

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
OFFICE OF THE SECRETARY

ATOMIC SAFETY AND LICENSING BOARD

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

In the Matter of)	
)	Docket No. 50-219
AMERGEN ENERGY COMPANY, LLC)	
OYSTER CREEK NUCLEAR)	
GENERATING STATION)	
)	March 27, 2007
License Renewal for Oyster Creek Nuclear)	
Generating Station)	
)	

PETITIONERS' OPPOSITION TO AMERGEN MOTION TO STRIKE

PRELIMINARY STATEMENT

In its e-mail of March 23, 2007, American Energy Company LLC ("AmerGen") has now agreed that the reply dated March 13, 2007 (the "Reply"), submitted on behalf 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 (collectively "Citizens"), was timely.

Thus, the only remaining issue is whether the reply permissibly referenced an e-mail from Sandia National Laboratories ("Sandia") that was not available at the time the Citizens filed their Motion To Add A New Contention (the "Petition"). Contrary to AmerGen's assertions, Citizens permissibly used the Sandia e-mail to refute the flawed

arguments presented by AmerGen's Answer to the Petition (the "Answer"). In addition, the disputed new information was entered into ADAMS and became available to all parties. It is therefore part of the record and, in accordance with a previous Atomic Safety and Licensing Board ("ASLB" or "Board") decision in this proceeding, it may be cited in reply.

BACKGROUND

Here Citizens sought to add a new contention about the computer modeling methods that should be used to derive the acceptance criteria. Petition at 6. In response, AmerGen argued that all issues regarding modeling methods had been resolved at the February 1, 2007 meeting of the Advisory Committee on Reactor Safeguards ("ACRS"). Answer at 14-15, 18-19. Replying to this argument, Citizens showed that it was reasonable to infer that an open issue remained. Reply at 4-5. Furthermore, on March 8, 2007, before Citizens were due to file the Reply, the NRC notified Citizens and AmerGen of the availability of the February 9, 2007 e-mail from Sandia expressing its disagreement with the presentation of its work by NRC staff at the February 1, 2007 meeting, and stating that Sandia continued to believe it inappropriate to use enhanced capacity reduction factors adjusted for hoop stress in conjunction with three dimensional models which already account for the hoop stress to some extent. E-mail from Hessheimer, Sandia, to Ashley, NRC, dated February 9, 2007 available at ML070430292.¹ Because

¹ AmerGen complains that Citizens did not reference a March 8, 2007 memorandum regarding the Sandia e-mail. However, the memo merely reiterated that Sandia had not used the modified capacity reduction factor and had no position on whether the data shared by AmerGen's expert Dr. Miller at the February 1, 2007 meeting justified the use of the modified capacity reduction factor. The first fact is obvious from inspection of the Sandia Report and lies at the heart of the Contention. The second is precisely Citizens' point: Sandia did not change the opinion expressed in its report either before or after the February 1, 2007 meeting. Moreover, Dr. Miller's presentation simply did not directly address the key issue raised by Sandia in its e-mail, which is that even though the modified reduction factor could be appropriate where used in conjunction with the analytic calculation method specified in N-284, it was not

this e-mail made it even clearer that AmerGen's claims about the ACRS meeting were overblown, Citizens included a reference to the Sandia e-mail in their Reply.

ARGUMENT

I. Legal Standards

In its Motion to Strike, dated March 20, 2007, AmerGen correctly points out that entirely new arguments may normally not be raised in reply. The primary reason for this is to avoid unfairness, where a party is deprived of the right to respond to a particular argument. However, the very decision cited by AmerGen shows that in reply petitioners may refute legal or logical arguments raised in the answer. Louisiana Energy Services., L.P. (National Enrichment Facility), CLI-04-25, 60 N.R.C. 223, 224-25 (2004). As this brief shows, this is all that Petitioners did in reply.

