

May 16, 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. 50-0219-LR  
 )  
(Oyster Creek Nuclear Generating Station) )  
 )

NRC STAFF RESPONSE TO  
MOTION TO APPLY SUBPART G PROCEDURES

INTRODUCTION

On May 5, 2006, six intervenor organizations<sup>1</sup> (collectively referred to as “Citizens”) filed a motion requesting that the proceeding be conducted under 10 C.F.R. Part 2, Subpart G, procedures, arguing that the presiding officer should find, pursuant to 10 C.F.R. § 2.310(d), that the credibility of an eyewitness may reasonably be expected to be at issue. Motion to Apply Subpart G Procedures (“Motion”).<sup>2</sup> For the reasons stated below, the motion should be denied.

BACKGROUND

On February 27, 2006, the Atomic Safety and Licensing Board (“Board”) granted Citizens’ intervention petition, ruling the proceeding would be conducted under 10 C.F.R. Part 2, Subpart L. LBP-06-07, 63 NRC 188 (2006). The admitted contention states:

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 [ultrasonic test] measurements in that region throughout the period of extended operation and, thus, will not enable AmerGen to determine the amount of corrosion in that

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<sup>1</sup> 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.

<sup>2</sup> Because Motion was received by email after 5 p.m. on May 5, the Staff’s response date is extended by one business day and is May 16 instead of May 15. See 10 C.F.R. §§ 2.323, 2.306.

region and thereby maintain the safety margins during the term of the extended license.

*Id.* at 217.<sup>3</sup>

Citizens contend that the “credibility” of employees of AmerGen, and its parent company, Exelon, is at issue with regard to Oyster Creek because “AmerGen/Exelon made misleading statements about various issues to this Board, to the press, and to elected officials,” has used “unjustifiable excuses to conceal the 1996 UT results” and has “accepted and relied upon the 1996 UT results, despite obvious deficiencies in the data.” Motion at 1-2. Citizens assert that these acts indicate a “pattern of questionable conduct related to this proceeding and at other plants.” *Id.* at 2. Citizens further claim (1) that, absent a Subpart G hearing and full discovery, Citizens will not have the ability to determine the veracity of witnesses or if documents have been falsified and (2) no showing that the credibility of particular witnesses is at issue should be required in order to show that the motion should be granted. *See id.* at 2. As demonstrated below, Citizens’ generalized claims do not provide sufficient grounds to grant the Motion under 10 C.F.R. § 2.310.

## DISCUSSION

### A. Legal Requirements for Application of Subpart G Procedures

The Commission’s regulations provide that this license renewal proceeding is to be conducted under 10 C.F.R. Part 2, Subpart L unless the presiding officer by order finds that the resolution of the contention or contested matter necessitates resolution of (1) issues of material fact relating to the occurrence of a past activity, where the credibility of an eyewitness may reasonably be expected to be at issue, and/or (2) issues of motive or intent of the party or

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<sup>3</sup> Both AmerGen and the Staff appealed the Board’s decision to admit Citizens’ 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 are pending before the Commission.

eyewitness material to the resolution of the contested matter. 10 C.F.R. § 2.310(d). *See also* 69 Fed. Reg. 2182, 2205 (Jan. 14, 2004). Citizens, the movants, have the burden to demonstrate that the motion should be granted. 10 C.F.R. § 2.325.

As the Commission indicated in promulgating 2004 revisions to 10 C.F.R. Part 2, because neither the Atomic Energy Act nor the Administrative Procedure Act require use of Subpart G procedures, those procedures should only be utilized “where the application of such procedures is necessary to reach a correct, fair and expeditious resolution of such matters.” 69 Fed. Reg. at 2205. The ability of the decisionmaker “to directly observe the demeanor of witnesses in response to cross-examination which challenges their recollection or perception” is important, but best suited to resolve issues where “‘motive, intent, or credibility are at issue, or if there is a dispute over the occurrence of a past event.’ *See Union Pac. Fuels v. FERC*, 129 F.3d 157, 164 (DC Cir. 1997), *citing La. Ass’n of Indep. Producers & Royalty Owners v. FERC*, 958 F.2d 1101, 1113 (DC Cir. 1992).” *Id.* A formal evidentiary hearing is not required where issues do not involve determinations of witness credibility, but instead turn on technical data and policy judgments. *See Chemical Waste Mgmt., Inc. v. EPA*, 873 F.2d 1477, 1483-85 (DC Cir. 1989).

The Commission also indicated that, unless an enforcement proceeding is involved, there is seldom a basis to conclude that Subpart G procedures are required, particularly because a governmental deprivation of life, liberty or property is not involved. *See* 69 Fed. Reg. at 2205 n.14.

As for discovery, the Commission noted that the mandatory disclosure of information, documents and tangible things relevant to the contested matter in the proceeding (together with the hearing file) and NRC’s provisions for broad access to documents in 10 C.F.R. § 2.390 “will be sufficient in most proceedings to provide a party with adequate information to prepare its position and presentations at hearing.” 69 Fed. Reg. at 2195.

B. Intervenors Fail to Show That a Subpart G Hearing is Required

Citizens have not shown that the requested procedures are necessary in order for their meaningful participation in this proceeding. Citizens claim that Subpart G procedures are required in this proceeding based on general allegations that AmerGen, its parent company, Exelon, and employees have made false or misleading statements. See Motion at 2-7. The cited examples are general aspersions that lack a nexus to the admitted issue in the above-captioned proceeding and fail to show that formal discovery and hearing procedures are needed for litigation of the admitted contention.

