments. AmerGen has committed to use ASME Section XI, Subsection IWE and 10 C.F.R. Part 50, Appendix J to "manage loss of material for steel elements of the containment including the drywell liner" for the license renewal period. Application at 3.5-18. While Petitioners acknowledge this commitment, Petition at 7, they simultaneously ignore the fact that the ASME Section XI, Subsection IWE aging management program for OCNGS specifically *includes* performing periodic UT inspections at critical locations of the drywell shell. Application at 3.5-18 and 4-55.

AmerGen currently performs UT thickness measurements in accordance with ASME Section XI, every 4 years (*i.e.*, every other refueling outage) in the upper region of the drywell at multiple locations within elevations 50'2", 51'10", 60'10", and 87'5". *NRC Safety Evaluation Related to the 10-Year Inservice Inspection Program Relief Request R-24, OCNGS*, at 2 (Aug. 30, 2000) (ML003732666). These locations were selected based on a much larger population of wall thickness measurements—*approximately 1,000 exploratory UT measurements* initially collected in the 1980s—because they showed the most corrosion or had the least remaining wall thickness. Application at 3.5-19. These are the "critical levels" of the upper region of the drywell shell. AmerGen conducted UT measurements of these levels as recently as 2004. *Id.* at 3.5-21. Thus, AmerGen is already performing UT measurements on the upper region of the drywell shell and has committed to the NRC to perform these measurements in accordance with ASME Section XI during the term of the renewed license. There is, therefore, no genuine dispute of material law or fact.

Petitioners' contention also lacks an adequate basis. Petitioners do not allege that ASME Section XI is deficient or that AmerGen is not complying with that Section. Nor do Petitioners allege that AmerGen is violating any NRC regulation or other requirement.

Furthermore, AmerGen's "critical locations" have been specifically defined and made available to the public. Despite the availability of that information, Petitioners do not discuss any of the specific locations where UT is being done, do not point out any additional locations that should be tested, and do not explain why AmerGen's approach is inadequate. Instead, Petitioners simply refer, without any specific definition, to "critical levels" of the drywell shell. Nor do they provide any support for their demand that UT measurements be "greatly expanded into areas not previously inspected." Petition at 3-4. Petitioners' proffered expert, Dr. Hausler, provides no support because his opinions are limited to the sand bed region of the drywell.

Finally, Petitioners misinterpret the Application regarding the minimum allowable thickness for the steel in the upper region of the drywell. Petitioners include a table compiled from a 1993 public document and allege that it shows that the "margins of safety left by severe corrosion damage . . . are extremely narrow." *Id.* at 8.[13]

Petitioners, however, overlook an amendment to the OCNGS Technical Specifications that "reduced the drywell design pressure from 62 psig to 44 psig." Application at 3.5-20. This reduction in peak drywell pressure changed the minimum allowable thickness, resulting in increased margin. Instead of being within hundredths of an inch of the minimum allowable thickness, the margins are significantly greater. The

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[13] The margins according to the table are: 0.032 inches for the cylinder portion of the drywell; 0.041 for the upper spherical portion of the drywell; and 0.073 for the middle spherical portion of the drywell.

failure of Petitioners to read the Application or reference other publicly available facts related to this aspect of their proposed contention further demonstrates that Petitioners lack an adequate basis for the contention.[14]

Sand Bed Region. Petitioners' contention is similarly deficient with respect to AmerGen's aging management program for the sand bed region of the drywell shell. First, AmerGen has, in fact, committed to the NRC during Aging Management Program Audits in early October 2005, to perform one-time UT measurements in the sand bed region. *See* AmerGen Exhibit 1. These measurements will be performed from inside the drywell in accordance with the same ASME Code protocol AmerGen uses to take UT measurements of the shell in the upper region of the drywell. The locations of these measurements will be a representative sample of the areas in the sand bed region previously identified as having exhibited corrosion. These UT measurements will be compared to previous UT measurements to confirm that the epoxy coating continues to adequately protect the drywell shell. This commitment should address Petitioners' demand for a new set of near-term, ASME-compliant UT measurements, "including multiple measurements at the area formerly known as the 'sand bed region.'" Petition at 3.[15]

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[14] To the extent Petitioners are challenging the adequacy of AmerGen's inspection program during the current term of the OCNGS license, it is an impermissible attack on AmerGen's current licensing basis and is outside the scope of a license renewal proceeding. *Florida Power & Light,* CLI-00-23, 52 NRC at 329.

[15] AmerGen will, of course, use calibrated equipment that is approved for nuclear facilities and operated by examiners certified to ASME non-destructive examination requirements. The equipment meets industry standards for UT thickness measurements, and is accepted by the NRC. The results will be made available to the NRC, as usual. Petitioners do not identify any requirement that this information be made available to the general public. In any event, such a request does not raise a genuine dispute of law or fact and does not, of itself, constitute an admissible contention.

