

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

April 11, 2006 (7:47am)

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 IN OPPOSITION TO NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION APPEAL FROM LBP-06-07

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TABLE OF CONTENTS

INTRODUCTION	1
LEGAL STANDARDS GOVERNING INTERLOCUTORY APPEAL.....	3
ARGUMENT.....	3
A. THE BOARD CORRECTLY REFUSED TO ADMIT NJDEP'S PROPOSED CONTENTION REGARDING SEVERE ACCIDENT MITIGATION ALTERNATIVES.....	4
B. THE BOARD CORRECTLY REFUSED TO ADMIT NJDEP'S PROPOSED CONTENTION REGARDING THE CUMULATIVE USAGE FACTOR FOR METAL FATIGUE ANALYSIS	11
C. THE BOARD CORRECTLY REFUSED TO ADMIT NJDEP'S PROPOSED CONTENTION REGARDING THE COMBUSTION TURBINES	13
CONCLUSION.....	16

TABLE OF AUTHORITIES

FEDERAL DECISIONS

<i>Weinberger v. Catholic Action of Haw.</i> , 454 U.S. 139 (1981).....	8
<i>Limerick Ecology Action v. NRC</i> , 869 F.2d 719 (3d Cir. 1989).....	8

ADMINISTRATIVE DECISIONS

<i>Dominion Nuclear Conn., Inc.</i> (Millstone Nuclear Power Station, Unit 3), CLI-02-27, 56 NRC 367 (2002)	5
<i>Dominion Nuclear Conn., Inc.</i> (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631 (2004).....	3, 11
<i>Duke Cogema Stone & Webster</i> (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-24, 56 NRC 335 (2002)	5
<i>Duke Energy Corp.</i> (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328 (1999).....	10
<i>Duke Energy Corp.</i> (McGuire Nuclear Station, Units 1 and 2), CLI-02-26, 56 NRC 358 (2002).....	5, 8
<i>Fansteel, Inc.</i> (Muskogee, Oklahoma, Site), CLI-03-13, 58 NRC 195 (2003)	4
<i>Potomac Elec. Power Co.</i> (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79 (1974).....	10
<i>Private Fuel Storage, L.L.C.</i> (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340 (2002)	5, 7, 8
<i>USEC, Inc.</i> (American Centrifuge Plant), CLI-06-09, ___ NRC ___ (2006).....	3
<i>USEC, Inc.</i> (American Centrifuge Plant), CLI-06-10, __ NRC __ (2006).....	3, 6, 9

REGULATIONS

10 C.F.R. Part 2	4
10 C.F.R. § 2.206	11
10 C.F.R. § 2.309	1, 2
10 C.F.R. § 2.309(h)(2).....	2, 3

10 C.F.R. § 2.311(b)	3
10 C.F.R. § 50.55a	12, 13
10 C.F.R. § 50.55a(a)(3)	12, 13
10 C.F.R. § 50.55a(c)(4)	11
10 C.F.R. § 50.55a(g).....	13
10 C.F.R. § 50.63	13
10 C.F.R. Part 50, Appendix B	14
10 C.F.R. Part 51	5
10 C.F.R. § 51.53(c)(3)(i)	5
10 C.F.R. Part 51, Appendix B, Table B-1	5
10 C.F.R. § 54.21(a)(3).....	11
33 C.F.R. Part 165.....	10

FEDERAL REGISTER

<i>American Energy Company, LLC Oyster Creek Nuclear Generating Station;</i> 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 (Sept. 15, 2005)	1, 16
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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION**

In the Matter of:)	April 10, 2006
AmerGen Energy Company, LLC)	Docket No. 50-219-LR
(License Renewal for Oyster Creek Nuclear Generating Station))	
)	

**AMERGEN BRIEF IN OPPOSITION TO NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION APPEAL FROM LBP-06-07**

INTRODUCTION

This case arises from the July 22, 2005 Application by AmerGen Energy Company, LLC (AmerGen) to renew the Oyster Creek Nuclear Generating Station (OCNGS) operating license (License No. DPR-16) for an additional 20 years (Application). The Commission's Hearing Notice stated that any person whose interest may be affected by this proceeding and who wishes to participate as a party must file a petition for leave to intervene by November 14, 2005, in accordance with 10 CFR § 2.309. See "AmerGen Energy Company, LLC 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 (Sept. 15, 2005).

