

July 27, 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 MOTION IN LIMINE REGARDING
CITIZENS' PRESENTATION ON DRYWELL CONTENTION

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323 and the “Memorandum and Order (Prehearing Conference Call Summary, Case Management Directives, and Final Scheduling Order”) (April 17, 2007) (unpublished) (“April 17 Order”), at 4, the Staff of the U.S. Nuclear Regulatory Commission (“Staff”) submits this motion to exclude portions of “Citizens”¹ Initial Statement Regarding Relicensing of Oyster Creek Nuclear Generating Station” (July 20, 2007) (“Citizens’ Presentation”), and attached testimony and exhibits. For the reasons set forth below, the identified portions should be excluded from the evidentiary record of this proceeding.

DISCUSSION

I. Scope of the Proceeding, Litigable Issues and Admissible Evidence

This proceeding concerns the AmerGen Energy Company, LLC (“AmerGen”) application to renew Oyster Creek’s operating license for 20 years past the April 9, 2009 expiration date. The scope of license renewal proceedings is limited. The Commission’s “[l]icense renewal reviews are not intended to ‘duplicate the Commission’s ongoing review of operating reactors.’”

¹ The six organizations--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--are collectively referred to as “Citizens.”

Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 7 (2001) (citing Final Rule, "Nuclear Power Plant License Renewal," 56 Fed. Reg. 64,943, 64,946 (Dec. 13, 1991)). Issues involving the facility's current licensing basis are outside the scope of license renewal. *Id.* at 8-9.

The admitted contention in this proceeding is:

[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.

LBP-06-22, 64 NRC 229, 255-56 (2006), *reconsideration den'd*, Memorandum and Order (Nov. 20, 2006) (unpublished). The Board has noted that this contention is 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, but rejected as nontimely Citizens' challenge to the adequacy of monitoring the sand bed region for integrity of the epoxy coating and for moisture, the challenge to the spatial scope of AmerGen's UT measurements and assertions that monitoring fails to systematically survey thin areas, and the challenge to AmerGen's drywell minimum thickness acceptance criteria (*i.e.*, 0.736 inches and 0.536 inches). *Id.* at 244-55, 237-240.

The Board subsequently denied Citizens' requests to admit late contentions concerning (1) AmerGen's proposal to conduct UT monitoring in the embedded region, (2) the inadequacy of AmerGen's proposed monitoring in the sand bed region from the outside, (3) the adequacy of UT acceptance criteria for the drywell shell (*i.e.*, 0.536 and 0.736 inches). See Memorandum and Order (Denying Citizens' Motion for Leave to Add Contentions and Motion to Add Contention) (Feb. 9, 2007) (unpublished), at 7, 15-16, 19; Memorandum and Order, (Apr. 10, 2007) (unpublished).

The Board has ruled that disputes exist regarding (1) the remaining safety margins,

(2) the potential for corrosion under the epoxy coating due to defect in and deterioration of the coating that is “past its useful life” and (3) future corrosion rates. See Memorandum and Order (Denying AmerGen’s Motion for Summary Disposition) (June 19, 2007) (“SD Order”) (unpublished), at 12. The Board indicated that evidence on uncertainties may include both the UT measurement technique and the interpretation of data, and that the Board will determine how much actual values of thickness can reasonably be expected to differ from the measured values and “how rapidly the thickness is approaching the acceptance criteria.” *Id.* at 7 and n.10.

Citizens “may not challenge the derivation or validity of the established acceptance criteria or the methodology for analyzing UT results,” but can argue that application of these items is inconsistent with past practice. *Id.* at 8. In addition, in a “Memorandum and Order (Clarifying Memorandum and Order Denying AmerGen’s Motion for Summary Disposition) (July 11, 2007) (“July 11 Order”) (unpublished), the Board indicated that (1) “Citizens may not challenge any aspect of AmerGen’s UT monitoring program that applies prior to the period of extended operation (*i.e.*, prior to 2009)” since it would be “an attack on AmerGen’s the current licensing basis” and beyond the scope of the proceeding and (2) Citizens may not attack AmerGen’s “*established* technique” (*i.e.*, approved by the Staff and relied on in the SER) for analyzing UT results and calculating the rate of corrosion. *Id.* at 2-3.

