

UNITED STATES
NUCLEAR REGULATORY COMMISSION

July 31, 2007 (3:55pm)

Before the Atomic Safety and Licensing Board

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of)	
)	
Entergy Nuclear Vermont Yankee, LLC)	Docket No. 50-271-LR
and Entergy Nuclear Operations, Inc.)	ASLB No. 06-849-03-LR
)	
(Vermont Yankee Nuclear Power Station))	

**NEW ENGLAND COALITION, INC.'S (NEC) MOTION TO FILE
SUPPLEMENTAL AUTHORITY IN SUPPORT OF NEC OPPOSITION TO NRC
STAFF MOTION TO STRIKE NEC RESPONSE TO NRC STAFF'S SUMMARY
DISPOSITION ANSWER**

New England Coalition, Inc. (NEC) moves to file the June 19, 2007 Atomic Safety and Licensing Board (ASLB) decision attached hereto as Exhibit 1 as supplemental authority in support of NEC's June 8, 2007 Opposition to the NRC Staff's Motion to Strike NEC's Response to NRC Staff's Summary Disposition Answer. NEC specifically requests that the Board consider the following discussion:

On a separate procedural note, on May 7, 2007, Citizens filed a response to the NRC Staff's answer to AmerGen's request for summary disposition. On May 9, 2007, AmerGen moved to strike Citizen's response, arguing that it was not authorized by the relevant regulation (10 C.F.R. § 2.1205). The NRC Staff filed an answer on May 16, 2007 supporting AmerGen's motion to strike. The relevant regulatory language and structure, on the one hand, provides some support for the argument advanced by AmerGen and the NRC Staff; on the other hand, we would find it to be contrary to fundamental fairness if the regulations absolutely deprived Citizens of the opportunity to respond to new facts or arguments presented by the Staff in support of AmerGen's summary disposition motion.

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, Memorandum and Order Denying AmerGen's Motion for Summary Disposition (June 19, 2007) at 15-16 n. 14.

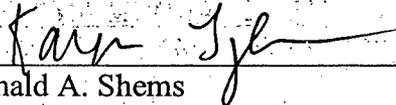
NEC has consulted with all parties to this proceeding concerning this motion. The State of Vermont and the State of New Hampshire do not object. The NRC Staff takes no position. Entergy is opposed.

WHEREFORE, the Board should grant NEC's Motion to File Supplemental Authority, and consider the ASLB decision attached hereto as Exhibit 1 in support of NEC's Opposition to the NRC Staff's Motion to Strike NEC's Response to NRC Staff's Summary Disposition Answer (June 8, 2007).

July 25, 2007

New England Coalition, Inc.

by:



Ronald A. Shems

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Attorneys for NEC

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

Before Administrative Judges:

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

In the Matter of	Docket No. 50-0219-LR
AMERGEN ENERGY COMPANY, LLC	ASLBP No. 06-844-01-LR
(License Renewal for Oyster Creek Nuclear Generating Station)	June 19, 2007

MEMORANDUM AND ORDER
 (Denying AmerGen's Motion for Summary Disposition)

Pending before this Board is a motion for summary disposition filed by AmerGen Energy Company, LLC ("AmerGen"), who has applied for a twenty-year renewal of its license for the Oyster Creek Nuclear Generating Station ("Oyster Creek").¹ The intervenors in this case – six organizations hereinafter referred to collectively as Citizens² – argue that AmerGen fails to satisfy the standards for granting summary disposition.³ We agree with Citizens, and we therefore deny AmerGen's motion.

I. BACKGROUND

¹ See AmerGen Energy Company, LLC Motion for Summary Disposition on Citizens' Drywell Contention (Mar. 30, 2007) [hereinafter AmerGen Summary Disposition Motion]. The NRC Staff supports AmerGen's motion. See NRC Staff Response to AmerGen's Motion for Summary Disposition (Apr. 26, 2007) [hereinafter NRC Staff Response].

² 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.

³ See Citizens' Answer Opposing AmerGen's Motion for Summary Disposition (Apr. 26, 2007) [hereinafter Citizens' Answer].

