RAS 12458

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:	October 30, 2006
AmerGen Energy Company, LLC	Docket No. 50-219
(License Renewal for Oyster Creek Nuclear Generating Station)	

AMERGEN'S ANSWER IN OPPOSITION TO
CITIZENS' OCTOBER 20, 2006 MOTION FOR RECONSIDERATION

On June 23, 2006, the citizens group now calling itself "Stop the License Renewal of Oyster Creek"[1] ("Citizens") submitted a new, seven-part proposed contention ("Petition") to this Atomic Safety and Licensing Board ("Board"). In general, the Petition challenged the adequacy of AmerGen Energy Company, LLC's ("AmerGen") ultrasonic testing ("UT") and coatings monitoring program for the sand bed portion of the drywell shell at the Oyster Creek Nuclear Generating Station ("Oyster Creek"). On October 10, 2006, the Board reformulated and admitted one part of the proposed contention: "AmerGen's scheduled UT monitoring frequency in the sand bed region of the drywell shell at Oyster Creek is insufficient to maintain an adequate safety margin." LBP-06-22, slip op. at 9 n.10 ("Decision").

On October 20, 2006, Citizens submitted a "Motion for Leave to File For Reconsideration and Motion For Reconsideration of Order Partially Granting Petition to File a

[1] Citizens are comprised of: 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.

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New Contention" ("Motion"). As the basis for seeking reconsideration, Citizens argue that the Board "misinterpret[ed] the law on timeliness and availability of new information" and "fail[ed] to note that Citizens could not have known how AmerGen was going to conduct tests that it had not even proposed at the time Citizens' filed their initial petition." Motion at 3-4.

As explained below, Citizens' Motion should be denied.

LEGAL STANDARDS

The Commission sets a "high bar" for parties seeking reconsideration of Board orders. *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 636 (2004). Citizens have the burden to establish "compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid" in their motion for reconsideration. 10 C.F.R. § 2.323(e). As the Commission explained, the "compelling circumstances" standard:

> is intended to permit reconsideration *only where manifest injustice would occur in the absence of reconsideration, and the claim could not have been raised earlier.* In the Commission's view, reconsideration should be an *extraordinary action and should not be used as an opportunity to reargue facts and rationales which were (or should have been) discussed earlier.*

Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,207 (Jan. 14, 2004) (emphasis added).

Similarly, a motion for reconsideration is "not an opportunity to present new arguments or evidence, or a 'new thesis,' unless . . . the moving party can demonstrate that the new material's availability could not reasonably have been anticipated and its consideration demonstrates compelling circumstances." *Dominion Nuclear Conn., Inc.*, LBP-04-22, 60 NRC 379, 380-81 (2004) (citing *Louisiana Energy Servs., L.P.* (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 (1997)).

As for timeliness, late-filed contentions may be admitted with leave of the presiding officer only upon a showing that:

> (i) the information upon which the amended or new contention is based was not previously available;
>
> (ii) the information upon which the amended or new contention is based is materially different than information previously available; and
>
> (iii) the amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

10 C.F.R. § 2.309(f)(2); LBP-06-22, slip op. at 6. Boards have strictly construed this language to reject a contention when "the *information* . . . is by no means new, [or] previously unavailable." Decision at 12 (emphasis in original); *see also Duke Energy Corp.* (McGuire and Catawba Nuclear Stations, Units 1 and 2), LBP-03-17, 58 NRC 221, *aff'd* CLI-03-17, 58 NRC 419 (2003). ("Differing factors apply with respect to the timeliness ..., based in part on when the information giving rise to the contention became publicly available").

Citizens have not even attempted to argue compelling circumstances, let alone demonstrate that such circumstances exist. They allege error, but make no effort to show that such alleged error rises to the compelling circumstances warranting the extraordinary relief of reconsideration. Thus, Citizens' Motion does not come close to meeting the standard set forth in 10 C.F.R. § 2.323(e) or demonstrating that the Board erred in applying 10 C.F.R. § 2.309(f)(2).

