

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

SERVED 06/06/06

Before Administrative Judges:

E. Roy Hawkens, Chairman
Dr. Paul B. Abramson
Dr. Anthony J. Baratta

In the Matter of

AMERGEN ENERGY COMPANY, LLC

(Oyster Creek Nuclear Generating Station)

Docket No. 50-0219-LR

ASLBP No. 06-844-01-LR

June 6, 2006

MEMORANDUM AND ORDER

(Contention of Omission is Moot, and
Motions Concerning Mandatory Disclosure are Moot)

I. INTRODUCTION

On February 27, 2006, this Board granted a Petition to Intervene submitted by six organizations¹ – hereinafter referred to collectively as NIRS – opposing an application by AmerGen Energy Company, LLC (“AmerGen”) to renew its operating license for the Oyster Creek Nuclear Generating Station (“Oyster Creek”) for twenty years beyond the current expiration date of April 9, 2009. See LBP-06-07, 63 NRC 188 (2006). This Board admitted one contention for litigation; namely, NIRS’s challenge to AmerGen’s aging management program for measuring corrosion in the sand bed region of Oyster Creek’s drywell liner to the extent that the program “fails to include periodic [ultrasonic testing (“UT”)] measurements in that region throughout the period of extended operation” (LBP-06-07, 63 NRC at 217).

¹ The six organizations are: 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.

On April 25, 2006, AmerGen filed a motion seeking to: (1) dismiss NIRS's contention as moot on the basis of AmerGen's newly docketed formal commitment to conduct periodic UT measurements in the sand bed region of the drywell liner throughout the period of extended operation; and (2) suspend further mandatory disclosures pending this Board's resolution of the dismissal request. See AmerGen's Motions to Dismiss Drywell Contention as Moot and to Suspend Mandatory Disclosures (Apr. 25, 2006) [hereinafter AmerGen Motion to Dismiss].²

Shortly thereafter, on May 5, 2006, NIRS filed a motion asking this Board to: (1) compel AmerGen to disclose all records relating to corrosion in the region *above* the sand bed region; and (2) grant permission for NIRS to file (if necessary) subsequent timely motions to compel after AmerGen makes its required disclosures. See [NIRS] Motion to Compel Further Mandatory Disclosures (May 5, 2006) [hereinafter NIRS Motion to Compel Disclosures].³

For the reasons discussed below, we conclude that NIRS's contention is moot and subject to dismissal. We will refrain, however, from issuing an order of dismissal for 20 days from the date of this Memorandum and Order, thus allowing NIRS the opportunity to seek leave to file a new contention in this proceeding. Our conclusion that NIRS's contention (which is the sole contention in this proceeding) is moot terminates the mandatory disclosure process for that contention, thus rendering moot the parties' remaining motions pertaining to mandatory disclosures.

² NIRS opposed AmerGen's requests. See [NIRS] Brief in Opposition to AmerGen's Motion to Dismiss and to Suspend Mandatory Disclosures (May 5, 2006) [hereinafter NIRS Opposition to AmerGen Motion to Dismiss]. The NRC Staff supported AmerGen's requests. See NRC Staff's Response to AmerGen's Motion to Dismiss Drywell Contention as Moot (May 5, 2006) [hereinafter NRC Staff Response to AmerGen Motion to Dismiss].

³ AmerGen opposed NIRS's requests. See AmerGen Answer Opposing [NIRS's] Motion to Compel Further Mandatory Disclosures (May 16, 2006) [hereinafter AmerGen Opposition to NIRS Motion to Compel Disclosures]. The NRC Staff declined to take a position on NIRS's requests. See Letter from Mitzi A. Young, Counsel for NRC Staff, to Administrative Judges (May 16, 2006).

II. BACKGROUND

AmerGen's License Renewal Application ("LRA") for Oyster Creek, as originally submitted, contained no provision for future UT measurements in the sand bed region of the drywell liner. The LRA omitted such measurements because AmerGen had concluded that corrosion in that region had been arrested, and that periodic visual inspections – which AmerGen planned to perform throughout the twenty-year renewal period – would be adequate to identify the effects of age-related corrosion (LRA at 3.5-19 to -21; AmerGen Motion to Dismiss at 2).