In October 2006, this Board admitted for adjudication the following contention proffered by Citizens challenging AmerGen's license renewal application: "AmerGen's scheduled UT monitoring frequency in the sand bed region [during the period of extended operation] is insufficient to maintain an adequate safety margin" (LBP-06-22, 64 NRC 229, 240 (2006)). More precisely, this Board stated that the "issue presented is whether, in light of the uncertainty regarding the existence vel non of a corrosive environment in the sand bed region and the correlative uncertainty regarding corrosion rates in that region, AmerGen's UT monitoring plan is sufficient to ensure adequate safety margins" (ibid.).⁴

⁴ During the course of this proceeding, this Board concluded that the following contentions proffered by Citizens were *not* admissible: (1) Citizens' challenge to AmerGen's monitoring program for areas of the drywell shell below and above the sand bed region (LBP-06-11, 63 NRC 391, 396-400 (2006)); (2) Citizens challenge asserting that AmerGen be directed to conduct a root cause analysis of the corrosion problem (id. at 400-01); (3) Citizens' challenge to AmerGen's modeling for deriving acceptance criteria (LBP-06-22, 64 NRC at 237-40; Licensing Board Memorandum and Order at 6-12 (Apr. 10, 2007) (unpublished)); (4) Citizens' challenge to AmerGen's monitoring program in the sand bed region for moisture and coating integrity (LBP-06-22, 64 NRC at 244-48); (5) Citizens' challenge to AmerGen's program for responding to wet conditions and coating failure in the sand bed region (id. at 248-49); (6) Citizens' challenge to the scope of AmerGen's UT monitoring program in the sand bed region (id. at 249-51; Licensing Board Memorandum and Order at 7-19 (Feb. 9, 2007) (unpublished) [hereinafter Feb. 9 Order]); (7) Citizens' challenge to AmerGen's quality assurance program for measurements in the sand bed region (LBP-06-22, 64 NRC at 251-53); and (8) Citizens' challenge to AmerGen's methods for analyzing UT results in the sand bed region (id. at 254-55).

AmerGen took its most recent UT measurements in the sand bed region of the drywell shell during the plant's refueling outage in October 2006. It will take measurements again in 2008 and thereafter at four-year intervals, unless the measurements warrant a different interval. See AmerGen Summary Disposition Motion, Exh. 3, Letter from Michael P. Gallagher, AmerGen, to NRC (Feb. 15, 2007) (Encl. 1).

On March 30, 2007, AmerGen submitted a motion for summary disposition, arguing that "there is no genuine issue of material fact that calls into question whether AmerGen's scheduled UT monitoring frequency for the sand bed region of the drywell is sufficient to maintain an adequate safety margin [and] AmerGen is [therefore] entitled to a decision as a matter of law" (AmerGen Summary Disposition Motion at 3). The NRC Staff supports AmerGen's motion (NRC Staff Response at 8-12), and Citizens oppose it (Citizens' Answer at 17-22).

II. ANALYSIS

A. Legal Standards Governing Summary Disposition Motions

Pursuant to 10 C.F.R. § 2.1205(a), a party in a Subpart L proceeding may submit a motion for summary disposition. Section 2.1205(c) states that the resolution of such motions shall be governed by the standards for summary disposition set forth in Subpart G. Pursuant to Subpart G, a moving party shall be granted summary disposition "if the filings in the proceeding, . . . together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law" (10 C.F.R. § 2.710(d)(2)).

Motions for summary disposition are analogous to motions for summary judgment and, accordingly, are evaluated pursuant to the standards governing summary judgment in Rule 56 of the Federal Rules of Civil Procedure. See Advanced Med. Sys., Inc. (One Factor Row, Geneva, Ohio), CLI-93-22, 38 NRC 98, 102 (1993). Pursuant to Rule 56, the movant is required to show the "absence of a genuine issue of material fact" and that, under the undisputed material facts,

the movant is entitled to a decision as a matter of law (Celotex Corp. v. Catrett, 477 U.S. 317, 323, 325 (1986)). To forestall the granting of the motion, the non-movant must designate "specific facts showing that there is a genuine issue [of material fact] for trial" (id. at 324).

Facts are "material" if they will "affect the outcome of the trial under the governing law" (Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). Issues are genuine only if a reasonably jury considering the evidence presented could find for the non-moving party (id. at 249). In determining whether a genuine question of material fact exists, a judge must consider all evidence in the light most favorable to the non-movant (Hunter v. Bryant, 502 U.S. 224, 233 (1991)).

