

September 19, 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 RESPONSE TO AMERGEN'S MOTION IN LIMINE
REGARDING CITIZENS' PRESENTATION ON DRYWELL CONTENTION

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323 and the "Memorandum and Order ("Hearing Directives") (Sept. 12, 2007) (unpublished) ("Sept. 12 Order"), at 3, the Staff of the U.S. Nuclear Regulatory Commission ("Staff") submits this answer to "AmerGen's Motion in Limine to Exclude Portions of Citizens' Sur-Rebuttal" (Sept. 18, 2007) ("Motion"). For the reasons set forth below, the Staff supports the Motion in part.

DISCUSSION

AmerGen Energy Company, LLC ("AmerGen") requests that the Board accord no weight to Section I of "Citizens' Reply to AmerGen and NRC Staff Rebuttal Testimony" (Sept. 14, 2007) ("Citizens' Sur-Rebuttal Presentation"), and exclude portions of the "Pre-Filed Sur-Rebuttal Written Testimony of Dr. Rudolf H. Hausler Regarding Citizens' Drywell Contention" (Sept. 14, 2007) ("Sur-Rebuttal Testimony) and Sections II and III of Citizens' Exhibit 61 ("Memorandum from R. Haulser to R. Webster re: Further Discussion of the External Corrosion on the Drywell Shell in the Sandbed Region" (Sept. 13, 2007)). See Motion at 1-2. AmerGen argues that Board should accord no weight to Section I of Citizens' Sur-Rebuttal because it exceeds the scope of permissibly sur-rebuttal and is irrelevant. *Id.* AmerGen asserts that portions of Dr. Hausler's Sur-Rebuttal Testimony and portions of Citizens' Exhibit 61 should be excluded because they exceed the permissible scope of sur-rebuttal testimony. *Id.* The Staff agrees in part.

Dr. Hausler's sur-rebuttal testimony at A7 and Sections II and III of Citizens' Exhibit 61 discusses AmerGen Exhibits 16-18, which were attached to AmerGen's initial presentation on July 20, 2007. Although Dr. Hausler lists AmerGen and Staff rebuttal testimony as references at the end of Exhibit 61, he does not reference any rebuttal testimony in Sections II and III. In accordance with "Memorandum and Order (Prehearing Conference Call Summary, Case Management Directives, and Final Scheduling Order)" (Apr. 17, 2007) (unpublished) ("Apr. 17 Order") at 6, sur-rebuttal testimony may not advance new affirmative claims and arguments that should have been made in rebuttal testimony. Dr. Hausler's Sur-Rebuttal Testimony at A7, and Sections II and III of Citizens' Exhibit 61, should be excluded to the extent they take issue with Exhibits 16-18 and are not responsive to arguments made by AmerGen or the Staff in rebuttal testimony.

The Staff agrees that Section I of Citizens' Sur-Rebuttal Presentation should be accorded no weight¹ because it exceeds the scope of permissible rebuttal, *i.e.*, it advances new affirmative arguments that do not respond to either AmerGen or Staff rebuttal submissions, and should have been made in rebuttal testimony in response to Board Question 11. See Memorandum and Order (Ruling on Motions in Limine and Motion for Clarification) (Aug. 9, 2007) (unpublished) at 10-11. In addition, Citizens' new affirmative arguments based on case law involving epidemiological studies and DNA evidence are not relevant to this proceeding because Citizens have not demonstrated that the case law cited is applicable to the nuclear industry, adopted by the Commission for NRC proceedings, or responsive to the areas identified by the Board in the September 12 Order.² Consequently, the Board should not consider

¹ In its September 18, 2007 Motion in Limine, the Staff incorrectly argued that arguments in Citizens' Sur-Rebuttal Presentation should be excluded.

² In the Sept. 12 Order, the Board stated that if AmerGen and Citizens have *experts* who could contribute to the topic of reasonable assurance, they should be prepared to have their experts testify. See Sept. 12 Order at 4. The Board did not, however, ask the parties to re-brief the topic of reasonable assurance.

Section I of Citizens' Sur-Rebuttal Presentation.

CONCLUSION

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

Respectfully submitted,

/RA/
Mary C. Baty
Counsel for NRC Staff

Dated at Rockville, Maryland
this 19th day of September, 2007

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC Staff Reponse to AmerGen's Motion in Limine Regarding Citizens' Sur-Rebuttal" 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 19th day of September, 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

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

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

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

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

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

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

Paul Gunter, Director*
Kevin Kamps
Reactor Watchdog Project
Nuclear Information
And Resource Service
6930 Carroll Avenue Suite 340
Takoma Park, MD 20912
E-mail: paul@beyondnuclear.org
kevin@beyondnuclear.org

/RA/

Mary C. Baty
Counsel for the NRC Staff