The New Jersey Department of Environmental Protection (NJDEP) submitted a "Request for Hearing and Petition for Leave to Intervene" on November 14, 2005 (Petition to Intervene). In its Petition to Intervene, NJDEP proffered three contentions regarding: (1) consideration of the

effects of terrorist attacks in AmerGen's Severe Accident Mitigation Alternatives (SAMA) analysis; (2) AmerGen's cumulative usage factor for analysis of metal fatigue; and (3) AmerGen's agreement with FirstEnergy regarding the operation and maintenance of the Forked River Combustion Turbines (CTs). The NRC Staff and AmerGen opposed the admission of these contentions and filed timely pleadings explaining the numerous reasons why NJDEP's proposed contentions failed to satisfy the admissibility requirements in 10 CFR § 2.309. *See* "Amergen's Answer Opposing NJDEP's Request for Hearing and Petition To Intervene"; "NRC Staff Answer To Request For Hearing and Petition To Intervene of the State of New Jersey Department of Environmental Protection." NJDEP, however, failed to file a Reply to either opposition, despite the opportunity to do so. *See* 10 CFR § 2.309(h)(2).¹

In its February 27, 2006 Memorandum and Order, the Atomic Safety and Licensing Board (Board) concluded that none of NJDEP's proposed contentions was admissible. *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, slip op. (2006) (Memorandum and Order). The Board found that the proposed SAMA contention was outside the scope of the proceeding (Memorandum and Order at 9-15); the proposed metal fatigue contention was not supported as a matter of law or fact and failed to show the existence of a genuine dispute on a material issue of fact or law (*Id.* at 20); and the proposed combustion turbine contention was not supported by facts or expert opinion, lacked an adequate basis, and failed to raise a material issue of fact or law (*Id.* at 23-26).

¹ NJDEP did respond to the Board's request for supplemental briefing on the proposed contentions related to metal fatigue and CTs. *See* "Supplemental Brief of Petitioner New Jersey Department of Environmental Protection On Issue of Regulations Governing Cumulative Usage Factor"; Letter from J. Covino to Judge Hawkens dated January 17, 2006.

On March 28, 2006, NJDEP appealed LBP-06-07 to the Commission. See “Brief on Behalf of Petitioner New Jersey Department of Environmental Protection on Appeal from Order LBP-06-07 of the Atomic Safety and Licensing Board Denying Request for Hearing and Petition to Intervene” (March 28, 2006) (Appeal Brief). AmerGen hereby opposes NJDEP’s appeal.

LEGAL STANDARDS GOVERNING INTERLOCUTORY APPEAL

Pursuant to 10 CFR § 2.311(b), an order denying a petition to intervene and/or request for hearing is appealable by the requestor/petitioner on the question as to whether the request and/or petition should have been granted. Inherent in this standard is a required showing by a petitioner that there have been “errors of law or abuse of discretion” by the Board. *USEC, Inc.* (American Centrifuge Plant), CLI-06-09, ___ NRC ___, slip op. at 7 (2006).

ARGUMENT

The Commission has very recently reconfirmed that participants in its adjudicatory proceedings may not raise new matters or issues for the first time on appeal. *USEC, Inc.* (American Centrifuge Plant), CLI-06-10, ___ NRC ___, slip op. at 8-9 (2006). In its appeal, NJDEP has run afoul of this fundamental tenet in attempting to cure the numerous deficiencies in its original Petition to Intervene by crafting new arguments and proffering new bases for its three contentions. NJDEP’s Appeal Brief is replete with new arguments that are simply absent from its Petition to Intervene. There can be no error or abuse of discretion by the Board in circumstances where the participant seeking review does so on the basis of arguments never raised below. On this basis alone, much of NJDEP’s appeal should be dismissed.

