

April 17, 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))	

NRC STAFF BRIEF OPPOSING NIRS'S NOTICE OF APPEAL OF LBP-06-11

INTRODUCTION

Pursuant to 10 C.F.R. § 2.341(b)(3), the staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby answers the "Citizens Notice of Appeal of LBP-06-11" filed by 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 "NIRS"). In LBP-06-11, the Atomic Safety and Licensing Board ("Board") denied NIRS's motion for leave to add contentions or supplement the basis of its original contention. For the reasons discussed below, the Commission should deny NIRS's request for review.

BACKGROUND

NIRS originally sought to intervene in this proceeding in November of 2005. "Request for Hearing and Petition for Leave to Intervene," dated November 14, 2005 ("Petition"). While awaiting a Board decision on its Petition, NIRS filed a motion requesting leave to add contentions or supplement the basis of the sole contention submitted as part of its Petition. See "Motion for Leave to Add Contentions or Supplement the Basis of the Current Contention," dated February 7, 2006. Both the Staff and AmerGen opposed this motion. See "NRC Staff's Response to Motion for Leave to Add Contentions or Supplement the Basis of the Current

Contention,” dated February 17, 2006; and “AmerGen’s Answer to Petitioner’s Motion for Leave to Add Contentions or Supplement the Basis of the Current Contention,” dated February 17, 2006.

Subsequently, the Licensing Board issued an order granting NIRS’s request for hearing and admitting the following contention, as re-framed by the Board:

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.

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 (February 27, 2006).

As noted above, in LBP-06-11, the Licensing Board denied NIRS’s motion for leave to add contentions. Memorandum and Order (Denying NIRS’s Motion for Leave to Add Contentions or Supplement the Basis of the Original Contention), LBP-06-11 (March 22, 2006). NIRS now improperly seeks simultaneous Commission review of this Order, pursuant to 10 C.F.R. § 2.311 and 10 C.F.R. § 2.341, and Board reconsideration of the same Order, pursuant to 10 C.F.R. § 2.323(e). NIRS employs the same brief for both purposes.

DISCUSSION

NIRS’s Notice of Appeal should be summarily rejected. NIRS seeks review pursuant to 10 C.F.R. §§ 2.311 and 2.341. Neither of these regulations, however, provides an avenue for this appeal. Section 2.311 only allows for appeals on rulings with respect to requests for hearing, petitions to intervene, and selection of hearing procedures. NIRS, which is already a party to this proceeding, is not appealing from a denial of a request for hearing; it is appealing from a denial of a motion to add late-filed contentions. Its petition to intervene and request for

hearing were granted in LBP-06-07 on February 27, 2006. Such an appeal is interlocutory and is not authorized by § 2.311.

Nor is NIRS allowed to seek Commission review under 10 C.F.R. § 2.341. As discussed above, NIRS simultaneously filed a Notice of Appeal to the Commission and a motion for reconsideration to the Board. This action disregards Commission regulations. Section 2.341(b)(6) states that a petition for review will not be granted as to issues raised before a presiding officer on a pending motion for reconsideration. The Commission disapproves of simultaneously seeking reconsideration of a Licensing Board decision and appealing the same Board ruling, because that practice would result in rulings on the same issues at the same time from both a trial and appellate forum.¹ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-01, 53 NRC 1, 2 (2001); *International Uranium (USA) Corp.*, (White Mesa Uranium Mill), CLI-97-9, 46 NRC 23, 24-25 (1997).

The Commission generally disfavors interlocutory review, reserving it for those cases where a petitioner has demonstrated that “the disputed ruling threatens the aggrieved party with serious, immediate, and irreparable harm or where it will have a ‘pervasive or unusual’ effect on the proceedings below.” *Private Fuel Storage*, CLI-01-01, 53 NRC at 3. The Commission has held that refusal to admit a contention from a party with other admitted contentions does not constitute a pervasive effect on the litigation that would justify interlocutory review. *Id.* NIRS claims neither a pervasive or unusual effect, nor irreparable harm. Instead NIRS asserts that its appeal is merely taken, “out of an overabundance of caution,” to “ensure their rights are preserved.” Notice of Appeal of LBP-06-11 at 1. NIRS does not even cite the Commission’s standard for interlocutory review, much less argue that it has satisfied it.

¹ In some similar situations, the Commission has reserved ruling until the Licensing Board disposed of the motion for reconsideration, in order to avoid this problem. See *White Mesa*, CLI-97-9, 46 NRC at 24-25. However, because NIRS has further failed to satisfy the standards for interlocutory review, denial of this appeal is appropriate. See *Private Fuel Storage*, CLI-01-01, 53 NRC at 5.

CONCLUSION

For the reasons stated above, the Commission should deny NIRS's appeal and decline to review the Board's decision.

Respectfully submitted,

/RA/

Ann P. Hodgdon
Steven C. Hamrick
Counsel for NRC Staff

Dated at Rockville, Maryland
this 17th day of April, 2006

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

NOTICE OF APPEARANCE

Dated at Rockville, Maryland
this 17th day of April 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
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AMERGEN ENERGY COMPANY, LLC)	Docket No. 50-219-LR
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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF BRIEF OPPOSING NIRS'S NOTICE OF APPEAL OF LBP-06-11" and "NOTICE OF APPEARANCE" of Steven C. Hamrick 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 17th day of April, 2006.

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