RAS 11658

DOCKETED
USNRC

May 17, 2006 (7:37am)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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

In the Matter of:	May 16, 2006
AmerGen Energy Company, LLC	Docket No. 50-219
(License Renewal for Oyster Creek Nuclear Generating Station)	

AMERGEN ANSWER OPPOSING
CITIZENS' MOTION TO COMPEL FURTHER MANDATORY DISCLOSURES

On May 5, 2006, Citizens[1] in the above-captioned proceeding submitted to the Atomic Safety and Licensing Board ("Board") a "Motion to Compel Further Mandatory Disclosures" ("Motion"). The Motion seeks action by the Board to "compel AmerGen to disclose all records relating to corrosion of the upper drywell at Oyster Creek," and permission to allow Citizens "to file further motions to compel within a month of AmerGen making all its disclosable documents available for viewing by Citizens." Motion at 6. AmerGen files this Answer in opposition to Citizens' Motion in accordance with 10 CFR §§ 2.306, 2.323 (c) and (h).

As discussed below, Citizens are seeking to impermissibly expand the substantive scope of the only contention admitted in this proceeding under the guise of a discovery dispute. Moreover, Citizens lack either a factual or legal basis upon which to file what amounts to an

[1] Citizens are comprised of: 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.

Template=SECY-041

SECY-02

anticipatory objection to future AmerGen disclosures on the same grounds set forth herein. Thus, their Motion should be denied in its entirety.

I. BACKGROUND AND LEGAL STANDARDS

At issue in this proceeding is Citizens' sole admitted contention related to corrosion monitoring in 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"). As admitted by the Board, the contention is expressly limited to the sand bed region:

> 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 testing] 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 33. In so limiting the scope of the admitted contention to the sand bed region, the Board unequivocally rejected Citizens' initial attempt to litigate issues related to corrosion in the upper regions of the drywell shell.[2] The governing NRC regulation at issue limits the mandatory disclosure of information in this proceeding to that which is "relevant to the contention[ ]." 10 CFR § 2.336(a)(2)(i).[3]

---

[2] Citizens' drywell contention is admitted in this proceeding "as narrowed by this Board to challenge only the aging management program for corrosion in the sand bed region of the drywell liner . . . ." LBP-06-07, at 25.

[3] As the Commission explained in the Statement of Considerations accompanying amendments to its adjudicatory rules, its mandatory disclosure provisions are generally modeled on Rule 26 of the Federal Rules of Civil Procedure and, together with the hearing file, are intended to "reduce or avoid the need to draft often-complex discovery requests" or "engage in extended litigation over the responsiveness of a party to a discovery request." 69 Fed. Reg. 2182, 2194 (Jan. 14, 2004).

II. ARGUMENT

Citizens' Motion impermissibly challenges the Board's ruling in LBP-06-07 by seeking to expand the scope of this proceeding—under cover of the mandatory disclosure process—to include materials related to corrosion management in the upper region of the drywell shell.[4] This tactic is revealed not only in Citizens' obvious understanding that relevance is the governing legal standard,[5] but also the fact that they "agree with AmerGen that corrosion in the upper drywell is outside the scope of the contention." Motion at 3.

A. The Bases for Citizens' Motion Are Without Merit and Do Not Demonstrate Any Relevance Between the Information Sought and the Admitted Contention

Citizens circuitously argue that information about corrosion in the upper drywell is relevant to the admitted contention. Motion at 3. This attempt to expand the scope of the proceeding, and litigate a proposed contention that has been rejected by the Board, is based on three premises: (1) the presence of water on the exterior of the drywell, even in the upper region, may impact corrosion in the sand bed region of the drywell; (2) documents concerning testing in the upper region would assist Citizens in analyzing a purportedly "erroneous systematic bias" in "UT measurements at Oyster Creek"; and (3) "AmerGen has had to deal with ongoing corrosion" in the upper drywell, and thus, the "approach used for the upper drywell will inform how predicting corrosion should be approached in the sand bed." Motion at 3-5. Neither individually, nor collectively, do any of these grounds support Citizens' Motion.