NJDEP’s decision to raise new arguments on appeal for the first time is particularly inappropriate because, although the NRC Staff and AmerGen filed Answers opposing NJDEP’s Petition to Intervene, NJDEP made no effort to further explain its concerns in a Reply, despite the opportunity to do so. See 10 CFR § 2.309(h)(2). The Commission has “expressed [its]

disapproval of petitioners who, despite being informed of the shortcomings of their petitions to intervene, nonetheless fail to correct them in a Reply.” *Fansteel, Inc.* (Muskogee, Oklahoma, Site), CLI-03-13, 58 NRC 195, 205 n.31 (2003).²

There are additional reasons to reject the appeal. NJDEP’s arguments related to its SAMA contention challenge the Commission’s previous definitive holdings that the impacts of terrorism need not be considered under the National Environmental Policy Act (NEPA). NJDEP has provided no basis for the Commission to reverse itself on that issue. As for the metal fatigue contention, even with its new argument, NJDEP once again misreads applicable NRC regulations. Finally, for the contention related to combustion turbines, NJDEP ignores the Commission’s Hearing Notice which required a petitioner to request copies of documents during the 60-day intervention period and cannot now, at this late date, claim that it lacks adequate information.

Accordingly, the Board committed no error of law or abuse of discretion in rejecting NJDEP’s contentions and its decision should be affirmed.

A. THE BOARD CORRECTLY REFUSED TO ADMIT NJDEP’S PROPOSED CONTENTION REGARDING SEVERE ACCIDENT MITIGATION ALTERNATIVES

NJDEP’s SAMA contention challenged the scope and adequacy of AmerGen’s SAMA analysis under NEPA. Petition to Intervene at 1. In particular, NJDEP alleged that the SAMA analysis in AmerGen’s License Renewal Application does not include a plant-specific analysis of the Design Basis Threat (DBT) “including aircraft impact and spent fuel pool vulnerability,” and that “Interim Compensatory Measures” imposed by the Commission since the events of September 11, 2001, are not adequate for the renewed license term. *Id.* at 1-3. NJDEP also

² Although *Fansteel* was a license transfer proceeding under 10 CFR Part 2, Subpart M, the Commission should disapprove of similar conduct in a license renewal proceeding under Subpart L, especially where a
(footnote continued)

requested that “information related to the specific design of Oyster Creek and its ability to withstand aircraft attacks, as well as the specific vulnerability of the spent fuel pool be made available to agency [*i.e.*, NJDEP] officials with sufficient clearance.” *Id.* at 4.

In denying admission of this contention, the Board held that potential aircraft attacks are outside the scope of this proceeding. The Board correctly noted that the “Commission repeatedly and unequivocally has ruled that effects of terrorist attacks need not be considered under NEPA.” Memorandum and Order at 10 (*citing Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-02-27, 56 NRC 367 (2002); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-24, 56 NRC 335 (2002); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340 (2002); and *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2) CLI-02-26, 56 NRC 358 (2002)). The Board also rejected NJDEP’s assertions regarding the potential impacts of a terrorist attack on the OCNGS spent fuel pool for the same reason, and because those assertions attempted to raise a “Category 1” environmental issue, which has been “resolved generically for all plants” under 10 CFR Part 51.² Memorandum and Order at 11-12.

The Board also concluded that NJDEP had not demonstrated a need for access to non-public security information (since the terrorism-related issues it raises are beyond the scope of the proceeding), and it rejected NJDEP’s claims regarding the alleged inadequacy of the

petitioner appeals a Licensing Board decision to the Commission.

² 10 CFR § 51.53(c)(3)(i) states that “[t]he environmental report for the operating license renewal stage is not required to contain analyses of the environmental impacts of the license renewal issues identified as Category 1 issues [*i.e.*, “small impacts”] in appendix B to subpart A of this Part.” Appendix B designates “On-site spent fuel” and “Uranium Fuel Cycle and Waste Management” as Category 1 issues. 10 CFR Part 51, Appendix B, Table B-1.

Commission-directed Interim Compensatory Measures, based on the Commission's ongoing generic rulemaking on this subject. *Id.* at 13-15.

NJDEP now argues for the first time that the effects of a terrorist attack are, under applicable NEPA principles, "reasonably foreseeable" and therefore must be considered in AmerGen's SAMA analysis. *See generally* Appeal Brief at 8-14. NJDEP recognizes that the Board rejected its contention "based upon the Commission's decisions that NEPA does not require consideration of the effects of terrorist attacks" (*Id.* at 10-11), but argues that it is "difficult to reconcile" these decisions with the ongoing generic DBT rulemaking (*Id.* at 11-14).

