

**RAS 13457**

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

**DOCKETED 04/10/07**

**SERVED 04/10/07**

Before Administrative Judges:

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

In the Matter of

AMERGEN ENERGY COMPANY, LLC

(License Renewal for Oyster Creek Nuclear  
Generating Station)

Docket No. 50-0219-LR

ASLBP No. 06-844-01-LR

April 10, 2007

**MEMORANDUM AND ORDER**

(Denying Citizens' Motion for Leave to Add a Contention  
and Motion to Add a Contention)

On February 6, 2007, the intervenors in this case – six organizations hereinafter referred to collectively as Citizens<sup>1</sup> – filed a motion seeking to add a new contention challenging the License Renewal Application submitted by AmerGen Energy Company, LLC (“AmerGen”) for the Oyster Creek Nuclear Generating Station (“Oyster Creek”).<sup>2</sup> AmerGen and the NRC Staff oppose Citizens' Motion.<sup>3</sup>

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<sup>1</sup> The six organizations are 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.

<sup>2</sup> See Motion for Leave to Add a Contention and Motion to Add a Contention (Feb. 6, 2007) [hereinafter Citizens' Motion]. See also Citizens' Combined Reply to AmerGen's and NRC Staff's Answer to Their Petition to Add a New Contention (Mar. 13, 2007) [hereinafter Citizens' Reply].

<sup>3</sup> See AmerGen's Answer Opposing Citizens' February 6, 2007 Motion for Leave to Add a Contention and Motion to Add a Contention (Mar. 5, 2007) [hereinafter AmerGen's Answer]; NRC Staff Answer to Citizens' Motion for Leave to Add a Contention and Motion to Add a Contention (Mar. 5, 2007) [hereinafter NRC Staff's Answer].

Because we conclude that Citizens are unjustifiably late in proffering their new contention, we deny their motion.

## I. **BACKGROUND**

As part of the NRC Staff's review of the Oyster Creek License Renewal Application, the Office of Reactor Regulation commissioned Sandia National Laboratories ("Sandia") to "independently confirm" conclusions reached by General Electric Nuclear Energy ("GE") in a 1991 study, which analyzed the structural integrity of the Oyster Creek drywell shell.<sup>4</sup> Jason P. Petti, Sandia National Laboratories, Structural Integrity Analysis of the Degraded Drywell Containment at the Oyster Creek Nuclear Generating Station at 12 (Jan. 2007) [hereinafter Sandia Study]. The Staff contemplated that the Sandia Study would assist it in evaluating whether AmerGen's determination that the "current known condition of the [drywell shell] and the progressive damage expected over the extended service life did not compromise the design function or licensing basis, was reasonable" (*id.* at 11).

The 1991 study performed by GE analyzed, in part, "whether historical corrosion [of the drywell shell] prevented [it] from performing its intended functions" (AmerGen's Answer at 8). Using a finite-element model of the drywell shell (36 degree slice), and the buckling (stability) limits specified in the American Society of Mechanical Engineers ("ASME") Boiler and Pressure Vessel Code Case N-284, GE determined that for the sand bed region, a minimum general thickness – hereinafter referred to as acceptance criteria – of .736 inch "will satisfy ASME Code requirements, with a safety factor of 2.0 against buckling for the controlling refueling load combination" (AmerGen's Answer at 8 & n.6).

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<sup>4</sup> A description of the Oyster Creek drywell shell – including the sand bed region – and a discussion of its history may be found at LBP-06-7, 63 NRC 188, 212-16 (2006).

