

December 12, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
AMERGEN ENERGY COMPANY, LLC) Docket No. 50-0219-LR
(Oyster Creek Nuclear Generating Station))
)

NRC STAFF ANSWER TO REQUEST FOR HEARING AND
PETITION TO INTERVENE OF THE STATE OF NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL PROTECTION

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1), the U.S. Nuclear Regulatory Commission Staff (“Staff”) hereby answers the Request for a Hearing and Petition for Leave to Intervene of the State of New Jersey Department of Environmental Protection (“NJDEP”). As set forth below, the NJDEP has standing to intervene in this proceeding but has not proffered an admissible contention. Therefore, the Petition should be denied.

BACKGROUND

By letter dated July 22, 2005, AmerGen Energy Company, LLC (“AmerGen”) submitted an application for renewal, pursuant to 10 C.F.R. Part 54, of Operating License No. DPR-16 for the Oyster Creek Nuclear Generating Station (“OCNGS” or “Oyster Creek”) for an additional 20 years.¹ The current operating license for the OCNGS expires April 9, 2009.

¹ See Letter from C.N. Swenson, Site Vice President, Oyster Creek Nuclear Generating Station [OCNGS], to U.S. NRC (July 22, 2005) (Agencywide Documents and Access Management System (“ADAMS”) Accession No. ML052080172).

On September 15, 2005, the NRC published a notice of acceptance for docketing and opportunity for hearing regarding the license renewal application (“LRA”).² On November 14, 2005, NJDEP filed a Request for Hearing and Petition for Leave to Intervene on AmerGen’s license renewal application.³ On December 9, 2005, this Atomic Safety and Licensing Board was established to preside over the proceeding. See “Establishment of Atomic Safety and Licensing Board”, dated December 9, 2005.

DISCUSSION

A. Standing

Any person or organization who requests a hearing or seeks to intervene in a Commission proceeding must establish standing by showing that it has a distinct, redressable interest in the action subject to the proceeding. See 10 C.F.R. § 2.309(d). When the petitioner is a State, however, the Commission’s regulations provide that the standing requirements need not be addressed when the facility subject to the proceeding is located within the State’s boundaries. 10 C.F.R. § 2.309(d)(2). NJDEP has represented that it is the state agency that has been delegated responsibility for providing radiation protection for residents of the State of New Jersey. See Letter from Bradley M. Campbell, Commissioner, NJDEP, to the Secretary of

² See [AmerGen], Oyster Creek Nuclear Generating Station; Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License No. DRP-16 for an Additional 20-Year Period, 70 Fed. Reg. 54,585 (September 15, 2005).

³ See “Request for Hearing and Petition for Leave to Intervene per 10 C.F.R. 2” (“Petition”). The Petition was served upon the Secretary by facsimile at 5:55 p.m. on November 14, 2005. The Staff notes that Petitioners failed to include a Certificate of Service, as required by 10 C.F.R. § 2.302(b). The Secretary has in the past rejected petitions to intervene that were deficient for failing to comply with service requirements, based on the authority set forth at 10 C.F.R. § 2.304(g). See, e.g., Letter from Annette L. Vietti-Cook to Mr. Mitchell “Mickey” J. Maricque (June 25, 2004) (ADAMS Accession No. ML041810651). In addition, the attorney for NJDEP was identified in the letter from Bradley M. Campbell, Commissioner, NJDEP, that forwarded the Petition, but no notice of appearance was filed for him. Although it is not required that a notice of appearance be filed with the petition to intervene, at some point, a notice of appearance on behalf of NJDEP must be filed. See 10 C.F.R. § 2.314(b).

the Commission, November 14, 2005. ("Letter") Accordingly, NJDEP has demonstrated standing to intervene.

B. Contention Admissibility

Although NJDEP has demonstrated its standing to intervene pursuant to 10 C.F.R. § 2.309(d)(2), it has failed to submit a petition adequate for intervention because it has failed to proffer an admissible contention.

1. Legal Standards Governing the Admission of Contentions

To gain admission to a proceeding as a party, in addition to satisfying the criteria for standing, a petitioner must submit at least one admissible contention that meets the requirements of 10 C.F.R. § 2.309(f). See 10 C.F.R. § 2.309(a). The regulations require a petitioner to:

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

as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

10 C.F.R. § 2.309(f)(1).⁴ The Commission has emphasized that its rules on contention admissibility establish an evidentiary threshold more demanding than a mere pleading requirement and are "strict by design." *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001). Failure to comply with any of these requirements is grounds for dismissing a contention. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

The contentions should refer to the specific documents or other sources of which the petitioner is aware and upon which he or she intends to rely in establishing the validity of the contentions. *Millstone*, CLI-01-24, 54 NRC at 358 (citing *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 333 (1999)). The petitioner must submit more than "bald or conclusory allegation[s]" of a dispute with the applicant. *Id.*

Furthermore, the scope of a license renewal proceeding is limited in both the safety and environmental contexts. The scope of Commission review determines the scope of admissible contentions in a renewal hearing absent a Commission finding under 10 C.F.R. § 2.335 (formerly § 2.758). See 60 Fed. Reg. 22,461; 22,482 n.2; *Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-06, 53 NRC 138, 152 (2001), *aff'd*, CLI-01-17, 54 NRC 3 (2001). Review of safety issues 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* analyses." *Duke Energy Corp.* (McGuire Nuclear Station,

⁴ Although the Commission recently revised its Rules of Practice in 10 C.F.R. Part 2, the provisions of § 2.309 "incorporate the longstanding contention support requirements of former § 2.714 - no contention will be admitted for litigation in any NRC adjudicatory proceeding unless these requirements are met." Changes to Adjudicatory Process, 69 Fed. Reg. 2,182; 2,221 (Jan. 14, 2004).

Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-26, 56 NRC 358, 363-64 (2002) (citations omitted) (emphasis in original). *See also Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), LBP-04-15, 60 NRC 81, 90 (2004), *aff'd*, CLI-04-36, 60 NRC 631 (2004); *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-14, 48 NRC 39, 41 (1998); 10 C.F.R. §§ 54.4, 54.21(a), (c).

The scope of the environmental review is also limited in accordance with 10 C.F.R. §§ 51.71(d) and 51.95(c). *See Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 11-13 (2001). As reflected in *Turkey Point*, consideration of environmental issues in the context of license renewal proceedings is specifically limited by 10 C.F.R. Part 51 and by the NRC's "Generic Environmental Impact Statement (GEIS) for License Renewal of Nuclear Plants" (NUREG-1437) ("GEIS"). *Id.* A number of environmental issues potentially relevant to license renewal are classified in 10 C.F.R. Part 51, Subpart A, Appendix B as "Category 1" issues, which means that "the Commission resolved the[se] issues generically for all plants and those issues are not subject to further evaluation in any license renewal proceeding." *Turkey Point*, LBP-01-06, 53 NRC at 152-53, *aff'd*, CLI-01-17, 54 NRC at 13. The remaining issues in Appendix B, designated as "Category 2," must be addressed by the applicant in its environmental report, and in the NRC's supplemental environmental impact statement for the facility at issue pursuant to 10 C.F.R. §§ 51.71(d) and 51.95(c). *Id.*

2. NJDEP Has Not Proffered an Admissible Contention.

NJDEP offers three contentions in support of its petition.⁵ For the reasons set forth below, none of these contentions is admissible.

⁵ See Letter at 2.

NJDEP's Proposed Contention 1 - "Severe Accident Mitigation Alternatives":

The State of New Jersey Department of Environmental Protection intends to request a hearing on the Oyster Creek Nuclear Generating Station's license renewal application and the licensee's application of Severe Accident Management Alternatives (SAMA) under 10 C.F.R. 51.53(c) "*Operating license renewal stage.*"

Basis: The NRC is in the process of evaluating site specific reviews for Design Basis Threats (DBT) at all nuclear power plants operating in the United States. The final threat analysis review and mitigating strategies are essential for SAMA, along with the licensee commitment to mitigate accidents for the 20-year period of the renewed license. AmerGen's license extension submittal does not include the DBT analysis.

Petition at 1⁶.

Staff Response to Proposed Contention 1:

Proposed Contention 1 is inadmissible. Proposed Contention 1 lacks basis, support, and specificity, is outside the scope of license renewal hearings, impermissibly challenges the Commission's regulations, is immaterial to the findings necessary to support license renewal, and fails to establish that a genuine dispute exists on a material issue of law or fact. See 10 C.F.R. §§ 2.309(f)(1)(i)-(vi), and 2.335(a). Therefore, NJDEP's Proposed Contention 1 fails to meet the Commission's pleading requirements articulated in 10 C.F.R. Part 2.

Proposed Contention 1 Lacks Adequate Basis, Support, and Specificity.

Although NJDEP identifies three areas in which it contends that the Oyster Creek LRA's discussion of Severe Accident Mitigation Alternatives ("SAMAs") is inadequate, See Petition at 2-3, nowhere does it offer any explanation as to why it believes that the National Environmental Policy Act of 1969, as amended, 42 U.S.C. § 4321 *et. seq.*, ("NEPA") requires consideration of these subjects in the LRA's SAMA discussion, nor does the Petition provide any evidence, documentary or otherwise, to support this contention. It merely asserts, without

⁶ As the Petition is not paginated, the Staff numbered the pages of the Petition, beginning with the first page of the Petition, following the two-page letter from Bradley M. Campbell, Commissioner, NJDEP, so that Page 1 is the page beginning with "Contention 1 - Severe Accident Mitigation Alternatives."

support, that the SAMA discussion is inadequate for failure to include consideration of the DBT. The Commission has stated that it “is unwilling to throw open its hearing doors to petitioners who have done little in the way of research or analysis, provide no expert opinion, and rest merely on unsupported conclusions.” *Duke Energy Corporation* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 NRC 1, 8 (2002). Therefore, Proposed Contention 1 is inadmissible because it lacks sufficient basis, support, and specificity. See 10 C.F.R. § 2.309(f)(1)(i),(ii), and (v).

Proposed Contention 1 Does Not Demonstrate Materiality to the Proceeding or That a Genuine Dispute Exists With Respect to an Issue of Law or Fact.

