

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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

In the Matter of:)	
)	April 17, 2006
AmerGen Energy Company, LLC)	
)	Docket No. 50-219
(License Renewal for Oyster Creek Nuclear Generating Station))	
)	

**AMERGEN'S ANSWER IN OPPOSITION TO
CITIZENS' MOTION FOR RECONSIDERATION**

On April 6, 2006, Citizens¹ in the above-captioned proceeding submitted to the Atomic Safety and Licensing Board ("Board") a "Motion for Reconsideration of Motion to Add New Contentions or Supplement the Basis of the Current Contention and Leave to File Such a Motion" ("Motion"). The Motion seeks reconsideration of the Board decision, dated March 22, 2006 ("Decision"), which denied Citizens' request to add two new contentions to its hearing request or, in the alternative, to supplement the basis of its original contention. "Memorandum and Order (Denying NIRS's Motion for Leave to Add Contentions or Supplement the Basis of the Original Contention)," LBP-06-11, at 2. In this latest Motion, Citizens argue that the Board "made clear factual and legal errors in rejecting Citizens' motion to amend the basis of their existing contention, and add new contentions regarding the need for further root cause analysis and measurement of corrosion in the embedded region of the drywell liner." Motion at 1. As

¹ Citizens are comprised of: Nuclear Information and Resource Service ("NIRS"); 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.

explained below, Citizens have failed to meet the stringent standards governing reconsideration of Board decisions. Thus, their Motion should be denied.

I. BACKGROUND

At issue in this proceeding is Citizens' sole admitted contention related to corrosion monitoring of the sand bed region of the Oyster Creek Nuclear Generating Station ("OCNGS") drywell shell. 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)," LBP-06-07 (Feb. 27, 2006) ("LBP-06-07"). In follow-up to their original Petition to Intervene, Citizens filed a late-filed "Motion for Leave to Add Contentions or Supplement the Basis of the Current Contention" ("Late-Filed Motion") with the Licensing Board more than two months ago. Their Late-Filed Motion was triggered by a January 31, 2006 teleconference hosted by the Nuclear Regulatory Commission ("NRC") Staff to discuss proposed Interim Staff Guidance ("ISG") regarding generic consideration of drywell shell corrosion in Mark I containments.

As detailed in AmerGen's Answer opposing the Late-Filed Motion, Citizens erroneously characterized the generic discussions regarding the proposed ISG as new material facts relevant to their pending drywell contention in the OCNGS license renewal proceeding.² In its Decision, the Board denied Citizens' Late-Filed Motion in its entirety, ruling that they had failed to satisfy the regulatory requirements governing the addition of new contentions because: (1) the allegedly new information did not satisfy the "new contention" requirements of 10 CFR § 2.309(f)(2); and (2) the newly-offered contentions did not satisfy the standard admissibility requirements of 10 CFR § 2.309(f)(1). Decision at 5. The Board also denied Citizens' request to supplement their original contention with allegedly new information because: (1) under 10 CFR

² See "AmerGen's Answer to Petitioners' Motion for Leave to Add Contentions or Supplement the Basis of the Current Contention" (Feb. 17, 2006) at 3-11.

§ 2.309(f)(2), the newly-presented information “is not new, materially different from previously available information, and not timely presented”; (2) 10 CFR § 2.309(c) does not provide a legal basis for supplementation because Citizens failed to demonstrate good cause for its belated use in the Late-Filed Motion; and (3) even if Citizens had included the information regarding the proposed ISG in the first instance in their Petition to Intervene, the “information would not have altered” the Board’s conclusion in LBP-06-07 regarding the admissibility of the drywell contention pursuant to 10 CFR § 2.309(f)(1). *Id.* at 13-14.

Citizens, on April 6, 2006, filed the instant Motion on the purported grounds that, in issuing LBP-06-11, the Board “made clear factual and legal errors” in rejecting their Late-Filed Motion. Motion at 1. Citizens provide the following three bases for reconsideration: (1) “the ASLB’s misinterpretation of the law on when new information allows intervenors to add or amend contentions”; (2) “the ASLB’s failure to note a key fact”; and (3) “the ASLB’s erroneous ruling on the adequacy of the pleading of the motion.” Motion at 3. As explained below, these bases are plagued by several deficiencies which render Citizens’ Motion legally and factually insufficient and thereby subject to immediate rejection.

