

April 7, 2006 (12:39pm)

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
BEFORE THE COMMISSION

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

In the Matter of:

AmerGen Energy Company, LLC

(License Renewal for Oyster Creek Nuclear  
Generating Station)

Docket No. 50-219

AMERGEN BRIEF OPPOSING CITIZENS' NOTICE OF APPEAL OF LBP-06-11

Donald J. Silverman  
Kathryn M. Sutton  
Alex S. Polonsky  
Morgan, Lewis & Bockius LLP  
1111 Pennsylvania Avenue, N.W.  
Washington, DC 20004

J. Bradley Fewell  
Assistant General Counsel  
Exelon Business Services Company  
200 Exelon Way  
Kennett Square, Pennsylvania 19348

Counsel for AmerGen Energy Company, LLC

April 7, 2006

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
BEFORE THE COMMISSION**

\_\_\_\_\_  
In the Matter of: )

AmerGen Energy Company, LLC )

(License Renewal for Oyster Creek Nuclear  
Generating Station) )  
\_\_\_\_\_ )

April 7, 2006

Docket No. 50-219-LR

**AMERGEN BRIEF OPPOSING CITIZENS NOTICE OF APPEAL OF LBP-06-11**

**INTRODUCTION**

Six environmental groups<sup>1</sup>—who now collectively refer to themselves as “Citizens”—filed a Petition to Intervene in this license renewal proceeding for the Oyster Creek Nuclear Generating Station (“OCNGS”). *See* Request for Hearing and Petition for Leave to Intervene (Nov. 14, 2005) (“Petition to Intervene”). Citizens’ sole contention related to corrosion monitoring of the upper and “sandbed” regions of the Oyster Creek drywell shell. *Id.* In LBP-06-07, the presiding Atomic Safety and Licensing Board (Board) granted standing to Citizens and admitted their sole contention, but limited it to the sandbed region. *See* Memorandum and Order “(Denying New Jersey’s Request for Hearing and Petition to Intervene, and Granting NIRS’ Request for Hearing and Petition to Intervene)” (Feb. 27, 2006).

<sup>1</sup> The six groups are Nuclear Information and Resource Service (“NIRS”), Jersey Shore Nuclear Watch, Inc. (“JSNW”), Grandmothers, Mothers and More for Energy Safety (“GRAMMES”), New Jersey Public Interest Research Group (“NJPIRG”), New Jersey Sierra Club (“NJ Sierra Club”), and New Jersey Environmental Federation (“NJEF”).

Nearly three months after filing their Petition to Intervene, on February 7, 2006, Citizens filed with the Licensing Board a "Motion for Leave to Add Contentions or Supplement the Basis of the Current Contention" ("Late-Filed Motion"). This Late-Filed Motion was triggered by a January 31, 2006 public telephone conference call hosted by the NRC Staff, the subject of which was proposed Interim Staff Guidance ("ISG") regarding the generic consideration of drywell shell corrosion in Mark I containments. Petitioners erroneously characterized the generic discussions regarding the proposed ISG as constituting new material facts relevant to their pending contention in the Oyster Creek license renewal proceeding. In LBP-06-11, the Licensing Board denied this Motion in its entirety, concurring with the rationale set forth in both AmerGen's and the Staff's oppositions to Citizens' Late-Filed Motion.

Citizens now impermissibly seek interlocutory review of LBP-06-11. As explained below, their attempt to seek review at this time is blatantly contrary to Commission regulations and precedent. It also wastes the parties' and the Commission's resources, as Citizens have simultaneously and impermissibly asked the Licensing Board to "reconsider" LBP-06-11. *See* Motion for Reconsideration of Motion to Add New Contentions or Supplement the Basis of the Current Contention and Leave to File Such a Motion (April 6, 2006). In fact, Citizens rely on the same brief for both their appeal to the Commission and their request to the Board for reconsideration. Such blatant disregard for the Commission's rules of practice should be summarily rejected.

### **ARGUMENT**

Citizens' attempt to secure an appeal is rife with deficiencies which render it unsupportable and subject to immediate rejection. Turning first to their purported bases for

appeal, Citizens cite 10 C.F.R. §§ 2.311 and 2.341. Quite simply, neither of these regulations affords Citizens the relief they seek.

As its title states, Section 2.311 is reserved for “interlocutory review of rulings on requests for hearing/petitions to intervene and selection of hearing procedures.” LBP-06-11 is not a ruling on Citizens’ Petition to Intervene, but rather a denial of late-filed contentions. Therefore, Section 2.311 is irrelevant, inapposite, and unavailable as a procedural vehicle for Citizens and their claims.

