UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 12200 **DOCKETED 09/06/06**

COMMISSIONERS

SERVED 09/06/06

Dale E. Klein, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield
Gregory B. Jaczko
Peter B. Lyons

In the Matter of	)	
AMERGEN ENERGY COMPANY, LLC	)	Docket No. 50-0219-LR
(License Renewal for Oyster Creek Nuclear Generating Station)	)	

CLI-06-24

MEMORANDUM AND ORDER

In this Memorandum and Order, we consider appeals of two Atomic Safety and Licensing Board decisions: LBP-06-07 and LBP-06-11. Both concern an application filed by AmerGen Energy Company, LLC ("AmerGen") for renewal of its operating license for its Oyster Creek Nuclear Generating Station ("Oyster Creek"). The appeals come to us in a rather complicated procedural posture.

In *LBP-06-07*,[1] the Board considered proposed contentions contained in two petitions to intervene filed in this operating license renewal proceeding. The New Jersey Department of Environmental Protection ("New Jersey") filed one petition,[2] and the Nuclear Information and Resource Service ("NIRS"), Jersey Shore Nuclear Watch, Inc., Grandmothers, Mothers and

[1]LBP-06-07, 63 NRC 188 (2006).

[2]Request for Hearing and Petition for Leave to Intervene per 10 CFR 2 – AmerGen Oyster Creek Nuclear Generating Station License Renewal Application – (Docket 50-219) ("New Jersey Petition") (Nov. 14, 2005).

More for Energy Safety, New Jersey Public Interest Research Group, New Jersey Sierra Club, and New Jersey Environmental Federation (collectively, "Citizens"[3]) filed the second.[4] The Board found that New Jersey failed to submit an admissible contention, and denied New Jersey's petition.[5] The Board granted Citizens' petition, finding that a narrowed version of its proposed contention was admissible.[6]

New Jersey has appealed, seeking to revive its three contentions. The first of New Jersey's contentions maintains that the National Environmental Policy Act ("NEPA") requires the NRC to consider the consequences of a terrorist attack on Oyster Creek, as well as appropriate severe accident mitigation alternatives. In connection with its "NEPA-terrorism" contention, New Jersey has asked us to consider a recent Ninth Circuit decision, holding that the NRC cannot categorically refuse to perform a NEPA-terrorism review.[7] Also, the Supreme Court has extended (by 30 days) the August 31 deadline for asking the Court to review the Ninth Circuit decision. As a result of these factors, we postpone our consideration of New Jersey's NEPA-terrorism arguments for now. As for New Jersey's other two contentions, we find the reasons given by the Board for their rejection persuasive, and affirm the Board's decision for these reasons and for the reasons we give below.

AmerGen and the NRC Staff have also appealed, seeking to eliminate Citizens' single

---

[3]The Board referred to these groups collectively as "NIRS." The groups now identify themselves collectively as "Citizens" (Citizens' Brief in Opposition to Appeal from LBP-06-07 ("Citizens' Appeal") *passim* (Mar. 24, 2006)), and we will use this designation here.

[4]Request for Hearing and Petition to Intervene ("Citizens' Petition") (Nov. 14, 2005).

[5]LBP-06-07, 63 NRC at 194, 211.

[6]*Id.* at 194, 217, 225-26.

[7]New Jersey Department of Environmental Protection's Notice of Pertinent New Case Law Affecting Appeal and Request for its Consideration (June 12, 2006), citing *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006).

contention. Events have interposed themselves here as well. In response to AmerGen's motion[8] to dismiss Citizens' proposed contention as moot,[9] the Board found the contention indeed moot (based upon the Board's interpretation of commitments made by AmerGen), and therefore subject to dismissal.[10] The Board refrained from issuing an order of dismissal for twenty days to allow Citizens the opportunity to file a new contention, with specific challenges regarding the new information.[11] Citizens did file a new contention,[12] accompanied by a motion seeking leave to supplement[13] this filing to incorporate another newly docketed AmerGen commitment regarding its drywell liner aging management program.[14] In response to this motion for leave to supplement, the Board permitted the parties to make certain limited new

---

[8]AmerGen's Motions to Dismiss Drywell Contention as Moot and to Suspend Mandatory Disclosures ("AmerGen Motion to Dismiss") (April 25, 2006).