In November 2005, NIRS submitted a Petition to Intervene in which it argued that periodic visual inspections would not be adequate to monitor the extent of corrosion in the sand bed region of the drywell liner. NIRS contended, *inter alia*, that for AmerGen to ensure an adequate safety margin in the thickness of the drywell liner in the sand bed region, it must conduct periodic UT measurements in that region throughout the renewal period (see LBP-06-07, 63 NRC at 211).⁴

In February 2006, this Board concluded that NIRS proffered an admissible contention. Because the contention, as originally advanced by NIRS, was overbroad, this Board reformulated it to clarify the precise scope (supra note 4). NIRS's contention – as admitted by this Board – alleges that AmerGen's LRA is deficient because it improperly omits "periodic UT measurements in [the sand bed] region throughout the extended period of operation" (LBP-06-07, 63 NRC at 217). The contention reads as follows (ibid.):

AmerGen's [LRA] 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

⁴ NIRS raised a similar contention with respect to the region of the drywell liner above the sand bed region, known as the upper region. The Board declined to admit that contention, because AmerGen's aging management program included periodic UT measurements of the upper region throughout the renewal period. See LBP-06-07, 63 NRC at 216 n.27.

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

Meanwhile, in December 2005 – while NIRS’s Petition to Intervene was pending before this Board – AmerGen docketed a commitment to perform UT measurements in the sand bed region prior to the period of extended operation under the proposed renewed license (LBP-06-07, 63 NRC at 216). Additionally, on April 4, 2006 – after this Board had granted NIRS’s Petition to Intervene – AmerGen docketed a commitment to perform periodic UT measurements in the sand bed region of the drywell liner throughout the period of extended operation. Specifically, AmerGen committed to perform UT measurements in the sand bed region every ten years following the measurements taken prior to the renewal period. AmerGen committed to incorporate the periodic UT program into its LRA. See Letter from Michael P. Gallagher, AmerGen, to NRC (Apr. 4, 2006).⁵

Pending before us is AmerGen’s Motion of April 25, 2006, which argues that its commitment “to perform a set of UT examinations in the sand bed region prior to the period of extended operation and then every ten years thereafter during the period of extended operation [renders] moot [NIRS’s] contention as admitted by the Board” (AmerGen Motion to Dismiss at 3). AmerGen therefore requests that we dismiss NIRS’s contention (ibid.).

The NRC Staff supports AmerGen’s request, but NIRS opposes it (NRC Staff Response to AmerGen Motion to Dismiss at 5; NIRS Opposition to AmerGen Motion to Dismiss at 10).⁶

⁵ A “licensee’s written commitments . . . that are docketed and in effect” constitute part of the “current licensing basis,” which is the “set of NRC requirements applicable to a specific plant” (10 C.F.R. § 54.3(a)). A licensee must “comply with its licensing basis unless the licensing basis is properly changed or the license is formally excused by the NRC from compliance” (Nuclear Power Plant License Renewal, 56 Fed. Reg. 64,943, 64,951 (Dec. 13, 1991)).

⁶ As mentioned supra Part I, the following motions are also pending before this Board: (1) AmerGen’s motion that we suspend further mandatory disclosures pending resolution of its dismissal motion (AmerGen Motion to Dismiss at 8-10); and (2) NIRS’s motion that we compel AmerGen to provide additional disclosures (NIRS Motion to Compel Disclosures at 5),
(continued...)

III. ANALYSIS

A. **NIRS's Contention, Which Is A Contention Of Omission, Has Been Rendered Moot By AmerGen's Commitment To Perform Periodic UT Measurements During The Renewal Period**

AmerGen and the NRC Staff characterize NIRS's contention as a contention of omission that attacks AmerGen's aging management program for failing to include periodic UT measurements in the sand bed region of the drywell liner throughout the renewal period. This alleged deficiency has been cured, they assert, by AmerGen's commitment to perform periodic UT measurements in that region throughout the renewal period. Accordingly, AmerGen and the NRC Staff aver that NIRS's contention is moot and should be dismissed. See AmerGen Motion to Dismiss at 3-6; NRC Staff Response to AmerGen Motion to Dismiss at 3-5.

In response, NIRS argues that AmerGen's commitment to perform "two or three rounds" of UT measurements in the sand bed region does not moot the contention (NIRS Opposition to AmerGen Motion to Dismiss at 1). To render the contention moot, asserts NIRS, "AmerGen would have to demonstrate that its proposed measurement regime will allow safety margins to be maintained throughout the entire relicensing period" (*id.* at 3).

NIRS's argument misconceives the nature of the admitted contention. There is a difference between contentions that, on the one hand, allege that a license application suffers from an improper omission, and contentions that, on the other hand, raise a specific substantive challenge to how particular information or issues have been discussed in a license application. In the former situation, "[w]here a contention alleges the omission of particular information or an issue from an application, and the information is later supplied by the applicant . . . , the conten-

⁶(...continued)
and that we allow NIRS (if necessary) to file future motions to compel (*ibid.*).

tion is moot” (Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 383 (2002)).⁷

Generally, the plain language of a contention will reveal whether the contention is (1) a claim of omission, (2) a specific substantive challenge to an application, or (3) a combination of both. In some instances, “it may be necessary to examine the language of the bases to determine the contention’s scope” (McGuire, CLI-02-28, 56 NRC at 383 n.45) (internal quotation marks omitted); accord Public Serv. Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-899, 28 NRC 93, 97 (1988); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-23, 54 NRC 163, 171 (2001).