In addition, Petitioners are aware, but overlook the significance, of the drywell inspection program that the NRC approved for OCNGS on November 1, 1995. Petitioners' Exh. 9. That program does not require AmerGen to take UT measurements of the drywell shell in the sand bed region. Instead, it requires AmerGen to take UT measurements in the upper region of the drywell, and to perform *visual* inspections of the epoxy coating in the sand bed region. Petitioners do not allege that AmerGen is violating this NRC-approved inspection program. They merely allege that visual inspections are not adequate for an additional operating period of 20 years. Petition at 13.

In support of this thesis, Petitioners include an expert Memorandum and make a number of claims which they assert call into question the adequacy of this NRC-approved corrosion inspection program for the period of extended OCNGS operation. Neither the Memorandum nor those claims, however, raise a genuine dispute of law or fact regarding AmerGen's sand bed region inspection program.

Petitioners include a Memorandum from "their expert, Dr. Rudolph Hausler of Corro-Consulta." Petition at 10. For several reasons, the Memorandum does not support the Petitioners' position. First, Dr. Hausler's Memorandum is not signed, and contains no statement of qualifications or curriculum vitae to demonstrate that Dr. Hausler is indeed an expert, and that he is capable of providing an expert opinion on the particular issue of nuclear reactor drywell integrity and aging for a BWR. Thus, Petitioners have failed to meet their burden to demonstrate that Dr. Hausler is qualified to provide opinions on this matter.

In any event, Dr. Hausler's opinion actually contradicts the contention. Dr. Hausler states that UT measurements of the sand bed region now covered by an epoxy

coating would *not*-be valid: "UT measurements through the epoxy coating are highly questionable and lack in accuracy." Dr. Hausler Memorandum at 2. He suggests that only optical (rather than UT) measurements are required:

> [t]he coating has to be removed and pit depth assessment has to be made with the best applicable methodology. UT measurements on the outside of the vessel wall are very difficult and have to be made by highly technically trained personnel. Optical pit depth measurements are no doubt more reliable.

Id. (emphasis added).[16]

Dr. Hausler also provides numerous factual statements about the temperature of the drywell and makes various assumptions about water entering the drywell and affecting the epoxy coating in the sand bed region. *Id.* at 1-2. Each of these statements and assumptions lacks a reference to the Application, industry publication, or academic article. Moreover, the conclusions he provides are unsupported by any technical analysis. As the Commission has observed, a petitioner "must do more than submit 'bald or conclusory allegation[s]' of a dispute with the applicant." *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001) (quoting 54 Fed. Reg. 33,168, at 33,171).

The contention also is inadmissible because it is a product, in part, of inaccurate factual bases. Specifically, the proposed contention is riddled with factual errors, unsupported statements and misinterpretations of the Application:

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16 These statements also demonstrate a misunderstanding of how UT measurements have been performed at OCNGS since the epoxy coating was applied. UT measurements are taken from the *inside* of the drywell shell, not the outside. *See e.g.*, Petitioners' Exh. 4, Encl. 2 at 2 ("Taken from inside drywell"). Accordingly, it is irrelevant that "UT measurements on the outside of the vessel wall" might be "very difficult." Also, there is no need to remove the epoxy coating adhering to the outside of the drywell shell to perform UT measurements from the inside.

1. Unsupported "Capillary Forces". Petitioners contend that "water will be retained in the pores of the sand bed by capillary forces and continued [*sic*] to support corrosion even though no drainage from the sand bed is observed." Petition at 6. Yet it is undisputed that all of the sand has been removed from the sand bed region. Thus, there are no more "pores" for the water to collect in. Petitioners have provided no basis to show that the outer surface of the drywell shell was improperly cleaned of corrosion prior to application of the epoxy coating, or that there was moisture present in the sand bed region when the epoxy coating was applied.
2. Unsupported Wet Conditions. Petitioners also state that wet conditions continue in the sand bed region of the drywell. They contend that "pinhole leaks in the coating . . . could allow for water seepage behind the epoxy coating resulting in corrosion behind the coating," Petition at 10, and that "wet conditions occurring over the past 12 years behind the epoxy coating can reasonably contribute to corrosion." Petition at 11. Petitioners provide no support for these statements. They identify no document which reports water being present in the sand bed region.
3. Wrong Assumption For Borated Water. Petitioners state that "lesser spills of water which could also include corrosive borated water from the refueling canal or leaks in the spent fuel pool could be taking place," Petition at 13, implying that AmerGen has overlooked a source of moisture that could lead to corrosion behind the epoxy coating. First, they provide no support for this statement; Dr. Hausler does not mention borated water. In any event, Petitioners are wrong when they

assert that the water is "corrosive borated water." Petitioners acknowledge that OCNGS is a BWR. Petition at 4. It is common knowledge that BWRs do not use borated water in the refueling canal or the spent fuel pool, or in any part of the reactor coolant system.