[9]LBP-06-16, 63 NRC __, slip op. (June 6, 2006).

[10]*Id.* at __, __, slip op. at 2, 9.

[11]*Id.*

[12][Citizens'] Petition to Add a New Contention (June 23, 2006).

[13][Citizens'] Motion for Leave to Supplement the Petition (June, 23, 2006).

[14]Summary of Commitments, Enclosure 2 to Supplemental Information Related to the Aging Management Program for the Oyster Creek Drywell Shell, Associated with AmerGen's License Renewal Application (TAC No. MC7624) (June 20, 2006), ADAMS Accession Number ML061740573.

filings.[15] Citizens made its initial filing,[16] AmerGen[17] and the NRC Staff[18] filed their answers, and Citizens responded to the answers.[19] As a result of these developments, it is premature, and may ultimately prove unnecessary, to decide AmerGen's and the NRC Staff's appeals of LBP-06-07.

In *LBP-06-11*,[20] the Board denied Citizens' motion for leave either to add two contentions or to supplement the basis of its original contention.[21] Citizens filed an "appeal"[22] of this decision with the Commission simultaneously with a motion for reconsideration[23] before the Board; in its appeal, Citizens indicated that its brief on the motion for reconsideration before the Board also serves as the supporting brief for its appeal. The Board has since issued a decision denying Citizens' motion for reconsideration, finding that Citizens had not satisfied the

---

[15]Order (Granting NIRS's [Citizens'] Motion for Leave to Submit a Supplement to its Petition) (July 5, 2006). Per the Board's order, AmerGen and the NRC Staff had 25 days to answer, and Citizens then had 7 days to reply to the answers. *Id*. at 4.

[16][Citizens'] Supplement to Petition to Add a New Contention; Preliminary Statement (July 25, 2006).

[17]AmerGen's Answer to Citizens' Petition to Add a New Contention and Supplement Thereto (Aug. 11, 2006).

[18]NRC Staff Answer to Petition to Add a New Contention and Petition Supplement (Aug. 21, 2006).

[19]Citizens' Reply to AmerGen's Answer to the Petition to Add a New Contention and Supplement Thereto (Aug. 18, 2006); Citizens' Reply to NRC Staff's Answer to the Petition to Add a New Contention and Supplement Thereto (Aug. 29, 2006).

[20]LBP-06-11, 63 NRC 391 (2006).

[21]Motion for Leave to Add Contentions or Supplement the Basis of the Current Contention (Citizens' Contention Motion") (Feb. 7, 2006).

[22]Citizens' Notice of Appeal ("Citizens' Notice") (Apr. 6, 2006).

[23]Motion for Reconsideration of Motion to Add New Contentions or Supplement the Basis of the Current Contention and Leave to File Such a Motion ("Citizens' Reconsideration Brief") (Apr. 6, 2006).

requirements for seeking reconsideration.[24]

We find that an "appeal" of LBP-06-11 does not lie under our regulations, and we deny any implicit petition for review of LBP-06-11 arguably contained in Citizens' appeal. Citizens' appeal includes no justification for granting what, under our regulations, could only be considered a petition for interlocutory review.

I. BACKGROUND

A. Regulatory Overview

1. License Renewal Rules.

As part of the NRC's review in a license renewal proceeding, the NRC Staff conducts a health and safety review under 10 C.F.R. Part 54, and an environmental review under 10 C.F.R. Part 51.

The scope of the health and safety review is limited to "those potential detrimental effects of aging that are not addressed by ongoing regulatory oversight programs"; a license renewal review does not revisit the full panoply of issues considered during review of an initial license application.[25] Renewal applicants must demonstrate that they will adequately manage the detrimental effects of aging for all important components and structures,[26] with attention, for example, to "[a]dverse aging effects [resulting] from [potential] metal fatigue, erosion, corrosion, thermal and radiation embrittlement, microbiologically induced effects, creep, and shrinkage,"[27] which "can affect a number of reactor and auxiliary systems, including the reactor vessel, the

---

[24]Memorandum and Order (Denying [Citizens'] Motion for Reconsideration) (Apr. 27, 2006) (unpublished) ("Reconsideration Decision").

[25]*Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 7, 9 (2001).

[26]*Id.* at 8, citing 10 C.F.R. § 54.21(a) and Final Rule, "Nuclear Power Plant License Renewal; Revisions," 60 Fed. Reg. 22,461, 22,462, 22,463 (May 8, 1995).