---

[4] The Board narrowed the admitted contention to corrosion management in the sand bed region of the drywell because it recognized that AmerGen is performing, and will continue to perform during any renewal period, ultrasonic testing measurements at critical locations in the upper region of the drywell in order to monitor any ongoing corrosion and to maintain safety margins. *See* LBP-06-07, at 32 n.27. The Board has denied subsequent, repeated attempts by Citizens to expand the scope of the admitted contention. *See* "Memorandum and Order (Denying NIRS's Motion for Leave to Add Contentions or Supplement the Basis of the Original Contention)," LBP-06-11 (Mar. 22, 2006); and "Memorandum and Order (Denying NIRS's Motion for Reconsideration)," slip op. (Apr. 27, 2006). Unfortunately, it is called upon to do so again.

[5] Claiming they have been "forced" to file the instant Motion, Citizens seek to "compel disclosure of certain documents, [sic] that Citizens believe are relevant to the contention but AmerGen believes are not." Motion at 1.

1. Documents Regarding Corrosion in the Upper Drywell Region Are Not Relevant to the Admitted Contention

As best one can interpret Citizens' first premise, they seem to say that water on the exterior of the upper drywell shell would tend to flow by gravity to the sand bed region and cause a corrosive environment in that area. Motion at 3. Thus, "all documents that tend to show the presence or absence of water on the exterior of the drywell are relevant." *Id.* As Citizens expressly concede, however, AmerGen already has agreed to provide "documents about the presence of water anywhere on the exterior of the drywell." *Id.*

There is no dispute about the disclosure of documents related to the presence of water on the exterior of the drywell. Thus, if AmerGen has documents discussing whether any water was or is migrating along the drywell exterior in the upper region to the sand bed region, then Citizens already have (or will have) the information they seek pursuant to this first basis for compelling mandatory disclosure.[6] Accordingly, this aspect of Citizens' first purported basis justifying their Motion is moot.

At the same time, however, AmerGen has justifiably refused to disclose to Citizens "documents about corrosion in the upper region," as upper region corrosion simply is not relevant to the contention as admitted by the Board. *Id*; *see supra* note 2. AmerGen does not consider its position to be "[an] attempt[ ] to split hairs," Motion at 3, but rather a straightforward application of the fundamental relevancy test. In facing this test, Citizens continue to reiterate information that already has been introduced, evaluated, and rejected by the Board. *See* "Memorandum and Order," LBP-06-11; and "Memorandum and Order," slip op. (Apr. 27, 2006).

---

[6] Any such disclosures will be made in accordance with the March 22, 2006 agreement between the parties.

Specifically, Citizens point to their expert's letter of April 4, 2006 (supporting their previously-filed Motion for Reconsideration), as providing a full discussion of their arguments regarding the significance of the upper region corrosion to the sand bed region. Motion at 3 n.1. The Board already has considered the expert's information and concluded that it did not support reconsideration of Citizens' motion to supplement the admitted contention. *See* "Memorandum and Order," slip op. at 8 (Apr. 27, 2006). The Board need not—and indeed should not—now reconsider that information in ruling on the current Motion.

2. Documents Regarding Testing in the Upper Region Are Not Relevant to the Admitted Contention

In their second basis, Citizens claim that their expert has identified "erroneous systematic bias" in AmerGen's UT methodology and that "[d]ocuments concerning testing in the upper region" would assist them to analyze the cause of the purported "bias" and "better characterize the actual random error observed in UT measurements at Oyster Creek." Motion at 4. Divining the meaning of this purported basis for the Motion is a challenge. Such meaning, however, is key to determining whether UT thickness measurement techniques employed by AmerGen in the upper drywell region are relevant to the contention as admitted by the Board. As discussed below, the answer to the question is "no."