GE derived the .736 inch acceptance criteria by using a capacity reduction factor (“CRF”)<sup>5</sup> of .340 to account for the presence of tensile stress in the drywell shell (AmerGen’s Answer at 9; see also Sandia Study at 67). In contrast, the CRF for an unstiffened sphere in uniaxial compression is .207 (Sandia Study at 67). When “internal pressure loading is present and causes tensile stresses in the circumferential direction,” Code Case N-284 provides that an increased CRF may be justified (id. at 77). According to AmerGen, using a CRF of .340 was justified “based upon the effects of hoop tension, which would be present in the refueling load combination” (AmerGen’s Answer at 9). The NRC Staff approved GE’s analysis in its 1992 Safety Evaluation Report (“SER”), concurring with GE “that the Oyster Creek drywell has adequate margin against buckling with no sand support for an assumed sand bed region shell thickness of 0.736 inch” (AmerGen’s Answer, Exh. 2, Safety Evaluation by the Office of Nuclear Reactor Regulation Drywell Structural Integrity, Oyster Creek Nuclear Generating Station at 4 (Apr. 24, 1992) [hereinafter 1992 SER]; see also Sandia Study at 12).<sup>6</sup>

Unlike GE’s analysis, Sandia’s analysis did not incorporate an increased CRF in calculating the acceptance criteria for the sand bed region. Sandia determined that the “circumferential tensile stresses in the [Oyster Creek] sand bed region for the refueling case stem from the geometry of the structure” and not from internal pressure (Sandia Study at 67). Thus, in the absence of further justification from GE for using an increased CRF, Sandia utilized a CRF of .207 (rather than GE’s CRF of .340), with a resultant acceptance criteria of .844 inch (rather than GE’s acceptance criteria of .736 inch) (id. at 77-80).

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<sup>5</sup> CRFs are used to correct for imperfections in the shell structure (Sandia Study at 67).

<sup>6</sup> GE’s analysis is considered “the analysis of record” for Oyster Creek and part of its current licensing basis (NRC Staff Answer at 15, 17; Advisory Committee on Reactor Safeguards Subcommittee on Plant License Renewal Transcript of Jan. 18, 2007 Meeting at 295).

Based on the Sandia Study, a subsequent discussion of the Study during the January 18, 2007 meeting of the Advisory Committee on Reactor Safeguards (“ACRS”) Subcommittee on Plant License Renewal, and the result of recent UT measurements released by AmerGen in January 2007, Citizens request that the following new contention be admitted to this proceeding (Citizens’ Motion at 6):

The computer modeling undertaken by General Electric, upon which the disputed acceptance criteria are based, used unjustified factors leading to underestimation of the uniform required thickness by over 0.108 inches and of the small area required thickness by over 0.082 inches. For this reason, the acceptance criterion for the average thickness of each bay of the drywell shell should be increased to around 0.844 inches to ensure that the applicable ASME Code safety requirements are met or should be replaced with a set of criteria based on accurate and realistic three dimensional modeling of further degradation in the sand bed. For similar reasons, the acceptance criterion for small area thicknesses should be increased to at least 0.618 inches or integrated into the acceptance criteria derived from further three dimensional modeling.

## **II. ANALYSIS**

### **A. Legal Standards Governing The Admissibility Of Citizens’ Newly Proffered Contention**

For Citizens’ to succeed in their quest to have their newly proffered contention admitted, they must satisfy several regulatory requirements. First, they must establish the contention is timely by showing that (10 C.F.R. § 2.309(f)(2)(i)-(iii)):

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

Failure to satisfy any of these requirements will mandate the conclusion that Citizens’ contention is nontimely.

A nontimely contention is not perforce inadmissible. However, a petitioner must demonstrate that admission of a nontimely contention is warranted pursuant to a balancing test that weighs the following factors “to the extent that they apply to the particular nontimely filing” (10 C.F.R. § 2.309(c)(1)):

- (i) Good cause, if any, for the failure to file on time;
- (ii) The nature of the . . . petitioner’s right . . . to be made a party of the proceeding;
- (iii) The nature and extent of the . . . petitioner’s property, financial or other interest in the proceeding;
- (iv) The possible effect of any order that may be entered in the proceeding on the . . . petitioner’s interest;
- (v) The availability of other means whereby the . . . petitioner’s interest will be protected;
- (vi) The extent to which the . . . petitioner’s interests will be represented by existing parties;
- (vii) The extent to which the . . . petitioner’s participation will broaden the issues or delay the proceeding; and
- (viii) The extent to which the . . . petitioner’s participation may reasonably be expected to assist in developing a sound record.