4. Wrong date for the last UT inspection. Petitioners appear to be under the impression that no UT measurements were conducted after the epoxy coating was applied, implicitly calling into question the efficacy of the coating to prevent corrosion of the underlying steel shell. Specifically, they state that "no UT measurements have been made at the severely corroded sand bed region . . . since the epoxy coating was originally applied in 1992." Petition at 13. This is factually incorrect. As Petitioners' own Exhibit 6 shows, UT measurements were taken of the sand bed region during the September 1994 refueling outage, 21 months after the coating was applied. *See also* Petition at 11. That Exhibit also committed the licensee to take UT measurements of the sandbed region in 1996. These measurements were also taken. These measurements demonstrated that the epoxy coating was adequately protecting the drywell shell.

Petitioners' contention seeks four specific remedies. See Petition at 3; p. 22-23 above. Petitioners first ask that AmerGen be required to perform an adequate number of UT measurements at unspecified critical areas of the drywell shell using state of the art equipment. As discussed above, AmerGen is performing such measurements in the upper region of the drywell, and has committed to perform one-time UT inspections in the sand bed region. AmerGen conducts these measurements with equipment that meets industry standards. Petitioners' contention raises no genuine dispute of material law or fact and

lacks an adequate basis to warrant litigation of this matter.

Petitioners next ask that the results of such measurements be made publicly available. As discussed above in footnote 16, such a request does not raise a litigable issue.

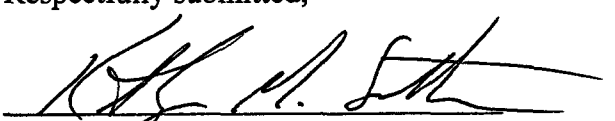
Third, Petitioner requests that AmerGen be required to meet ASME standards relating to the drywell shell integrity. AmerGen has already committed to those standards.

Finally, Petitioners seek an ongoing program of UT measurements in both the upper region of the drywell shell and the sand bed region. AmerGen has such a continuing program for the upper region of the drywell shell and a visual inspection program for the sand bed region that will continue into the period of extended operations. As for Petitioners' request that UT measurements be extended into the sand bed region, they have failed to raise a genuine dispute of material law of fact, failed to provide an adequate basis for their assertions, and failed to provide any supporting expert opinion. Accordingly, Petitioners' contention is inadmissible and must be rejected.

V. CONCLUSION

Petitioners each lack standing and their sole contention is inadmissible. Accordingly, AmerGen respectfully requests that Petitioners' Request for Hearing and Petition to Intervene be denied.

Respectfully submitted,



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COUNSEL FOR
AMERGEN ENERGY COMPANY, LLC

Dated in Washington, D.C.
this 12th day of December 2005

AMERGEN EXHIBIT 1

AmerGen℠

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10 CFR 50
10 CFR 51
10 CFR 54

2130-05-20238

December 9, 2005

U. S. Nuclear Regulatory Commission
ATTN: Document Control Desk
Washington, DC 20555

Oyster Creek Generating Station
Facility Operating License No. DPR-16
NRC Docket No. 50-219

Subject: Additional Commitments Associated with Application for Renewed Operating License – Oyster Creek Generating Station

Reference: Letter from C. N. Swenson (AmerGen Energy Company, LLC) to USNRC "Application for Renewed Operating License" dated July 22, 2005

This letter formalizes AmerGen's commitment to perform two specific activities that are related to renewal of the Oyster Creek Generating Station operating license. AmerGen previously discussed its intent to perform these activities with the NRC Audit team in October 2005, during the Aging Management Program Audit at the Oyster Creek site. The two activities discussed below will be implemented prior to the proposed period of extended operation.

First, AmerGen will revise the Oyster Creek UFSAR to incorporate an updated metal fatigue analysis limit for reactor coolant pressure boundary components, consistent with the current requirements of 10CFR 50.55a for operating plants, into the Oyster Creek current licensing basis. Specifically, this revision will change the cumulative usage factor from 0.8 to 1.0 in accordance with ASME Section XI, Appendix L.

Second, AmerGen will perform one-time inspection of the drywell shell in the sand bed region, conducting ultrasonic testing (UT) thickness measurements. These one-time UT measurements will be taken from inside the drywell at locations tested in the 1990s such that the new measurements can be compared with the earlier testing results. The last UT measurements in the sand bed region, taken during the 16th Refueling Outage in 1996, along with the UT measurements taken in 1994, confirmed that the surface coating applied to the liner in that region in 1992 had arrested corrosion that was previously occurring. Based upon our discussions with the Staff, AmerGen will take these additional measurements to provide a high degree of assurance that the surface coating applied to the liner has arrested corrosion that was previously occurring there. This will confirm that periodic inspections of the coating condition, already planned as part of the aging management program for the containment, will ensure the long-term integrity of the drywell shell in the sand bed region.