NJDEP demonstrates no error of law or abuse of discretion by the Board. First, the Petition to Intervene contained no allegation that a terrorist attack on OCNGS was "reasonably foreseeable" and never even mentioned the line of Commission decisions issued in 2002 holding that the effects of terrorism need not be considered under NEPA. NJDEP now improperly argues those points for the first time on appeal.

Just last week, the Commission had the occasion to strongly reiterate the prohibition against raising new matters for the first time on appeal in exactly the same circumstances as here. In *USEC, Inc.*, CLI-06-10, slip op. at 8-9, the Commission discussed the fact that a petitioner had raised new issues on appeal of a Licensing Board's denial of its petition to intervene. The Commission stated:

[petitioner's] appeal briefs repeatedly raise new arguments to support its contentions. Indeed, several of these new claims effectively amount to distinct new contentions, never presented to the Board. Allowing petitioners to file vague, unsupported contentions, and later on appeal change or add contentions at will would defeat the purpose of our contention-pleading rules. Therefore, absent extreme circumstances, we will not consider on appeal "either new arguments or new evidence ... which the Board never had the opportunity to consider" *The purpose of an appeal to the Commission is to point out errors made in the*

Board's decision, not to attempt to cure deficient contentions by presenting arguments and evidence never provided to the Board.

(Emphasis added) (Citations omitted) Nor does NJDEP even allege any actual legal error or abuse of discretion *by the Board*, since it admits that the Board adhered to the applicable, binding decisions issued by the Commission. Appeal Brief at 7, 10-11 (*e.g.*, the “Board applied previous decisions of this Commission that the likelihood of a terrorist attack on a nuclear power plant is only speculative”). Instead, what NJDEP has done in its Appeal Brief is to simply reargue the issue previously resolved in the Commission’s unambiguous NEPA/terrorism precedents.

NJDEP has provided no basis for the Commission to reverse itself. It argues that it is inconsistent for the Commission to conclude that a terrorist attack on a specific nuclear power plant is speculative, while at the same time engaging in post-September 11 generic efforts to enhance security and revise the DBT. But NJDEP cites no new information to warrant any reexamination or reversal by the Commission of its previous decisions – all of which were rendered after September 11, 2001, and after it had commenced its generic initiatives to enhance plant security. *In Private Fuel Storage*, CLI-02-25, 56 NRC at 343, for example, the Commission stated:

Below we consider in some detail the *legal* question whether NEPA requires an inquiry into the threat of terrorism at nuclear facilities. At the outset, however, we stress our determination, in the wake of the horrific September 11th terrorist attacks, to strengthen security at facilities we regulate. We currently are engaged in a comprehensive review of our security regulations and programs, acting under our AEA-rooted duty to “protect health and safety” and the “common defense and security.”

(Emphasis added.) The Commission then described each of the initiatives it had underway to enhance security at NRC-licensed facilities. *Id.* at 343-45. Thus, the Commission clearly recognized the distinction between the narrow legal issue before it under NEPA, and its broad policy responsibilities under the Atomic Energy Act.

Furthermore, the precise question of whether the effects of a terrorist attack must be considered in a license renewal proceeding also has been addressed by the Commission:

NEPA imposes no legal duty on the NRC to consider intentional malevolent acts such as the [September 11, 2001 terrorist attacks], on a case-by-case basis in conjunction with commercial power reactor license renewal applications.

McGuire, CLI-02-26, 56 NRC at 365. NJDEP does not address this precedent. Nor does NJDEP even attempt to address the Commission's other decisions holding that "[s]ecurity issues at nuclear power reactors . . . are simply not among the aging-related questions at stake in a license renewal proceeding." *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 638 (2004); *McGuire*, CLI-02-26, 56 NRC at 364.⁴ Thus, NJDEP has provided no basis for the Commission to reverse itself, and has identified no error of law or abuse of discretion by the Board.