The petitioner bears the burden of demonstrating “that a balancing of these factors weighs in favor of granting the petition” (Texas Utils. Elec. Co. (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-88-12, 28 NRC 605, 609 (1988)).<sup>7</sup>

**B. Citizens’ Newly Proffered Contention Is Not Admissible**

Citizens’ newly proffered contention asserts that AmerGen’s acceptance criteria for the sand bed region of the drywell shell are unacceptable because the modeling upon which the

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<sup>7</sup> For a nontimely contention to be admissible, it must – in addition to satisfying the balancing test in 10 C.F.R. § 2.309(c) – satisfy the standard admissibility requirements in 10 C.F.R. § 2.309(f)(1). Here, because we conclude that Citizens’ newly proffered contention is nontimely and fails to satisfy the balancing test in section 2.309(c), we need not conduct a section 2.309(f)(1) analysis.

criteria are based utilized an unjustifiably high CRF. Based on the conclusions reached in the Sandia Study, Citizens argue that the uniform thickness acceptance criteria should be increased from .736 to .844 inch, and the local area acceptance criteria should be increased from .536 to .618 inch. An increase in minimum thickness is necessary, according to Citizens, because the October 2006 UT measurements reveal that if the acceptance criteria were increased to .844 inch, the sand bed region of the drywell shell in Bay 13 “would not be accepted as suitable for service” (Citizens’ Motion at 8).

We agree with AmerGen and the NRC Staff (AmerGen’s Answer at 12-19; NRC Staff’s Answer at 11-14, 16-17) that Citizens’ contention is nontimely under section 2.309(f)(2), and Citizens fail to demonstrate that admission of their nontimely contention is warranted under section 2.309(c). We therefore deny their motion.<sup>8</sup>

**1. Citizens’ Newly Proffered Contention Is Nontimely Under  
10 C.F.R. § 2.309(f)(2)**

In arguing that the recently issued Sandia Study renders their newly proffered contention timely, Citizens demonstrate a fundamental misunderstanding of 10 C.F.R. § 2.309(f)(2). Although it is true that prior to January 2007 Citizens were unaware of the Sandia Study and, thus, “did not know that, in the opinion of a highly respected national laboratory, the enhancement of the [CRF] used by GE is not justified” (Citizens’ Motion at 12), the Sandia Study cannot – for purposes of determining the timeliness of Citizens’ newly proffered contention under section 2.309(f)(2) – be divorced from the information that undergirds its conclusions.

Specifically, 10 C.F.R. § 2.309(f)(2) allows admission of a new or amended contention when the *information* on which the contention is based is materially different from that which was previously available. Contrary to Citizens’ belief, the fact that a new *document* has come to

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<sup>8</sup> Because we reject Citizens’ belated contention on timeliness grounds, we decline the invitation of AmerGen and the NRC Staff to analyze the contention’s admissibility pursuant to the 10 C.F.R. § 2.309(f)(1). See supra note 7.

light does not, in and of itself, satisfy section 2.309(f)(2). The *information* underlying any relevant conclusions in that document must also be new and materially different.