Summary judgment is not appropriate if it would require a judge to engage in the making of "[c]redibility determinations, the weighing of the evidence, [or] the drawing of legitimate inferences from the facts" (Anderson, 477 U.S. at 255), because the performance of such functions signals the existence of a genuine factual issue whose resolution should be based on a hearing, not a summary judgment motion. Similarly, summary judgment is not appropriate if it would require a judge to assess the correctness of facts and conclusions that are embodied in the competing, well-founded opinions of the parties' experts. See United States v. Alcan Aluminum Corp., 990 F.2d 711, 722-23 (2d Cir. 1993); Norfolk S. Corp. v. Oberly, 632 F. Supp. 1225, 1243 (D. Del. 1986), aff'd, 822 F.2d 388 (3d Cir. 1987); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-39, 54 NRC 497, 509-10 (2001).

B. The Existence Of Genuine Issues Of Material Fact Preclude The Granting Of AmerGen's Request For Summary Disposition

1. The Factual Issues Included in the Admitted Contention

The parties are in sharp disagreement about the litigable issues included in the admitted contention.⁵ Defining those issues is critical so this Board may properly analyze AmerGen's

⁵ See AmerGen Motion to Strike (May 4, 2007); Citizens' Opposition to AmerGen

summary disposition motion and so the parties may prepare a relevant and focused record for the evidentiary hearing.

In Citizens' view, the litigable issues in the admitted contention include disputes regarding the acceptance criteria (Citizens' Answer at 5-8), and the methods for analyzing UT results (id. at 8-13). In addition, Citizens appear to seek to litigate some aspect of the scope of the UT monitoring program, as evidenced by their expert's reference to that issue. See Citizens' Answer, Memorandum from Rudolf H. Hausler to Richard Webster at 1 (Apr. 25, 2007) [hereinafter Hausler Memorandum].

Motion to Strike (May 11, 2007) [hereinafter Citizens' Opposition to Motion to Strike]; NRC Staff Answer to AmerGen's Motion to Strike Citizens' Summary Disposition Answer (May 11, 2007) [hereinafter NRC Staff Answer to Motion to Strike].

AmerGen argues that, based on this Board's prior rulings, Citizens are foreclosed from raising challenges regarding (AmerGen Motion to Strike at 2-5): (1) the derivation of the acceptance criteria; (2) the established methods for analyzing UT results; and (3) the scope of the UT monitoring program. In addition, AmerGen argues that Citizens may not rely on new information acquired by AmerGen during its 2006 performance of UT measurements (*id.* at 5-6). AmerGen asks this Board to strike those portions of Citizens' Answer that touch on these matters.⁶

⁶ The NRC Staff disagrees with AmerGen to the extent AmerGen asserts that Citizens may not rely on new information – including information acquired by AmerGen during its 2006 performance of UT measurements – that is relevant to, and within the scope of, the admitted contention (NRC Staff Answer to Motion to Strike at 6-7). Aside from that, the Staff supports AmerGen's motion to strike (*id.* at 4-7).

We grant AmerGen's request in part. AmerGen is correct in arguing that Citizens are precluded from raising challenges regarding: (1) the derivation of the acceptance criteria for the drywell shell; (2) the established methods for analyzing UT results; and (3) the scope of the UT monitoring program. This Board previously rebuffed Citizens' efforts to raise such challenges on the ground that Citizens failed to raise them in a timely manner or failed to show that they satisfied the admissibility requirements in 10 C.F.R. § 2.309(f)(1). See supra note 4. These challenges are thus not litigable, and Citizens may not resurrect them in effort to avoid summary disposition. Nor do we expect Citizens to attempt to raise these issues further in the course of this proceeding.⁷

AmerGen is incorrect, however, to the extent it argues that Citizens may not rely on new information (e.g., information acquired by AmerGen during its 2006 performance of UT measurements) that is relevant to, and within the scope of, the admitted contention. As a matter of common sense, to render an informed and accurate factual finding on an issue incident to an admitted contention, a Board must consider the factual record in its entirety, including new, pertinent information that comes to light after the contention is admitted. AmerGen's assertion to the contrary would, if accepted, require a Board to render a factual finding on an incomplete, and possibly misleading, factual record. Plainly, the process advocated by AmerGen is untenable on its face. See Citizens' Opposition to Motion to Strike at 7-10; NRC Staff Answer to Motion to Strike at 6-7.⁸