ARGUMENT

A. The Board Properly Rejected Citizens' Challenge to AmerGen's Acceptance Criteria

The Board found that Citizen's challenge to AmerGen's drywell thickness acceptance criteria was inadmissible because the information upon which the contention was based was neither new nor previously unavailable. Decision at 12. The crux of Citizens' argument that

this part of their contention was timely is that they could not have known of AmerGen's plans to use the existing acceptance criteria before AmerGen committed to perform additional UT during the period of extended operation in its April 4, 2006 commitment to the NRC. Motion at 4-5. Citizens also state that AmerGen did not identify acceptance criteria in its December 9, 2005 commitment to perform one-time UT prior to the period of extended operation. *Id.* at 5.

Citizens' purported justifications fall far short of the "compelling circumstances" required for the extraordinary relief of reconsideration. The Board properly addressed this argument when it concluded that the information regarding acceptance criteria was neither new nor unavailable. In this regard, the Board correctly noted the prominence of such information in Citizens' references to "as designed" and "minimum required" thicknesses (*i.e.*, the acceptance criteria) in its original Petition to Intervene (Request for Hearing and Petition to Intervene at 9 (Nov. 19, 2005)), the discussion of minimum thicknesses in the License Renewal Application ("LRA") (at 3.5-18 to -20), and the references in Citizens' own exhibits to the use of the ASME Code for establishing acceptance criteria. Decision at 12-13. The Board also correctly noted that Citizens had directly challenged the adequacy of AmerGen's acceptance criteria in their February 2006 motion to add new contentions, and that the analyses used to derive the acceptance criteria had "long been publicly available." *Id.* at 13. Thus, the Board did not err in its application of the timeliness requirement, and fully complied with 10 CFR § 2.309(f)(2).

Rather, this aspect of Citizens' Motion aptly reflects their desire to have yet another bite at the apple. As the Board stated when it denied Citizens' earlier Motion for Reconsideration:

> NIRS's Motion for Reconsideration makes no attempt to show the existence of *any* circumstances – much less "compelling circumstances" (10 C.F.R. § 2.323(e)) – that render the Board's admissibility analysis invalid. Instead, NIRS simply repeats the arguments . . . . At bottom, NIRS is expressing its bare disagreement with this Board's decision, which does not warrant the filing of a motion for reconsideration. See 69 Fed. Reg. at 2,207 (reconsideration motion should not be used to "reargue facts and rationales which were . . . discussed earlier" and rejected).

Memorandum and Order (Denying NIRS's Motion for Reconsideration) at 9 (Apr. 27, 2006) (unpublished). The Board correctly found that Citizens failed to challenge the acceptance criteria at the appropriate time, and are barred from doing so now. Decision at 14.

In summary, Citizens have not argued or demonstrated the compelling circumstances required for the Board to entertain reconsideration of this part of the rejected contention.

B. The Board Properly Rejected Citizens' Challenge to AmerGen's Spatial Scope of Monitoring

The Board also found inadmissible Citizens' argument that the spatial scope of the UT monitoring is insufficient to identify and test all the degraded areas of the drywell shell in the sand bed region. In concluding that Citizens were aware that AmerGen intended to perform UT measurements in the same locations as had been tested in the 1990s, and thus their contention was not timely, the Board correctly relied upon AmerGen's December 9[2] commitment and Citizens' own exhibits to their Petition to Intervene. *Id.* at 29-30.

Citizens make the same argument as they do for the first part of the contention; namely, that they could not have known of AmerGen's spatial scoping plans before AmerGen filed the April 4, 2006 commitment. This argument fails for the same reasons

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[2] That commitment was to take one-time UT thickness measurements in the sand bed region in a "sample of areas previously inspected (in the 1990s) and identified as having corrosion." Letter from C. N. Swenson, AmerGen to NRC at Enclosure (Dec. 9, 2005) (Attached as Exhibit 1 to AmerGen's Answer Opposing NIRS et al.'s Request for Hearing and Petition to Intervene (Dec. 12, 2005)). The reason to use the same areas was to "allow comparison of results in order to confirm that the surface coating applied in 1992 has arrested corrosion that had previously occurred." *Id.*

stated above. The Board correctly recognized that Citizens "knew well before AmerGen docketed its December 9 commitment when and where UT measurements were taken." *Id.* at 29. Moreover, the December 9 commitment "made clear" that the same locations would be used. *Id* at 29-30. Clearly, Citizens filing of their Petition on June 23, over six months after AmerGen filed its December 9 commitment, was not timely.

