May 11, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF ANSWER TO AMERGEN'S MOTION TO STRIKE CITIZENS' SUMMARY DISPOSITION ANSWER

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c) and the Board's Order (Granting AmerGen's Request for Leave to File Motion to Strike) (May 1, 2007) (unpublished), at 2, the Staff of the Nuclear Regulatory Commission ("Staff") hereby answers AmerGen's May 4, 2007, "Motion to Strike" (Motion) portions of "Citizens'[1] Answer Opposing AmerGen's Motion for Summary Disposition" (April 26, 2007) ("Citizens Answer"). In its Motion, AmerGen argues that Citizens' Answer impermissibly went beyond the scope of the admitted contention by raising either issues excluded from this proceeding or new issues outside the scope of the contention that require admission of a late-filed contention. *See* Motion at 1, 5-6. For the reasons set forth below, the Motion should be granted, in part, and denied, in part.

BACKGROUND

On March 30, 2007, AmerGen sought summary disposition of Citizens' drywell contention, addressing the contention bases Citizens identified in proffering the contention

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[1] Citizens is the collective name for the six organizations admitted as an intervenor in this proceeding, i.e., 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.

admitted in this proceeding by LBP-06-22, 64 NRC 229, 240-244, 255-256 (2006). *See* Motion for Summary Disposition of Citizens' Drywell Contention (Mar. 30, 2007) ("SD Motion"). In that decision, the Board admitted only one of seven challenges[2] raised by Citizens in their June and July 2006 filings as the following contention:

> [I]n light of the uncertain corrosive environment and correlative uncertain corrosion rate in the sand bed region of the drywell shell, AmerGen's proposed plan to perform UT tests prior to the period of extended operations, two refueling outages later, and thereafter at an appropriate frequency not to exceed 10-year intervals is insufficient to maintain an adequate safety margin.

The Board found that Citizens' contention grounded upon the assumption that the corrosion rate in the sand bed region is unknown due to the uncertain corrosive environment. *See* 64 NRC at 240. The Board, *inter alia,* rejected as nontimely Citizens' challenge to the adequacy of monitoring the sand bed region for integrity of the epoxy coating and for moisture, challenge to the spatial scope of AmerGen's ultrasonic testing (UT) measurements and whether such monitoring fails to systematically survey thin areas, and challenge to AmerGen's drywell minimum thickness acceptance criteria (i.e., 0.736 inches and 0.536 inches). *Id.* at 244-51, 237-40.

The Board subsequently rejected as untimely Citizens' December 20, 2006 request for admission of two late-filed contentions that challenged AmerGen's revised UT monitoring commitments based on October 2006 outage results and Citizens' February 6, 2007 request for admission of a late-filed contention that claimed UT acceptance criteria were inadequate and should be increased. *See* Memorandum and Order (Denying Citizens' Motion for Leave to Add Contentions and Motion to Add Contention) (February 9, 2007) ("February 9 Order")

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[2] Citizens challenged as inadequate AmerGen's (1) drywell thickness acceptance criteria, (2) scheduled UT monitoring frequency, (3) moisture and coating integrity monitoring, (4) response to wet conditions and coating failure, (5) scope of UT monitoring to systematically identify and sufficiently test degraded areas, (6) quality assurance for measurements, and (7) methods for analyzing UT results. *See* LBP-06-22, 64 NRC at 236.

(unpublished); Memorandum and Order (Denying Citizens' Motion for Leave to Add a Contention and Motion to Add Contention) (April 10, 2007) ("April 10 Order") (unpublished).[3]

Citizens and the Staff each filed answers to AmerGen's summary disposition motion. *See* Citizens Answer; NRC Staff Response to AmerGen's Motion for Summary Disposition (April 26, 2007). Citizens opposed summary disposition of their drywell monitoring frequency contention, arguing a genuine dispute exists regarding AmerGen's ultrasonic testing (UT) measurement acceptance criteria for the sand bed region of the drywell shell, the available margin to those criteria, the corrosion rate between inspections, and the frequency of testing to maintain drywell thickness margins during the renewal period. *See, e.g.,* Citizens Answer at 2-4.

