

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

ATOMIC SAFETY AND LICENSING BOARD

December 29, 2005 (2:19pm)

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

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of:)	December 29, 2005
AmerGen Energy Company, LLC)	Docket No. 50-219
(License Renewal for Oyster Creek Nuclear Generating Station))	

AMERGEN MOTION TO STRIKE

In accordance with 10 C.F.R. § 2.323(a), AmerGen Energy Company, LLC (“AmerGen”), hereby files this Motion to Strike new arguments and new supporting information contained in Petitioners’¹ December 19, 2005 Combined Reply to the Answers of AmerGen and the NRC Staff (hereafter “Reply”).² As demonstrated below, Petitioners’ Reply impermissibly presents for the first time various new arguments and exhibits in support of their sole contention. Petitioners also ignore the criteria of 10 C.F.R. § 2.309(f)(2) for amending a contention. Accordingly, these new arguments and exhibits should not be considered by the Licensing Board and should be stricken.

¹ The Petitioners are six organizations: 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”).

² As required by 10 C.F.R. § 2.323(b), counsel for AmerGen contacted Ms. Donato, Petitioners’ counsel of record, in an attempt to resolve the issues raised in this Motion. Ms. Donato was unable to reach her clients and so could not agree to the relief requested in this Motion.

TEMPLATE = SECY-041

SECY-02

I. BACKGROUND

On July 22, 2005 AmerGen submitted an application to the NRC to renew the Oyster Creek Nuclear Generating Station (“OCNGS”) operating license (License No. DPR-16) for an additional 20 years (“Application”). The Petitioners filed their Request for Hearing and Petition to Intervene on November 14, 2005 (“Petition”), raising one contention which asserted that the Application was 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 contention is supported by multiple unnumbered bases, nine exhibits, and an unsigned Memorandum from Dr. Rudolf Hausler to Mr. Paul Gunter of NIRS (“Dr. Hausler’s Memorandum”).

Both AmerGen and the NRC Staff oppose admission of the contention. *See* AmerGen’s Answer Opposing NIRS et al. Request for Hearing and Petition to Intervene (Dec. 12, 2005) (“AmerGen Answer”); NRC Staff Answer to Request for Hearing and Petition to Intervene (Dec. 14, 2005) (“Staff Answer”). Petitioners responded to AmerGen and the NRC Staff with a combined Reply, which includes new arguments and supporting information not originally included in their Petition. Petitioners also submit exhibits that were not previously attached to the Petition.

II. NEW ARGUMENTS AND SUPPORTING INFORMATION ARE PROHIBITED UNDER 10 C.F.R. § 2.309(h)(2)

The new arguments and supporting information that Petitioners include in their Reply expand the scope and bases of the contention, and are prohibited under NRC regulations and adjudicatory practice. “In Commission practice, and in litigation practice

generally, new arguments may not be raised for the first time in a reply brief.” *Louisiana Energy Servs., L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004) (“*LES*”)(citations omitted).

The rationale for the requirement that a petitioner include all of its arguments in its initial filing, and not wait to include those arguments in a reply, was recently reiterated by the Commission:

our contention admissibility and timeliness requirements “demand a level of discipline and preparedness on the part of petitioners,” who must examine the publicly available material and set forth their claims and the support for their claims at the outset. The Petitioners’ reply brief should be “narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer” As we face an increasing adjudicatory docket, the need for parties to adhere to our pleading standards and for the Board to enforce those standards are paramount. There simply would be “no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements” and add new bases or new issues that “simply did not occur to [them] at the outset.”

Id. at 224-25 (citations omitted).

As described below, Petitioners’ Reply improperly includes three new arguments and four new exhibits.³ As a result, those arguments and exhibits should be stricken.⁴

³ NIRS is well aware that raising new arguments in a reply brief is prohibited, as it was a party to the *LES* proceeding. See *Louisiana Energy Servs., L.P.* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 47 (2004). Furthermore, as an intervenor in the Palisades Nuclear Plant license renewal proceeding, NIRS filed a Reply that is subject to a pending NRC Staff Motion to Strike because it raises new arguments and contains new support for its contentions. See *NRC Staff Motion to Strike Petitioners’ Combined Reply to NRC Staff and NMC Answers to Petition to Intervene and Request for Hearing* (Sept. 28, 2005) (Docket No. 50-255-LR).