Likewise, Proposed Contention 1 does not demonstrate that a genuine dispute exists with respect to a material issue of law or fact. See 10 C.F.R. § 2.309(f)(iv) and (vi). NJDEP’s Petition correctly states that “SAMA was submitted as part of the Oyster Creek Nuclear Generating Station’s license renewal application under 10 C.F.R. Part 51,” and that NRC regulations require that “[i]f the staff has not previously considered severe accident mitigation alternatives for the applicant’s plant in an environmental impact statement or related supplement or in an environmental assessment, a consideration of alternatives to mitigate severe accidents must be provided.” 10 C.F.R. § 51.53(c)(3)(ii)(L). However, Oyster Creek’s LRA does include a discussion of SAMAs.⁷ NJDEP’s petition alleges that the SAMA discussion is inadequate because it does not include information about the Design Basis Threat – specifically, because it does not include consideration of an aircraft attack scenario and spent fuel accident scenarios.⁸ However, NJDEP does not demonstrate, explain, or make reference

⁷ See “Applicant’s Environmental Report – Operating License Renewal Stage, Oyster Creek Generating Station,” Appendix F (July 26, 2005) (ADAMS Accession No. ML052080189) (“ER”).

⁸ See Petition at 2-3. NJDEP’s Petition also alleges that “[l]ong-term measures rather than interim compensatory measures must be in place” in order to “ensure that all SAMA have been evaluated.” Petition at 3. NJDEP does not explain this statement or point to any specific section of the LRA in support of this statement, nor explain why it is required by NEPA. Therefore, to the extent that

to any documentation stating that consideration of such issues is required under NEPA. Since the scope of what is required for SAMA is necessarily bounded by the scope of NEPA and Proposed Contention 1 fails to establish or contend that such information is required by NEPA, Proposed Contention 1 and its basis, even if factually correct, do not demonstrate that a genuine dispute exists with respect to a material issue of law or fact. Accordingly, Proposed Contention 1 is inadmissible.

Proposed Contention 1 Is Outside the Scope of the Renewal Proceeding and Impermissibly Challenges Commission Regulations.

In addition, NJDEP has not demonstrated that its contention is within the scope of the proceeding. See 10 C.F.R. § 2.309(f)(1)(iii). With respect to environmental issues, the scope of review is limited in accordance with 10 C.F.R. Part 51 and with NUREG-1437, “Generic Environmental Impact Statement (GEIS) for License Renewal of Nuclear Plants.” See, e.g., *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 11-13 (2001). NRC regulations require, with respect to SAMA, the subject of Proposed Contention 1, that a consideration of alternatives to mitigate severe accidents be provided. 10 C.F.R. § 51.53(c)(3)(ii)(L).

Although Proposed Contention 1 suggests that the Oyster Creek LRA is deficient because its discussion of SAMAs does not include information about the DBT, specifically, an aircraft attack scenario and spent fuel accident scenario, Proposed Contention 1 does not provide any information, explanation, argument, or documentation as to why NEPA requires such scenarios to be considered within the scope of SAMA discussion. Petitioner appears to be attempting to place its concerns regarding security and terrorism within the scope of this license renewal proceeding by describing them as a SAMA issue when such concerns are not

the Contention relies on this statement, it is outside the scope of a renewal proceeding, in addition to lacking proper basis, specificity, materiality to the proceeding, and support, and does not establish a genuine dispute on a material issue of law or fact.

otherwise within the scope of license renewal. See, e.g., *Dominion Nuclear Connecticut* (Millstone Nuclear Power Station, Units 2 & 3), CLI-04-36, 60 N.R.C. 631, 638 (2004). Indeed, the Commission has definitively stated that terrorist activities should not be considered within the scope of NEPA. See, e.g., *Duke Energy Corporation* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-26, 56 N.R.C. 358 (2002); *Dominion Nuclear Connecticut* (Millstone Nuclear Power Station, Unit 3), CLI-02-27, 56 NRC 367 (2002); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 350-51, 356 (2002); see also *Limerick Ecology Action Inc. v. U.S. NRC*, 869 F.2d 719 (3rd Cir. 1989). A distinction must be drawn between the environmental impact of the facility (the proper consideration under NEPA) as opposed to the impact of an outside act upon the facility (the subject of the DBT). *Private Fuel Storage*, CLI-02-25, 56 NRC at 350.

The Commission has given several reasons for excluding terrorism concerns from NEPA analyses. First, 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 or action, not to speculate about a “worst-case” scenario and how to prevent it. See *Private Fuel Storage*, CLI-02-25, 56 NRC at 347. Use of such a “worst-case” scenario for NEPA purposes would create a distorted picture of an action’s impacts and waste agency resources. *Id.*; see also *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 354-55 (1989). In addition, the possibility of a terrorist attack is speculative and simply too far removed from the natural or expected consequences of agency action to require consideration under NEPA. *Private Fuel Storage*, CLI-02-25, 56 NRC at 347. Agencies have discretion to exclude high-consequence, low-probability events, such as terrorist attacks, from a NEPA analysis. *Id.*; see also *City of New York v. U.S. Dep’t of Transportation*, 715 F.2d 732, 750 (2nd Cir. 1982), *appeal dismissed and cert. denied*, 465 U.S. 1055 (1984). Finally, using the NEPA process to consider terrorism would be incompatible with NEPA’s, and the NRC’s, public

participation process, as the NRC cannot make publicly available the kind of information necessary for a more than superficial NEPA review on this subject. *Private Fuel Storage*, CLI-02-25, 56 NRC at 354-56. Because NEPA is not the appropriate forum to address terrorism concerns, and because the scope of the environmental review for license renewal is limited to NEPA considerations, Proposed Contention 1 is outside the scope of the proceeding to the extent that its basis is the consideration of terrorist attacks or activities.