II. ARGUMENT

An initial, fundamental error in Citizens’ Motion can be found in the “legal requirements” discussion which sets the stage for the remainder of their argument. Motion at 2-3. In particular, Citizens have requested that the Board reconsider its Decision pursuant to the standards set forth in 10 CFR § 2.323(e), which expressly states that “[m]otions for reconsideration may not be filed except upon leave of the presiding officer or the Commission, upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision

invalid.”² Citizens’ pleading does not address the applicable legal standard for granting a motion for reconsideration. Specifically, while Citizens refer to Section 2.323(e) as the basis for their Motion, they fail to even attempt to make the requisite showing of “compelling circumstances.” Instead, they apply a lesser standard for reconsideration than that set forth in NRC regulations; *i.e.*, that the Board has “overlooked or misunderstood relevant facts or law.” Motion at 2-3.

In amending its adjudicatory rules in 2004, the Commission considered whether it should continue to apply the standard for motions for reconsideration, as defined by NRC case law such as that cited by Citizens (which allowed for motions requesting the presiding officer to reexamine existing evidence that may have been misunderstood or overlooked), or whether it should establish the “compelling circumstances” standard, which sets a higher threshold than that discussed in pre-existing NRC case law. *See* Final Rule; Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2207 (Jan. 14, 2004). It chose the latter course. As the Commission explained, the “compelling circumstances” standard

is intended to permit reconsideration only where manifest injustice would occur in the absence of reconsideration, and the claim could not have been raised earlier. In the Commission’s view, reconsideration should be an extraordinary action and should not be used as an opportunity to reargue facts and rationales which were (or should have been) discussed earlier.

Id. (emphasis added); *see also* Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Units 2 and 3), LBP-04-22, 60 NRC 379, 380-381 (2004).

² Although a procedural matter, in filing this Motion, Citizens simultaneously sought “leave to file such a motion,” as reflected in the title of their pleading. Such leave, however, was neither sought by, nor granted to, Citizens prior to filing their Motion. Simply paying lip service to the necessary request for such “leave” in the title line of the Motion itself does not satisfy the express requirement in Section 2.323(e). *Entergy Nuclear Vermont Yankee LLC* (Vermont Yankee Nuclear Power Station), Docket No. 50-271-OLA, ASLBP No. 04-832-02-OLA, “Memorandum and Order (Denying Motion for Reconsideration or Certification)” at 5-6 (Mar. 17, 2005).

A. Citizens' Assertion that the Board Erred in Finding the Motion Untimely Is Not A Compelling Circumstance, But Rather a Reiteration of Previously Argued and Rejected Rationales for Their Late-Filed Motion

Although it is by no means clearly articulated by Citizens in Sections II.A and II.C of their Motion, they seem to argue that they should be granted relief because the Board incorrectly ruled that the information upon which they seek to base a new or amended contention is not “new and [] materially different from previously available information” and, therefore, not untimely pursuant to 10 CFR § 2.309(f)(2). Motion at 3 and 6. In the context of this proceeding, the timeliness argument is undercut by the fact that Citizens continue to offer up the same claims about the purported newness and materiality of the underlying information. See Motion at 4-5, 7-8. Such recycled arguments are not compelling, as they previously were raised by Citizens in their Late-Filed Motion. Late-Filed Motion at 3-5, 9-11.

Similarly, Citizens' evidentiary arguments (Motion at 4) were fully considered, and rejected, by the Board in the Decision.⁴ The Board emphasized that “NIRS submitted the written PowerPoint presentation prepared by the NRC Staff that specified the purpose, background, and basis for the conference call (NIRS Motion, Exhibit B). We believe that this twelve-page document provides an adequate basis for considering the merits of NIRS's Motion.” *Id.* Thus, Citizens are clearly using this Motion as a means to obtain another “opportunity to reargue facts and rationales which were . . . discussed earlier,” as expressly prohibited by the Commission. 69 Fed. Reg. at 2207.

⁴ Noting that they provided a “brief summary of what Staff said on the call,” Citizens go on to argue that “[w]hile AmerGen and Staff disputed that account in their pleadings, they did not present any evidence on the issue.” Motion at 4. This line of argument ignores the Board's earlier finding that Citizens' Late-Filed Motion was “not based solely on the untranscribed discussion that occurred during the conference call.” Decision at 7 n.5.