NJDEP next takes issue with the Commission's decision in *Private Fuel Storage* that the "public NEPA process might result in the harmful release of sensitive information." Appeal Brief at 14. This is again an issue that has been improperly raised for the first time on appeal. NJDEP never even cited the *Private Fuel Storage* case in its Petition to Intervene, and it is again an effort to reargue issues resolved by the Commission in its 2002 NEPA/terrorism decisions. No Board error of law or abuse of discretion is alleged.⁵

⁴ NJDEP states that the "Commission's actions to increase safety following the accident at Three Mile Island provide an analogous example in support of NJDEP's point." Appeal Brief at 13, citing *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719 (3d Cir. 1989). The Commission was well aware of the *Limerick* decision when it rendered its NEPA/terrorism decisions. See *Private Fuel Storage*, CLI-02-25, 56 NRC at 346. Indeed, it specifically noted that "the Third Circuit determined that in licensing a nuclear power reactor the NRC could decline to consider the effects of terrorism in an EIS because the intervenors had not shown any way to predict or analyze the risk meaningfully." *Id.* at 349.

⁵ NJDEP also references the U.S. Supreme Court's decision in *Weinberger v. Catholic Action of Haw.*, 454 U.S. 139 (1981), recognizing that the Commission explicitly discussed that decision in *Private Fuel*
(footnote continued)

NJDEP also argues that the “design,” “location,” and “specific threat of attack” at OCNGS make it “uniquely vulnerable to terrorist attack.” Appeal Brief at 15-22. The Petition to Intervene, however, failed to raise any issue whatsoever regarding the alleged “uniqueness” of the OCNGS design, location, or threat profile. *See* Petition to Intervene at 1-4.⁶ NJDEP never discussed: the alleged “obsolete Mark 1 [sic] containment design” or “elevated and poorly-protected spent fuel pool”; the National Academy of Sciences report now cited by NJDEP in its Appeal Brief; the location of and evacuation time estimates for OCNGS; the age of the plant; the report of the September 11 Commission; or the Coast Guard findings specific to OCNGS upon which it now relies. *See* Appeal Brief at 17-22. This is all entirely new information and cannot serve as the basis for overturning the Board’s decision. *See USEC, Inc., CLI-06-10, slip op. at 8-9.*

Moreover, none of this information is relevant to whether a terrorist attack is more likely or “foreseeable” at OCNGS than at other U.S. commercial power reactors. NJDEP’s allegations regarding the Mark I design and the elevated spent fuel pool (including its references to the NAS report), even if true, go to the *consequences* of a terrorist attack not the likelihood or foreseeability. To that extent, they are little more than a veiled challenge to the safety of the OCNGS design, which is outside the scope of this license renewal proceeding. Nor does the location of OCNGS show that a terrorist attack on the plant is more foreseeable than at other nuclear facilities, and NJDEP’s references to the location and the evacuation time estimates are challenges to the facility siting and emergency planning issues that are outside the scope of this

Storage. Appeal Brief at 14-15. NJDEP criticizes the Board for relying on this aspect of the *Private Fuel Storage* decision (Appeal Brief at 15), but as binding precedent, it was the Board’s obligation to do so.

⁶ Without any further explanation, the Petition does state that “[i]nformation regarding specific threats to the Oyster Creek facility needs to be available for SAMA consideration.” Petition to Intervene at 4.

proceeding. The age of the plant, of course, raises no issue as to the foreseeability of a terrorist attack. Finally, neither the report of the September 11 Commission nor the Coast Guard's findings provide any basis for concluding that a terrorist attack specifically at OCNGS is reasonably foreseeable.⁷

NJDEP's final basis for challenging the Board's rejection of this contention is that the Commission's ongoing DBT rulemaking "does not adequately address the imminent risk of irreparable harm posed to Oyster Creek by the threat of terrorist attack by aircraft" and that the Commission "should exercise its discretion to consider proactively [revising] [the] DBT within relicensing." *See* Appeal Brief at 22, 23. NJDEP has provided no basis for the Commission to depart from its long-standing policy of not considering generic issues that are the subject of ongoing rulemaking efforts in individual adjudicatory proceedings. *Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3)*, CLI-99-11, 49 NRC 328, 345 (citing *Potomac Elec. Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2)*, ALAB-218, 8 AEC 79, 85 (1974)).