Furthermore, the case that AmerGen cites about fairness actually shows that it would be unfair to exclude the Sandia e-mail. That case holds that Petitioners must have the same opportunity as their opposition to be heard before a contention can be admitted or denied. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 N.R.C. 521 (1979). In fact, AmerGen had much more opportunity than Citizens to present its case before the ACRS on February 1, 2007, because it presented at length and provided oral expert testimony which had not been previously available. At the same meeting, Citizens gave a brief presentation, but could not respond to the previously unavailable expert evidence, and Sandia did not present at all. Thus, it would be fundamentally unfair to now exclude the evidence that emerged

appropriate when a three dimensional finite element analysis is used to calculate the buckling loads. Thus, the March 8, 2007 memo merely serves to further illustrate that the February 1, 2007 ACRS meeting did not resolve all the issues, contrary to AmerGen's claims in its Answer.

shortly after the ACRS meeting, definitively confirming that Sandia continues to disagree with the Staff and AmerGen about the appropriate capacity reduction factor.

Finally, the record stays open until the hearing is closed and all evidence is submitted. Connecticut Yankee Atomic Power Co. (Haddam Neck Plant), ASLB 01-7878-02, 2003 WL 21314058 (2003). Furthermore, even where additional relevant evidence comes to light after the hearing is complete, it may be added to the record. Id. Here, Citizens simply cited to material that is in the record. The decision of this Board on AmerGen's previous motion to strike found that material that is in the record and is therefore equally available to both sides may be used to buttress arguments in a reply brief, provided petitioners use it to amplify an argument in the petition or to respond to the answer. LBP-06-07, slip op. at 46, 63 NRC 188 (2006). Here, Citizens are using the Sandia e-mail to refute AmerGen's erroneous argument that the February 1, 2007 ACRS meeting settled everything. This is entirely permissible.

II. The Reply Merely Refuted AmerGen's Answer

AmerGen incorrectly alleges that Citizens proffered a new argument in the Reply that "Sandia continues to disagree about the appropriate capacity reduction factor." Motion to Strike at 2. This is incorrect for two reasons. First, Citizens used the Sandia's opinions about the capacity reduction factor as their primary basis for the new contention. Petition at 7-9. Implicit in this argument is that Sandia had not changed its opinion, because if Sandia had subsequently changed its opinion, the new contention would have had insufficient basis.

In response, AmerGen specifically stated that the Petition "introduces allegations based on issues raised and resolved before the ACRS" and "AmerGen and Staff

addressed *all* of the relevant issues from the January 18, 2007 subcommittee meeting in detail before the full ACRS and counsel for Citizens on February 1, 2007.” Answer at 18-19. Thus, AmerGen appeared to suggest that Sandia had changed its position the appropriate capacity reduction factor at some point before, during or after the February 1, 2007 ACRS meeting. To refute this erroneous argument Citizens then showed that there was no evidence that Sandia had changed its position about the appropriate capacity reduction factor that should be used with its analysis. Reply at 4. Citizens then amplified this argument by referencing the newly available Sandia e-mail. *Id.* at 5. Thus, because Citizens used the Sandia e-mail to amplify its refutation of AmerGen’s over ambitious argument about the effect of the ACRS meeting, its use was entirely within the bounds described by Louisiana Energy Services and this Board in this proceeding.

II. Use Of The Sandia E-mail Was Fair

AmerGen suggests that it was unfair for Citizens to use the Sandia e-mail in the Reply. Motion to Strike at 4. However, its reasoning on this point is unclear. AmerGen seems to suggest that having chosen not to dispute Dr. Miller’s assertions at the ACRS in the Petition, Citizens could not then later refute AmerGen’s argument that all issues had been resolved by those assertions and the decision of the ACRS. This is entirely illogical. In their pleadings, Citizens were seeking to establish a basis for the new contention. Citizens did not and do not dispute that AmerGen and its experts disagree with the new contention. That is hardly a surprise. Indeed, a material dispute must be raised for any contention to be valid. What Citizens do dispute is AmerGen’s argument in its Answer that Dr. Miller’s testimony and the ACRS decision somehow invalidated

Sandia's opinion that the capacity reduction factor used in conjunction with the Sandia modeling should not be enhanced.