⁴ A Licensing Board has the authority to strike individual arguments and exhibits. See generally 10 C.F.R. § 2.319 (The presiding officer has all the powers necessary “to take appropriate action to control the prehearing . . . process”). See also 10 C.F.R. § 2.304(c) (“If a document is not signed . . . it may be stricken”); 10 C.F.R. § 2.319(d) (authorizing the presiding officer to “strike any portion of a written presentation”); 10 C.F.R. § 2.333(b) (authorizing the presiding officer to “strike argumentative, repetitious, cumulative, unreliable, immaterial, or irrelevant evidence”); 10 C.F.R. § 2.705(g)(3) (authorizing a presiding officer to strike an unsigned discovery-related request, response, or objection); 10 C.F.R. § 2.1320(a)(9) (authorizing the presiding officer to “strike or reject duplicative, unreliable, immaterial, or irrelevant presentations”).

A. New Argument No. 1 – Embedded Portion of the Drywell Shell

Although their original contention generally refers to “all critical areas” of the OCNGS drywell shell (Petition at 3), Petitioners’ bases discuss only the sand bed region of the drywell shell and the upper region of the drywell shell (the area above the sand bed region). Petition at 3-13. Petitioners only mention the embedded area below the sand bed region in passing. *See, e.g., id.* at 4 (“The spherical portion is partially embedded in reinforced concrete”). In other words, the bases for the contention are *silent* with respect to any potential corrosion issues below the sand bed region in the embedded portion of the drywell shell. Indeed, both AmerGen and the NRC Staff structured their Answers to focus only on the upper and sand bed regions of the drywell shell. *See* AmerGen Answer at 23-28; Staff Answer at 14-17.

Petitioners now seek to amend the contention by expanding the bases to cover the area of the drywell shell that is embedded in concrete (*i.e.*, below the sand bed region). For example, Petitioners now state that “the steel drywell liner just below the concrete is obviously another critical level.” Reply at 14. This is a “late attempt to reinvigorate [a] thinly supported contention[] by presenting [an] entirely new argument[] in the reply brief[],” and is prohibited. *LES*, CLI-04-25, 60 NRC at 224.

For reasons not explained in the Reply, Petitioners elected not to challenge the integrity of the drywell shell below the sand bed region in their Petition. They are prohibited from doing so now.

B. New Argument No. 2 – Inspection of the Epoxy Coating

With respect to inspections of the epoxy coating, Petitioners originally asserted only that AmerGen “does not indicate whether visual coating inspections since the original application have been made specifically for pinhole leaks in the coating”

(Petition at 10), and that “it is unreasonable to rely... solely on visual inspections of the condition of the coating.” Petition at 13. In their Reply, however, Petitioners now identify two specific testing procedures for evaluating protective coatings and note that “AmerGen has not provided any indication that the inspection of the coating . . . has employed any such procedures.” Reply at 5-6 (citing National Association of Corrosion Engineers, International (NACE) Test Method TM-00384 and RP-0281). This is new information presented for the first time in Petitioners’ Reply. Their original Petition does not allege that AmerGen has failed to meet any particular coating inspection standards. Thus, this aspect of their Reply should be stricken as well.

C. New Argument No. 3 – Buckling of the Drywell Shell

Petitioners also devote an entire page of their Reply to new issues related to the potential buckling of the drywell shell in the sand bed region. Reply at 7-8. This discussion includes a previously uncited portion of the Application (Application at 2.4.3) and new speculation that failure of the drywell shell could “act[] like a guillotine” and cause a Loss-of-Coolant-Accident. *Id.* at 8. Petitioners apparently do not believe that their discussion presents a new argument, because they assert that they discussed buckling in the sand bed region as a “defining issue” in the Petition. *Id.* at 7 (citing to Petition at 8).