The other regulation cited by Citizens—Section 2.341—is a similarly deficient basis for Citizens’ “appeal.” First, Commission regulations unambiguously prohibit a party from simultaneously filing an appeal with the Commission and a motion for reconsideration with the presiding Board. *See* 10 C.F.R. § 2.341(b)(6) (“A petition for review will not be granted as to issues raised before the presiding officer on a pending motion for reconsideration”). Yet this is precisely what Citizens have done. The appeal should be rejected for this reason alone.<sup>2</sup>

Second, looking past these procedural deficiencies, Citizens’ *reason* for seeking interlocutory appeal is wholly inadequate to justify Commission review. Citizens state that they seek appeal “[o]ut of an overabundance of caution, and in order to ensure their rights are preserved.” Citizens Notice of Appeal of LBP-06-11 at 1. This rationale turns a blind eye to the fundamental fairness consideration pursuant to which the Commission “continues[s] to disfavor [interlocutory] appeals, largely due to [its] general unwillingness to engage in ‘piecemeal interference in ongoing Licensing Board proceedings.’” *Exelon Generation Co.* (Early Site Permit for the Clinton ESP Site), CLI-04-31, 60 NRC 461, 465-66 (2004) (*quoting Duke Cogema Stone and Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7,

---

<sup>2</sup> We note for the Commission that Citizens are represented by competent counsel and are not proceeding *pro se*.

55 NRC 207, 213 (2002)). That is why the Commission's regulations require that, in the absence of a Board certifying or referring an issue to the Commission:

[a] petition for interlocutory review will be granted *only* if the party demonstrates that the issue for which the party seeks interlocutory review:

(i) Threatens the party adversely affected by it with *immediate and serious irreparable impact* which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or

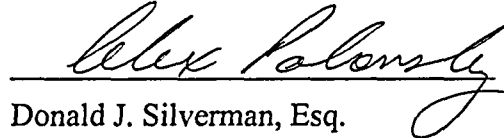
(ii) Affects the *basic structure* of the proceeding in a *pervasive or unusual manner*.

10 CFR § 2.341(f)(2) (emphasis added). *See also Exelon Generation Co.*, CLI-04-31, 60 NRC at 466. Citizens ignore these standards and allege no immediate and serious irreparable impact from the Board's decision. Nor do they allege a pervasive or unusual change to the basic structure of the proceeding.

Nor can such impact or change even be reasonably inferred from their Notice of Appeal. There is no serious irreparable impact because Citizens can appeal the Board's denial of their late-filed contentions at the conclusion of the proceeding. Similarly, "[c]laims that a board has wrongly rejected a contention . . . are commonplace; such claims cannot be said to affect a proceeding's 'basic structure.'" *Exelon Generation Co.*, CLI-04-31, 60 NRC at 467. Although the Commission may accept interlocutory review "as an exercise of [its] inherent supervisory authority over agency adjudicatory proceedings" (*Duke Energy Corp. (Catawaba Nuclear Station, Units 1 and 2)*, CLI-04-21, 60 NRC 21, 27 (2004)), a "Board's routine ruling on contention admissibility provides no occasion for [the Commission] to invoke" that authority (*Exelon Generation Co.*, CLI-04-31, 60 NRC at 466).

Thus, Citizens' rationale for their appeal is wholly inadequate. It appears that Citizens simply are seeking to preserve some undefined, unsupported right to appeal. They are expressly prohibited from doing under Sections 2.311 and 2.341. Such legally-deficient action is wasteful of NRC and party resources, and thus, Citizens' appeal should be summarily rejected.

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](mailto:dsilverman@morganlewis.com)  
E-mail: [ksutton@morganlewis.com](mailto:ksutton@morganlewis.com)  
E-mail: [apolonsky@morganlewis.com](mailto: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](mailto:Bradley.Fewell@exeloncorp.com)

COUNSEL FOR  
AMERGEN ENERGY COMPANY, LLC

Dated in Washington, D.C.  
this 7th day of April 2006

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE COMMISSION**

\_\_\_\_\_  
In the Matter of: )

) April 7, 2006

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 Brief Opposing Citizens' Notice of Appeal of LBP-06-11 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](mailto:HEARINGDOCKET@nrc.gov))

Administrative Judge  
E. Roy Hawkens, Chair  
Atomic Safety and Licensing Board Panel  
Mail Stop – T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
(E-mail: [erh@nrc.gov](mailto: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](mailto: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](mailto:ajb5@nrc.gov))

John A. Covino  
Ellen Barney Balint  
Valerie Anne Gray  
Caroline Stahl  
Division of Law  
Environmental Permitting and Counseling Section  
P.O. Box 093  
Hughes Justice Complex  
Trenton, NJ 08625  
(E-mail: [john.covino@dol.lps.state.nj.us](mailto:john.covino@dol.lps.state.nj.us))  
(E-mail: [Ellen.Balint@lps.state.nj.us](mailto:Ellen.Balint@lps.state.nj.us))  
(E-mail: [Valerie.Gray@dol.lps.state.nj.us](mailto:Valerie.Gray@dol.lps.state.nj.us))  
(E-mail: [Caroline.Stahl@lps.state.nj.us](mailto:Caroline.Stahl@lps.state.nj.us))

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

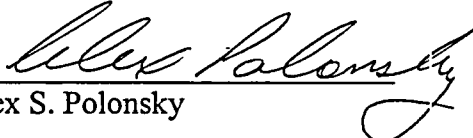
Ann P. Hodgdon  
Office of the General Counsel, 0-15D21  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555  
(E-mail: [aph@nrc.gov](mailto:aph@nrc.gov))

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

Richard Webster  
Rutgers Environmental Law Clinic  
123 Washington Street  
Newark, NJ 07102-5695  
(E-mail: [rwebster@kinoy.rutgers.edu](mailto:rwebster@kinoy.rutgers.edu))

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

\* Original and 2 copies  
\*\* First Class Mail only

  
Alex S. Polonsky