In its Motion, AmerGen argues that Citizens exceed the permissible scope of the admitted contention and raises new issues without first obtaining permission for a late-filed contention. *See* AmerGen Motion at 1, 5-6. AmerGen claims four grounds for striking portions of Citizens' Answer and the attached affidavit.[4] Citizens impermissibly raise issues specifically excluded from this proceeding: 1) disputes about AmerGen's local acceptance criteria; 2) disputes about AmerGen's methods for analyzing UT results in the sand bed region; and 3) disputes about the spatial scope of UT monitoring. *See* Motion at 1-4. And fourth, AmerGen asserts that Citizens' statements "addressing 2006 UT results" improperly allege deficiencies in AmerGen's 2006 UT measurements and analysis of those measurements without first being granted permission to amend their contention to include such information. *See* Motion at 5-6

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[3] Citizens' December 20, 2006 filing cited AmerGen's October 2006 UT results claiming that monitoring in the sand bed region and in the embedded region was inadequate. *See* February 9 Order at 2-5.

[4] AmerGen appends, as MTS Exhibit 1, a version of Citizens' Answer that identifies the passages to be stricken and, as MTS Exhibit 2, a similar version of Dr. Rudolf Hausler's Memorandum, dated April 25, 2007.

(citing *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-04-09, 59 NRC 286, 292 (2004); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-23, 49 NRC 485, 493 (1999)).

The Staff's response to this motion is set forth below.

DISCUSSION

Under the Commission's rules of practice, an opposition to summary disposition must state specific facts showing a genuine issue of material fact to be litigated. *See* 10 C.F.R. §§ 2.1205(c) and 2.710(b); *Advanced Medical Sys., Inc.* (One Factory Row, Geneva, Ohio), CLI-93-22, 38 NRC 98, 102 (1993).

The first three grounds cited for striking Citizens' Answer (challenges to the adequacy of AmerGen's acceptance criteria, methods for analyzing UT results, and scope of UT monitoring) are well founded. *See*, *e.g.*, Motion at 2-5. Citizens' late-filed attempts to raise those matters have been specifically rejected by the Board. *See* LBP-06-22, 64 NRC at 237-40, 254-55, 249-251; February 9 Order at 15-19; April 10 Order at 5-6, 13.

AmerGen's fourth ground for striking portions of Citizens' filing is not entirely warranted. AmerGen argues that Citizens present "arguments" based on alleged deficiencies in 2006 UT measurements without amending their contention to "address the results of UT measurements taken during the October 2006 outage or the [December 2006] revisions to AmerGen's License Renewal Application" that address those results. *See* Motion at 5 (citing Letter from Michael P. Gallagher to NRC (Dec. 3, 2006) ("December 3 Submittal") (ML063390664)).[5] AmerGen also argues that raising "arguments" for the first time in a summary disposition answer deprives the other parties of the opportunity to substantively address such matters and is akin to raising

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[5] While AmerGen is correct that Citizens did not seek to amend their contention based on AmerGen's December 3 Submittal, *see* Motion at 6, Citizens did proffer that document as Exhibit ANC 1 to a motion to add two new contentions in this proceeding. *See* February 9 Order at 3.

matters in a reply brief that were not raised in an initial pleading. *See* Motion at 5-6 (citing *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224, 225 (2004) (upholding the rejection of arguments presented for the first time in reply briefs as a late attempt to reinvigorate thinly supported contentions), *reconsideration denied*, CLI-04-35, 60 NRC 619 (2004) ("*LES*")).

The Staff agrees that Citizens may not use a summary disposition answer to raise new and late-filed contentions in this proceeding. New contentions or bases stemming from new information may be raised in this proceeding only with prior Board permission to amend the existing contention or to add an additional contention. *See* 10 C.F.R. § 2.309(c) and (f)(2). Allowing "reply briefs to provide, for the first time, the necessary threshold support for contentions . . . would effectively bypass and eviscerate [the Commission's] rules governing timely filing, contention amendment, and submission of late-filed contentions." *LES,* CLI-04-35, 60 NRC at 623.[6] To the extent AmerGen identifies areas where Citizens attempt to broaden the admitted contention or raise a new contention without obtaining Board approval under late-filed contention procedures, striking those portions is appropriate.

