

August 1, 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 IN LIMINE REGARDING CITIZENS' INITIAL PRESENTATION

INTRODUCTION

Pursuant to the "Memorandum and Order (Prehearing Conference Call Summary, Case Management Directives, and Final Scheduling Order)" (April 17, 2007) (unpublished) ("April 17 Order"), at 5, the Staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby answers "AmerGen's Motion in Limine to Exclude Portions of Citizens'¹ Initial Written Submission" (July 27, 2007) ("Motion"). For the reasons set forth below, the Staff supports AmerGen's motion, in large part.

DISCUSSION

AmerGen requests that the Board exclude portions of "Citizens' Initial Statement Regarding Relicensing of Oyster Creek Nuclear Generating Station" (July 20, 2007) ("Citizens' Statement"), the "Pre-filed Direct Testimony of Dr. Rudolph H. Hausler" ("Testimony"), and Citizens' Exhibits 12 and 13, as well as exclude the entirety of Citizens' Exhibits 26, 27 and 36 in accordance with 10 C.F.R. § 2.337(a). See Motion at 1-2. As grounds for its Motion, AmerGen argues that (1) Dr. Hausler is not expert in statistical analysis or in epoxy coating systems, (2) Citizens seek to litigate issues outside the scope of the admitted contention,

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."

- (3) Citizens present speculation and unsupported statements that are not reliable, and
- (4) Dr. Hausler's testimony includes impermissible attachments. See Motion at 2.

AmerGen's motion is well grounded. The issue in this proceeding is, given the "uncertain corrosive environment" and the corrosion rate, whether the frequency of AmerGen's ultrasonic testing interval in the sand bed region is sufficient to maintain an adequate safety margin. LBP-06-22, 64 NRC 229, 255-56 (2006), *reconsideration den'd*, Memorandum and Order (Nov. 20, 2006). Only relevant, material and reliable evidence which is not unduly repetitious is to be admitted at hearing. 10 C.F.R. § 2.337(a). The opinions of an expert qualified by "knowledge, skill, experience, training, or education" must have an adequate factual basis and not merely constitute bare assertions, "subjective belief or unsupported speculation." See *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-04, 61 NRC 71, 80-81 (quoting Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589-90 (1993)).

In addition, matters pertaining to the current licensing basis of the facility are outside the scope of license renewal and should not be litigated in this proceeding. See *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 8-9 (2001); Memorandum and Order (Denying AmerGen's Motion for Summary Disposition) (June 19, 2007) ("SD Order") (unpublished) at 8 (Citizens may not challenge the derivation or validity of established acceptance criteria or the methodology for analyzing UT results); Memorandum and Order (Clarifying Memorandum and Order Denying AmerGen's Motion for Summary Disposition) (July 11, 2007) (unpublished) ("July 11 Order"), at 2-3 (Citizens may not challenge any aspect of AmerGen's UT monitoring program that applies prior to the period of extended operation or established techniques for analyzing UT results and calculating the corrosion rate). Challenges to AmerGen's UT acceptance criteria, spatial scope of UT measurements (including assertions that thin areas are not systematically surveyed), monitoring

for the integrity of the coating and for moisture, UT monitoring in the embedded region, and proposed monitoring in the sand bed region from the outside have been rejected as late-filed contentions and are not within the scope of this proceeding. See LBP-06-22, 64 NRC 229, 237-40, 244-55 (2006); Memorandum and Order (Feb. 9, 2007) (unpublished), at 7-15.

With respect to Dr. Haulser's expertise, the Staff agrees that Dr. Hausler has not demonstrated expertise in analyzing the potential for failure of a mechanical structure like a drywell shell or expertise in the application, performance and expected life span of the epoxy coating on the drywell shell exterior. See Motion at 4. Thus, Citizens' arguments and Dr. Hausler's testimony on these topics should be excluded

The Staff also supports AmerGen's request to exclude testimony or exhibits which seek to litigate corrosion in the embedded region of the drywell shell or challenge AmerGen's methods of analyzing UT results or uncertainties, scope of monitoring in the drywell, and adequacy of drywell acceptance criteria. See Motion at 5-7. These issues have been rejected in rulings on late-filed contentions and are outside the scope of this proceeding. See SD Order at 2 n.4.² Similarly, Citizens' statements about real time corrosion monitoring should be excluded based on the Board's ruling on a Citizens' late-filed contention. See Motion at 8 (citing LBP-06-22, 64 NRC at 245, 247-48).

AmerGen correctly argues that Citizens' speculative statements should be excluded. See AmerGen at 8-9.³ Only relevant, material, and reliable evidence which is not unduly repetitious is admissible. 10 C.F.R. § 2.337.

² By contrast, Citizens are permitted to argue that AmerGen has been inconsistent in applying its acceptance criteria or its statistical methods. See SD Order at 8.

³ For example, AmerGen's argues that the "redacted," but yet still visible, portions of Attachment 3 to Dr. Hausler's testimony (the "redacted" April 25, 2007 affidavit) should be excluded as beyond the scope of this proceeding and as unreliable. See Motion at 9 n.41. Dr. Hausler admits that the redacted portions of Attachment 3 either address matters outside the scope of this proceeding or are now outdated. See Testimony of Dr. Hausler at A.9. Thus, the redactions do not satisfy 10 C.F.R. § 2.337.

With respect to the Attachments 3, 4, and 5 of Dr. Hausler's testimony, the Staff agrees that, consistent with NRC practice, testimony should be presented in question and answer form, and that any attachments to testimony should not be duplicative of other exhibits. See Motion at 9. Thus, these attachments should be rejected in their entirety.

CONCLUSION

For the reasons discussed above, the Staff supports AmerGen's motion to the extent it seeks to exclude statements, testimony and exhibits that are not relevant, material or reliable, or which are unduly repetitious.

Respectfully submitted,

/RA/

Mitzi A. Young
Counsel for NRC Staff

/RA/

Mary C. Baty
Counsel for NRC Staff

Dated at Rockville, Maryland
this 1st day of August, 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))

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF ANSWER TO AMERGEN'S MOTION IN LIMINE REGARDING CITIZENS' INITIAL PRESENTATION" 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 1st day of August, 2007.

E. Roy Hawkens, Chair
Administrative Judge
Atomic Safety and Licensing Board
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
ERH@nrc.gov

Anthony J. Baratta
Administrative Judge
Atomic Safety and Licensing Board
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
AJB5@nrc.gov

Paul B. Abramson
Administrative Judge
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
PBA@nrc.gov

Office of the Secretary*
ATTN: Docketing and Service
Mail Stop: O-16C1
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
HEARINGDOCKET@nrc.gov

Office of Commission Appellate
Adjudication
Mail Stop O-16C1
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
OCAmail@nrc.gov

Debra Wolf
Law Clerk
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
DAW1@nrc.gov

Suzanne Leta Liou
NJ Public Interest Research Group
11 N. Willow St.
Trenton, NJ 08608
sliou@environmentnewjersey.org

Richard Webster, Esq.*
Rutgers Environmental Law Clinic
123 Washington Street
Newark, NJ 07102-5695
rwebster@kinoy.rutgers.edu

J. Bradley Fewell, Esq.*
Exelon Corporation
4300 Warrenville Road
Warrenville, IL 60555
bradley.fewell@exeloncorp.com

Donald Silverman, Esq.*
Alex S. Polonsky, Esq.*
Kathryn M. Sutton, Esq.*
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Ave., N.W.
Washington, DC 20004
dsilverman@morganlewis.com
apolonsky@morganlewis.com
ksutton@morganlewis.com

/RA/

Mary C. Baty
Counsel for the NRC Staff