In support of this second basis, Citizens cite their expert's May 3, 2006 letter accompanying Citizens' Response to AmerGen's Motion to Dismiss. Motion at 4 n.2. As a matter of law, AmerGen continues to believe that information solely pertaining to UT measurement techniques used in the upper region to measure the effects of corrosion is irrelevant to the admitted contention. As Citizens recognize in their Motion, however, AmerGen has not and will not exclude documents from mandatory disclosure if they contain "information about the upper region AND the sand bed region, since the sand bed region is relevant." Motion at 2.

However, upper region information—standing on its own—is not relevant to the admitted contention.

3. Citizens' Speculation About AmerGen's "Approach Used for the Upper Drywell" Bears No Relevance to the Admitted Contention

Citizens' third basis for their Motion is closely tied to the second purported basis discussed above. Namely, Citizens presume—without factual basis or explanation—that documents related to the corrosion prediction modeling used in the upper drywell are relevant to actions that AmerGen must undertake to model corrosion rates in the sand bed region of the drywell. Motion at 4. Citizens contend, absent any supporting information, that AmerGen has developed a corrosion prediction model that confirms the adequacy of the scope and frequency of testing in the upper region, that "this model should have been calibrated and verified," and that "AmerGen must undertake a similar task for the sand bed region." *Id.*

Simply claiming that the approach used in the upper drywell "will inform how predicting corrosion should be approached in the sand bed" does not explain how "approaches" to upper drywell region corrosion, standing alone, are relevant to the admitted contention. *Id.* at 4-5. Documents related solely to corrosion monitoring in the upper region simply are outside the scope of, and not relevant to the admitted contention. Again, AmerGen already has confirmed that it has not or will not exclude information about the upper region "if a document contained information about the upper region AND the sand bed region, . . . since the sand bed region information would be relevant." Motion at 2.

B. The Board Should Not Presume That AmerGen Will Not Comply With Its Duty to Disclose Relevant Documents and Should Prohibit Filing of Duplicative Motions on Previously Resolved Issues

Citizens further claim that they are "currently unable to determine whether other relevant documents have been omitted from the disclosures provided by AmerGen," and that "it is

impossible to know whether other disputes regarding relevancy may emerge after Citizens review the documents." Motion at 1, 5. This professed "impossibility" underscores that, in a speculative and anticipatory mode, Citizens have included in their Motion a request that the Board "allow such objections to be heard until after Citizens actually get the chance to review the disclosed documents and can assess whether other relevant documents have been omitted." They further request that such future "motions to compel regarding relevancy" be filed "within a month of AmerGen making all its disclosable documents available for viewing by Citizens." Motion at 1-2, 5.

Like all other parties to this proceeding, AmerGen is required to conduct a reasonable search in order to identify all documents relevant to the admitted contentions, pursuant to 10 CFR § 2.336(a)(2)(i). The Board has explained that it "will not presume that a party will not comply with its duty to disclose all documents . . . relevant to the contentions," because "if there is an unexcused failure to make a full disclosure, the Board will not hesitate to impose sanctions . . . against the offending party" pursuant to 10 CFR § 2.336(e). *Entergy Nuclear Vermont Yankee, L.L.C.* (Vermont Yankee Nuclear Power Station), LBP-04-31, 60 NRC 686, 698 (2004). Thus, Citizens are not without meaningful protection if they believe that AmerGen has failed to comply with applicable disclosure requirements.

But, to the extent the Board's ruling on this Motion encompasses any future relevancy claims on the same issues raised by Citizens herein, its decision should be dispositive and not open to continual revisitation. By granting Citizens' request, the Board would create an open door for perpetual filings by Citizens which reiterate the same arguments about upper drywell corrosion. This would necessitate the unwarranted expenditure of time and resources by the Board, Staff, and AmerGen in order to respond to arguments regarding upper drywell corrosion

that already have been raised by Citizens in at least four filings to date and consistently rejected by the Board.

