

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF NOTICE OF APPEAL OF LBP-06-07

Pursuant to 10 C.F.R. § 2.311(a) and (c), the NRC staff (Staff) files this Notice of Appeal of the Atomic Safety and Licensing Board's February 27, 2006, Memorandum and Order, which, among other things, admitted for litigation in the above captioned proceeding a contention related to corrosion of the Oyster Creek Nuclear Generating Station drywell liner, together with the attached Brief.

Respectfully submitted,

/RA/

Ann P. Hodgdon
Counsel for NRC Staff

Dated at Rockville, Maryland
this 14th day of March, 2006

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Ann P. Hodgdon
Counsel for NRC Staff

March 14, 2006

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APPEAL FROM LBP-06-07

INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(c), the staff of the Nuclear Regulatory Commission ("Staff") hereby appeals the decision of the Atomic Safety and Licensing Board ("Board") in LBP-06-07. This decision denied intervention to the New Jersey Department of Environmental Protection ("NJDEP") and granted intervention to the Nuclear Information and Resource Service; Jersey Shore Nuclear Watch, Inc.; Grandmothers, Mothers and More for Energy Safety; New Jersey Public Interest Research Group; New Jersey Sierra Club; and New Jersey Environmental Federation (collectively referred to as "NIRS"). The Staff appeals the decision of the Board only with respect to the Board's conclusion that NIRS proffered an admissible contention. As discussed below, the Board erred in admitting NIRS's contention, and, accordingly, that portion of the Order admitting NIRS's contention should be reversed and its request for hearing wholly denied.

STATEMENT OF THE CASE

This case arises from the July 22, 2005 application by AmerGen Energy Company, LLC ("AmerGen") to renew its operating license for Oyster Creek Nuclear Generating Station ("Oyster Creek"). 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 of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License DRP-16 for an Additional 20-Year Period.” 70 Fed. Reg. 54,585 (2005). On November 14, 2005, NIRS filed its “Request for Hearing and Petition to Intervene” (“NIRS Petition”).

Subsequently, this Board was established to preside over the proceeding. See “Establishment of Atomic Safety and Licensing Board,” dated December 9, 2005. On December 12, 2005, AmerGen filed its response to NIRS’s Petition to Intervene, while the Staff filed its response to NIRS on December 14, 2005.¹ On December 19, 2005, NIRS filed a combined reply to the Staff and AmerGen. See “Combined Reply of [NIRS] to the Answers of AmerGen and the NRC Staff,” dated December 19, 2005 (“NIRS Reply”). Subsequently, the parties filed simultaneous supplemental briefs in response to a Board order.² Following these briefs, the Board, on February 27, 2006, issued an order admitting NIRS’s single proposed contention and granting NIRS’s request for hearing. See Memorandum and Order (Denying New Jersey’s Request for Hearing and Petition to Intervene, and Granting NIRS’s Request for Hearing and Petition to Intervene), LBP-06-07, 63 NRC __ (February 27, 2006).

STATEMENT OF THE ISSUES

The Board, in reaching its conclusion that NIRS’s contention was admissible, committed several errors. The Board erred in rewriting and reframing NIRS’s contention so as to bring it

¹ See “AmerGen’s Answer Opposing NIRS et al. Request for Hearing and Petition to Intervene,” dated December 12, 2005 (“AmerGen Answer”); “NRC Staff Answer to [NIRS] Request for Hearing and Petition to Intervene,” dated December 14, 2005 (“Staff Answer”).

² On January 17, 2006, NIRS, AmerGen, and the NRC Staff each filed a supplemental brief (“NIRS Supp. Brief,” “AmerGen Supp. Brief,” and “Staff Supp. Brief,” respectively) in response to a January 10, 2006 Order (Directing Supplemental Briefing on Hearing Requests) (“Supplemental Briefing Order”). On January 24, 2006, the Board informed the parties by e-mail that it would not schedule oral argument regarding the admissibility of NIRS’s contention.

within the scope of license renewal. The Board also erred in directing supplemental briefings, which gave NIRS an opportunity to provide information on matters upon which it had failed to sustain its burden in setting forth its contention and supporting information in its Petition. Finally, the Board erred in admitting NIRS's contention, even as rewritten, because the proposed contention lacked an adequate basis and supporting information, did not raise a genuine issue of fact or law material to license renewal, and did not demonstrate that it was within the scope of the proceeding.