Thus, Citizens are precluded from providing evidence that challenges (1) the current licensing basis² or the derivation of acceptance criteria, (2) the scope of UT monitoring, (3) established methods for analyzing UT results, and (4) “methods of calculation or uncertainties contained in AmerGen’s Statistical Analysis [(Calculation No. C-1302-187-5300)] are inadequate, or that AmerGen must consider additional uncertainties in performing its

² As the Board noted, challenges to the adequacy of AmerGen’s UT monitoring for the current license term may be brought via a 10 C.F.R. § 2.206 petition. July 11 Order at 2 n.3.

analysis.” See July 11 Order at 2-4; LBP-06-22, 64 NRC 229, 237-240, 244-55 (2006).³

To be admitted at hearing, only relevant, material, and reliable evidence which is not unduly repetitious will be admitted. 10 C.F.R. § 2.337. Immaterial or irrelevant parts of an admissible document will be segregated and excluded to the extent practicable. *Id.* Opinions of experts qualified by “knowledge, skill, training or education” must have an adequate factual basis; bare assertions and general denials, even by an expert, insufficient. See *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-04, 61 NRC 71, 80-81 (2005).⁴ The proponent of a witness has the burden to demonstrate that the expert’s testimony will assist the trier of fact. See *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-410, 5 NRC 1398, 1405 (1977).

For the reasons set forth below, Citizens have exceeded the permissible scope of matters litigable regarding the contention admitted in this proceeding or have not proffered admissible evidence.

³ Litigable issues are (1) the amount by which the remaining shell thickness exceeds established acceptance, (2) whether a corrosive environment can exist after removal of the sand, (3) the potential for corrosion under alleged “defects” in the epoxy coating, and (4) the future corrosion rate. See SD Order at 7, 12. Citizens may demonstrate that AmerGen’s application of its acceptance criteria and method of analyzing 2006 UT results is inconsistent with the established application of criteria or methodology for analyzing UT results. *Id.* at 8; July 11 Order at 4.

⁴ An expert’s opinion is only admissible if would assist the tier of fact in understanding the evidence or determining a fact at issue and the opinion is based on sound methods and reliable principles rather than “subjective belief or unsupported speculation.” *Duke Cogema*, 61 NRC at 80 (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589-90 (1993)).

II. Submissions To Be Excluded

Citizens seek to demonstrate the merits of the admitted issue through their Presentation, the attached “Initial Prefiled Written Testimony of Dr. Rudolf H. Hausler Regarding Citizens’ Drywell Contention” (“Hausler Testimony”), and 36 exhibits.⁵

Citizens have exceeded the scope of admissible testimony in number of instances. Citizens state that “corroded areas are already thinner than required.” Presentation at 1, 25 n.4, Hausler Testimony at A11, A13. Citizens suggest an alternative approach for estimating mean thickness. See Presentation at 2, paragraph 3 and n.2; Hausler Testimony at Attachment 4, Section VI. Citizens assert that interior UTs “over estimate thickness” and external UTs are more “representative.” See Presentation at 12 (1st full paragraph) and 14, Hausler Testimony at 20 (last sentence), Attachment 5 at 8, 10-11). Citizens suggest “real time corrosion monitoring” of the drywell shell. See Presentation at 4; Hausler Testimony at A19, Attachment 5 at 21-22, Exhibit 30 at 2 (fifth paragraph) and Latanision Letter at 2 (last three sentences). These statements challenge the adequacy of acceptance criteria and the spatial scope of AmerGen’s UT program. Such issues were previously rejected in late-filed contentions and are otherwise not litigable in this proceeding. See, e.g., LBP-06-22, 64 NRC at 244-55 237-240; July 11 Order at 2-4.