Nor has NJDEP provided any evidence of the "imminent risk" it now alleges. Again, its allegations regarding the uniqueness of OCNGS (which presumably are the basis for its belief that there is an imminent risk of a terrorist attack) are raised for the first time on appeal. Finally, its request that the Commission revise the DBT on a plant-specific basis is raised anew for the first time in this appeal, addresses security-related matters beyond the bounds of its NEPA-based

⁷ Furthermore, the OCNGS containment and spent fuel pool design are hardly unique. There are 23 operating Mark I containments and 8 operating Mark II containments at U.S. nuclear power plants. Both designs incorporate elevated spent fuel pools. *See* NRC 2005-2006 Information Digest, Appendix A. The Coast Guard's inclusion of OCNGS in a security zone is also not unique. *See* 33 CFR Part 165 "Regulated Navigation Areas and Limited Access Areas" for a list of other facilities subject to such security zones.

contention, and raises matters that are outside the scope of a license renewal proceeding. *See Millstone*, CLI-04-36, 60 NRC at 638.⁸

Thus, NJDEP has identified no error of law or abuse of discretion by the Board in its disposition of the SAMA contention. Accordingly, that aspect of the Board's decision should be affirmed.

B. THE BOARD CORRECTLY REFUSED TO ADMIT NJDEP'S PROPOSED CONTENTION REGARDING THE CUMULATIVE USAGE FACTOR FOR METAL FATIGUE ANALYSIS

NJDEP's second contention was that AmerGen has exceeded the OCNGS current licensing basis (CLB) by utilizing a "cumulative usage factor" (CUF)² of 1.0 in its analysis of potential metal fatigue, because the ASME Code Edition and Addenda that were in effect when the plant was first constructed required the use of a CUF of 0.8. NJDEP alleged that this violates 10 CFR §§ 50.55a(c)(4) and 54.21(a)(3). *Petition to Intervene* at 4-5. NJDEP argued that AmerGen's decision to use a CUF of 1.0 violates 10 CFR § 50.55a(c)(4) because it interprets that regulation to require AmerGen to continue to apply the ASME Code Edition that was in effect when the OCNGS Construction Permit was issued. *Id.* at 4. Based on that interpretation, NJDEP concluded that AmerGen also is in violation of 10 CFR § 54.21(a)(3) because it has not demonstrated that aging effects will be appropriately managed consistent with the plant's CLB. *Id.* at 4.

⁸ NJDEP states that the "Commission has the power and discretion to consider revised DBT issues in the present proceeding," citing 10 CFR § 2.206. *Appeal Brief* at 23. Section 2.206, of course, provides for the filing by any person of a request to institute a separate proceeding to modify, suspend or revoke a license. NJDEP has filed no such request.

² "The CUF assists in describing the level of a component's cumulative fatigue damage – that is, damage caused by the repeated stresses of operating load cycles during the component's operating life." *Memorandum and Order* at 15 n.11.

In rejecting NJDEP's contention, the Board found that: (1) NJDEP had "explicitly acknowledged that 10 CFR § 50.55a 'provide[s] AmerGen with the opportunity to update' its CUF from 0.8 to 1.0 (New Jersey Second Supp. Brief at 4)"; (2) 10 CFR § 50.55a "does *not* impose an inexorable requirement that AmerGen forever use" the ASME standards in effect when the plant's construction permit was issued; (3) utilizing a CUF of 1.0 is permitted under the current, relevant portion of the ASME Code; and that (4) AmerGen's written commitment to revise its FSAR prior to the period of extended operation to update the CLB to reflect the 1.0 CUF "satisfies its regulatory obligation under Section 54.21(a)(3). Memorandum and Order at 17-19.

On appeal, NJDEP has completely and impermissibly changed its contention. NJDEP claims that it "never denied that 10 C.F.R. § 50.55a allows for AmerGen to change its CUF" (Appeal Brief at 24), yet that was exactly its contention as originally proffered. NJDEP now argues, for the first time, that the NRC Director of Nuclear Reactor Regulation (NRR) must pre-approve AmerGen's change to a CUF of 1.0. NJDEP alleges that AmerGen has failed to seek such an authorization from the NRR Director.

In addition to impermissibly raising this argument for the first time on appeal, NJDEP has failed to quote critical language in Section 50.55a(a)(3) and has misinterpreted the regulation. Section 50.55a(a)(3) states:

Proposed alternatives to the requirements of paragraphs (c), (d), (e), (f), (g), and (h) of this section or portions thereof may be used when authorized by the Director of the Office of Nuclear Reactor Regulation. The Applicant shall demonstrate that:

(i) The proposed alternatives would provide an acceptable level of quality and safety, or

(ii) Compliance with the specified requirements of this section would result in hardship or unusual difficulty without a compensating increase in the level of quality or safety.