LEGAL STANDARDS

A. Legal Standard for Interlocutory Appeal of Licensing Board Order Granting a Petition to Intervene or Request for a Hearing

Pursuant to 10 C.F.R. § 2.311(c), an order granting a petition to intervene and/or request for hearing may be appealed by a party other than the requestor/petitioner on the question as to whether the request/petition should have been wholly denied. In considering an appeal raised pursuant to section 2.311(c) (formerly, 2.714a(c)), the Commission has the option to consider all the points of error raised on appeal, rather than simply whether the petition should have been wholly denied. See *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-02, 53 NRC 9, 19 (2001); *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-869, 26 NRC 13, 25-27 (1987).

B. Legal Standards for the Admission of Contentions

To gain admission to a proceeding as a party, a petitioner for intervention, in addition to establishing standing, must proffer at least one contention that satisfies the admissibility requirements of 10 C.F.R. § 2.309(f). See 10 C.F.R. § 2.309(a). See also, e.g., *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 NRC 328, 333 (1999). For a contention to be admissible, the petitioner must satisfy the following six requirements:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
- (ii) Provide a brief explanation of 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 . . . petitioner's position on the issue and on which the petitioner intends to rely at the hearing, together with references to the specific sources and documents on which the . . . 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 . . . 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)(i)-(vi). These contention requirements are "strict by design." *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001). A contention that fails to comply with any of these requirements will not be admitted for litigation. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); Changes to Adjudicatory Process [Final Rule], 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004). The petitioner must do more than submit bald or conclusory allegations of a dispute with the applicant. *Millstone*, CLI-01-24, 54 NRC at 358. There must be a specific factual and legal basis supporting the contention. *Id.* at 359. A contention will not be admitted if it is based only on unsupported assertions and speculation. *See Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003). 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 Services, L.P.* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 56 (2004) (citing *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001)).

C. License Renewal

The scope of a license renewal proceeding with respect to technical issues is limited by 10 C.F.R. Part 54. See *Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 6-10 (2001); *Nuclear Management Co., LLC* (Palisades Nuclear Plant), LBP-06-10, 63 NRC ___, slip op. at 25-28 (March 7, 2006); [Final Rule], Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. 22,461 (May 8, 1995). The focus of Part 54 safety review is on “the detrimental effects of aging on the functionality of certain systems, structures, and components in the period of extended operation.” 60 Fed. Reg. at 22,464. As the Commission has explained, license renewal review focuses on “plant systems, structures, and components for which current [regulatory] activities and requirements *may not* be sufficient to manage the effects of aging in the period of extended operation.” *Turkey Point*, CLI-01-17, 54 NRC at 10 (citing 60 Fed. Reg. at 22,469) (alteration in CLI-01-17).

In contrast, issues relating to a plant’s “current licensing basis” are ordinarily beyond the scope of a license renewal review, because “those issues already [are] monitored, reviewed, and commonly resolved as needed by ongoing regulatory oversight.” *Id.* at 8. The current licensing basis is defined in § 54.3(a) and includes the various Commission requirements and licensee’s written commitments applicable to a particular plant that are docketed and in effect. See 10 C.F.R. § 54.3. Therefore, a contention that does not raise a genuine dispute of fact or law with respect to the “detrimental effects of aging” during the period of extended operation has not demonstrated that it is within the scope of license renewal and therefore, necessarily, has not raised an issue material to license renewal.

DISCUSSION

A. The Licensing Board Erred in Rewriting and Reframing NIRS's Proposed Contention and in Ordering Supplemental Briefing on the Issue of Scope

The Board rewrote and admitted NIRS's proposed contention regarding drywell liner corrosion. The text of the admitted contention, as rewritten by the Board, states:

AmerGen's License Renewal Application fails to establish an adequate aging management plan for the sand bed region of the drywell liner, because its corrosion management program fails to include periodic UT measurements in that region throughout the period of extended operation and, thus, will not enable AmerGen to determine the amount of corrosion in that region and thereby maintain the safety margins during the term of the extended license.