[27]*Turkey Point*, CLI-01-17, 54 NRC at 7.

reactor coolant system pressure boundary, steam generators, electrical cables, the pressurizer, heat exchangers, and the spent fuel pool."[28] Further, to the extent that any health and safety analyses performed during the initial licensing process were limited to the initial 40-year license period, the applicant must show that it has reassessed these "time-limited aging analyses" and that these analyses remain valid for the period of extended operation.[29] However, review of a license renewal application does not reopen issues relating to a plant's current licensing basis, or any other issues that are subject to routine and ongoing regulatory oversight and enforcement.[30]

A Part 51 license renewal environmental review has both a generic component and a plant-specific component.[31] In a generic environmental impact statement, the NRC has already considered certain environmental issues common to all (or to a certain category of) reactors. These issues are designated "Category 1" issues, and include such matters as onsite land use, noise, bird collisions with cooling towers, and onsite spent fuel storage.[32] The site-specific environmental review does not routinely reconsider Category 1 issues, but requires applicants (and ultimately the NRC Staff) to assess certain site-specific, "Category 2" issues.[33] As with our

---

[28] *Id.* at 7-8.

[29] *Id.* at 8, citing 60 Fed. Reg. at 22,480, 10 C.F.R. §§ 54.21(c), 54.29(a)(2).

[30] *Turkey Point*, CLI-01-17, 54 NRC at 8-9.

[31] *Id.* at 11-12. The generic component is contained in NUREG-1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants," Final Report, Vol. 1 ("GEIS") (May 1996). The conclusions of the GEIS were ultimately codified in 10 C.F.R. Part 51. *See* Final Rule, Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 66,537 (Dec. 18, 1996). The site-specific component is addressed in a Supplemental Environmental Impact Statement ("SEIS") to the GEIS, prepared by the NRC Staff.

[32] 10 C.F.R. part 51, Subpart A, Appendix B, Table B-1.

[33] *See* § 51.53(c)(3).

Part 54 review, we have tailored our Part 51 environmental review requirements to provide an efficient and focused renewal-specific review, rather than duplicating the review required for an initial license.[34]

2. Contention Pleading Rules.

To intervene in a Commission proceeding, including a license renewal proceeding, a person must file a petition for leave to intervene. In accordance with 10 C.F.R. § 2.309(a), this petition must demonstrate standing under 10 C.F.R. § 2.309(d), and must proffer at least one admissible contention as required by 10 C.F.R. §§ 2.309(f)(1)(i)-(vi). The requirements for admissibility set out in 10 C.F.R. §§ 2.309(f)(1)(i)-(vi) are "strict by design,"[35] and we will reject any contention that does not satisfy these requirements. Our rules require "a clear statement as to the basis for the contentions and the submission of . . . supporting information and references to specific documents and sources that establish the validity of the contention."[36] "Mere 'notice pleading' does not suffice."[37] Contentions must fall within the scope of the proceeding – here, license renewal – in which intervention is sought.[38]

3. Appeals.

Under our rules, where (as here) the NRC Staff or the license applicant argues that the

---

[34] *Id.* at 11.

[35] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *petition for reconsideration denied,* CLI-02-1, 55 NRC 1 (2002). *See also Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP site), CLI-05-29, 62 NRC 801, 808 (2005), citing *Millstone*, CLI-01-24, 54 NRC at 358.

[36] *Arizona Public Service Co*. (Palo Verde Nuclear Generating Station, Units 1, 2, & 3), CLI-91-12, 34 NRC 149, 155-56 (1991). *Accord Clinton*, CLI-05-29, 62 NRC at 808.

[37] *Clinton*, CLI-05-29, 62 NRC at 808, citing *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 428 (2003).

[38] *See* 10 C.F.R. § 2.309(f)(1)(iii).