In fact, instead of undermining the basis for the new contention by raising this argument in its Answer, it appears that AmerGen was actually seeking adjudication of the material dispute that the Contention raises. This is inappropriate at the preliminary stage, when petitioners only have to "provide a brief explanation of the basis for the contention," 10 C.F.R. § 2.309(1)(ii) and "a concise statement of the alleged facts or expert opinions which support the petitioner's position." 10 C.F.R. § 2.309(1)(v). This rule ensures that "full adjudicatory hearings are triggered only by those able to offer minimal factual and legal foundation in support of their contentions." Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999) (emphasis added). Thus, it is simply not the role of the Board to adjudicate the weight of the evidence for and against a contention at the preliminary stage. At this stage the Board must only establish whether a genuine dispute exists, not adjudicate it. Thus, piling on more evidence highlighting disagreement among the experts, as AmerGen has done, cannot undermine the basis of the new contention.

Furthermore, the only purpose of the Sandia e-mail was to confirm the inference that Citizens had already made when they filed the Petition. Citizens reasonably inferred that Sandia continued to believe that the use of an enhanced capacity reduction factor in conjunction with its sophisticated modeling techniques was not justified. See Petition at 4, 7-9. The Sandia e-mail at issue merely confirmed that fact. Thus, although the Sandia e-mail is certainly inconvenient for AmerGen, it was already on notice that Citizens believed this to be Sandia's position all along. AmerGen can hardly claim that it was

unfairly prejudiced by the inability to respond to this argument, because it actually responded to it by stating incorrectly that all issues had been resolved by the ACRS meeting and subsequent decision. Just because the Sandia e-mail starkly shows that AmerGen's argument was incorrect does not mean that the use of the e-mail was unfair.

Finally, the Sandia e-mail is dated February 9, 2007, three days after Citizens filed the Petition. Although Citizens did not receive notice of the e-mail until March 8, 2007, it is not clear when AmerGen first obtained the e-mail. AmerGen notably fails to allege that it did not have access to the Sandia e-mail at the time it filed its Answer. In fact, because the e-mail arrived on February 9, 2007 it is quite possible that AmerGen had access to the Sandia e-mail on or before March 5, 2007, when it filed its Answer. Thus AmerGen has utterly failed to establish that Citizens use of the Sandia e-mail was in any way unfair or prejudicial.

III. The New Contention Was Not Amended

In an argument that is hard to follow, AmerGen accuses Citizens of failing to address the late-filing criteria for amended contentions. Motion to Strike at 3-4. This is a complete red-herring. Citizens' Reply did not amend the new contention. It merely refuted AmerGen's erroneous arguments.

IV. The Sandia E-mail Is Part Of The Record

There is no question that the record remains open until this proceeding is complete. Furthermore, as far as Citizens are aware, the Sandia e-mail was treated like any other document and therefore became part of the record. This Board in this proceeding has previously found that material that is in the record, although not cited in an opening brief, may be cited on reply provided it is used appropriately. LBP-06-07, slip

op. at 46, 63 NRC 188 (2006). Here, Citizens used the Sandia e-mail to definitively refute AmerGen's argument that the ACRS meeting on February 1, 2007 resolved everything. Thus, Citizens made permissible use of a record item on Reply by citing the Sandia e-mail.

V. The New Contention Has Sufficient Basis Even Without The Sandia E-mail

Even without the Sandia e-mail, Citizens still showed that Sandia consistently maintained that using an enhanced capacity reduction factor with its analysis is not justified. Petition at 7-8; Reply at 4. At the preliminary stages of a contention Citizens have to provide is a minimal factual and legal basis for the contention, they do not have to prove a likelihood of success on the merits. Thus, even if the ASLB were to exclude the Sandia e-mail, the new contention would still have an adequate basis.

CONCLUSION

For the foregoing reasons, AmerGen's Motion to Strike should be denied.

Respectfully submitted.



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Dated: March 27, 2007

UNITED STATES OF AMERICA
BEFORE THE NUCLEAR REGULATORY COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	Docket No. 50-0219-LR
AMERGEN ENERGY COMPANY, LLC)	
)	ASLB No. 06-844-01-LR
(License Renewal for the Oyster Creek)	
Nuclear Generating Station))	March 27, 2007

CERTIFICATE OF SERVICE

I, KAREN A. HUGHES, of full age, certify as follows:

1. I am a paralegal at the Rutgers Environmental Law Center (RELC). The RELC represents Citizens in this matter.
2. I hereby certify that on March 27, 2007 I caused the response to a motion to strike to be served via email and U.S. Postal Service on the following:

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Dated: March 27, 2007