Concerns regarding spent fuel storage are not admissible in a license renewal proceeding. See *Florida Power and Light Co.* (Turkey Point, Units 3 and 4), CLI-01-17, 54 NRC 3, 21 (2001); see also § 51.53(d)(2). In *Turkey Point*, a petitioner attempted to advance a contention very similar to NJDEP's contention here, contending that the risk of a spent fuel pool accident should be considered under NEPA. See *Turkey Point*, CLI-01-17, 54 NRC at 20-21. The Commission found that the risks of spent fuel accidents, and their mitigation, were treated generically in the GEIS and, thus, could not be raised on renewal. *Id.* at 21; see also GEIS, at xlviii, 6-72 to 6-76, 6-86, 6-92. The Commission also found that Part 51's reference to "severe accident mitigation alternatives" only applies to nuclear reactor accidents, not spent fuel storage accidents. *Id.* The Petition states, as a reason that spent fuel accidents should be considered in the SAMA analysis, that "spent fuel pool accidents are part of the licensee's and state emergency preparedness programs." See Petition at 3. However, emergency preparedness programs are evaluated on a continuing basis and, therefore, are outside the scope of license renewal. See, e.g., *Dominion Nuclear Connecticut* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, slip op. at 8-9 (Oct. 26, 2005); see also *Turkey Point*, LBP-01-06, 53 NRC at 161. The proper regulatory avenue for dealing with an issue of emergency preparedness at this stage would be a petition for enforcement action

under 10 C.F.R. § 2.206 or petition for rulemaking under 10 C.F.R. § 2.802.⁹ In addition, the impacts of spent fuel storage have been generically evaluated and that evaluation may not be challenged in this proceeding.¹⁰ In addition, this contention appears to be barred by the Commission's Waste Confidence Rule, 10 C.F.R. § 51.23(a), in which the Commission found that spent fuel could be stored safely onsite during and after the renewal term. See *Turkey Point*, LBP-01-06, 53 NRC at 161. Proposed Contention 1, therefore, appears to be challenging the Commission's regulations regarding the scope of license renewal, its waste confidence rule regarding spent fuel storage, and its regulations implementing NEPA and setting out what information must be provided in a licensee's ER and LRA. Except with limited exceptions not applicable here, a Commission rule or regulation may not be challenged in an adjudicatory proceeding. See 10 C.F.R. § 2.335(a).

The purpose of SAMA discussion is to evaluate environmental impacts and the relative costs and benefits of potential alternatives to mitigate environmental impacts should a severe accident occur. *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 NRC 1, 5 (2002), *rev'g in part and aff'g in part* LBP-02-04, 55 NRC 49 (2002); *clarified*, CLI-02-28, 56 NRC 373 (2002). SAMAs are rooted in a cost-benefit assessment. *Id.* For any severe accident concern, "there are likely to be numerous conceivable SAMAs and...[i]t would be unreasonable to trigger full adjudicatory proceedings...[when] petitioners have done nothing to indicate the approximate relative cost and benefit" of a proposed SAMA." *Id.* at 7. In this case, petitioners have not even suggested a SAMA but merely made conclusory statements that the LRA SAMA discussion is inadequate

⁹ See also 10 C.F.R. § 50.47(a)(1), which specifically states that no finding regarding the adequacy of emergency plans need be made in the case of an application for license renewal.

¹⁰ See 10 C.F.R. Part 51, Subpart A, App. B; see 61 Fed. Reg. 28, 467 (1996); see also *Turkey Point*, CLI-01-17, 54 NRC at 20-21.

for failing to include information regarding the DBT, without providing any information or documentation supporting the position that consideration of such information would affect the SAMA discussion in any way. “The Commission is unwilling to throw open its hearing doors to petitioners who have done little in the way of research or analysis, provide no expert opinion, and rest merely on unsupported conclusions” regarding the SAMA discussion. *Id.* at 8.

Although Proposed Contention 1 alleges that the discussion of SAMA in the Oyster Creek LRA is inadequate in that it fails to include information about the DBT, the Petition does not give any supporting rationale or evidence that suggests that aircraft attacks or spent fuel pool accidents must be considered within the SAMA analysis under NEPA, nor does it offer any information to suggest that the impacts of such accidents, and, therefore, mitigation alternatives, would be different from the impacts of those severe accidents that are considered in the LRA’s SAMA discussion. Indeed, the Commission has ruled that such concerns are properly excluded from analysis under NEPA. The LRA, in fact, does contain a discussion of SAMAs,¹¹ and NJDEP has not taken issue with the discussion of any specific SAMA or argued that any particular SAMA that should have been included was not. The NRC has evaluated the potential impacts of aircraft attacks and spent fuel accidents on both a generic and site-specific basis and is continuing to do so.¹² The NRC has found that impacts related to the DBT do not differ from the impacts of severe accidents that are considered in the LRA SAMA discussion.¹³ Under

¹¹ See *Applicant’s Environmental Report – Operating License Renewal Stage, Oyster Creek Generating Station*, Appendix F (ADAMS Accession No. ML052080189)

¹² See, e.g., *McGuire and Catawba*, CLI-02-26, 56 NRC at 365-66; *Private Fuel Storage*, CLI-02 25, 56 NRC at 343-44. See also *infra*, note 13, and accompanying citations.