Here, the record is clear that the information underlying the conclusions contained in the Sandia Study – namely, that GE applied an increased CRF to derive the acceptance criteria for the sand bed region of the drywell shell – is not new. As reflected in the exhibits attached to Citizens’ Petition to Intervene, Citizens have long been aware of GE’s analysis for deriving the acceptance criteria for the sand bed region. In the NRC Staff’s 1992 SER – which Citizens attached as Exhibit 3 to their Petition to Intervene – the Staff addressed GE’s use of the increased CRF, and concluded that GE’s analyses were performed in accordance with ASME Code Case N-284 (1992 SER at 4). Attached to the 1992 SER was a Technical Evaluation Report issued by Brookhaven National Laboratory (“BNL”) that, according to the Staff, was publicly available.<sup>9</sup> As part of its analysis, BNL evaluated whether GE appropriately modified the CRF “to take into account the beneficial effects of tensile hoop stress” (Att. To 1992 SER, [BNL] Technical Evaluation Report on Structural Analyses of the Corroded Oyster Creek Steel Drywell at 4). A simple reading of these documents would have made clear to Citizens – long before Sandia released its Study – that GE’s analysis was based on a modification to ASME Code Case N-284. Had Citizens wanted to challenge GE’s modification, they should have done so in their Petition to Intervene. Their belated attempt to raise such a challenge now is nontimely.

Notably, this is not the first time that Citizens have sought to challenge the modeling underlying GE’s acceptance criteria. As part of their June 2006 Petition to Add a New Contention, Citizens alleged that “one of the [ASME] code sections [relied upon by GE] is not

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<sup>9</sup> Although Citizens’ Exhibit 3 did not include the BNL Technical Evaluation Report, it is well established that the “onus of obtaining . . . copies of documents necessary to support its proposed contentions” is on the petitioner (CLI-06-24, 64 NRC 111, 123 n.71 (2006)).

directly applicable to the issues involved in setting the acceptance criteria” (Supplement to Petition to Add a New Contention at 19 (July 25, 2006)). In support of that contention, Citizens’ expert, Stress Engineering Services, Inc. (“SESI”), opined that GE’s use of “idealized geometries . . . adjusted using . . . ‘capacity reduction factors’ . . . may not be adequate to capture [the drywell shell’s] global behavior” (Memorandum from [SESI] to Richard Webster at 2 (July 15, 2006)). This Board rejected that contention as nontimely (LBP-06-22, 64 NRC 229, 237-40 (2006)). The same rationale governs here, mandating the conclusion that Citizens’ newly proffered contention is nontimely.

**2. A Balancing Of The Relevant Factors In 10 C.F.R. § 2.309(c)(1) Weighs Decisively Against Admitting Citizens’ Nontimely Contention**

Citizens assert (Citizens’ Motion at 13-14) that even if their newly proffered contention challenging AmerGen’s acceptance criteria is nontimely, it should nevertheless be deemed admissible under the balancing test in 10 C.F.R. § 2.309(c)(1).

AmerGen and the NRC Staff, on the other hand, argue that a balancing of the factors in section 2.309(c)(1) militates against admitting Citizens’ belated contention (AmerGen’s Answer at 18-19; NRC Staff’s Answer at 16-17). We agree.

The Commission has instructed that the first factor to be evaluated – “[g]ood cause, if any for the failure to file on time” (10 C.F.R. § 2.309(c)(1)(i)) – is accorded the greatest weight. See Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-05-24, 62 NRC 551, 564 (2005). To demonstrate good cause, a petitioner must show not only that it “acted promptly after learning of the new information, but the information itself must be *new* information, not information already in the public domain” (Texas Utils. Elec. Co. (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 70 (1992)).

Citizens assert that, without the Sandia Study, the only way they could have included this new contention in their Petition to Intervene is “if they had commissioned [Sandia] or

another specialist consulting firm to undertake three dimensional finite element modeling of the drywell shell” (Citizens’ Reply at 6). This, Citizens assert, “would have been prohibitively expensive,” which allegedly constitutes good cause for their failure to file in a timely manner (*id.* at 8). Citizens are incorrect.