B. There is Nothing Compelling in Citizens' Attempt to Reargue Why the Information Underlying Their Late-Filed Motion Was New

Citizens next assert—yet again—that the NRC Staff released new information outlining its concerns regarding aging management of the drywell liners in GE Mark I containments, contrary to the Board's ruling in its Decision. Motion at 4. As the Board correctly explained, as a matter of law, “the information arising from that [January 31, 2006] discussion, standing alone, is insufficient to support an admissible contention, because it fails to identify an alleged deficiency that is specific to Oyster Creek or its License Renewal Application.” Decision at 13. The Oyster Creek license renewal application—much less the lower, embedded portions of its drywell liner or the OCNCS aging management plan for the drywell liner—was not the subject of the Staff's January 31 teleconference. *See* Decision at 8 n.6. While specific plants may have been discussed during the teleconference, the underlying purpose of the discourse was a proposed, generic ISG. Information associated with this wide-ranging discussion of a possible generic issue is not a compelling circumstance upon which to grant a motion for reconsideration when it already has been the subject of considerable Board analysis and extends far beyond the scope of *this* license renewal proceeding.⁵

Furthermore, the 1991 *LES* decision cited by Citizens is inapposite. Motion at 5. That case does not involve a motion for reconsideration, but rather the admissibility of contentions. It pre-dates the 2004 amendments to 10 CFR Part 2. Moreover, the case is factually distinguishable, as it involved a draft Regulatory Guide that had been published for public

⁵ As in their Late-Filed Motion, Citizens again seek to litigate matters arising from the conference call related to the generic issue of Mark I drywell shell corrosion and the Staff's proposal for a generic response to that issue, rather than rely on information concerning an alleged deficiency specific to OCNCS. Quoting the Board, “[t]his it may not do.” LBP-06-11, at 11, *citing Long Island Lighting Co.* (Shoreham Nuclear Power Station), ALAB-99, 6 AEC 53, 55 (1973); *Gulf States Utils. Co.* (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760, 773 (1977).

comment; the substantive content of which was relevant to the application at issue therein.⁶ *Louisiana Energy Servs. LP* (Claiborne Enrichment Center), 34 NRC 332 (1991). The January 31 public teleconference at issue herein cannot be analogized to a publicly-available NRC Staff document that the *LES* Board equated to a preliminary interpretation of “what is required by [a] regulation.” *Id.* at 347. As the Board notes in LBP-06-11, the NRC Staff’s communications during the conference call “were not declarations of programmatic policy or regulatory conclusions.” Decision at 9 (emphasis in original). On these various bases, the *LES* decision is distinguishable and not compelling.

C. Citizens’ Allegation that the ASLB Failed To Note a “Key Fact” is Factually Incorrect and, Thus, Not Compelling

Citizens continue to assert that AmerGen has “corrected” its Answer to their Request for Hearing and incorrectly claim this as the basis for their allegation that the Board “failed to note a key fact.” Motion at 3 and 8.⁷ Their allegation about the Board is unfounded. Rather, in response to a question posed by Citizens’ counsel about a sentence on page 21 of AmerGen’s Answer,⁸ AmerGen (via electronic correspondence, notification of which was served on the Board and all other parties) simply agreed that the sentence could cause confusion; adding that the single word “including” should be deleted from the sentence.

⁶ 10 CFR § 70.22 required the materials license application at issue in *LES* to include emergency planning information. Draft Guide 3005, published for public comment prior to submittal of the application, provided a fully developed Staff position on the information required by Section 70.22 and was ultimately published—~~ur~~.changed—as Regulatory Guide 3.67.

⁷ See also “Citizens’ Brief in Opposition to Appeal from LBP-06-07,” March 24, 2006, at 19 (“AmerGen is in the process of correcting its Answer . . .”).

⁸ The sentence at issue states: “Based on these measurements and inspections, AmerGen concluded that corrosion of the drywell shell has been arrested, including in the sand bed region. Application at 3.5-20 to -21.” “AmerGen’s Answer Opposing NIRS Et Al. Request for Hearing and Petition to Intervene” at 21 (Dec. 12, 2005). Counsel for Citizens was concerned that this sentence suggested that corrosion in the upper region of the drywell has been arrested. See Letter from A. Polonsky to E. Hawkens of 3/24/2006, “Clarification; AmerGen Energy Company, LLC (License Renewal Proceeding for Oyster Creek Nuclear Generating Station), Docket No. 50-219.”

Turning to the substance of this clarification, AmerGen further explained to Citizens' counsel that the Board did not rely on the condition of the drywell shell in the upper region when it rejected that portion of the proposed contention. *See* LBP-06-07 at 32 n.27 ("We limit NIRS's contention to the sand bed region because, contrary to NIRS's assertion, AmerGen is performing, and will continue to perform during the renewal period, UT measurements at critical locations in the upper region of the drywell liner.") AmerGen noted that all parties to the proceeding had a copy of the OCNGS license renewal application, which clearly states that corrosion in the upper region "continues to decline." OCNGS License Renewal Application at 3.5-21.²

Thus, "critical facts" have not been "obscured" by what Citizens' mischaracterize as "AmerGen's misleading pleading." Motion at 9. Indeed, the new memorandum from Dr. Hausler, appended to Citizens' Motion, cites the OCNGS license renewal application as the basis for "continued corrosion observed in 2004" in the upper region of the drywell.¹⁰ The application clearly does not constitute new or compelling information capable of sustaining a motion for reconsideration. Furthermore, the "anecdotal"¹¹ information in an Alaska pipeline article (which Citizens also append to their Motion) is not relevant to NRC regulation of commercial nuclear power reactors; *i.e.*, it is neither material nor compelling.