Use of the October 2006 outage results to raise new contentions or bases (such as the adequacy of AmerGen's criteria, method for analyzing results or spatial scope of monitoring; or whether 2006 UT measurements and associated analyses are deficient) is not appropriate. *See LES*, CLI-04-25 at 225 (replies should be narrowly focused on legal or logical arguments); *Duke Cogema*, LBP-04-09, 59 NRC at 292 (summary disposition of a contention alleging omission of information from an application is not precluded where the contention became moot

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[6] In order to supplement the bases for a contention or raise a new contention, petitioners must address the Commission's late-filed contention criteria found in 10 C.F.R. §§ 2.309(c) and (f)(2). *See* CLI-04-35, 60 NRC at 623, n.20; *see also LES,* LBP-04-14, 60 NRC 40, 58, *aff'd* CLI-04-25, 60 NRC 223 (2004). Raising new claims in a reply unfairly deprives other participants of an opportunity to rebut the claims. *See Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006).

by later revision to the application and the intervenor challenged the adequacy of that information absent admission of a late-filed contention); *Private Fuels Storage*, LBP-99-23, 49 NRC at 493 (arguments challenging summary disposition of an issue addressed by inclusion of previously omitted information in a revised application would support admission of a new contention challenging such analysis rather than denial of summary disposition).

Although a petitioner need not provide an exhaustive list of possible bases to support its contention, *LES,* CLI-04-35, 60 NRC at 623, the Commission's Rules of Practice dictate that Citizens must obtain permission to amend their contention to raise issues based on new information. Citizens may raise such contentions, but the process to raise such matters must be followed. *See LES,* LBP-04-14, 60 NRC at 58, *aff'd* CLI-04-25, 60 NRC 223; *see also LES*, CLI-04-35, 60 NRC at 623. Citizens must file a motion addressing the late-filed contention standards in 10 C.F.R. §§ 2.309(c) and (f)(2). Citizens' attempt to raise a new or amended contention in an endeavor to demonstrate the existence of a genuine dispute on a material issue of law or fact is impermissible.

AmerGen's motion, however, could be read to suggest that Citizens may not use information post-dating the admission of the contention. The Staff does not object to Citizens' use of information acquired after admission of the contention in the proceeding so long as they do not attempt to expand the scope of the admitted contention. *See, e.g., U.S. Army* (Jefferson Proving Ground Site), LBP-07-07, 64 NRC ___ slip op. at 10-12 (May 1, 2007) (inclusion of later information permissible to the extent it supports the matters in contention).[7] In addition, summary disposition is to be based on a consideration of the factual record in its entirety,

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[7] The following portions of MTS Exhibit 1 should not be stricken: 1) the last four sentences of the first paragraph on page 9; 2) the sentence, "Using the latest results taken in Bay 11 …" on page 10; 3) the first two sentences in the first paragraph on page 12; 4) the two paragraphs on page 13; and 5) the last two sentences in the first paragraph on page 21. As for MTS Exhibit 2, the first five sentences in the "Conclusion" paragraph on page 5 should not be stricken. These passages appear to use the 2006 outage results to support arguments within the scope of the admitted contention.

including information received via discovery. *See* 10 C.F.R. § 2.710(d)(2); *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 & 2), LBP-83-46, 18 NRC 218, 223 (1983).

The Staff also notes that AmerGen's summary disposition motion addressed the corrosion rate in the sand bed, the extent of the margin above its acceptance criteria, and referred to October 2006 outage data. *E.g.*, AmerGen SD Motion at 16, 29; Affidavit of Peter Tamburro at ¶¶ 40-41; Affidavit of Jon R. Cavallo at ¶ 15. Thus, Citizens may use information concerning the results of the October 2006 outage results to show a genuine issue of material fact concerning the admitted contention (i.e., whether the frequency of UT monitoring, as proposed by AmerGen, will be sufficient to maintain an adequate safety margin if there is any future corrosion in the sand bed region of the drywell shell).

In sum, AmerGen's Motion should be granted based on the first three grounds in its motion. The fourth ground for the Motion should be granted only to the extent that Citizens improperly raise a late-filed contention or bases alleging deficiencies in the 2006 outage results and in analyses of that data. The Staff does not object to use of that data to support arguments raised within the scope of the admitted contention.

CONCLUSION

For the reasons discussed above, AmerGen's motion should be granted, in part, and denied, in part

Respectfully submitted,

/RA/

Mitzi A. Young
Counsel for NRC Staff

Dated at Rockville, Maryland
this 11th day of May 2007

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF ANSWER TO AMERGEN'S MOTION TO STRIKE CITIZENS' SUMMARY DISPOSITION ANSWER" in the captioned proceeding, have been served on the following by electronic mail with copies by deposit in the NRC's internal mail system or as indicated by an asterisk, by electronic mail, with copies by U.S. mail, first class, this 11th day of May, 2007:

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