¹³ Even if the NRC was required by law to consider terrorism under NEPA, the NRC has already issued a Generic Environmental Impact Statement (“GEIS”) that considers sabotage in connection with license renewal. The GEIS concluded that, if such an event were to occur, the resultant core damage and radiological releases would be no worse than those expected from internally initiated events. See *Private Fuel Storage*, CLI-02-25, 56 NRC at 358, 361; see also NUREG-1437, “Generic Environmental Impact Statement for Licence Renewal of Nuclear Plants” (May 1996), Vol. 1 at p. 5-18.

NEPA, mitigation in general and SAMAs in particular need be discussed only in sufficient detail to ensure that environmental consequences of the proposed action have been fairly evaluated. *Duke Energy Corporation*, (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC 419, 431; *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352-53 (1989). As NJDEP has not provided any information or support for the proposition that consideration of the accidents that NJDEP suggests would change the SAMA analysis or the environmental consequences of severe accidents, NJDEP's first contention is not admissible.

In the *Turkey Point* license renewal proceeding, the Commission noted that contentions related to severe accidents could not be admitted for adjudication merely upon the assertion that SAMAs are a Category 2 issue. The Commission noted that, because the contention did "not identify any mitigation alternatives that should be considered and it [did] not mention, much less challenge, the Applicant's evaluation of SAMAs in its environmental report, but merely discussed severe accidents," the contention was inadmissible for exceeding the scope of a renewal proceeding. See *Turkey Point*, CLI-01-17, 54 NRC at 21. The same applies here. NJDEP has framed its contention as one related to SAMAs, but it does not at any point discuss mitigation alternatives or take issue with any portion of the SAMA discussion in the Oyster Creek LRA.

The scope of environmental review in a license renewal case is limited to that which is required under NEPA, which mandates the consideration of SAMAs, and not severe accident risks, in the ER. *Turkey Point*, LBP-01-06, 53 NRC at 160-61. There is simply no support, either in NRC regulations or the licensee's analysis or in petitioner's contention, for the proposition that the types of accidents to which the petitioner refers specifically or the DBT generally must be included in the LRA SAMA discussion based on their environmental impacts. Therefore, the contention exceeds the scope of license renewal and is inadmissible. In

addition, a contention presents an impermissible challenge to the Commission's regulations by seeking to impose requirements in addition to those set forth in the regulations.¹⁴ Proposed Contention 1 seeks to impose additional requirements upon the Commission's security regulations, waste-confidence rule, and rules implementing NEPA, and is therefore outside the scope of renewal, as well as an impermissible challenge to Commission regulations.

See 10 C.F.R. § 2.335.

In summary, because Proposed Contention 1 lacks basis, support, and specificity, is outside the scope of license renewal hearings, impermissibly challenges the Commission's regulations, is immaterial to the findings necessary to support license renewal, and fails to establish that a genuine dispute exists on a material issue of law or fact, see 10 C.F.R. §§ 2.309(f)(1)(i)-(vi) and 2.335(a), Proposed Contention 1 fails to meet the Commission's pleading requirements articulated in 10 C.F.R. Part 2 and is inadmissible.

NJDEP's Proposed Contention 2 - "Metal Fatigue":

10 C.F.R. § 50.55a(c)(4) 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.*" The Oyster Creek licensee appears unwilling to maintain this requirement for the proposed license extension period as presented in the application submitted under oath and affirmation on July 22, 2005. As a result, the licensee is also in violation of 10 C.F.R. § 54.21(a)(3) which states that the licensee must, as part of its application, "*For each structure and component ... demonstrate that the effects of aging will be adequately managed so that the intended functions(s) will be maintained consistent with the CLB for the period of extended operation.*" CLB is defined in 10 C.F.R. § 54.3 as the current licensing basis for the plant.

Basis: In Section 4.3 of the Oyster Creek license renewal application, the licensee makes extensive use of a cumulative usage factor (CUF) for fatigue evaluations for the reactor coolant pressure boundary and associated components of 1.0 rather than the 0.8 CUF specified by the Code Edition and Addenda that were

¹⁴ See, e.g., *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-87-12, 26 NRC 383, 395 (1987); *Turkey Point*, LBP-01-06, 53 NRC 138; *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982).