D. The ASLB Correctly Rejected the Proposed Supplemental Contentions

Finally, Citizens claim that their Motion should be granted due to the "ASLB's erroneous ruling on the adequacy of the pleading of the motion." Motion at 3. Specifically, they claim that the Board erred in concluding that their Late-Filed Motion did not satisfy the requirements of 10 CFR § 2.309(f)(1) because it "did not specify a genuine dispute on a material issue and did

² *See also* OCNGS License Renewal Application at B-76 (the rate of corrosion in the upper region of the drywell shell is "in a declining trend.")

¹⁰ Memorandum from R. Hausler to R. Webster of 4/4/2006, "Oyster Creek Dry Well Corrosion, Additional Evidence for Continued Corrosion," at 2 ("Hausler Memorandum").

¹¹ *Id.* at 3.

not specify faulty portions of the License Renewal Application.” *Id.* at 9. In support of this claim, Citizens seem to believe that a genuine dispute arises out of the mere existence of their disagreement with AmerGen’s citation¹² to a portion of the OCNGS License Renewal Application (*i.e.*, 3.5-19) which they believe to be deficient. *Id.*

Such disagreement, alone, is neither legally sufficient to support admission of a contention nor sufficiently compelling to support Citizens’ Motion. This line of argument underscores Citizens’ fundamental misunderstanding of the underlying requirement that an adjudicatory proceeding, such as this, must have at its core a genuine dispute of material law or fact. 10 CFR § 2.309(f)(1)(vi). A party cannot create such a genuine dispute purely on the basis of its own disagreement, opinion, or speculation; nor that of its purported expert.¹³ Instead, it must demonstrate, with the requisite level of specificity, a genuine dispute that is supported by an adequate *basis*.

Pointing to the license renewal application alone is not a sufficient basis for a contention. For a contention to be admissible, it must refer to those portions of the application that the petitioner disputes *and* indicate supporting reasons for each dispute.¹⁴ This is the duty of the Petitioner, not the Board.¹⁵ Citizens—both in their Late-Filed Motion and herein—attempt to meet this burden by reference to the January 31, 2006 conference call and supporting NRC Staff PowerPoint presentation. Such information is only indicative of an ongoing, generic Staff dialogue; not any ultimate Staff determinations on the OGNGS license renewal application. As

¹² Citizens cite “AmerGen Ans. To Mot. To Add Contentions at 7.” Motion at 9.

¹³ 10 CFR § 2.309(1)(v); *See Fansteel, Inc.* (Muscogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003)(a contention will be ruled inadmissible if the petitioner has offered no “tangible information,” but instead only “assertions and speculation”).

¹⁴ *See Florida Power & Light Co.*, (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 19; *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 130 (2004).

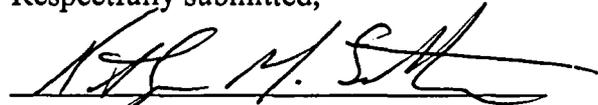
¹⁵ *See Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-14, 48 NRC 39, 41 (1998)(“It is the responsibility of the Petitioner to provide the necessary information to satisfy the basis requirement for the admission of its contentions and demonstrate that a genuine dispute exists . . .”)

such, the Board correctly ruled that such information does not give rise to a genuine dispute on material issues. LBP-06-11, at 10.

III. CONCLUSION

In their Motion, Citizens ignore the governing legal standard set forth in 10 CFR § 2.323(e) and have made no showing of the requisite “compelling circumstances” to take such “extraordinary action” as to disturb the Board’s reasoned decision in LBP-06-11. Instead, they simply reargue facts and rationales discussed earlier in their Late-Filed Motion. For the reasons discussed above, the Motion should be denied by the Board.

Respectfully submitted,



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Dated in Washington, D.C.
this 17th day of April 2006

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of:)

AmerGen Energy Company, LLC)

(License Renewal for Oyster Creek Nuclear)
Generating Station))
_____)

April 17, 2006

Docket No. 50-219

CERTIFICATE OF SERVICE

I hereby certify that copies of AmerGen's Answer In Opposition To Citizens' Motion For Reconsideration were served this day upon the persons listed below, by E-mail and first class mail, unless otherwise noted.

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