LBP-06-07, slip op. at 33. In contrast, the contention originally articulated by NIRS stated:

The Petitioners contend that the licensee's application is significantly deficient by failing to adequately and reasonably assure the continued integrity for the requested twenty (20) year license extension for the safety-related containment component, 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 of the vitally important containment component. Petitioners contend that failing to do so unreasonably jeopardizes the health and safety of the Petitioners' members. The Petitioners therefore contend that as part of this licensing proceeding that the applicant be required to conduct an adequate number of confirmatory UT measurements using state of the art equipment at all levels of the drywell liner, including multiple measurements at the area formerly known as the "sand bed region" and also be required to submit the results to the United States Nuclear Regulatory Commission as publicly available documents as part of this license extension proceeding for the Petitioners' independent review and analysis. The Petitioners further contend that the applicant's new UT measurements at all critical areas, the NRC and the Petitioners' independent analysis shall concur with ASME standards governing the safety limitations of the known degraded drywell liner. The Petitioners further contend that the 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" to include the requested 20-year extension to confirm that the actual corrosion

measurements are as projected and that additional UT measurements be greatly expanded into areas not previously inspected.

1. The Board Erred in Rewriting and Reframing NIRS's Contention

In rewriting and reframing NIRS's drywell liner corrosion contention, the Board committed error. As the Commission has stated, it is the petitioner's responsibility, not the Licensing Board's, to frame and write its contentions, and to provide sufficient information to satisfy the contention admissibility requirements. *See Millstone*, CLI-01-24, 54 NRC at 363 n.10; *see also Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998). In this case, the Board rewrote and reframed NIRS's contention, which, as proffered by NIRS, did not make any mention of aging-related degradation during the period of extended operation or discuss specifically any aging management program in AmerGen's license renewal application ("LRA").

NIRS's proposed contention merely requested UT testing of the drywell liner in order to "determine the actual remaining wall thickness of the vitally important containment component," as well as UT testing, periodically, "for the life of the reactor." NIRS Petition at 3. As originally proffered by NIRS, the contention did not establish a genuine issue of fact or law material to license renewal because it did not raise an issue of aging-related degradation specific to the period of license renewal.³ Although it discussed corrosion of the drywell liner and alluded to the 20-year period of renewal, and although corrosion is a possible source from which "aging effects can result," *see Turkey Point*, CLI-01-17, 54 NRC at 7, NIRS's proposed contention did not establish or provide any basis for a belief that corrosion of the drywell liner would be an

³ The Staff in its Answer pointed out that "Petitioners' Proposed Contention does not dispute any of the factual assertions contained in the Oyster Creek LRA or cite or allege any specific deficiencies in the proposed aging management program. Nor do Petitioners assert that the OCNGS is not complying with the program or that the licensee's proposed program or implementation is in violation of any regulatory requirement." NRC Staff Answer to Request for Hearing and Petition to Intervene, December 14, 2005, at 14.

aging effect peculiar to the period of extended operation, as opposed to an operating concern that has been and will continue to be addressed through ongoing regulatory activities.

See LBP-06-07, "Dissenting Opinion of Judge Abramson, Disagreeing With the Board's Conclusion That NIRS Proffered an Admissible Contention," slip op. at 5-7.

In rewriting the contention, the Board specifically tied the issue of drywell liner corrosion to the management of the effects of aging during the period of extended operation. In contrast, Petitioner's original contention concerned UT measurements "to determine the actual remaining wall thickness" of the drywell liner, as well as further UT measurements "for the life of the reactor." See NIRS Petition at 3.⁴

Therefore, although it claims to have narrowed the scope of NIRS's contention as submitted, the Board actually broadened the scope of NIRS's original contention to raise issues of the detrimental effects of aging on the drywell liner during the period of extended operation. While a board may, in some cases (not applicable here), recast or rewrite a petitioner's contention, it is improper for a licensing board to expand the scope of a contention by doing so. See *Cleveland Elec. Illuminating Co.* (Perry Nuclear Plant, Units 1 & 2), ALAB-675, 15 NRC 1105, 1114-16 (1982); see also *Pac. Gas & Elec. Co.* (Humboldt Bay Power Plant, Unit 3), 1986 WL 68859, at *5 (1986). The Board erred in so rewriting NIRS's contention, because the responsibility of formulating an admissible contention rests on the petitioner, not on the licensing board.