In anticipation of this basis for rejection of their Motion, Citizens then speculate whether the Board would have allowed them to rely on the December 9 commitment as new information to support their contention. Motion at 5. They mistakenly, and curiously, argue that this commitment is outside the scope of the proceeding because the UT measurements would be taken before the period of extended operation and, therefore, are part of the current licensing basis ("CLB"). *Id.* at 6.

This guesswork is legally deficient and fails to constitute "compelling circumstances" warranting the Board's reconsideration. The Staff's license renewal review covers docketed *written commitments* concerning aging management of the containment (*see* 10 C.F.R. § 54.21(a)(1)(i)), which includes the drywell shell. *See* Final Rule, Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. 22,461, 22,473 (May 8, 1995) (the license renewal review includes written commitments that are part of the CLB, but that encompass systems, structures, and components within the scope of the Section 54.21(a) integrated plant assessment). In fact, the very subject line of the December 9 commitment letter—"Additional Commitments Associated with *Application for Renewed Operating License*"—demonstrates that the commitment supports the LRA.

Finally, Citizens argue that "if knowledge about past programs could preclude challenges to future programs under Part 2 rules, this would violate the Administrative Procedure Act and the Atomic Energy Act because Citizens would never be able to get a

hearing when an applicant decides to revive old methods for new aging management programs." Motion at 7. Citizens miss the point. Knowledge of past programs precludes challenges to future programs when Citizens could have raised the issue in this proceeding in a timely manner. Citizens were not precluded from *ever* raising the issue in this proceeding, they are just precluded from doing so at this late stage.

In summary, for these reasons, the second element of Citizens' Motion also fails to warrant reconsideration. Citizens have not argued or demonstrated the compelling circumstances required for the Board to reconsider this part of the contention.

C. The Board Properly Rejected Citizens' Challenge to AmerGen's Quality Assurance Program

The Board also found inadmissible, for several reasons, Citizen's argument that AmerGen's quality assurance ("QA") plans for the UT measurements are inadequate. First, the Board concluded that the contention was untimely because the QA program was described in the LRA and had "Citizens wished to contest any aspect of the program, they should have done so in their original Petition to Intervene." Decision at 31. The Board also held that the contention was beyond the scope of the proceeding because the Commission has determined that a licensee's QA program is excluded from license renewal review. *Id.* at 32. Finally, the Board held that it failed to demonstrate a genuine factual dispute because it contained "nothing more than a broad unsupported assertion that 'AmerGen must revise its [QA] plans.'" Decision at 40 (quoting Petition at 11).

As a basis for reconsideration, Citizens now argue that the Board has subjected them to an "evidentiary standard" that is contrary to Part 2 by asking for support for Citizens accusation that they requested the 1996 UT results, but that AmerGen "*consistently* refused to provide [them]." Motion at 8 (emphasis added). Access to the 1996 UT data is a

procedural matter that simply does not rise to the level of a material factual or legal error that would justify the extraordinary relief of reconsideration. The dispute is not over the Board's substantive ruling on the admission of Citizens' contention, but instead on the subsidiary issue of access to information.[3]

Moreover, the Board did not impose upon Citizens an "evidentiary standard." Motion at 2. The Board was merely seeking *some* support for the bald accusation that a party in the proceeding had repeatedly not provided relevant documents. Decision at 32 n.27. This is wholly consistent with the Commission's heightened pleading standards. *See e.g. Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001) (citing Final Rule, "Rules of Practice for Domestic Licensing Proceedings-Procedural Changes in the Hearing Process," 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989)) (a petitioner must do more than submit "'bald or conclusory allegations' of a dispute with the applicant").