III. CONCLUSION

Citizens' Motion is yet another attempt to impermissibly expand the scope of their single admitted contention to include corrosion monitoring in the upper drywell region. As the three bases for their Motion reveal, they are simply requesting a broad range of documents relevant only to upper drywell corrosion—a matter outside the scope of this proceeding. Neither should Citizens be allowed, in advance, to preserve identical objections to future disclosures on the unfounded presumption that AmerGen will withhold relevant documents. For these reasons, Citizens' Motion should be denied in its entirety.

Respectfully submitted,

Donald J. Silverman, Esq.
Kathryn M. Sutton, Esq.
Alex S. Polonsky, Esq.
MORGAN, LEWIS & BOCKIUS, LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004
Phone: (202) 739-5502
E-mail: dsilverman@morganlewis.com
E-mail: ksutton@morganlewis.com
E-mail: apolonsky@morganlewis.com

J. Bradley Fewell
Assistant General Counsel
Exelon Business Services Company
200 Exelon Way
Kennett Square, Pennsylvania 19348
Phone: (610) 765-5580
E-mail: Bradley.Fewell@exeloncorp.com

COUNSEL FOR
AMERGEN ENERGY COMPANY, LLC

Dated in Washington, D.C.
this 16th day of May 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	May 16, 2006
AmerGen Energy Company, LLC	)	Docket No. 50-219
(License Renewal for Oyster Creek Nuclear Generating Station)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Amergen Answer Opposing Citizens' Motion To Compel Further Mandatory Disclosures " were served this day upon the persons listed below, by E-mail and first class mail, unless otherwise noted.

Secretary of the Commission*
U.S. Nuclear Regulatory Commission
Attn: Rulemakings and Adjudications Staff
One White Flint North
11555 Rockville Pike
Rockville, Maryland 20852-2738
(E-mail: HEARINGDOCKET@nrc.gov)

Administrative Judge
E. Roy Hawkens, Chair
Atomic Safety and Licensing Board Panel
Mail Stop – T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(E-mail: erh@nrc.gov)

Administrative Judge
Paul B. Abramson
Atomic Safety and Licensing Board Panel
Mail Stop – T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(E-mail pba@nrc.gov)

Administrative Judge
Anthony J. Baratta
Atomic Safety and Licensing Board Panel
Mail Stop – T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(E-mail: ajb5@nrc.gov)

John A. Covino
Ellen Barney Balint
Valerie Anne Gray
Caroline Stahl
Division of Law
Environmental Permitting and Counseling Section
P.O. Box 093
Hughes Justice Complex
Trenton, NJ 08625
(E-mail: john.covino@dol.lps.state.nj.us)
(E-mail: Ellen.Balint@lps.state.nj.us)
(E-mail: Valerie.Gray@dol.lps.state.nj.us)
(E-mail: Caroline.Stahl@lps.state.nj.us)

Office of Commission Appellate
Adjudication**
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Richard Webster
Rutgers Environmental Law Clinic
123 Washington Street
Newark, NJ 07102-5695
(E-mail: rwebster@kinoy.rutgers.edu)

Suzanne Leta
NJPIRG
11 N. Willow Street
Trenton, NJ 08608
(E-mail: sleta@njpirg.org)

Paul Gunter
Nuclear Information and Resource Service
1424 16th Street, NW
Suite 404
Washington, DC 20036
(E-mail: pgunter@nirs.org)

Mitzi A. Young
Steven C. Hamrick
Office of the General Counsel, 0-15D21
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
(E-mail: may@nrc.gov)
(E-mail: sch1@nrc.gov)

Debra Wolf
Law Clerk
Atomic Safety and Licensing Board
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
DAW1@nrc.gov

* Original and 2 copies
** First Class Mail only

Kathryn M. Sutton