⁴ The Staff would argue nonetheless that even the contention as rewritten by the Board does not meet the Commission's standards for admissibility because there is no basis or support in the information supplied or referenced by NIRS for the belief that drywell liner corrosion will be a detrimental aging effect during the period of extended operation. See LBP-06-07 (J. Abramson, dissenting), and section B of this brief, *infra*.

2. The Board Erred in Ordering Supplemental Briefing

In addition, the Board erred in ordering supplemental briefing on the issue of the scope of NIRS's contention. Although the Staff does not dispute that licensing boards have the authority to order supplemental briefing, the Board's use of supplemental briefing in this case was in error because it gave NIRS, which had not in its initial filing demonstrated that its contention was within the scope of license renewal, another opportunity to provide additional information regarding scope.⁵ The Board requested the supplemental briefing in order to obtain "greater specificity as to the ambit of [the] legal standard" for license renewal safety review and to "assist [the Board] in fleshing out the meaning and actual applicability of this standard[.]" Supplemental Briefing Order, at 2 n.1.

As the Staff noted in its supplemental filing, the NRC's regulations place the burden of demonstrating that a contention is within the scope of the proceeding upon the petitioner. See Staff Supp. Brief at 2.⁶ Because NIRS made no attempt to tie its concern regarding drywell liner corrosion to the management of the detrimental effects of aging, NIRS did not meet that burden. See, e.g., *Palisades*, LBP-06-10, slip op. at 40 (finding a contention inadmissible for failing to state clearly how a technical issue that *is* within the scope of license renewal is

⁵ The Board's order for supplemental briefing is at odds with 10 C.F.R. § 2.309(h)(3) to the extent that it provided NIRS an opportunity to present additional information, not before submitted, in support of its petition. As § 2.309(h)(3) makes clear, the NRC's rules of practice contemplate a petition for intervention in support of a petitioner's proposed contention, answers to the petition from existing parties, and a petitioner's reply filing addressing arguments raised by an already existing party in answer to the petition to intervene. These rules require that a petitioner provide the information necessary to support its contention at the outset and do not contemplate additional opportunities to allow a petitioner to meet its burden to demonstrate compliance with the contentions admissibility requirements in § 2.309(f)(1).

⁶ Although the Board chastises the Staff for not fully developing its argument regarding NIRS's contention, see LBP-06-07, slip op. at 41, the burden is on the petitioner to demonstrate the admissibility of the contention, not on the Staff to demonstrate its inadmissibility. See *Balt. Gas & Elec. Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2)*, CLI-98-14, 48 NRC 39, 41 (1998) ("It 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 [the] proceeding."); 10 C.F.R. § 2.309(f)(1).

susceptible to litigation).⁷ The Board, however, gave NIRS the opportunity to reframe its argument and provide additional information with its supplemental brief. It was only in this supplemental pleading that NIRS even attempted to tie the issue of drywell liner corrosion to the detrimental effects of aging during the period of extended operation. See NIRS Supp. Brief at 4-10. It was error for the Board to rely on information in NIRS's supplemental brief to support admitting the contention,⁸ because NRC regulations require that a petitioner demonstrate the admissibility of its contention at the outset.⁹ The Board erred in ordering supplemental briefing, which allowed NIRS to provide further information to attempt to make its contention admissible.

B. The Licensing Board Erred in Admitting NIRS's Contention, Which Lacked Adequate Support and Basis and Did Not Raise a Genuine Dispute of Fact Material to and Within the Scope of License Renewal

The Board erred in admitting NIRS's contention, even as rewritten and reframed by the Board, because both the original and revised contentions 1) lack adequate basis and support and 2) fail to raise a genuine dispute of fact material to and within the scope of license renewal.

Even if the Board's rewriting of NIRS's contention and its reliance on supplemental briefings were proper, the contention would nevertheless be inadmissible because it fails to provide any support for the proposition that the drywell liner will be subject to corrosion in the future. As explained succinctly in Judge Abramson's dissent, NIRS fails to present any fact or

⁷ The Board in *Palisades* commented: "[R]egarding the requirement of section 2.309(f)(1)(iii) that a demonstration be made that 'the issue raised in the contention is within the scope of the proceeding,' we have observed above that embrittlement is within the scope of a license renewal proceeding. But [here] the Petitioners provide very little *with regard to the particular way in which embrittlement is an issue susceptible to litigation in this proceeding.*" *Id.* (emphasis added). Similarly, even if corrosion *under certain circumstances* could be within the scope of license renewal, NIRS's contention failed to explain why corrosion of the Oyster Creek drywell liner is such an issue.