required by Commission regulations at the time of issuance of the construction permit. Specifically, as stated on page 4-24 of the renewal application, “...the Oyster Creek reactor vessel was designed in accordance with ASME Code Sections I and VIII (i.e., it pre-dated ASME Code Section III, including the Code Case Interpretations 1270N and 1273N). Sections 3.1.26, 5.2.2.1 and 5.3.1.1 of the Oyster Creek UFSAR document the original RPV Purchase Specification reactor vessel design requirements, including the allowable fatigue usage factor of 0.8 for the reactor pressure vessel.” Furthermore, as stated on page 4-26 of the renewal application, “Three of the reactor vessel components, the closure bolts, RPV support skirt, and the RPV basin seal skirt (refueling bellows) support, indicated fatigue usage over the allowable value of 60 years of operation when using the original fatigue methodology from the reactor vessel stress report. The original fatigue analysis pre-dated the issuance of ASME Section III and established conservative fatigue rules and acceptance criterion for CUF of 0.8.” Additionally, Table 4.3.1-2 of the renewal application shows the Feedwater Nozzle Forging and the Recirculation Outlet Nozzle CUFs exceed 0.8 for the proposed period of extended operation. While Table 4.3.1-2, Note 1, states that an updated ASME Code fatigue methodology was useful for CUF calculations, even so, this table shows the RPV outlet nozzle CUF exceeds 0.8. The extent by which reactor coolant pressure boundary components would exceed a CUF of 0.8 for the period of extended operation, when calculated as specified by the Code Edition and Addenda that were required by Commission regulations at the time of issuance of the construction permit, is undeterminable based on the information provided by the applicant and is not specified in the applicant’s license renewal application.

Using a CUF of 1.0 would be outside Oyster Creek’s current licensing basis (CLB) and would result in a 25 percent increase in allowable fatigue life beyond that specified by the Code of record for Oyster Creek, thereby significantly reducing the margin of safety for metal fatigue. This is in violation of 10 C.F.R. § 54.21(a)(3) which states that the licensee must, as part of its application, “For each structure and component...demonstrate that the effects of aging will be adequately managed so that the intended function(s) will be maintained consistent with the CLB for the period of extended operation.”

Petition at 4-5.

Staff’s Response to NJDEP’s Proposed Contention 2

NJDEP’s Proposed Contention 2 is inadmissible. Proposed Contention 2 impermissibly challenges the Commission’s regulations, is immaterial to the findings necessary to support license renewal, is outside the scope of a renewal proceeding, and fails to establish that a genuine dispute exists on a material issue of law or fact. See 10 C.F.R. §§ 2.309(f)(1)(iv) and

(vi), 2.335(a). Therefore, NJDEP's Proposed Contention 2 fails to meet the Commission's pleading requirements articulated in 10 C.F.R. Part 2.

NJDEP's Proposed Contention 2 concerns metal fatigue and, specifically, the cumulative usage factor ("CUF") used to perform fatigue evaluations for the reactor coolant pressure boundary. See Petition at 4. The OCNCS LRA indicates that "[t]he fatigue [CUFs] of the reactor vessel, including the support skirt, shell, upper and lower heads, closure assembly, nozzles and penetrations, and nozzle safe ends will be managed by the Metal Fatigue of Reactor Coolant Pressure Boundary (B.3.1) aging management program. See Oyster Creek LRA at 4-25. This program will monitor CUFs through either stress-based fatigue (SBF) monitoring or cycle-based fatigue (CBF) monitoring versus the allowable value." *Id.* Proposed Contention 2 does not challenge whether the aging management programs described in the Oyster Creek LRA will adequately manage the components in question, but instead challenges the CUF by suggesting that a CUF of 0.8, and not 1.0, is required for OCNCS by the Commission's regulations because it is that plant's design basis CUF.

Proposed Contention 2 Does Not Establish a Genuine Dispute on a Material Issue of Law or Fact and Impermissibly Challenges Commission Regulations.

Proposed Contention 2 does not establish a genuine dispute on a material issue of law or fact. The regulation that Petitioner cites, 10 C.F.R. § 50.55a(c)(4), is intended, with respect to a component of the reactor coolant pressure boundary, to permit a licensee to use the original construction code during the operational phase if it so chooses. See Final Rule, Industry Codes and Standards; Amended Requirements, 64 Fed. Reg. 51,370, 51,381 (1999). However, section 50.55a contemplates that the ASME Code will be continually updated and that the Commission will review new and amended editions of the code and, when appropriate, incorporate them into 10 C.F.R. § 50.55a. See, e.g., 37 Fed. Reg. 17021 (1972). A licensee retains the option, under § 50.55a(c), to voluntarily update to a later version of the ASME code

which has been endorsed by § 50.55a. See Final Rule, Industry Codes and Standards; Amended Requirements, 64 Fed. Reg. at 51,381. The NRC regulations require compliance with an NRC approved code, but do not, except in rare cases not applicable here, mandate the use of specific ASME codes.¹⁵ The very purpose of using ASME Codes is that the codes are continuously updated and revised to reflect increasing and evolving engineering knowledge. Section 50.55a(c)(4) was included in the regulation to prevent the imposition of a new Code Section or Edition on existing nuclear power plants. See *Proposed Rule, Codes and Standards for Nuclear Power Plants*, 50 Fed. Reg. 20574, 20574-75 (1985); 64 Fed. Reg. at 51, 381. However, it cannot be read to prevent licensees from adopting new versions of the Code that are approved by the NRC, when the licensee voluntarily does so. See 10 C.F.R. §§ 50.55a, 50.59; 64 Fed. Reg. at 51,381. The regulation that NJDEP cites does not, therefore, provide a basis for requiring the OCNGS to retain a CUF of 0.8. Oyster Creek may elect to use an NRC-approved version of the ASME Code which provides for a CUF of 1.0. See 64 Fed. Reg. At 51,381; NUREG-1800, Section 4.3.2.1.1.2 Rev. 1 (Sept. 2005); see also Oyster Creek LRA, Section 4.3. Therefore, NJDEP has not established that a genuine dispute of law or fact exists on a material issue. To the extent that NJDEP is challenging the use of a newer version of the ASME Code, it is impermissibly challenging the NRC regulations in 10 C.F.R. § 50.55a. See 10 C.F.R. § 2.335. In addition, to the extent that Proposed Contention 2 concerns the design basis for the OCNGS, not the effects of aging, Proposed Contention 2 is outside the scope of the renewal proceeding.