⁷ That these issues are beyond the scope of this proceeding does not mean that their safety implications are not considered by the NRC Staff. In the context of a license renewal application, the "NRC Staff will consider and resolve all safety questions regardless of whether any hearing takes place" (Baltimore Gas & Elec. Co. (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 350 (1998)). Here, the Staff's extensive consideration of safety questions relating to corrosion of the drywell shell may be found in the Safety Evaluation Report Related to the License Renewal of Oyster Creek Generating Station (Mar. 2007).

⁸ We emphasize that the new information a party seeks to introduce into the record must be relevant to, and within the scope of, the admitted contention. A party may not attempt to

Accordingly, consistent with the above discussion, we grant AmerGen's motion to strike in part, and we deny it in part.⁹

use new information to expand the scope of an admitted contention without first obtaining authority from the Board to admit a new, or to amend an existing, contention. See 10 C.F.R. § 2.309(f)(2).

⁹ The granting of AmerGen's motion does not result in the actual expungement of material from the record; rather, we simply decline to consider the offending material. The reason such material is not purged from the record is that it could become relevant in a subsequent appeal. See PPL Susquehanna LLC (Susquehanna Steam Electric Station, Units 1 & 2), LBP-07-4, 65 NRC __, __ n.86 (slip op. at 18 n.86) (Mar. 22, 2007).

To be clear, in our view, the relevant factual issues that remain litigable in this proceeding pertain to: (1) the amount by which the remaining thickness of the shell exceeds the established acceptance criteria in the sand bed region; (2) the existence vel non of a corrosive environment, taking into account whether sources of water have been eliminated as well as whether, regardless of the potential existence of water, a corrosive environment can exist in the sand bed region after the sand was removed and the protective coating applied, particularly considering that sand is no longer there to hold water in the previously corroded area of the shell; and (3) the corrosion rate – including the uncertainties related to its determination¹⁰ – that reasonably may be expected in the sand bed region. Establishment of these facts will, in turn, determine how rapidly the thickness is approaching the acceptance criteria and, thus, the adequacy of the frequency of UT measurements AmerGen proposes to take during the period of extended operation.

We do not discount the possibility that the factual issues identified above may contain ancillary issues that require resolution. For example, Citizens are not proscribed from arguing

¹⁰ Uncertainties relating to the corrosion rate may derive from a variety of sources, including the limited accuracy of the measurement method used, the use of a limited number of data points, and the method used to analyze and interpret the data. Thus, in addressing uncertainties, the parties may provide evidence associated with the measurement technique as well as with the interpretation of the data. The Board's consideration of this information will be for the purpose of determining how much the actual values of thickness can reasonably be expected to differ from the measured values, which, in turn, will inform the Board's judgment regarding whether AmerGen has demonstrated that its UT monitoring plan is sufficient to ensure adequate safety margins.

that the frequency of UT measurements is insufficient to ensure that an adequate safety margin is maintained under the protective epoxy coating. This argument – which is directed to a discrete portion of the sand bed region (i.e., the shell under the epoxy coating) – plainly is encompassed in the contention that additional UT measurements are necessary in the sand bed region due to the “uncertainty regarding the existence . . . of a corrosive environment in th[at] region and the correlative uncertainty regarding corrosion rates in that region” (LBP-06-22, 64 NRC at 240. See also id. at 242 (Citizens provide expert opinion in support of their assertion that UT monitoring is necessary even where visual inspections of epoxy coating do not reveal coating deterioration, because “corrosion may occur under epoxy coating in the absence of visual deterioration due to nonvisible . . . pinholes”).

Similarly, although Citizens may not challenge the derivation or validity of the established acceptance criteria or the methodology for analyzing UT results, they are not precluded from arguing that AmerGen’s application of acceptance criteria and analytic methodology to the 2006 UT results was inconsistent with past practice. See Citizens’ Answer at 5-8, 10. Such a challenge, if advanced by Citizens, would not be an attack on the validity of AmerGen’s *established* acceptance criteria and methodology for analyzing UT results. Rather, it would be an assertion that AmerGen’s *unexplained deviation* from established, valid practices casts doubt on the most recent analysis. Such a challenge would go to the heart of the admitted contention, because it would be relevant to determining whether AmerGen’s most recent assessment of UT measurements provides a reasonable assurance of safe operation until the next scheduled UT monitoring is performed. Hence, if Citizens were to provide adequate support for such an argument and indicate with sound technical reasoning how the difference of application has led – or reasonably could be expected to lead – to differing interpretations of remaining thickness, AmerGen would be required to rebut those arguments.