⁸ See, e.g., *Palisades*, LBP-06-10, slip op. at 37 (finding no good cause for Petitioner's failure to provide previously-available information in its initial petition rather than in a Reply).

⁹ See, e.g., *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224-25 (2004); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC 419, 428-29 (2003).

expert opinion that would demonstrate a risk of drywell liner corrosion during the period of extended operation, the critical inquiry for a license renewal contention. See LBP-06-07 (J. Abramson, dissenting), slip op. at 6-7. Because NIRS provided no specific support to demonstrate why drywell liner corrosion (or even a corrosive environment) is to be expected – and the Board’s revision of the contention does not fill that void – the contention is inadmissible. See 10 C.F.R. § 2.309(f)(1)(v).

1. NIRS’s Contention Lacked Adequate Support and Basis

As a review of the record demonstrates, the Board majority perceives a significantly more cohesive basis in NIRS’s submissions than is warranted. For example, with regard to present drywell liner conditions, the Board states: “NIRS explains that...corrosion-causing moisture continues to enter the drywell liner.” LBP-06-07, slip op. at 33-34. The Board cites NIRS’s Petition at pages 6, 11, and 13 in support of this statement.¹⁰ *Id.* at 34. However, an examination of page 6 of NIRS’s Petition shows that it makes only an unsupported statement that “neither the leakage nor the corrosion was in fact arrested.” NIRS Petition at 6. To the extent NIRS offers any support for this statement, it suggests 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.” *Id.* However, this statement ignores the fact that the sand in the sand bed was removed by the licensee and therefore cannot continue to support corrosion, a fact explained in many of the documents cited by NIRS as well as in

¹⁰ The Board also cites NIRS’s Reply Brief. However, a petitioner may not raise new arguments, not before developed in its petition, in its reply brief. See LBP-06-07, slip op. at 33 n.28; *Louisiana Energy Services*, CLI-04-25, 60 NRC at 225. NIRS did not develop this “ongoing corrosion” argument in its initial Petition, even though the information on which it relies, AmerGen’s response (dated October 12, 2005) to the Staff’s RAIs, was available when NIRS initially filed on November 14, 2005. See NIRS Reply at 18 n.7 (citing “Response to NRC Request for Additional Information (RAI 2.5.1.19-1), dated September 28, 2005, Related to Oyster Creek License Renewal Application (TAC No. MC7624), Appendix D, Page 10 of 19, Accession No. ML052910091”). In fact, the same information was available as early as July 22, 2005, in AmerGen’s LRA at Appendix B, at B85.

NIRS's own Petition. See NIRS Petition at 7-8, NIRS Exh. 4; see also LBP-06-07 (J. Abramson, dissenting), slip op. at 3. Therefore, page 6 of NIRS's petition does not provide any basis for NIRS's assertion that wet conditions exist in the sand bed region.

The Board also cites page 11, which merely states that "wet conditions occurring over the past 12 years behind the epoxy coating can reasonably contribute to corrosion." See NIRS Petition at 11. As the dissent recognized, NIRS offers no support for the proposition that such conditions have occurred, nor does it offer any evidence at all to believe that such conditions will continue during the period of extended operation. See LBP-06-07 (J. Abramson, dissenting), slip op. at 2 n.3, 5-7. At best, any NIRS implications that a corrosive environment exists or will exist during the period of extended operation amount to unsupported speculation. *Id.* at 5-7.

Finally, the Board cites page 13, which asserts that "pinhole leaks" in the epoxy coating "could provide a pathway for water intrusion and subsequent corrosion." NIRS Petition at 13. This statement again represents only unsupported speculation and provides no basis for the proposition that a corrosive environment exists or will exist during the period of extended operation. In fact, as the documents referenced by NIRS indicate, the probable source of corrosion-causing leakage at Oyster Creek was leakage through the refueling cavity, the refueling seal of which was repaired and a gasket replaced. See NIRS Exh. 1.