Specific details describing these commitments are provided in the Enclosure to this letter.

If you have any questions regarding this information, please contact Fred Polaski, Manager, License Renewal, at 610-765-5935.

I declare under penalty of perjury that the foregoing is true and correct.

Respectfully,

Executed on 12/9/2005

C. N. Swenson
Site Vice President, Oyster Creek
Generating Station
AmerGen Energy Company, LLC

Enclosure: Summary of Commitments

cc: Regional Administrator, USNRC Region I
NRC Project Manager, NRR - License Renewal, Safety
NRC Project Manager, NRR - License Renewal, Environmental
NRC Project Manager, OCGS, Part 50
NRC Senior Resident Inspector, OCGS
Bureau of Nuclear Engineering, New Jersey Department of Environmental Protection
Oyster Creek File No. 05040

Enclosure

Summary of Commitments

The following table identifies commitments made in this document. Any other actions discussed in the submittal represent intended or planned actions. They are described to the NRC for the NRC's information and are not regulatory commitments.

Commitment	Committed Date or Outage	One-Time Action (Yes/No)	Programmatic (Yes/No)
1. AmerGen will revise the Oyster Creek UFSAR to update the current licensing basis to reflect that a cumulative usage factor of 1.0 will be used in fatigue analysis for reactor coolant pressure boundary components, as endorsed by the NRC in 10 CFR 50.55a.	Prior to period of extended operation	Yes	No
2. AmerGen will perform a set of one-time thickness measurements in an area of the containment structure (drywell) known as the "sand bed region" to confirm that the surface coating applied to this region of the containment has arrested corrosion. These measurements will be performed using ultrasonic testing from inside the drywell. The locations of these measurements will be a sample of areas previously inspected (in the 1990s) and identified as having exhibited corrosion. Inspecting the same locations will allow comparison of results in order to confirm that the surface coating applied in 1992 has arrested corrosion that had previously occurred.	Prior to period of extended operation	Yes	No

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	December 12, 2005
AmerGen Energy Company, LLC	Docket No. 50-219
(License Renewal for Oyster Creek Nuclear Generating Station)	

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with 10 C.F.R. § 2.314(b), the following information is provided:

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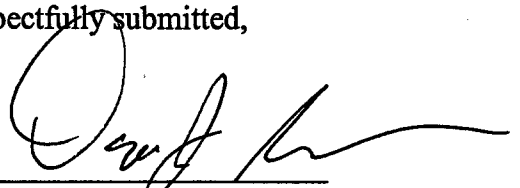
Admissions:	District of Columbia Court of Appeals
Name of Party:	Counsel for AmerGen Energy Company, LLC

Respectfully submitted,



Donald J. Silverman

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	December 12, 2005
AmerGen Energy Company, LLC	)	Docket No. 50-219
(License Renewal for Oyster Creek Nuclear Generating Station)	)	

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with 10 C.F.R. § 2.314(b), the following information is provided:

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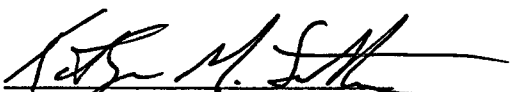
Admissions:	District of Columbia Court of Appeals
Name of Party:	AmerGen Energy Company, LLC

Respectfully submitted,



Kathryn M. Sutton

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	December 12, 2005
AmerGen Energy Company, LLC	)	Docket No. 50-219
(License Renewal for Oyster Creek Nuclear Generating Station)	)	

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with 10 C.F.R. § 2.314(b), the following information is provided:

Name:	Alex S. Polonsky
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Telephone: Facsimile:	(202) 739-5830 (202) 739-3001
Admissions:	U.S. District Court for the District of Columbia
Name of Party:	Counsel for AmerGen Energy Company, LLC

Respectfully submitted,

Alex S. Polonsky

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	December 12, 2005
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NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with 10 C.F.R. § 2.314(b), the following information is provided:

Name:	J. Bradley Fewell
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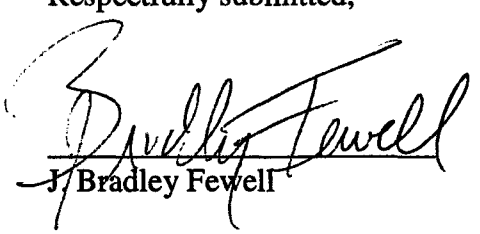
Admissions:	Pennsylvania Court of Appeals
Name of Party:	Counsel for AmerGen Energy Company, LLC

Respectfully submitted,



J. Bradley Fewell