In summary, because Proposed Contention 2 impermissibly challenges the Commission's regulations, is immaterial to the findings necessary to support license renewal, is outside the scope of a renewal proceeding, and fails to establish that a genuine dispute exists

¹⁵ See §§ 50.55a(a)(2), (3), (b), (c).

on a material issue of law or fact, Proposed Contention 2 does not meet the Commission's contention admissibility requirements and is, therefore, inadmissible.

NJDEP's Proposed Contention 3 - "Combustion Turbine":

AmerGen's compliance with 10 C.F.R. 50.63, "Loss of All Alternating Current Power," relies upon the combustion turbines as a last resort for an alternating current power supply. With respect to the combustion turbines, the Oyster Creek License Renewal Application states "The Forked River Combustion Turbines (FRCTs), first installed in 1988, are owned, operated, and maintained by FirstEnergy and provide peak loading to the grid. Consistent with Oyster Creek Generating Station commitments, and as reviewed and approved by the NRC in its letters dated August 23, 1991 and February 12, 1992, the FRCTs also provide a standby source of alternate AC power for the Oyster Creek station in the even of a Station Blackout (SBO). The Interconnection Agreement between AmerGen and First Energy guarantees that SBO electric power from the FRCTs is available, when needed, to fulfill these objectives."

It is the Department's contention that this arrangement will NOT assure that:

1. First Energy will continue to operate the combustion turbines during the proposed extended period of operation at Oyster Creek.
2. The combustion turbines will be maintained, inspected, and tested in accordance with AmerGen's aging management plan that, when developed, will become part of the license renewal commitments. There will be a reliance on a competitor to manage and perform this work with little opportunity for AmerGen to oversee any of it.
3. All deficiencies encountered by First Energy in the course of operating, maintaining, inspecting and testing the combustion turbines will be entered into a corrective action program that meets the requirements of 10 C.F.R. 50 Appendix B, Quality Assurance Criteria for Nuclear Power Plants and Fuel Reprocessing Plants

Basis: *10 C.F.R. 54.33(b) states, "Each renewed license will be issued...as the Commission deems appropriate and necessary to help ensure that systems, structures, and components subject to review in accordance with § 54.21 will continue to perform their intended functions for the period of extended operation. In addition, the renewed license will be issued...as the Commission deems appropriate and necessary to help ensure that systems, structures, and components associated with any time-limited aging analyses will continue to perform their intended functions for the period of extended operation."*

The Department has determined that it is a requirement of the Nuclear Regulatory Commission and in the best interest of the residents of New Jersey to have reliable back up electric power supply sources to the Oyster Creek Nuclear Generating Station during the period of extended operation. Two combustion turbines that are owned, maintained, and operated by First Energy, a

competitor of Exelon Corporation, of which AmerGen Energy is a subsidiary, are called upon as a back up power supply to essential safety systems at Oyster Creek.

10 C.F.R. 54.35, Requirements during term of renewed license, states: "During the term of a renewed license, licensees shall be subject to and shall continue to comply with all Commission Regulations contained in 10 C.F.R. Parts 2, 19, 20, 21, 26, 30, 40, 50, 51, 54, 55, 70, 72, 73, and 100, and the appendices to these parts that are applicable to holders of operating licenses."

Petition at 7-8.

Staff's Response to Proposed Contention 3

NJDEP's Proposed Contention 3 is inadmissible. Proposed Contention 3 lacks basis, support, and specificity, is outside the scope of license renewal hearings, impermissibly challenges the Commission's regulations, is immaterial to the findings necessary to support license renewal, and fails to establish that a genuine dispute exists on a material issue of law or fact. See 10 C.F.R. §§ 2.309(f)(1)(i)-(vi) and 2.335(a). Therefore, NJDEP's Proposed Contention 3 fails to meet the Commission's pleading requirements articulated in 10 C.F.R. Part 2.

The Forked River Combustion Turbines ("FRCTs") are owned, operated, and maintained by FirstEnergy and provide peak loading to the grid.¹⁶ Consistent with OCNGS commitments, and as reviewed and approved in the past by the NRC¹⁷, the FRCTs provide a standby source of alternate AC power for the OCNGS in the event of a Station Blackout. RAI Response at 2. The FRCTs have been found to be within the scope of license renewal. *Id.*; see also *Oyster Creek LRA* at 2.5.1.13.

Proposed Contention 3 Is Outside the Scope of License Renewal.

¹⁶ See "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," dated October 12, 2005 (ADAMS Accession No. ML052910091) ("RAI Response").

¹⁷ See, e.g., "Final Safety Analysis Report for Oyster Creek Generating Station - Volume 5," rev. 12, (April 25, 2001) (ADAMS Accession No. ML011270040).