First, and dispositively, Citizens’ assertion that they could not have raised this challenge without the Sandia Study is simply wrong. The thrust of Citizens’ belated contention focuses *not* on the conclusions in the Sandia Study; rather, the gravamen of their contention is that the 1991 GE study was not justified in using an increased CRF in deriving its acceptance criteria. As discussed *supra* Part II.B.1, the GE study and its underlying information have long been in existence and in the public domain. When crafting contentions for their Petition to Intervene, Citizens failed to avail themselves of that publicly available information, which compels the conclusion that their late-filed contention is not justified by good cause (Comanche Peak, CLI-92-12, 36 NRC at 70).

Moreover, contrary to Citizens’ understanding, they do not satisfy the good cause standard by asserting that the filing of a timely contention would have been “prohibitively expensive” (Citizens’ Reply at 8). This argument – which links a finding of good cause with a finding regarding a petitioner’s lack of resources – is not tenable for two reasons. First, as a legal matter, the Commission has identified the components that satisfy the good cause standard – *i.e.*, (1) the information was new and publicly unavailable, and (2) the petitioner acted promptly after learning of the new information (Comanche Peak, CLI-92-12, 36 NRC at 70) – and Citizens provide no persuasive reason for altering that well-established standard. Second, as a practical matter, Citizens’ argument – if accepted – would favor admission of nontimely contentions by petitioners with an alleged insufficiency of resources, which, in turn, would have the anomalous effect of promoting the acceptance of nontimely contentions by that class of petitioners who, due to a lack of resources, would be least likely to assist in develop-

ment of a sound record. Such an outcome would be inconsistent with Commission policy and practice. As the Commission has explained:

While we are sympathetic with the fact that a party may . . . possess fewer resources than others to devote to a proceeding, this fact does not relieve that party of its hearing obligations. Thus, an intervenor in an NRC proceeding must be taken as having accepted the obligation of uncovering information in publicly available documentary material.

Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), CLI-83-19, 17 NRC 1041, 1048 (1983) (citations omitted) (ruling that the “institutional unavailability of a licensing-related document does not establish good cause for filing a contention late if information was available early enough to provide the basis for the timely filing of that contention”).

It is axiomatic that “there is a substantial public interest in efficient and expeditious administrative proceedings” (Catawba, CLI-83-19, 17 NRC at 1048). Consistent with this interest, and in fairness to license applicants, Commission regulations require all petitioners – regardless of their assets – to “diligently uncover and apply all publicly available information to the prompt formulation of contentions” (ibid.). Here, to the extent that Citizens failed to uncover or discern the relevance of information that was in the public domain in time to submit a timely contention, they failed to comply with their “responsibilities connected with participation in [this proceeding]” (ibid.). This failure was in derogation of the established principle that “a person who invokes the right to participate in an NRC proceeding also voluntarily accepts the obligations attendant upon such participation” (ibid.). Citizens’ failure to file a timely contention was thus not justified by good cause.

“Lacking a favorable showing on good cause, a petitioner must show a compelling case on the remaining [applicable] factors” (State of New Jersey, CLI-93-25, 38 NRC 289, 296 (1993); 10 C.F.R. § 2.309(c)(1)). We believe that the following two factors are applicable to, and may be accorded some measurable weight in conducting, the balancing test: (1) the seventh factor, which examines the extent to which admission of the contention will broaden the

issues or delay the proceeding (10 C.F.R. § 2.309(c)(1)(vii)); and (2) the eighth factor, which examines the extent to which Citizens' participation in litigating this contention may reasonably be expected to assist in developing a sound record (id. § 2.309(c)(1)(viii)).<sup>10</sup>

With respect to the seventh factor, there can be no question that admission of a new contention would broaden the issues and, at the least, contribute toward a lengthier evidentiary hearing. However, because this Board already has admitted a contention filed by Citizens on an issue related to the maintenance of adequate safety margins in the sand bed region of the drywell shell, we believe that the admission of Citizens' new contention would neither unreasonably broaden the issues nor significantly delay the proceeding. The seventh factor thus militates in favor of admitting Citizens' newly proffered contention.