As the Board stated, the “genuine dispute” in this proceeding is “whether AmerGen’s aging management program for the heavily corroded sand bed region – which does not include periodic UT measurement – will enable AmerGen to determine the extent and continuation *vel non* of corrosion and thereby maintain the required safety margins during the term of the extended license.” LBP-06-7, 63 NRC at 221. Citizens have not shown that resolution of this contention involves issues of material fact where the credibility of an eyewitness (*e.g.*, a technician that performed UT measurements in the drywell or an expert that analyzed the results) may reasonably be expected to be an issue.

Citizens have not shown that personnel involved in the “tritium leaks” at Braidwood or falsification of inspection documents at Quad Cities, are the same as those responsible for UT examinations or analyses in the sand bed region of the drywell at Oyster Creek or are otherwise eye witnesses who will likely testify in this proceeding. General suspicions about AmerGen and/or its counsel based on a misstatement in a pleading, disputes about whether AmerGen UT results are proprietary or reliable, or whether AmerGen has accurately characterized aircraft and spent fuel pool hazards at Oyster Creek (as stated in fact sheets or reported by the media) are not relevant to evaluation of the technical and policy issues in this proceeding. See Motion

at 2-7. They also fail to show a pattern of non-disclosure of relevant documents or information material to the admitted contention.

Citizens further fail to show that particular licensee witnesses would be of “questionable veracity under oath.” See Motion at 8, citing *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), 2005 NRC LEXIS 52 (2005) [Memorandum and Order (Denying Motion for Reconsideration or Certification), dated March 17, 2005 (unpublished)]; *id*, LBP-04-31, 60 NRC 686, 701-02 (2004). While the board in *Vermont Yankee* noted that historical information may raise questions about a witness’ veracity, Citizens neglect to mention that a proponent must also show an alleged credibility problem with a particular, probable eyewitness. See 60 NRC at 702. In *Vermont Yankee*, the board ruled that “generalized aspersions” regarding a party’s credibility or the credibility of unnamed individuals were insufficient to trigger a Subpart G hearing under the first criterion of 10 C. F. R. § 2.310(d), particularly if there is no showing that the prior acts are reasonably related to the issues in contention and that the allegations concerns the credibility of a person who is likely to be an eyewitness in the proceeding. See 60 NRC at 700-02. “Unless the allegations concern an individual who continues to work for [the licensee] and is identified as an eyewitness here, we cannot conclude that 10 C.F.R. § 2.310(d) has been satisfied.” 60 NRC at 702.<sup>4</sup>

Furthermore, general allegations of lack of integrity by, or poor character of, a licensee, do not show a pattern of misconduct, particularly when they appear to be of historical interest and do not relate directly to the proposed licensing action. See *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 365-67 (2001)

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<sup>4</sup> Expert witnesses may testify about the validity of various technical assumptions, but they are not eyewitnesses. See LBP-04-31, 60 NRC at 700. Subpart G procedures are reserved for “issues relating to the occurrence of a past event material to the issue in controversy, where the credibility of an eyewitness (not an expert witness without first-hand knowledge) may reasonably be expected to be at issue, as well as issues of motive or intent of the party or eyewitness.” 69 Fed. Reg. at 2196.

(license amendment proceeding is not an opportunity to engage in a free ranging inquiry into a licensee's character). The Commission does not allow issues to be admitted premised on a general fear that a licensee cannot be trusted, but rather expects that issues raised are directly germane to the challenged licensing action. *Id.* at 366-67. By the same token, general statements indicating distrust of AmerGen do not provide a basis for granting Citizen's request to apply Subpart G procedures in the instant proceeding.

Citizens also fail to show that formal discovery is required for their meaningful participation in this proceeding. In addition to information available pursuant to 10 C.F.R. §§ 2.336, 2.390 and 2.1203, Citizens will have an opportunity in this Subpart L proceeding to propose questions for the Board to propound to witnesses, and to file a motion requesting that the Board let Citizens conduct cross-examination in order to develop an adequate record in the proceeding, see 10 C.F.R. § 2.1204, 2.1207, 2.1208. The Commission has expressed confidence that the public meetings, public access to information, mandatory disclosure and the hearing file, provide a systems for disclosure of pertinent information tailored to NRC licensing matters. 69 Fed. Reg. at 2189. This proceeding has involved the disclosure of numerous documents via mandatory disclosures and the hearing file. See, e.g., Letter from Alex Polonsky to Richard Webster, dated April 3, 2006; Letter from Ann Hodgdon to Administrative Judges, dated April 3, 2005 [sic: 2006]. The Motion lacks any showing that the documents disclosed in this Subpart L proceeding will not be sufficient for Citizens to make their case on the narrow technical issue admitted in this proceeding.

Inasmuch as the general aspersions raised here do not demonstrate that the credibility of any particular witness is at issue or that formal discovery is required to litigate the narrowly framed, technical issue admitted in this proceeding, the Motion should be denied.

CONCLUSION

For the reasons discussed above, the Motion fails to meet the standards of 10 C.F.R. § 2.310(d) and should be denied.

Respectfully submitted,

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Mitzi A. Young  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 16th day of May 2006

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S RESPONSE TO MOTION TO APPLY SUBPART G PROCEDURES" 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 or, as indicated by an asterisk, by electronic mail, with copies by U.S. mail, first class, this 16th day of May, 2006.

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