There are two problems with this assertion. First, Petitioners did not identify buckling as a “defining issue” to be litigated in their Petition. In fact, the Petition only uses the word “buckling” twice, and in both instances, the references are statements of background facts that, when read in context, clearly do not reflect an effort by Petitioners to place potential “buckling” of the drywell shell into litigation. *See* Petition at 8 (“Petitioners note that the sand was originally installed to prevent buckling of the drywell

liner”); Petition at 10 (“The UT measured minimums at the sand bed region were recorded at 0.806 inches while the Code required 0.736 inches as determined by buckling calculations for the drywell liner”) (citing Petitioners’ Exhibit 6, at Table 1).⁵ That these references cannot be read to place the matter of “buckling” into dispute is underscored by the fact that, again, neither AmerGen nor the NRC Staff addressed buckling in their Answers.

Second, a reply brief must be “narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer.” *LES*, CLI-04-25, 60 NRC at 225 (quoting Final Rule, Changes to the Adjudicatory Process, 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004)). Petitioners admit that “[b]oth AmerGen and the NRC Staff Answers *do not address* the critical limiting factor of buckling.” Reply at 8 (emphasis added). Since Petitioners recognize that AmerGen and the Staff did not address the issue of buckling in their Answers, Petitioners may not address the matter in their Reply.

Thus, Petitioners’ discussion of potential buckling of the drywell shell constitutes a new argument presented for the first time in their Reply and should be stricken.

D. New Exhibits

Petitioners filed nine exhibits with their Petition. None of those exhibits indicated that water was present in the sand bed region since the epoxy was applied to the outside of the drywell shell in that region in 1992. In their Reply, Petitioners now seek to include three exhibits—Petitioners’ Exhibits 10, 11, and 12—to demonstrate that water was

⁵ Petitioners now also cite to Petitioners’ Exhibit 5, at 12, as support for their buckling argument, Reply at 7, although they did not cite to this exhibit as support for this issue in the Petition. *See* Petition at 9. A petitioner should not be permitted to include an exhibit in its Petition to demonstrate one purpose and then identify it in its Reply for another. *See generally LES*, CLI-04-25, 60 NRC at 225 (a petitioner must present the “support for [its] claims at the outset”).

present for all or some of that time. *Id.* at 17. Petitioners, however, were required to “examine the publicly available material and set forth their claims *and the support for their claims at the outset.*” *LES, CLI-04-25, 60 NRC at 225 (emphasis added).*

Petitioners failed to support their claim at the outset, and in its Answer AmerGen merely alerted the Licensing Board to that fact. Petitioners should not be permitted to supplement their Petition now with new exhibits.

Finally, Petitioners’ new Exhibit 13 also should be stricken. Petitioners assert that this exhibit is the same Memorandum from Dr. Hausler to Mr. Gunter “as provided in the original filing.” Reply at 20. The only reason Petitioners attach Exhibit 13 to the Reply is purportedly to include Dr. Hausler’s signature which did “not optically transmit” with the original. *Id.* at 19. Petitioners, however, present only an electronic signature for Dr. Hausler. *Id.* at 20.

Electronic signatures are not authorized in NRC adjudicatory proceedings. 10 C.F.R. § 2.304(c) (“the original of each document must be signed in ink”); 10 C.F.R. § 2.304(d) (“a pleading or other document . . . must be filed in an original . . .”); *see also Duke Cogema Stone & Webster LLC (Savannah River Mixed Oxide Fuel Fabrication Facility)*, 2001 WL 871664, at *1 (July 17, 2001) (noting that the NRC “has yet to establish . . . electronic signature provisions for pleadings”); *cf. Proposed Rule, Use of Electronic Submissions in Agency Hearings*, 70 Fed. Reg. 74950, 74951 (Dec. 16, 2005) (noting that the proposed rule is needed because the NRC’s 2003 electronic filing rule “does not apply to filings in NRC hearings”).⁶ Accordingly, since Dr. Hausler’s

⁶ Petitioners are fully capable of producing non-electronically signed documents. All other parts of Petitioners’ November 14, 2005 filing had original signatures, including multiple affidavits from third persons supporting Petitioners’ standing.