Board ought to have rejected all contentions, an appeal lies.[39] An appeal also lies where (as here) a potential intervenor claims that the Board wrongly rejected all contentions.[40] Finally, in cases where an "appeal" does not lie, we have discretion to grant interlocutory review at the request of a party in limited circumstances.[41] However, "[t]he Commission's longstanding general policy disfavors interlocutory review."[42] We recognize "an exception where the disputed ruling threatens the aggrieved party with serious, immediate, and irreparable harm or where it will have a 'pervasive or unusual' effect on the proceedings below."[43] We grant review under the "pervasive and unusual" effect standard "only in extraordinary circumstances."[44]

B. Board Decision in LBP-06-07

The Board found that both New Jersey[45] and Citizens[46] had standing. The Board rejected all of New Jersey's proposed contentions,[47] and admitted Citizens' one proposed contention, in a form narrowed by the Board.[48] Judge Abramson dissented from that portion of

---

[39]10 C.F.R. § 2.311(c).

[40]10 C.F.R. § 2.311(b).

[41]10 C.F.R. § 2.341(f).

[42]*Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 70 (2004).

[43]*Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 5 (2001).

[44]*Id.*

[45]LBP-06-07, 63 NRC at 194.

[46]*Id.* at 195.

[47]*See id.* at 199-211.

[48]*See id.* at 211-26.

the opinion admitting Citizens' narrowed contention.[49] Since we do not decide the appeals challenging the admission of Citizens' contention today, we omit any discussion of the Board's decision on that topic. We also omit any discussion of the Board's decision on New Jersey's NEPA-terrorism contention, since we also do not decide that today.

New Jersey's second and third contentions are the two relevant here:

1. Second contention: In evaluating metal fatigue at Oyster Creek, AmerGen must use a 0.8 "cumulative usage factor"[50] rather than the less restrictive 1.0 factor AmerGen used in its license renewal application;[51] and

2. Third contention: A contractual arrangement between AmerGen and FirstEnergy[52] does not provide adequate assurance that combustion engines Oyster Creek relies on for back-up power will continue to operate, will comply with AmerGen's aging management plan, or will meet regulatory requirements should a corrective action plan ever be required.[53]

With respect to these two contentions, the Board held that controlling NRC regulations and industry standards render AmerGen's 1.0 "cumulative usage factor" permissible on its face,[54] and that New Jersey had raised no specific, non-speculative flaws in the AmerGen-

---

[49] *Id.* at 228 n.39, 229-33.

[50] The cumulative usage factor "assists in describing the level of a component's cumulative fatigue damage – that is, damage caused by the repeated stresses of operating load cycles during the component's operating life." LBP-06-07, 63 NRC at 204 n.11.

[51] *See* New Jersey Petition at 6-9 (unnumbered).

[52] FirstEnergy is the owner/operator of the Forked River Combustion Turbines, which provide back-up power to Oyster Creek. *See* LBP-06-07, 63 NRC at 207.

[53] *See* New Jersey Petition at 9-11 (unnumbered).

[54] *See id.* at 204-07.

FirstEnergy contractual arrangement on back-up power.[55]

C. Board Decision in LBP-06-11

The Board denied Citizens' motion to add two new corrosion contentions or to supplement the basis of its originally proposed contention.[56] The Board based its decision on findings that the allegedly new information that prompted Citizens' motion was not, in fact, new, and that, even had the information been new, it did not satisfy our contention admissibility standards.[57] Citizens sought reconsideration, but the Board denied Citizens' motion.[58]

II. ANALYSIS

A. New Jersey Appeal of LBP-06-07

We give "substantial deference" to our boards' determinations on threshold issues, such as standing and contention admissibility.[59] We regularly affirm "Board decisions on the admissibility of contentions where the appellant 'points to no error of law or abuse of discretion.'"[60] We find no error of law or abuse of discretion with respect to the portions of New Jersey's appeal of LBP-06-07 under consideration here (New Jersey's second and third contentions): the Board thoroughly analyzed the issues, the arguments, and the underlying supporting facts and expert opinions. We do not reiterate the Board's reasoning in full below,

---

[55] *See id.* at 207-11.

[56] LBP-06-11, 63 NRC at 393, 402.

[57] *Id.* at 396.

[58] Reconsideration Decision at 3-10.

[59] *See, e.g., Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 324 (1999); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-855, 24 NRC 792, 795 (1986).

[60] *USEC Inc.* (American Centrifuge Plant), CLI-06-09, 63 NRC 433, 439 n.32 (2006), citing *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 637 (2004). *Accord Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 265 (2000).

but focus instead on certain questions raised in the appellate briefs.