10 CFR § 50.55a(a)(3) (emphasis added). NJDEP did not quote the highlighted language above in its Appeal Brief. That language makes clear that this provision is intended to provide a method by which applicants may seek approval for approaches or alternatives that are *not* authorized by subsections (c) through (h) of the regulation. Licensees who intend to adhere to subsections (c) through (h) clearly are not required to seek any such approval from the NRR Director.

AmerGen explained that the change from a CUF of 0.8 to a CUF of 1.0 is fully consistent with 10 CFR § 50.55a(g). AmerGen Answer at 19-22. The Board recognized this in its decision. *See* Memorandum and Order at 18. Thus, NJDEP’s new reliance on the procedure for NRR Director approval of changes from the approved methods set forth in 10 CFR § 50.55a is entirely inapposite.

Again, NJDEP has not demonstrated any legal error or abuse of discretion in the Board’s handling of this contention. This aspect of the Board’s decision should therefore be affirmed as well.

C. THE BOARD CORRECTLY REFUSED TO ADMIT NJDEP’S PROPOSED CONTENTION REGARDING THE COMBUSTION TURBINES

Finally, NJDEP’s third contention alleged that AmerGen’s Interconnection Agreement with FirstEnergy for operation and maintenance of the Forked River Combustion Turbines (CTs) is inadequate. Petition to Intervene at 7-9. The CTs are located adjacent to the OCNGS, but are owned by FirstEnergy. They are designed to provide alternate, alternating current (AC) power to certain safety-related equipment in the event of a station blackout (SBO).

Although NJDEP claimed that it did not have a copy of the Interconnection Agreement, NJDEP alleged that the Agreement was inadequate to assure: (1) continued operation of the CTs for ensuring compliance with 10 CFR § 50.63, “Loss of All Alternating Current Power”; (2)

appropriate maintenance, inspection, and testing of the CTs in accordance with AmerGen's aging management plan; and (3) that deficiencies, that may be encountered by FirstEnergy during the course of maintaining, inspecting, and testing, will be entered into a corrective action program that meets the quality requirements of 10 CFR Part 50, Appendix B. *Id.* at 7.

In denying admission of this contention, the Board found that NJDEP's allegations regarding AmerGen's contractual arrangements with FirstEnergy with respect to the CTs were not supported by facts or expert opinion, lacked an adequate basis, and failed to demonstrate a genuine issue of material law or fact. Memorandum and Order at 20-23. In particular, the Board found that NJDEP simply "speculates – without any factual or expert support – that FirstEnergy will not fulfill its [contractual] obligations" (*Id.* at 21), "simply postulates that FirstEnergy may fail to implement [AmerGen's] aging management plan" (*Id.* at 23), and with respect to its allegations regarding 10 CFR Part 50, Appendix B, "fails to dispute AmerGen's assertion that Part 50, Appendix B need not be followed, and ... fails to explain why the actions described in AmerGen's Application are inadequate" (*Id.* at 24).

On appeal, NJDEP again impermissibly raises new arguments. In its Petition to Intervene, NJDEP focused on the alleged impropriety of allowing AmerGen to rely on "a competitor" to maintain, inspect and test the CTs in accordance with AmerGen's aging management plan, "with little opportunity for AmerGen to oversee any of it." Petition to Intervene at 7. NJDEP now alleges that the Board erred when it focused on whether AmerGen could satisfy its obligation to comply with NRC regulations through an Agreement with a competitor, rather than on whether an "*updated I.A.*" is needed that "assigns to [FirstEnergy] the responsibility for employing the proposed aging management plan." Appeal Brief at 27 (emphasis added). This argument was not previously raised to the Board. Certainly the Board

cannot be faulted for focusing on the arguments that NJDEP originally submitted. This new argument does not raise an error of law or an abuse of discretion.

