

May 5, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S RESPONSE TO AMERGEN'S MOTION
TO DISMISS DRYWELL CONTENTION AS MOOT

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the Staff of the Nuclear Regulatory Commission ("Staff") hereby answers the "Motion to Dismiss Drywell Contention as Moot and to Suspend Mandatory Disclosures" ("Motion") filed by AmerGen Energy Company, LLC ("AmerGen") on April 25, 2006. For the reasons discussed below, the Staff agrees that the contention is moot and supports the Motion to Dismiss.¹

BACKGROUND

A. The Contention

On November 14, 2005, six organizations² (collectively "NIRS") filed a request for hearing and petition to intervene in this case. NIRS proposed a contention that AmerGen's license renewal application ("LRA") for the Oyster Creek Nuclear Generating Station ("OCNGS") was deficient for, *inter alia*, its failure to include periodic UT measurements in the

¹ As stated in footnote two to AmerGen's Motion, the Staff concurs with AmerGen's request to suspend mandatory disclosures pending resolution of the Motion to Dismiss.

² The six organizations are 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.

sand bed region of the drywell liner. "Request for Hearing and Petition for Leave to Intervene," dated November 14, 2005 ("Petition").

On February 27, 2006, the Atomic Safety and Licensing Board ("Board") granted NIRS's request for hearing and petition to intervene. 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 188 (February 27, 2006). The Board narrowed NIRS's contention to read as follows:

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.

Id. at 217.³

B. AmerGen's Periodic UT Examination Commitments

AmerGen has formally docketed two commitments pertinent to NIRS's admitted contention. Motion at 2. First, on December 9, 2005, AmerGen docketed a commitment to perform a one-time UT examination on the sand bed region prior to the renewal period.⁴ Second, on April 4, 2006, AmerGen docketed a commitment to perform additional UT examinations once every ten years during the renewal period.⁵ On April 25, 2006, AmerGen filed the instant Motion, arguing that these two commitments render NIRS's contention moot.

³ Both AmerGen and the Staff appealed the Board's decision to admit NIRS's contention. See "AmerGen Notice of Appeal of LBP-06-07 Granting Admission of Petitioners' Contention on Drywell Corrosion," dated March 14, 2006; and "NRC Staff Notice of Appeal of LBP-06-07," dated March 14, 2006. At this time, the appeals remain before the Commission.

⁴ Letter from C.N. (Bud) Swenson to NRC Document Control Desk, dated December 9, 2005 (ADAMS Accession No. ML0534902190).

⁵ Letter from Michael P. Gallagher to NRC Document Control Desk, dated April 4, 2006 (ADAMS Accession No. ML060970288).

DISCUSSION

The Commission distinguishes contentions that merely allege an omission of information from those that make specific substantive challenges to how particular information is discussed in an application. *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 382-83 (2002). Where contentions allege the “omission of particular information or an issue from an application, and the information is later supplied by the applicant . . . the contention is moot.” *Id.* at 383; *see also Entergy Nuclear Vermont Yankee L.L.C. and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-05-24, 62 NRC 429 (2005); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-04-9, 59 NRC 286 (2004); *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 & 2), LBP-04-7, 59 NRC 259 (2004).

In cases where the Board must determine whether a contention falls under the omission category, the analysis category, or some combination of the two, it will look first to the language of the contention. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-02-2, 55 NRC 20, 29 (2002) (citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-23, 54 NRC 163, 171 (2001)). If that is unavailing, it will turn to “the language of the bases provided to support the contention . . . to discern the sponsor’s intent relative to the contention’s scope.” *Private Fuel Storage*, 54 NRC at 171.

In this case, both the language of the contention, as well as its bases, indicate that it is strictly a contention of omission, rather than one of analysis. See 63 NRC at 217-18. NIRS’s contention challenges AmerGen’s License Renewal Application “because its corrosion management program fails to include periodic UT measurements.” *Id.* at 217. Similarly, the language of the bases identified by the Board to support the contention focuses solely on this omission (e.g. “accordingly, periodic UT inspections must be employed in the sand bed region

during the license renewal period to confirm the actual remaining wall thicknesses of this vital safety structure”). *Id.* at 218.

In the Vermont Yankee extended power uprate (“EPU”) proceeding, a contention challenged the EPU application for its failure to “assure seismic and structural integrity of the cooling towers under uprate conditions” because “the minimum appropriate structural analyses ha[d] apparently not been done.” 62 NRC at 430. The Board designated this a contention of omission. *Id.* at 431. The licensee subsequently performed a structural and seismic analysis of the cooling towers, which took into account changes to the cooling towers associated with the EPU and filed a motion to dismiss the contention. *Id.* at 430. The Board dismissed the contention, stating: “[g]iven that the contention was based on the ‘need for Entergy to perform a seismic and structural analysis,’ now that Entergy has performed this analysis, the contention is moot.”⁶ *Id.* at 432.

The Board in *Vermont Yankee* acknowledged that some of the language in the contention seemed to indicate that it was not solely a contention of omission:

For example, the first sentence of the contention alleges, in pertinent part, that: “Entergy cannot assure seismic and structural integrity of the cooling towers under uprate conditions” . . . But this phrase, read alone, is a broad and very unfocused complaint . . . Nevertheless, in context, it is clear that NEC Contention 4 focused on the omission, not the quality, of any seismic and structural analysis of the cooling system under EPU conditions. This was inevitable, because at the time there was no such analysis, and therefore no way that NEC could review or challenge its adequacy.

Id.

⁶ The Board in *Vermont Yankee* did not address the quality of the applicant’s seismic and structural analysis, because the contention was one of omission. The alleged deficiency was cured simply by the applicant’s providing the analysis. The Board directed parties with any specific complaints regarding the analysis to seek leave to file a new contention. 62 NRC at 433. Similarly, as NIRS’s contention is one of omission, the adequacy of AmerGen’s UT examination commitments is not relevant at this juncture. The Staff will address this topic in its review of the application.

Here, NIRS's contention asserts that AmerGen's application "fails to establish an adequate aging management plan." While this language, taken alone, may seem to raise a qualitative challenge to the aging management plan, in context, it is clear that the contention merely challenges the plan insofar as AmerGen failed to include periodic UT measurements in the sand bed region of the drywell liner. This failure has been remedied. Deprived of the specific challenge to the corrosion management program's lack of periodic testing, the contention's assertion regarding the inadequacy of AmerGen's aging management plan is rendered "a broad and very unfocused complaint." AmerGen's commitments to provide periodic UT measurements cure any specific deficiencies alleged by the contention. Although the Staff has yet to determine the adequacy of these commitments as part of the applicant's corrosion management program, the omission has been remedied. NIRS's contention, therefore, should be dismissed.

CONCLUSION

For the foregoing reasons, the Board should grant AmerGen's motion to dismiss.

Respectfully submitted,

/RA/

Steven C. Hamrick
Counsel for NRC Staff

Dated at Rockville, Maryland
this 5th day of May, 2006

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S RESPONSE TO AMERGEN'S MOTION TO DISMISS DRYWELL CONTENTION AS MOOT" 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 5th day of May, 2006.

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