***1. Second Contention: Cumulative Usage Factor*.**

In its license renewal application, AmerGen employs a cumulative usage factor (one measure of the damage caused by the repeated stresses of operating load cycles) of 1.0.[61] This is less stringent than the 0.8 factor in place when the reactor was built.[62] New Jersey argues that the more stringent 0.8 factor, rather than the 1.0 factor, should have been used in the license renewal application.

On appeal, New Jersey concedes that under NRC rules AmerGen may update its current licensing basis to a new cumulative usage factor, but argues that AmerGen has not complied with or completed the process it must follow to effectuate the update.[63] Docketing a commitment with NRC Staff to update the current licensing basis to the 1.0 factor, as AmerGen has done, is insufficient, according to New Jersey. Moreover, New Jersey says, employing a cumulative usage factor of 1.0, instead of 0.8, results in a 25 percent increase in permitted metal fatigue, which significantly reduces the margin of safety at Oyster Creek. New Jersey asserts that NRC rules require the Director of the NRC's Office of Nuclear Reactor Regulation ("NRR") to evaluate this reduction in the margin of safety[64] and that AmerGen should use the 0.8 factor until the Director has approved a different factor. For these reasons, New Jersey argues that the Board erred in refusing to admit the proposed cumulative usage factor contention.

We agree with AmerGen that on appeal New Jersey (in effect) has rewritten its

---

[61]LBP-06-07, 63 NRC at 204, 204 n.11.

[62]*Id.* at 204, 206.

[63]New Jersey Appeal at 24-25. *See* 10 C.F.R. § 50.55a.

[64]New Jersey Appeal at 24-26.

proposed contention, converting it into an impermissible new contention.[65] New Jersey's new contention on appeal focuses on the question of NRR approval. But New Jersey's original proposed contention said nothing about any alleged failure to seek NRR approval of the change in the cumulative usage factor. Additionally, as AmerGen argues, New Jersey misconstrues the pertinent NRC rule – 10 C.F.R. § 50.55a(a)(3). Contrary to New Jersey's interpretation, section 50.55a(a)(3) expressly states that authorization from the NRR Director is required only when "alternatives" to the established requirements in subsections (c), (d), (e), (f), (g), and (h) are used. As NRC Staff puts it, "no . . . approval is required where the updated version of the Code has already been endorsed by Commission regulation."[66] That is the case here. As the Board pointed out, "[u]tilizing a [cumulative usage factor] of 1.0 is permitted under the current, relevant portion of the ASME [American Society of Mechanical Engineers] Code . . . . Moreover, that portion of the Code is specifically referenced in, and endorsed by, 10 C.F.R. § 50.55a(g)(4)."[67] Since AmerGen's change in cumulative usage factor is "already endorsed" by subsection (g), the approval requirements of subsection (a)(3) do not apply. New Jersey's argument thus fails.

Further, in recasting its contention on appeal and arguing only on the basis of that rewritten version, New Jersey does not controvert the Board's decision rejecting the originally proposed version of this contention as "unsupported as a matter of law or fact."[68] We reject the

---

[65]*See American Centrifuge Plant*, CLI-06-10, 63 NRC at 458, citing *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622-23 (2004), *Private Fuel Storage*, CLI-04-22, 60 NRC at 140, *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-04-2, 59 NRC 5, 8 n.18 (2004), and *Commonwealth Edison Co*. (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 194.

[66]NRC Staff's Brief in Opposition to Appeal from LBP-06-07 ("NRC Staff Response") (Apr. 10, 2006) at 9.

[67]LBP-06-07, 63 NRC at 206. As the Board notes, AmerGen's License Renewal Application provides for a cumulative usage factor of 1.0. *Id*. at 205.

[68]*See* LBP-06-07, 63 NRC at 204-07.

new, rewritten proposed contention, and affirm the Board's unchallenged rejection of the original proposed contention.

2. Third Contention: Back-up Power.

New Jersey also appeals the denial of one portion of its proposed contention relating to the combustion turbines that provide backup power for Oyster Creek. The contention had three components in its original formulation.[69] The point New Jersey appeals, which it characterizes as "included" in its original proposed contention, concerns AmerGen's alleged failure to show the existence of an "updated" interconnection agreement requiring FirstEnergy to comply with AmerGen's aging management plan. New Jersey argues that 10 C.F.R. § 54.21(c), which requires an applicant for a license renewal to "demonstrate that . . . (iii) [t]he effects of aging on the intended function(s) will be adequately managed for the period of extended operation,"[70] requires evidence of a contractual obligation to comply with the aging management plan where the alternate power source is not owned and operated by the renewal applicant.[71]

---

[69]New Jersey Petition at 7 (unnumbered).