Furthermore, Citizens' Motion only demonstrates that their accusation is false. Citizens' now submit Exhibit RC1, which refers only to a *single* e-mail dated Sept. 6, 2005, from Ms. Edith Gbur and Mr. Paul Gunter asking AmerGen to provide, among other things, the 1996 UT data. At that time, there was no proceeding even pending on AmerGen's license renewal application. The *Federal Register* notice announcing the opportunity to file Petitions to Intervene was not published until over a week later on September 15, 2005.[4] 70 Fed. Reg. 54,585 (Sept. 15, 2005). A single email by members of the public before an

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[3] It should be noted that Citizens have not alleged that AmerGen had any legal obligation whatsoever to provide access to these data at the time they were requested.

[4] AmerGen does not provide detailed technical information to members of the public as a routine matter. As Exhibit RC1 states, such information is made available onsite for review by regulators.

opportunity to intervene existed does not support the accusation that AmerGen "*consistently* refused to provide" the 1996 UT results to Citizens.

Citizens also argue with the Board's conclusion that their contention regarding AmerGen's QA program is an "attack [on] the CLB." Motion at 8. Citizens attempt to clarify that they are challenging the QA program for measurements to be taken during the extended operating period, not during the current license term. *Id.* at 8-9. But the Commission already has concluded that a licensee's QA program—even for activities undertaken during the period of extended operation—is outside the scope of a license renewal proceeding. 60 Fed. Reg. at 22,475 (cited in Decision at 42).

Finally, Citizens never really challenge the Board's conclusion that this part of the contention does not raise a genuine factual dispute. They merely state that "this challenge is well supported by the record" because both AmerGen and the NRC Staff have "acknowledged that . . . the 1996 results . . . are actually erroneous." Motion at 9. But this is the same kind of conclusory language that the Board found inadequate to support admission of a contention in the first place – and it must fail as a basis for reconsideration.

Thus, yet again, Citizens have not argued or demonstrated the compelling circumstances required for the Board to entertain reconsideration of this part of the rejected contention.

D. The Board Properly Rejected Citizens' Challenge to AmerGen's Statistical Methods

The Board also found inadmissible Citizen's argument that AmerGen's methods for analyzing UT results are flawed. Decision at 33. The Board found this part of the contention untimely because the LRA discussed inclusion of the 1987 corrosion monitoring program in the Aging Management Program, and an exhibit to the Petition to Intervene also included a

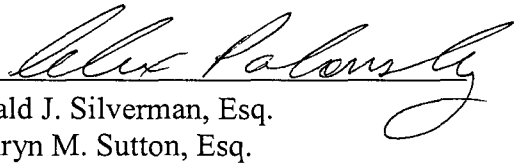
1991 NRC Information Notice addressing corrosion rate calculations. *Id.* 34-35. The Board further found that the statistical techniques used for the drywell shell were publicly available, having been submitted to the NRC in 1990. *Id.* at 35-36.

Citizens acknowledge that they "knew how AmerGen had calculated past corrosion rates." Motion at 9. The crux of their argument, however, is the same as for other parts of the rejected contention; namely, they couldn't have raised the issue until AmerGen filed its April 4 commitment. *Id.* at 9-10. To have raised an earlier challenge, they mistakenly argue, would have been outside the scope of this proceeding because it would have related to the CLB. *Id.* at 10. These arguments fail to show compelling circumstances for the same reasons discussed above.

CONCLUSION

In their Motion, Citizens have made no showing of the requisite "compelling circumstances" to take such "extraordinary action" as to disturb the Board's reasoned decision in LBP-06-22, as required by 10 CFR § 2.323(e). Instead, they simply reargue facts and rationales they discussed in prior pleadings. For the reasons discussed above, the Motion should be denied.

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

Dated in Washington, D.C.
this 30th day of October 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	October 30, 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's Answer in Opposition to Citizens' October 20, 2006 Motion for Reconsideration 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
(E-mail: daw1@nrc.gov)

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Alex Polonsky