Memorandum is treated by NRC regulations as unsigned, it should be stricken. *See* 10 C.F.R. § 2.304(c) (“If a document is not signed . . . it may be stricken”).

III. PETITIONERS FAIL TO ADDRESS 10 C.F.R. § 2.309(f)(2)

The new arguments and exhibits discussed above in Section II also should be stricken because Petitioners failed to comply with the criteria in 10 C.F.R. § 2.309(f)(2). That regulation allows a petitioner to amend a contention after the initial filing “only with leave of the presiding officer² upon a showing that—

- (i) The information upon which the amended or new contention is based was not previously available;
- (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
- (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.”

10 C.F.R. § 2.309(f)(2)(i)-(iii).

Petitioners did not comply with this regulation. As far as AmerGen is aware, Petitioners did not seek leave of the Licensing Board to amend its contention with new arguments and exhibits. Nor did Petitioners even attempt to address the criteria in 10 C.F.R. § 2.309(f)(2)(i)-(iii).

Nor could Petitioners have met these criteria. Nothing precluded Petitioners from originally including the area below the sand bed region (*i.e.*, the area embedded in reinforced concrete) as a separate basis for their contention (*see* New Argument No. 1, above). Petitioners were certainly aware that this embedded region exists. *See* Petition at 4 (“The spherical portion is partially embedded in reinforced concrete . . .”). Petitioners

² The presiding officer in this case is the Licensing Board. *See* 10 C.F.R. § 2.313(a)(1).

also could have identified NACE Test Method TM-00384 and RP-0281 in their Petition (see New Argument No. 2, above). AmerGen assumes that these test methods have been in existence for some time since Petitioners assert that they are “commonly used.” Reply at 5. Petitioners also could have sought to litigate—rather than merely mention in passing—the issue of potential buckling of the drywell shell (see New Argument No. 3, above).

Finally, Petitioners’ Exhibits 10, 11, and 12, were publicly available before Petitioners were required to file their Reply on November 14, 2005, and two of them have been in the public domain for about a decade. See Petitioners’ Exhibit 10 (Dec. 15, 1995); Exhibit 11 (Feb. 15, 1996); Exhibit 12 (October 12, 2005). By failing to provide—or even reference—these documents in their Petition, Petitioners denied AmerGen and the Staff an opportunity to address those documents in their Answers.

IV. CONCLUSION

The supporting bases for Petitioners' sole contention that were originally included in their Petition specifically focus on the upper and sand bed regions of the drywell shell. Petitioners cannot add new arguments and supporting information in their Reply relating to the embedded region of the drywell shell, specific coating testing methods, and potential buckling of the drywell shell. Moreover, Petitioners did not seek approval from the Licensing Board before including these new arguments and supporting information, and failed to address the criteria in 10 C.F.R. § 2.309(f)(2)(i)-(iii) for amending their contention. Accordingly, AmerGen's Motion to Strike should be granted.

Respectfully submitted,



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

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

COUNSEL FOR
AMERGEN ENERGY COMPANY, LLC

Dated in Washington, D.C.
this 29th day of December 2005.

**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 29, 2005
AmerGen Energy Company, LLC)	
(License Renewal for Oyster Creek Nuclear Generating Station))	Docket No. 50-219
)	
)	
)	

CERTIFICATE OF SERVICE

I hereby certify that copies of AmerGen's Motion to Strike were served this day upon the persons listed below, by E-mail and first class mail, unless otherwise noted.

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

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

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

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

John A. Covino
Deputy Attorney General -
Division of Law
Environmental Permitting and Counseling Section
Hughes Justice Complex
Trenton, NJ 08625
(E-mail: john.covino@dol.lps.state.nj.us)

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

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

Michele R. Donato
P.O. Box 145
106 Grand Central Avenue
Lavallette, New Jersey 08735
(E-mail: mdonato@micheledonatoesq.com)

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

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

* Original and 2 copies
** First Class Mail only


Alex S. Polonsky