[70]10 C.F.R. § 54.21(c)(1)(iii).

[71]New Jersey argues that the Board erred in finding this proposed contention inadmissible for failure to provide supporting documentation. New Jersey maintains that an updated interconnection agreement has not been finalized and therefore does not exist, and that copies of the current interconnection agreement are considered by AmerGen to be confidential and proprietary and have not been made available. According to New Jersey, the NRC Staff failed to alert the Board to the existence of this confidential, proprietary interconnection agreement, and this deprived the Board of options it would otherwise have had – namely, rejecting, as impossible, the NRC Staff's effort to impose an obligation on New Jersey to have produced the document in order to support its proposed contention; reviewing the document itself *in camera*; or issuing a protective order so that New Jersey could have access to the document. New Jersey protests the "unfairness" of requiring it to cite to or produce a document when it cannot use the Commission's discovery processes unless and until it is allowed to intervene as a party to the proceeding. In response, AmerGen points out that the Commission's hearing notice clearly placed the responsibility for requesting documents, and for contacting the applicant to discuss the need for a protective order with respect to any document, on petitioners. 70 Fed. Reg. 54585, 54586 n.1 (Sept. 15, 2005). AmerGen asserts that, to its knowledge, New Jersey made no such request at any time during the contention

(continued...)

We agree with AmerGen that, as formulated in New Jersey's appeal, the proposed contention – demanding an updated interconnection agreement – does not match any of the three pieces that formed its original proposed contention. Neither New Jersey's petition as a whole nor the proposed contention as originally formulated made any reference to an "updated interconnection agreement."[72] New Jersey cannot raise new contentions for the first time on appeal to the Commission.[73] We note in any event that AmerGen has made a commitment –

---

[71](...continued)
filing period. We agree with AmerGen that the onus of obtaining supporting documentation was on New Jersey, and further, that appropriate mechanisms were in place to enable New Jersey to obtain copies of documents necessary to support its proposed contentions. *See American Centrifuge Plant*, CLI-06-10, 63 NRC at 460 ("Under longstanding agency precedent, petitioners and intervenors may request and, where appropriate, obtain – under protective orders or other measures – information withheld from the general public for proprietary or security reasons."). New Jersey never requested the documents.

[72]The original proposed contention read:

> It is [New Jersey's] contention that th[e] arrangement [between FirstEnergy and AmerGen] will NOT assure that:
>
> 1. First Energy [sic] will continue to operate the combustion turbines during the proposed extended period of operation at Oyster Creek.
> 2. The combustion turbines will be maintained, inspected and tested in accordance with AmerGen's aging management plan that, when developed, will become part of the license renewal commitments. There will be a reliance on a competitor to manage and perform this work with little opportunity for AmerGen to oversee any of it.
> 3. All deficiencies encountered by First Energy [sic] in the course of operating, maintaining, inspecting and testing the combustion turbines will be entered into a corrective action program that meets the requirements of 10 CFR 50 Appendix B, Quality Assurance Criteria for Nuclear Power Plants and Fuel Reprocessing Plants.

New Jersey Petition at 7 (unnumbered).

[73]*See* n.62, *supra*.

which it acknowledges is binding – to ensure adherence to its aging management programs.[74]

Again, by rewriting its proposed contention to convert it into an impermissible new contention and arguing on appeal solely for the new version, New Jersey fails to challenge the Board's rejection of its originally proposed contention. We agree with the Board, for the reasons it gives, that the proposed contention, as originally formulated, lacked factual or expert support, lacked an adequate basis, and did not demonstrate "a genuine issue of material fact or law."[75] As the NRC Staff argues, New Jersey's proposed contention regarding the combustion turbines "fails to reference any factual grounds for disagreement with the aging management plan or AmerGen's assertions about its implementation."[76]

We reject the new proposed contention and affirm the Board's finding in LBP-06-07 that New Jersey's originally proposed contention regarding the combustion turbines was inadmissible.