In the instant case, we specifically interpreted NIRS’s contention to be a claim of omission, and we reformulated it according to that understanding. The contention’s plain language thus challenges AmerGen’s 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*” (LBP-06-07, 63 NRC at 217) (emphasis added).⁸

⁷ If a contention includes both a claim of omission and a specific substantive challenge, an applicant’s curing of the omission will not necessarily render the entire contention moot. For example, here, NIRS conceivably could have proffered a contention that included (1) an “omission” challenge asserting that AmerGen must take periodic UT measurements in the sand bed region, and (2) a “substantive” challenge asserting – based on particularized supporting information – that AmerGen’s UT measurements must be performed at a specified frequency. Had NIRS proffered (and had we admitted) such a contention, AmerGen’s commitment to perform periodic UT measurements would have mooted the “omission” component of the contention, but not necessarily the “substantive” component (unless AmerGen committed to perform UT measurements consistent with the contention’s prescribed frequency).

⁸ The thrust of the reformulated contention tracked that of NIRS’s overbroad contention (supra note 4), which asserted that “UT measurements [must] be taken periodically for the life of the reactor . . . to confirm that the actual corrosion measurements are as projected” (LBP-06-07, 63 NRC at 211).

That NIRS's contention is one of omission is confirmed by its underlying basis which, as we stated in our admissibility analysis, was grounded on the premise that – “given the extent of corrosion damage in [the sand bed] region and the potential for continuing corrosion, coupled with the licensee's prior acknowledgment of the need to take UT measurements for the life of the plant to assure public safety – periodic UT measurements must be taken in the sand bed region during the renewal period” (LBP-06-07, 63 NRC at 218 n.29). In other words, according to NIRS, AmerGen's failure to include periodic UT measurements in the sand bed region during the renewal period was a fatal flaw of omission.⁹

Finally, if further evidence were needed to support the conclusion that NIRS's contention is one of omission, it may be found in our discussion rejecting NIRS's argument that its contention was not limited to the sand bed region, but extended as well to the upper region of the drywell liner (see supra note 4). We stated (LBP-06-07, 63 NRC at 216 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. . . . For this reason, NIRS's contention – to the extent it includes the upper region of the drywell liner – lacks an adequate basis

The foregoing statement makes clear that a fundamental distinction between the upper region of the drywell liner (which was excluded from the contention) and the sand bed region (which

⁹ This Board's admissibility analysis shows decisively that the gravamen of NIRS's claim is that AmerGen's aging management program improperly fails to include periodic UT measurements in the sand bed region throughout the period of extended operation. See, e.g., LBP-06-07, 63 NRC at 219 (“the issue of . . . the necessity vel non of periodic UT measurements to maintain safety margins during the term of the extended license, is material in this license renewal proceeding”); id. at 220 (NIRS's expert opines that “it is ‘absolutely essential’ that the integrity of the [sand bed region of the drywell liner] be directly assessed by periodic UT measurements”); id. at 221 (“we find that a genuine dispute exists regarding whether AmerGen's aging management program for the heavily corroded sand bed region – which does *not* include periodic UT measurements – will enable AmerGen to determine the extent and continuation vel non of corrosion”); ibid. (“NIRS contends that periodic UT measurements in this heavily corroded and epoxy covered region are essential throughout Oyster Creek's extended period of operation”).

was included in the admitted contention) was the fact that AmerGen's aging management program included periodic UT measurements in the upper region throughout the renewal period, but failed to include them in the sand bed region. That omission – which was the sole foundation for our conclusion that NIRS had proffered an admissible contention – has now been cured.

Specifically, in response to this Board's admission of NIRS's contention of omission – i.e., NIRS's complaint that AmerGen's LRA failed to include periodic UT measurements of the sand bed region throughout the renewal period – AmerGen has committed to perform periodic UT measurements in the sand bed region during the renewal period pursuant to a ten year cycle (AmerGen Motion to Dismiss at 2-3). Because AmerGen has supplied a plan to provide the periodic UT measurements that NIRS's contention claimed were improperly omitted from AmerGen's LRA, NIRS's claim of omission is moot.¹⁰

Where, as here, a contention of omission that is the sole contention in the proceeding has been rendered moot and no other motions remain pending, an order dismissing the contention ordinarily would terminate the proceeding. This Board declines to take that step at this juncture. The Commission has instructed (McGuire, CLI-02-28, 56 NRC at 383) that when a contention of omission has been rendered moot, the intervenor – if it wishes to raise specific