Citizens’ attempt to litigate corrosion in the embedded region (see, e.g., Presentation Presentation at 22 (last paragraph), 25; Citizens’ Exhibit 15 at 216 (“water inside the drywell below the floor”); Hausler Testimony at A16, A22) should be rejected as beyond the scope of the admitted contention. See LBP-06-11, 63 NRC 391, 396-400 (2006). In addition, Citizens’

⁵ Attached to the Hausler Testimony are five attachments: Attachment 3 is a redacted version of Dr. Hausler’s April 25, 2007 memorandum (“Hausler April 25 Memo”) previously filed response to AmerGen’s March 30, 2007, motion for summary disposition, Attachment 4 is a July 18, 2007, memorandum from Dr. Hausler to Richard Webster (“Hausler June 18 Memo”), and Attachment 5 is a “factual summary” done by Dr. Hausler and Citizens’ attorney. See Hausler Testimony at A9.

reference to a containment spray incident, without providing any basis for its relevance to corrosion in the sand bed region (see Presentation at 27; Hausler Testimony, Attachment 5 at 23) should also be rejected. See *Duke Cogema*, 61 NRC at 80-81.

The Board should not admit evidence that AmerGen's acceptance criteria are "deficient" as this issue is outside the scope of this proceeding. See, e.g., July 11 Order at 2-4. Thus, statements that the local acceptance criterion is not adequate for "grooved shaped thin areas" (see Presentation at 30 (last paragraph); Hausler Testimony at A11, Attachment 4 Section X, Attachment 5 at 23) should be rejected. Moreover, because Citizens have not demonstrated that Dr. Hausler is an expert in structural mechanics or ASME Code Section III, he is not qualified to render an opinion on this matter. See *Diablo Canyon*, 5 NRC at 1405; *Duke Cogema*, 61 NRC at 80-81.

With respect to corrosion under the epoxy coating, statements challenging the adequacy of AmerGen's coatings monitoring program, see Presentation at 20 (suggesting "visual inspection" is inadequate to detect corrosion in pin holes), Testimony of Dr. Hausler, Attachment 5 at 17 (reasonable to assume coating could fail at any time), Hausler April 25 Memo at 8, paragraph 3 (visual inspections inadequate), are speculative⁶ and seek to litigate a previously rejected late-filed contention. See April 17 Order at 5-6 (experts must set out sufficient detail for confirmation by another expert). See also *Duke & Cogema*, 61 NRC at 80-81; LBP-06-22, 64 NRC at 244-48. Similarly, Dr. Hausler's testimony that "[t]he industry standard is to measure at half the interval in which it is possible to lose margin," Hausler Testimony at A18, and that the "corrosion rate . . . in pitting situations . . . will increase exponentially with time. Hence, past performance is no indication of what may happen in the future," *id.* at A21, is not supported and

⁶ Bare assertions, even by an expert, are insufficient to support a contention. See, e.g., *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), LBP-04-17, 60 NRC 229, 242 (2004).

thus should be rejected. Citizens have not demonstrated that Dr. Hausler is qualified to provide expert opinion regarding the application, performance, or expected life span of an epoxy coating on the exterior of a drywell shell. Although he is knowledgeable about corrosion, his expertise appears to be confined to chemical corrosion inhibitors and not coatings. See Hausler Testimony at Attachment 2.

Finally, Attachment 5 to Dr. Hausler's Testimony should be rejected in its entirety as argument of counsel or unduly repetitious. See 10 C.F.R. § 2.337. Although it purports to be a statement of "facts," it is argumentative and therefore the document is not probative.

Pursuant to 10 C.F.R. § 2.323(b), Staff counsel contact counsel for the other parties to resolve the issues raised in this motion. Counsel for AmerGen and Citizens both indicated that they would respond, as appropriate, to the motion when filed.

CONCLUSION

For the reasons discussed above, the subject motion should be granted.

Respectfully submitted,

/RA/

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/RA/

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Dated at Rockville, Maryland
this 27th day of July, 2007

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC MOTION IN LIMINE REGARDING CITIZENS' PRESENTATION ON DRYWELL CONTENTION" in the above-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 27th day of July, 2007.

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