The eighth factor, however, militates against admitting Citizens' new contention. The Commission repeatedly has stressed that a petitioner has the burden of providing "specific and detailed information" in support of an assertion that it may reasonably be expected to assist in developing a sound record (Comanche Peak, CLI-92-12, 36 NRC at 74) (quoting CLI-88-12, 28 NRC 605, 611 (1988)). To that end, a petitioner is expected to "set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony" (ibid.) (quoting Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-704, 16 NRC 1725, 1730 (1982)). Because we find that Citizens failed to address this factor with the specificity that case law requires, we are unable to

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<sup>10</sup> The other five factors (10 C.F.R. § 2.309(c)(1)(ii) to (vi)) go toward a petitioner's standing or the protection of its interests and, therefore, seemingly should be limited in application to situations where a petitioner seeks nontimely intervention rather than where, as here, an intervenor who already has established standing seeks to file a nontimely contention. Nevertheless, even were we to assume that these factors were germane to this balancing test and that they favored Citizens, we would find that they are of de minimis weight and do not affect the outcome. Cf. Comanche Peak, CLI-92-12, 36 NRC at 74 (the availability of other means for protecting petitioner's interest, and the extent to which petitioner's interest will be represented by other parties, are the "least important of the . . . factors").

conclude that Citizens' participation in litigating this contention may reasonably be expected to assist in developing a sound record. This factor thus weighs against admission of Citizens' nontimely contention, counterbalancing the seventh factor.<sup>11</sup>

In sum, if, for the moment, we disregard the good cause factor (10 C.F.R. 2.309(c)(1)(i)) – which weighs heavily against admitting Citizens' belated contention (supra pp. 8-10) – we are left with a balance that, in our judgment, is in equipoise. Placing the good cause factor on the scale results in the balance tipping decisively against admission of Citizens' nontimely contention.<sup>12</sup>

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<sup>11</sup> We note that Citizens' assertion that they lacked adequate resources to file this contention in a timely manner (Citizens' Reply at 8) appears to be in serious tension with a conclusion that they have the resources necessary to assist in developing a sound record for their newly proffered contention.

<sup>12</sup> On March 20, 2007, AmerGen filed a motion urging this Board to disregard an allegedly new argument advanced in Citizens' Reply (AmerGen's Motion to Strike (Mar. 20, 2007)). The NRC Staff supported AmerGen's motion (NRC Staff's Answer to AmerGen's Motion to Strike (Mar. 30, 2007)), and Citizens opposed it (Petitioners' Opposition to AmerGen's Motion to Strike (Mar. 27, 2007)). In denying Citizens' motion to add a new contention, we considered all of their arguments. Our disposition of Citizens' motion renders AmerGen's motion moot.

**III. CONCLUSION**

For the foregoing reasons, we deny Citizens' request to add a new contention.

It is so ORDERED.

THE ATOMIC SAFETY  
AND LICENSING BOARD<sup>13</sup>

*/RA/*

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E. Roy Hawkens, Chairman  
ADMINISTRATIVE JUDGE

*/RA/*

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Dr. Paul B. Abramson  
ADMINISTRATIVE JUDGE

*/RA/*

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Dr. Anthony J. Baratta  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
April 10, 2007

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<sup>13</sup> Copies of this Memorandum and Order were sent this date by Internet e-mail to counsel for: (1) AmerGen; (2) NIRS; (3) New Jersey; 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 (DENYING CITIZENS' MOTION FOR LEAVE TO ADD A CONTENTION AND MOTION TO ADD A CONTENTION) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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LB MEMORANDUM AND ORDER (DENYING CITIZENS' MOTION  
FOR LEAVE TO ADD A CONTENTION AND MOTION TO ADD  
A CONTENTION)

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[Original signed by Evangeline S. Ngbea]

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Office of the Secretary of the Commission

Dated at Rockville, Maryland  
this 10<sup>th</sup> day of April 2007