The list of potential ancillary issues identified above may not be panoptic.¹¹ It must be emphasized, however, that the scope of the admitted contention is circumscribed, and we expect the parties will scrupulously endeavor to remain within that scope as they prepare testimony for the evidentiary hearing. In this regard, counsel for the NRC Staff previously expressed the "expectation" that the parties, working together, will be able to narrow the issues included in direct testimony "through stipulations . . . [and, therefore] probably should not be faced with testimony that is all over the place and not focused on the admitted issue" (Tr. at 70 (Apr. 11, 2007)). Achievement of this goal will have the salutary effect of conserving resources, promoting efficiency, and avoiding the need for motions in limine. This Board will look with disfavor on further efforts by any party to raise matters that we have indicated – either here or in prior rulings – are outside the scope of this proceeding.

2. AmerGen Fails to Show the Absence of Genuine Disputes Regarding the Adequacy of the Frequency of UT Measurements it Will Take in the Sand Bed Region of the Drywell Shell

¹¹ For example, Citizens have expressed concern that the "bathtub ring" of corrosion in the sand bed region may lead to a buckling failure between AmerGen's performance of scheduled UT measurements, but they have not provided technical support showing that the extant pattern of corrosion can result in such a failure. We would expect the parties to address that issue, including whether the pattern of corrosion existing in the sand bed region – as that pattern may be exacerbated by future corrosion – renders the shell susceptible to buckling failure for which the buckling acceptance criteria was developed, and if not, what criteria (such as a leakage criteria) should apply. Cf. LBP-06-7, 63 NRC 188, 214-15 nn.23 & 24 (2006); Feb. 9 Order at 21 (concurring opinion of Judge Abramson).

AmerGen appears to argue that there is no genuine dispute as to the following material facts: (1) AmerGen has taken corrective action to prevent water from reaching the sand bed region of the drywell shell, thus preventing a corrosive environment in that region (AmerGen Summary Disposition Motion at 16); (2) corrosion of the drywell shell in the sand bed region has been arrested (*ibid.*); and (3) in light of the remaining thickness of the drywell shell in the sand bed region and the negligible corrosion that may reasonably be expected, the frequency of the UT measurements that will be performed during the period of extended operations is sufficient to ensure an adequate safety margin is maintained (*id.* at 17-18).¹² Accordingly, argues AmerGen, Citizens' contention challenging the frequency of UT measurements may be rejected as a matter of law (*id.* at 19). In support of these arguments, AmerGen submits affidavits that contain the expert opinions of Peter Tamburro, Barry Gordon, and Jon Cavallo, each of whom, for present purposes, we accept as an expert in the area of his respective testimony based on his education, experience, and knowledge. Mr. Tamburro provides a twelve-page affidavit in support of his opinion that (1) Citizens' allegation regarding the amount of remaining safety margin lacks merit, and (2) Citizens' allegation regarding a future annual corrosion rate lacks merit. See AmerGen Summary Disposition Motion, Affidavit of Peter Tamburro (Mar. 26, 2007). Mr. Gordon provides a nine-page affidavit in support of his opinion that (1) Citizens' allegation regarding the corrosion rate of the epoxy-coated drywell shell lacks merit, and (2) AmerGen's frequency of UT measurements is adequate in any event to detect such corrosion before the safety criteria is

¹² AmerGen did not provide a separate statement of material facts, arguing that the simplified process for summary disposition in Subpart L proceedings, 10 C.F.R. § 2.1205, dispenses with the *requirement* in section 2.710(a) of providing a separate statement. See AmerGen Summary Disposition Motion at 4 n.4. Assuming the correctness of AmerGen's argument, we nevertheless observe that, in our view, it is a far better practice if a party seeking summary disposition provides a separate statement. As the Staff observes, where – as here – a movant fails to provide a separate statement of material facts, it may be “difficult for parties and this Board to discern material facts that the movant believes are not in dispute and whether particular facts have been controverted” (NRC Staff Response at 5 n.11).

exceeded. See AmerGen Summary Disposition Motion, Affidavit of Barry Gordon (Mar. 26, 2007). Mr. Cavallo provides a nine-page affidavit in support of his opinion that Citizens' allegation regarding the need for additional UT measurements for the epoxy-coated drywell shell lacks merit. See AmerGen Summary Disposition Motion, Affidavit of Jon R. Cavallo (Mar. 26, 2007).