B. Citizens' Appeal of LBP-06-11

In LBP-06-11, the Board rejected a motion to supplement the basis of Citizens' original contention (on corrosion of the drywell liner) or to add two new contentions. Citizens asked to add certain "previously unavailable information"[77] to support the initial contention; alternatively, Citizens asked to add two new contentions, one "alleging that the proposed corrosion

---

[74]AmerGen Opposition at 15, quoting from AmerGen's Brief in Response to Order Directing Supplemental Briefing on Hearing Requests at 9-10 (January 17, 2006).

[75]LBP-06-07, 63 NRC at 209.

[76]NRC Staff Response at 11.

[77]Citizens maintained that the NRC Staff communicated certain "conclusions" during a conference call regarding the Generic Aging Lessons Learned ("GALL") Report. Citizens described these alleged conclusions as decisions by the NRC Staff "that not only is corrosion of the drywell liner within the scope of license renewal proceedings, but the sources of the water which is the root cause of of this corrosion are also included." Citizens' Contention Motion at 10. The Board found that this information was "not new, not materially different from previously available information, and not timely presented." LBP-06-11, 63 NRC at 402.

management of inaccessible areas of the drywell liner is inadequate,"[78] and the second arguing that a "root cause analysis" of the source of the corrosion must be performed.[79]

In its notice of appeal, Citizens states that it is appealing "[o]ut of an overabundance of caution, and in order to ensure that [the group's] rights are preserved."[80] As support for its "appeal," Citizens attaches the same brief to its notice that it filed in support of its (since denied) motion for reconsideration before the Board.[81] Neither the notice nor the brief includes any arguments in support of an "appeal" (as opposed to a motion for reconsideration). While Citizens makes passing reference to 10 C.F.R. §§ 2.311 and 2.341 in its notice, it ignores both the requirements for an appeal under 10 C.F.R. § 2.311, and the requirements for a petition for (discretionary) Commission review under 10 C.F.R. § 2.341.

As the NRC Staff points out, section 2.311 is not applicable to the Board's refusal to supplement the basis of Citizens' contention or to add new contentions because the section applies only where a board decision rules on a request for hearing, petition to intervene, or selection of hearing procedures. It does not authorize appeals from an order like LBP-06-11 refusing to supplement an admitted contention.

---

[78]Citizens' Contention Motion at 10. Citizens argued "that the monitoring regime for inaccessible areas of the drywell liner . . . must at least include ongoing, regular, direct measurements of the thickness at all areas where corrosion could have occurred for the life of the plant and clear acceptance criteria for the measurements." *Id.* at 11. The Board found that the information underlying this new proposed contention was "neither new . . . nor materially different than information that was previously available." LBP-06-11, 63 NRC at 397. The Board also found that the submission of the new contention was untimely. *Id.* at 398.

[79]Citizens' Contention Motion at 10-11. In addition to the root cause analysis, Citizens argued that AmerGen must "implement a verifiable program to eliminate leakage of water onto the drywell liner." *Id.* at 13. Again, the Board found that the information underlying this new proposed contention was "neither new . . . nor materially different from previously available information." LBP-06-11, 63 NRC at 400.

[80]Citizens' Notice at 1.

[81]Reconsideration Decision at 3-10.

Although section 2.311 does not apply, 10 C.F.R. § 2.341 – the section of our regulations setting out procedures for petitions for Commission review – conceivably could. But Citizens makes none of the arguments required in a petition for review in either its notice of appeal or its dual-duty "motion for reconsideration" brief. For a viable petition for review – since LBP-06-11 is not a final decision on the merits – Citizens needed to make a case for *interlocutory* review under section 2.341(f).[82] Under section 2.341(f), a petitioner must show that the issue for which interlocutory review is sought: "(i) [t]hreatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or (ii) [a]ffects the basic structure of the proceeding in a pervasive or unusual manner."[83] Citizens asserts no immediate and irreparable impact on itself and no pervasive effect on the litigation. Nor is it obvious how Citizens could make such a showing, since it has already successfully intervened in the proceeding on the drywell liner issue.[84] In fact, Citizens makes absolutely no showing (and no argument) to justify interlocutory review. For these reasons, we decline to take up LBP-06-11 on interlocutory review.