¹⁰ AmerGen makes the alternative argument that NIRS's contention is moot to the extent that it is construed as requiring – in general, non-quantified terms – an “adequate number of confirmatory UT measurements,” because the “docketed commitments fully and satisfactorily address the concept of an ‘adequate number’ of UT measurements” (AmerGen Motion to Dismiss at 7). But cf. NRC Staff Response to AmerGen Motion to Dismiss at 5 (Staff states it “has yet to determine the adequacy of [AmerGen's] commitments [to perform UT measurements in the sand bed region] as part of the applicant's corrosion management program”). Because we resolve the mootness issue in AmerGen's favor on a different ground, we need not, and do not, address AmerGen's alternative argument.

challenges regarding the new information – may timely file a new contention that addresses the admissibility factors in 10 C.F.R. § 2.309(f)(1).¹¹

Accordingly, to give NIRS the opportunity to file a new contention in this proceeding raising a specific substantive challenge to AmerGen’s new periodic UT program for the sand bed region, we will forbear from issuing an order of dismissal for 20 days from the date of this Memorandum and Order. See Entergy Nuclear Vermont Yankee L.L.C. (Vermont Yankee Nuclear Power Station), LBP-05-24, 62 NRC 429, 433 (2005); cf. 10 C.F.R. § 2.319 (presiding officer has “all the powers necessary” to promote efficiency and ensure a fair hearing process). If NIRS seeks leave to file a new contention within 20 days of the date of this Memorandum and Order (i.e., by June 26, 2006), we will deem the filing to be timely for purposes of 10 C.F.R. § 2.309(f)(2)(iii). Any such filing – the substance of which must be limited to the sand bed region, and which must be limited to AmerGen’s new UT program for that region as reflected in its docketed commitment of April 4, 2006 – shall address the remaining factors in 10 C.F.R. § 2.309(f)(2), as well as the admissibility factors in 10 C.F.R. § 2.309(f)(1). See Vermont Yankee, LBP-05-24, 62 NRC at 433.¹²

¹¹ The Commission in McGuire explained that unless it “require[d] an amended or new contention in ‘omission’ situations, an original contention alleging simply a failure to address a subject could readily be transformed – without basis or support – into a broad series of disparate new claims. This approach effectively would circumvent NRC contention-pleading standards and defeat the contention rule’s purposes” (CLI-02-28, 56 NRC at 383).

¹² The above procedure, which deems a new contention filed within 20 days to be timely for purposes of 10 C.F.R. § 2.309(f)(2)(iii), means that – if NIRS satisfies the remaining factors in section 2.309(f)(2) – the parties need not address the requirements under 10 C.F.R. § 2.309(c), which apply to “nontimely filings.” See Entergy Nuclear Vermont Yankee L.L.C. (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC ___, ___-___ & n.14 (slip op. at 3-7 & n.14) (May 25, 2006).

If NIRS elects to file a new contention, AmerGen and the NRC Staff may file an answer consistent with 10 C.F.R. § 2.309(h)(1). NIRS may file a reply to any answer consistent with 10 C.F.R. § 2.309(h)(2).

B. The Motions Concerning The Mandatory Disclosure Process For The Moot Contention Are Moot

Because the sole contention in this proceeding is moot, the mandatory disclosure process for that contention (10 C.F.R. §§ 2.336 and 2.1203) is terminated. The following requests pertaining to mandatory disclosures are thus moot: (1) AmerGen's motion to suspend mandatory disclosures (AmerGen Motion to Dismiss at 8-10); (2) NIRS's motion to compel further mandatory disclosures (NIRS Motion to Compel Disclosures at 6); and (3) NIRS's motion seeking permission to file (if necessary) subsequent timely motions to compel (ibid.).

IV. CONCLUSION

For the foregoing reasons, we conclude that NIRS's contention is moot. However, we will refrain from issuing an order of dismissal for 20 days from the date of this Memorandum and Order, thus allowing NIRS the opportunity to seek leave to file a new contention in this proceeding if it wishes to raise a specific substantive challenge regarding AmerGen's periodic UT program for the sand bed region. Our conclusion that NIRS's contention is moot terminates the mandatory disclosure process for that contention, and the motions pending before us pertaining to mandatory disclosures are thus moot.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD¹³

/RA/

E. Roy Hawkens, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Paul B. Abramson
ADMINISTRATIVE JUDGE

/RA by G.P. Bollwerk for:/

Dr. Anthony J. Baratta
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 6, 2006

¹³ Copies of this Memorandum and Order were sent this date by Internet e-mail to counsel for: (1) AmerGen; (2) New Jersey; (3) NIRS; and (4) the NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (CONTENTION OF OMISSION IS MOOT, AND MOTIONS CONCERNING MANDATORY DISCLOSURE ARE MOOT) (LBP-06-16) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Docket No. 50-219-LR
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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 6th day of June 2006