The NRC Staff supports AmerGen's motion for summary disposition (NRC Staff Response at 8-12). Consistent with its position, the Staff submits affidavits that contain the expert opinions of Hansraj Ashar and James Davis, Ph.D., each of whom, for present purposes, we accept as an expert in the area of his respective testimony based on his education, experience, and knowledge. Mr. Ashar provides a four-page affidavit in support of his opinion that, in light of the corrective actions taken by AmerGen since the 1980s, the performance of UT measurements and visual inspections every four years "provides reasonable assurance that the drywell shell integrity (and the intended function of the drywell) will be maintained during the period of extended operation" (NRC Staff Response, Affidavit of Hansraj G. Ashar at 4 (Apr. 26, 2007)). Dr. Davis provides a five-page affidavit in support of his opinion that Citizens' allegation regarding the need for additional UT measurements for the epoxy-coated drywell shell lacks merit. See NRC Staff Response, Affidavit of James A. Davis, Ph.D. (Apr. 26, 2007).

Citizens oppose summary disposition, arguing that genuine issues of material fact continue to underlie their contention that AmerGen's plan to conduct UT monitoring every four years is inadequate. In particular, Citizens argue that record evidence supports the conclusions that: (1) AmerGen has, without justification, been inconsistent in applying a local area acceptance criterion (Citizens' Answer at 5-8); (2) AmerGen has been inconsistent in determining the safety margins (id. at 10-13); (3) a corrosive environment exists in the drywell shell, because AmerGen has not devised a way to ensure the refueling cavity does not leak, nor has it definitively traced the source of all moisture in the drywell shell to the refueling cavity (id. at 14); (4)

appreciable corrosion may occur under the epoxy coating (id. at 13-14); and (5) corrosion – from both inside and outside the drywell shell – could occur at a rate that is so substantial that it warrants conducting UT monitoring at least every two years (ibid.). In support of their arguments opposing summary disposition, Citizens present the expert opinion of Rudolf Hausler, Ph.D., whom, for present purposes, we accept as an expert based on his education, experience, and knowledge. See Citizens' Answer, Affidavit of Dr. Rudolf H. Hausler (Apr. 25, 2007). Cf. LBP-06-22, 64 NRC at 242 n.14 (Board previously deemed Dr. Hausler to be "qualified to provide an expert opinion with regard to matters relating to corrosion of the drywell shell").

We agree with Citizens that summary disposition is not appropriate. At this juncture and on this record, we are unable to conclude as a matter of law that AmerGen's UT monitoring plan is sufficient to ensure adequate safety margins during the period of extended operation.

Significant to our decision are the reasonably supported expert opinions provided by the parties. The expert opinions provided by AmerGen and the NRC Staff, on the one hand, aver that AmerGen's UT monitoring program is adequate. In contrast, the expert opinion provided by Citizens' expert, Dr. Hausler, states that "great uncertainty" surrounds all of the facts underlying AmerGen's "current approach of taking UT measurements once every four years in the sand bed region" (Hausler Memorandum at 2). For example, Dr. Hausler explains that, in his professional judgment, serious disputes exist regarding (id. at 1-12): (1) the remaining safety margins; (2) the potential for corrosion under the epoxy coating due to defects in and deterioration of the coating, which is – for all intents and purposes – past its useful life; and (3) future corrosion rates.