---

[82]Section 2.341(b)(6) expressly prohibits granting review where a petitioner has simultaneously filed for reconsideration before the Board: "A petition for review will not be granted as to issues raised before the presiding officer on a pending motion for reconsideration." Citizens ought not have filed a simultaneous appeal and petition for reconsideration. But that procedural problem is moot, now that the Board has rejected Citizens' reconsideration motion.

[83]10 C.F.R. § 2.341(f)(2).

[84]*See Private Fuel Storage*, CLI-01-1, 53 NRC at 5 ("We have repeatedly held that refusal to admit a contention, where the intervenor's other contentions remain in litigation, does not constitute a pervasive effect on the litigation calling for interlocutory review.").

CONCLUSION

For the foregoing reasons and for the reasons given by the Board, we *affirm* the Board's decisions in LBP-06-07 with respect to New Jersey's appeal of the rejection of its second and third contentions only and *deny* review of LBP-06-11. Decisions on New Jersey's appeal of the rejection of its first contention and on AmerGen's and the NRC Staff's appeals of LBP-06-07 are *postponed* until further notice.

IT IS SO ORDERED.

For the Commission,

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 6th day of September, 2006.

Commissioner Gregory B. Jaczko respectfully dissents, in part:

I dissent in this order because the NEPA terrorism issue is a significant matter that needs resolution. I believe the agency should conduct a review of the impacts of terrorist attacks on nuclear facilities as part of a NEPA analysis. More importantly, I believe continuing to refuse to consider the environmental effects of terrorist attacks will subject the agency to unnecessary judicial challenges. Thus, I am fully supportive of all efforts to give this matter the thorough and deliberate review warranted.

In addition, I believe that the current uncertainty surrounding the impact of this issue may lead to unnecessary confusion in the review of new reactor licenses. To eliminate this uncertainty, the agency should expeditiously develop a process to review terrorism issues as part of a NEPA analysis. This particular case presents a timely opportunity for the Commission to resolve these matters, providing clarity and certainty for the potential increase in licensing reviews the Commission may conduct in the next few years.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-06-24) have been served upon the following persons by electronic mail this date, followed by deposit of paper copies in the U.S. mail, first class, and NRC internal mail.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: ocaamail@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, DC 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, DC 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, DC 20555-0001
E-mail: ajb5@nrc.gov

Steven C. Hamrick, Esq.
Mitzi A. Young, Esq.
Office of the General Counsel
Mail Stop - O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: sch1@nrc.gov; may@nrc.gov

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

Docket No. 50-219-LR
COMMISSION MEMORANDUM AND ORDER (CLI-06-24)

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

Donald J. Silverman, Esq.
Kathryn M. Sutton, Esq.
Alex S. Polonsky, Esq.
Morgan, Lewis, & Bockius LLP
1111 Pennsyvlania Ave., NW
Washington, DC 20004
E-mail: dsilverman@morganlewis.com;
ksutton@morganlewis.com;
apolonsky@morganlewis.com

Bradley M. Campbell, Commissioner
New Jersey Department of
Environmental Protection
P.O. Box 402
Trenton, NJ 08625-0402
E-mail:
commissionercampbell@dep.state.nj.us

Jill Lipoti, Director
New Jersey Department of
Environmental Protection
Division of Environmental Safety and Health
P.O. Box 424
Trenton, NJ 08625-0424
E-mail: jill.lipoti@dep.state.nj.us

Ron Zak
New Jersey Department of
Environmental Protection
Nuclear Engineering
P.O. Box 415
Trenton, NJ 08625-0415
E-mail: ron.zak@dep.state.nj.us

J. Bradley Fewell, Esq.
Exelon Corporation
200 Exelon Way, Suite 200
Kennett Square, PA 19348
E-mail: bradley.fewell@exeloncorp.com

Docket No. 50-219-LR
COMMISSION MEMORANDUM AND ORDER (CLI-06-24)

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

John A. Covino, Esq.
Ellen Barney Balint, Esq.
Valerie Anne Gray, Esq.
Caroline Stahl, Esq.
Deputy Attorneys General
New Jersey Office of the Attorney General
Environmental Permitting &
Counseling Section, Division of Law
Hughes Justice Complex
P.O. Box 093
Trenton, NJ 08625
E-mail: john.covino@law.dol.lps.state.nj.us;
ellen.balint@lps.state.nj.us;
valerie.gray@dol.lps.state.nj.us;
caroline.stahl@lps.state.nj.us

[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

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