

September 18, 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' REPLY

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323 and “Memorandum and Order (Hearing Directives)” (Sept. 12, 2007) (unpublished) (“Sept. 12 Order”), at 3, the staff of the U.S. Nuclear Regulatory Commission (“Staff”) submits this motion to exclude portions of “Citizens’ Reply to AmerGen and NRC Staff Rebuttal Testimony” (Sept.14, 2007) (“Reply”). For the reasons set forth below, the Staff requests that the Board exclude from the evidentiary record or otherwise not consider the portions of Citizens’ Reply discussed below.¹

DISCUSSION

The Staff has previously briefed the scope of this proceeding, the litigable issues in this proceeding, and what evidence is admissible in this proceeding. See NRC Staff Motion in Limine Regarding Citizens’ Initial Presentation on Drywell Contention (July 27, 2007) (“Staff July 27 Motion”).

Citizens argument that some courts have required 95% confidence for acceptance of scientific evidence is irrelevant and should be excluded or given no weight. See *Reply* at 4.

¹ The Staff’s request is framed in the alternative because the Board previously declined to expunge irrelevant material and indicated that it will accord such material “no weight.” See Memorandum and Order (Ruling on Motions in Limine and Motion for Clarification) (Aug. 2, 2007) (unpublished) at 2. Consistent with the Board’s Sept. 12 Order, the Board has ordered Citizens’ to redact certain irrelevant material, see Sept. 12 Order at Attachment A, the Staff maintains that immaterial or irrelevant portions of admissible documents should be excluded to the extent practicable in accordance with 10 C.F.R. § 2.337(a).

Citizens cite examples of courts requiring 95% confidence in cases involving the admissibility of epidemiological studies and DNA evidence. *Id.*

In addition, A10 of the “Sur-Rebuttal Testimony of Dr. Rudolf H. Hausler Regarding Citizens’ Drywell Contention” (Sur-Rebuttal Testimony) (Sept. 13, 2007) should be excluded because it impermissibly challenges the scope spatial scope of AmerGen’s UT program. Citizens’ late-filed attempts to challenge the scope of AmerGen’s UT monitoring program are inadmissible in this proceeding. See LBP-06-22, 64 NRC 229 at 249-51; Memorandum and Order (Clarifying Memorandum and Order Denying AmerGen’s Motion for Summary Disposition) (July 11, 2007) (unpublished) (“July 11 Order) at 5; .Sept. 12 Order at Attachment A (excluding Dr. Hausler’s direct testimony at 8, answer 20 (final sentence)).

The contour plots included in Citizens’ Exhibits 13 and 39 should also be excluded. In A5 of the “Sur-Rebuttal Testimony of Dr. Rudolf H. Hausler Regarding Citizens’ Drywell Contention” (Sur-Rebuttal Testimony) (Sept. 13, 2007), Dr. Hausler, states that since his initial and rebuttal testimony, he has refined his calculations and therefore the contour plots included in Citizens’ Exhibit 61 “should be regarded as definitive.” Dr. Hausler therefore admits that his previously submitted plots are in accurate and unreliable. Therefore, contour plots submitted by Citizens in Citizens’ Exhibits 13 and 39 should be excluded or accorded no weight pursuant to 10 C.F.R. § 2.337(a).

Dr. Hausler’s Sur-Rebuttal Testimony at A27 should be excluded because it is speculative. Dr. Hausler has not provided evidence that the condition of the epoxy coating on the floor of the sand bed demonstrates the existence of a corrosive environment or that the epoxy coating on the drywell shell will behave similarly.

Dr. Hausler’s Sur-Rebuttal Testimony at A31 should be excluded or given no weight. The Staff maintains its position that Citizens have not demonstrated that Dr. Hausler is qualified by knowledge, training, or experience to provide expert opinion regarding the application,

performance, or expected life span of an epoxy coating on the exterior of a drywell shell.

Pursuant to 10 C.F.R. § 2.323(b), Staff counsel contacted counsel for the other parties to resolve the issues raised in this motion. Counsel for AmerGen supports the Staff's motion. Citizens' oppose.

CONCLUSION

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

Respectfully submitted,

/RA/

Mary C. Baty
Counsel for NRC Staff

Dated at Rockville, Maryland
this 18th day of September, 2007

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF MOTION IN LIMINE REGARDING CITIZENS' REPLY" 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 18th day of September, 2007.

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