Viewing the evidence in the light most favorable to Citizens – as we are required to do in the context of considering AmerGen's motion (Hunter, 502 U.S. at 233) – we are compelled to conclude that Dr. Hausler's version of the facts and his expert opinion derived therefrom demonstrate the existence of genuine issues regarding the adequacy of AmerGen's UT monitoring

program.¹³ This conclusion mandates the rejection of AmerGen's summary disposition motion, because the resolution of factual disputes based on an evaluation of competing expert opinions "is not a basis upon which [this Board] may rest in granting a motion for summary [disposition]" (Arrington v. United States, 473 F.3d 329, 333 (D.C. Cir. 2006) (quoting George v. Leavitt, 407 F.3d 405, 413 (D.C. Cir. 2005)). To rule otherwise would be to act in derogation of the Supreme Court's admonition that a summary disposition motion "by no means authorizes trial on affidavits" (Anderson, 477 U.S. at 255).¹⁴

¹³ It is well established that a judge ought to be chary about granting requests for summary disposition where it would require the judge to assess the correctness of competing, reasonably supported views embedded in affidavits submitted by the parties' experts. See cases cited supra p. 4; Hudson Riverkeeper Fund, Inc. v. Atl. Richfield Co., 138 F. Supp. 2d 482, 488-89 (S.D.N.Y. 2001) (citing cases); Seneca Meadows, Inc. v. EDI Liquidating, Inc., 121 F. Supp. 2d 248, 254 (W.D.N.Y. 2000) (citing cases). That principle applies here. Based on the record before us, we find that AmerGen has failed to demonstrate the absence of a genuine dispute on the litigable issues identified supra pp. 7-9.

¹⁴ On a separate procedural note, on May 7, 2007, Citizens filed a response to the NRC Staff's answer to AmerGen's request for summary disposition. On May 9, 2007, AmerGen

moved to strike Citizen's response, arguing that it was not authorized by the relevant regulation (10 C.F.R. § 2.1205). The NRC Staff filed an answer on May 16, 2007 supporting AmerGen's motion to strike. The relevant regulatory language and structure, on the one hand, provides some support for the argument advanced by AmerGen and the NRC Staff; on the other hand, we would find it to be contrary to fundamental fairness if the regulations absolutely deprived Citizens of the opportunity to respond to new facts or arguments presented by the Staff in support of AmerGen's summary disposition motion. But we need not resolve the issue, because we have concluded – without reference to or reliance on Citizens' response – that AmerGen's request for summary disposition lacks merit. We therefore dismiss as moot AmerGen's motion to strike Citizens' response to the NRC Staff's summary disposition answer.

III. CONCLUSION

For the foregoing reasons, we: (1) grant in part and deny in part AmerGen's motion to strike portions of Citizens' Answer opposing AmerGen's request for summary disposition (supra Part II.B.1); (2) deny AmerGen's request for summary disposition (supra Part II.B.2); and (3) dismiss as moot AmerGen's motion to strike Citizens response to the NRC Staff's summary disposition answer (supra note 14).

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD¹⁵

/Original signed by/

E. Roy Hawkens, Chairman
ADMINISTRATIVE JUDGE

/Original signed by E. Roy Hawkens for/

Dr. Paul B. Abramson
ADMINISTRATIVE JUDGE

/Original signed by/

Dr. Anthony J. Baratta
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 19, 2007

¹⁵ Copies of this Memorandum and Order were sent this date by Internet e-mail to counsel for: (1) AmerGen; (2) Citizens; (3) the NRC Staff; and (4) New Jersey.

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of)	
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Entergy Nuclear Vermont Yankee, LLC)	Docket No. 50-271-LR
and Entergy Nuclear Operations, Inc.)	ASLBP No. 06-849-03-LR
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(Vermont Yankee Nuclear Power Station))	

CERTIFICATE OF SERVICE

I, Clara Cavitt, hereby certify that copies of NEW ENGLAND COALITION, INC.'S MOTION TO FILE SUPPLEMENTAL AUTHORITY IN SUPPORT OF NEC'S OPPOSITION TO NRC STAFF MOTION TO STRIKE NEC RESPONSE TO NRC STAFF'S SUMMARY DISPOSITION ANSWER, in the above-captioned proceeding were served on the persons listed below, by U.S. Mail, first class, postage prepaid; by Fed Ex overnight to Judge Elleman; and, where indicated by an e-mail address below, by electronic mail, on the 25th day of July, 2007.

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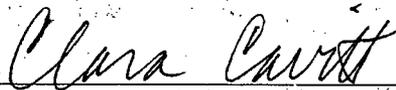
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