Proposed Contention 3 asserts that the arrangement provided for in the Oyster Creek LRA concerning the combustion turbines does not assure that: 1) FirstEnergy will continue to operate the FRCTs during the period of extended operation; 2) the combustion turbines will be maintained, inspected, and tested in accordance with AmerGen's aging management plan that, when developed, will become part of the license renewal commitments; and 3) deficiencies encountered by First Energy in the course of operating, maintaining, inspecting and testing the combustion turbines will be entered into a corrective action program that meets the requirements of 10 C.F.R. Part 50 Appendix B, Quality Assurance Criteria for Nuclear Power Plants and Fuel Reprocessing Plants. See Petition at 7. Of these three assertions, only the second assertion even arguably concerns the aging of plant systems, structures, or components, which is the limited scope of safety review for license renewal. *Turkey Point*, LBP-01-06, 53 NRC at 152. Therefore, to the extent that the contention relies on the first or third of these assertions, it is outside the scope of the renewal proceeding and, therefore, inadmissible.

Proposed Contention 3 Lacks the Necessary Basis, Support, and Specificity.

In addition, the contention as a whole lacks basis, support, and specificity. It references part of the LRA and states that it does not ensure that the FRCTs will be operated for the renewal period, but does not controvert the information in the LRA, nor does it raise a legal issue by stating that the information in the LRA fails to meet NRC requirements. Proposed Contention 3 speculates that First Energy may not operate the FRCTs for the period of extended operation, that the FRCTs will not be managed by AmerGen's aging management programs, and that deficiencies in the FRCTs will not be entered into AmerGen's corrective action program. However, Petitioner does not provide any factual support for these suggestions. Proposed Contention 3 merely speculates and does not provide any expert opinion or evidence or information to support its claims about the FRCTs. Since the contention

consists of no more than “bald or conclusory allegation[s],” it is inadmissible and must be rejected. See *Millstone*, CLI-01-24, 54 NRC at 358.

Proposed Contention 3 Does Not Establish a Genuine Dispute on a Material Issue of Law or Fact.

Nor does Proposed Contention 3 establish a genuine dispute on a material issue of law or fact. The FRCTs were discussed extensively in AmerGen’s response to a request for additional information by the NRC staff. See *RAI Response*, *supra*, note 16. The RAI Response makes clear that AmerGen has developed Aging Management Programs (“AMPs”) for the FRCTs, which will ensure that the FRCTs are adequately managed for the period of extended operation. *Id.* at 2. This information was publicly available to NJDEP when framing its contention, but Proposed Contention 3 does not take issue with any of the factual assertions in the RAI Response or, in fact, even mention the RAI Response. Petitioners have a duty to review publicly-available material in framing their contentions. See, e.g., *Duke Energy Corp* (Catawba Nuclear Station, Units 1 and 2), LBP-04-04, 59 NRC 129, 146 (2004). Petitioners have apparently ignored this duty.

The Oyster Creek LRA and RAI Responses state that the effects of aging on the combustion turbines will be adequately managed by several aging management programs. Proposed Contention 3 contends that there is no assurance that the effects of aging will be adequately managed, but does not take issue with any of the factual assertions in the Oyster Creek LRA or RAI Responses, nor does it provide any information to support the claim that such effects will not be adequately managed. Therefore, Proposed Contention 3 does not demonstrate a genuine dispute on a material issue of law or fact.

In summary, because Proposed Contention 3 lacks the necessary basis, support, and specificity, is outside the scope of license renewal, impermissibly challenges Commission

regulations, is immaterial to the findings necessary to support license renewal, and fails to state a genuine dispute on a material issue of law or fact, it does not meet the Commissions contention admissibility requirements and is inadmissible.

CONCLUSION

Although NJDEP has demonstrated standing to intervene, it has failed to proffer an admissible contention. Therefore, the Licensing Board should deny its Petition.

Respectfully submitted,

Original signed by Daniel Hugo Fruchter
Ann P. Hodgdon
Daniel Hugo Fruchter
Counsel for NRC Staff

Dated at Rockville, Maryland
this 12th day of December, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
AMERGEN ENERGY COMPANY, LLC) Docket No. 60-219-LR
(Oyster Creek Nuclear Generating Station))
)

NOTICE OF APPEARANCE

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

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Name of Party: NRC Staff

Respectfully submitted,

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Daniel Hugo Fruchter
Counsel for NRC Staff

Dated at Rockville, Maryland
this 12th day of December, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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In the Matter of)
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AMERGEN ENERGY COMPANY, LLC) Docket No. 50-219-LR
(Oyster Creek Nuclear Generating Station))
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Notice is hereby given that the undersigned attorney enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.314(b), the following information is provided:

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Dated at Rockville, Maryland
this 12th day of December 2005

:

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF ANSWER TO REQUEST FOR HEARING AND PETITION TO INTERVENE OF THE STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION," "NOTICE OF APPEARANCE" for Daniel Hugo Fruchter, and "NOTICE OF APPEARANCE" for Ann P. Hodgdon in the above-captioned proceeding have been served on the following through deposit in the NRC's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by electronic mail, with copies by U.S. mail, first class, as indicated by double asterisk, this 12th day of December, 2005:

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