In short, NIRS offers no support for its assertion that a corrosive environment exists at Oyster Creek or will exist during the period of extended operation. Quite to the contrary, NIRS's petition and supporting documents recognize that the sand responsible for causing a corrosive environment was removed from the sand bed, see NIRS Petition at 7-8, NIRS Exh. 4; that a gasket in the refueling seal believed to be a cause of corrosion-causing leakage was replaced by the licensee, see NIRS Exh. 1; and that an NRC-approved drywell monitoring program exists to control corrosion and detect any further leakage that might contribute to a corrosive

environment. See NIRS Exh. 4, 9. NIRS does not offer any evidence or basis to contradict the licensee's finding, referenced by NIRS, that a "thorough program has been established for managing leakage that could affect drywell integrity due to corrosion from moisture ingress into the drywell gap," or that "surveillance of the sand bed drains indicates that the sand bed is free of water." See NIRS Exh. 2. Nor does NIRS offer any basis or support to controvert the licensee's conclusion, accepted by the NRC staff, that "corrosion has been arrested in the sand bed region[.]" See NIRS Exh. 6, 9. NIRS merely offers unsupported speculation that water intrusion into the sand bed could still be taking place. In short, contrary to the Board majority's finding, NIRS provided no specific support to demonstrate why drywell liner corrosion or even corrosive conditions are to be expected during the period of extended operation. Therefore, the contention should have been found inadmissible. See 10 C.F.R. § 2.309(f)(1)(v).

2. NIRS's Contention Did Not Raise a Genuine Dispute of Fact Material to and Within the Scope of License Renewal

NIRS's contention is also inadmissible because it fails to raise a genuine dispute of fact that would be material to and within the scope of license renewal. See 10 C.F.R. § 2.309(f)(1)(iii), (vi). To be admissible, contentions in a license renewal proceeding must concern the "detrimental effects of aging." *Turkey Point*, CLI-01-17, 54 NRC at 7; see also LBP-06-07 (J. Abramson, dissenting), slip op. at 5. As the Board majority acknowledged, corrosion in some cases may represent a temporary problem that does not implicate renewal, aging effects, or the period of extended operation; in short, corrosion may not be the result of aging-related degradation. LBP-06-07, slip op. at 42-43. To produce an admissible contention within the scope of this proceeding, therefore, NIRS needed to explain in its contention how its corrosion concerns are indeed aging-related. See 10 C.F.R. § 2.309(f)(1)(iii); see also *Palisades*, LBP-06-10, slip op. at 40. NIRS, however, refers only to previous corrosion or to present regulatory oversight programs, without explaining how these matters relate to potential

future corrosion or why that corrosion would be aging-related. Consequently, the petitioners' references are not material to the necessary claim for an admissible contention – that corrosion at Oyster Creek is likely to occur as a result of aging-related degradation. Furthermore, even if past corrosion or current oversight were material to this proceeding, NIRS does not provide a basis for disputing the findings of the licensee and the NRC staff that both leakage and corrosion have been arrested. See NIRS Exh. 2, 4, 6, 9. NIRS therefore has failed to demonstrate a genuine dispute concerning either the present *or* future risk of corrosion at Oyster Creek. See 10 C.F.R. § 2.309(f)(1)(vi).

CONCLUSION

As stated above, the Board erred by rewriting NIRS's contention, allowing NIRS to improperly supplement its original petition, and admitting NIRS's contention despite the contention's failure to demonstrate either an adequate basis or a genuine issue of fact material to and within the scope of license renewal. Therefore, the Commission should reverse the Board's ruling admitting NIRS's contention, and deny the Petition in its entirety.

Respectfully submitted,

/RA/

Ann P. Hodgdon
Counsel for NRC Staff

Dated at Rockville, Maryland
this 14th day of March, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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 NOTICE OF APPEAL OF LBP-06-07" and the "NRC STAFF'S BRIEF IN SUPPORT OF APPEAL FROM LBP-06-07" in the above-captioned proceeding have been served on the following by electronic mail with copies by deposit in the NRC's internal mail system as indicated by an asterisk, or by electronic mail, with copies by U.S. mail, first class, as indicated by double asterisk, this 14th day of March, 2006.

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