NJDEP also takes issue with the finding of the Board that it had “failed to provide supporting information and references to specific documents.” *Id.* at 28 (*quoting* Memorandum and Order at 23). NJDEP makes a number of points. First, because the AmerGen/FirstEnergy Interconnection Agreement (IA) was “executed in 1999,” the IA could not have addressed AmerGen’s proposed aging management plan. *Id.* at 27-28. As AmerGen stated in supplemental briefing to the Licensing Board, however,:

[w]hile [the IA and SBO Blackout Agreements] do not explicitly address AmerGen’s aging management programs, AmerGen has committed to a robust aging management program for the CTs as described in detail in its responses to NRC Staff Requests for Additional Information (“RAIs”). *See* “AmerGen’s Answer Opposing NJDEP’s Request for Hearing and Petition to Intervene” (“AmerGen Answer to NJDEP”), at 27 n. 11. Whether by virtue of its agreements with First Energy or via other means, those commitments are binding upon AmerGen and provide reasonable assurance that aging effects associated with the CTs will be managed consistent with the CLB for the period of extended operation.

“AmerGen’s Brief in Response to Order Directing Supplemental Briefing on Hearing Requests,” at 9-10 (Jan. 17, 2006). Thus, the fact that the IA is dated 1999 did not raise a genuine dispute of law or fact.

Second, NJDEP argues that “copies of the current agreement have not been made available because it is considered ... proprietary” (Appeal Brief at 28), it “could not ... use discovery to obtain the document because one must first be a party to ask for discovery,” and that “[i]f the Board had known that the document was unavailable,” it could have taken certain actions such as issuing a protective order (*Id.* at 29). NJDEP ignores the fact that the Commission’s Hearing Notice specifically stated that “*petitioners* desiring access to [proprietary]

information should contact the applicant or applicant's counsel to discuss the need for a protective order." 70 Fed. Reg. at 54,586 n.1 (emphasis added). As a petitioner, therefore, NJDEP could have requested access to the document. To the best of AmerGen's knowledge, however, NJDEP did not seek such access during the 60-day intervention period.

In addition, the Board most assuredly knew that NJDEP had not obtained a copy of the IA. NJDEP's Petition to Intervene stated that "the referenced contract or agreement ... cannot be cited in this contention." Petition to Intervene at 9. The AmerGen Answer referred to "NJDEP's inability to actually cite the agreement" and noted that NJDEP "did not contact AmerGen to request a copy." AmerGen Answer at 25. As stated above, it was clearly not incumbent upon the Board to take steps to make the IA available, in the absence of any timely request for documents by NJDEP.

Finally, NJDEP argues for the first time that there is a "new" IA and that it could not be cited because it is still being negotiated. *Id.* at 28. Even if that is the case, again, as AmerGen stated in supplemental briefing to the Licensing Board, AmerGen has committed to a robust aging management program for the CTs, and these commitments are binding upon AmerGen and provide reasonable assurance that aging effects associated with the CTs will be managed consistent with the CLB for the period of extended operation.

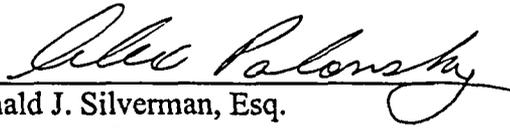
Thus, because NJDEP has failed to identify any legal error or abuse of discretion by the Board, the Commission should affirm this aspect of the Board's decision as well.

CONCLUSION

NJDEP submitted a Petition to Intervene that simply did not meet the Commission's strict standards for the admission of contentions and that does not warrant the expenditure of NRC resources in an adjudicatory hearing. The new information presented for the first time on appeal and NJDEP's unsupported challenge to the Commission's NEPA/terrorism decisions, as

well as its failure to raise any genuine dispute of material law or fact warrant denial of its
Petition to Intervene and affirmance of the Board's decision.

Respectfully submitted,



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AMERGEN ENERGY COMPANY, LLC

Dated in Washington, D.C.
this 10th day of April 2006

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of:))	April 10, 2006
AmerGen Energy Company, LLC))	
(License Renewal for Oyster Creek Nuclear))	Docket No. 50-219
Generating Station)))	
))	
))	

CERTIFICATE OF SERVICE

I hereby certify that copies of AmerGen's Brief In Opposition to New Jersey Department of Environmental Protection Appeal From LBP-06-07 were served this day upon the persons listed below, by E-mail and first class mail, unless otherwise noted.

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