

September 19, 2007 (8:00am)

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

ATOMIC SAFETY AND LICENSING BOARD

**Before Administrative Judges:
E. Roy Hawkens, Chair
Dr. Paul B. Abramson
Dr. Anthony J. Baratta**

In the Matter of:)	September 18, 2007
AmerGen Energy Company, LLC)	Docket No. 50-219
(License Renewal for Oyster Creek Nuclear Generating Station))	

**AMERGEN'S MOTION IN LIMINE TO EXCLUDE PORTIONS OF
CITIZENS' SUR-REBUTTAL**

I. INTRODUCTION

In accordance with 10 C.F.R. §§ 2.1204, 2.323 and 2.337, and the Atomic Safety and Licensing Board's ("Board") Orders of April 19, 2006,¹ April 17, 2007,² and September 12, 2007,³ AmerGen Energy Company, LLC ("AmerGen") hereby moves to have the Board accord no weight to one section of "Citizens"⁴ Reply to AmerGen and NRC Staff Rebuttal Testimony," dated September 14, 2007 ("Citizens' Sur-rebuttal"), and to exclude portions of the "Pre-Filed Sur-Rebuttal Written Testimony of Dr. Rudolf H. Hausler Regarding Citizens' Drywell

¹ Memorandum and Order (Prehearing Conference Call Summary, Initial Scheduling Order, and Administrative Directives) (unpublished).
² Memorandum and Order (Prehearing Conference Call Summary, Case Management Directives, and Final Scheduling Order) (unpublished) ("April 17 Order").
³ Memorandum and Order (Hearing Directives) (unpublished) ("Sept. 12 Order").
⁴ "Citizens" 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.

Contention” (“Testimony”); and Citizens’ Exhibit 61 (“Memorandum from R. Hausler to R. Webster re: Further Discussion of the External Corrosion on the Drywell Shell in the Sandbed Region”).⁵ Specifically, the Board must exclude or accord such information no weight because Citizens have submitted new material that does not respond to material in AmerGen’s or the Staff’s Rebuttal Testimony, Brief, or associated rebuttal exhibits. These portions of Citizens’ Sur-rebuttal amount to a second “bite at the apple” of rebuttal testimony, deprive AmerGen and the Staff of the opportunity to respond, and defy this Board’s directions regarding rebuttal testimony: the parties’ responses should not “advance any new affirmative claims or arguments that reasonably should have been, but were not, included in the party’s previously-filed” submittals.⁶

II. ARGUMENT

A. Citizens’ Arguments Addressing the “24 Calc”

Citizens’ sur-rebuttal Testimony and Exhibit 61 (an additional memorandum from Dr. Hausler) present a variety of responses to information in the “24 Calc.,” revision 2, Applicant’s Exhibit 16. AmerGen submitted this exhibit with its direct testimony. Thus, any responses from Citizens should have been filed with their rebuttal testimony. Citizens’ inclusion of these new arguments at this late date deprives AmerGen and the Staff of the opportunity to respond and defies the Board’s directives regarding the scope of responsive filings.

⁵ In its Sept. 12 Order at 2 (unpublished), the Board directed Citizens to “redact” from their testimony material that the Board had ruled to be inadmissible, but Citizens’ written statements are not evidence, so inadmissible portions should be accorded “no weight.” *Id.* at 1; *see also id.* at 2 n.2.

⁶ April 17 Order at 6. Counsel for AmerGen has consulted with Citizens’ and NRC Staff counsel in accordance with 10 C.F.R. § 2.323(a). Counsel for Citizens does not concur with this motion. NRC Staff counsel indicated that the Staff concurs with Argument “B” in this motion, but that the Staff would respond as appropriate after review of Argument “A.”

In “A7” of Citizens’ sur-rebuttal Testimony, Dr. Hausler offers a variety of allegations about “AmerGen’s latest analysis,” but he uses this phrase to describe the 24 Calc., revision 2, not any analysis in AmerGen’s rebuttal testimony.

Similarly, in Sections II and III, Dr. Hausler criticizes “Mr. Tamburro’s evaluation” of the external UT measurements in the 24 Calc., without any reference, discussion, or response to AmerGen’s or the Staff’s rebuttal submittals.

For these reasons, the Board must exclude “A7” in Citizens’ sur-rebuttal Testimony, and Section II and Section III of Citizens’ Exhibit 61.

B. Citizens’ “Additional Response to Board Question 11(a)”

Apparently unsatisfied with their response to the Board’s Question 11(a), Citizens now shoehorn a second answer in Section I of their sur-rebuttal statement, without any reference or response to the rebuttal submittals of the other parties. Citizens attempt to mask their impermissible new arguments by referencing alleged “questions” that the Board “still” has regarding the “issue of confidence and reasonable assurance.”² The Board’s question on this topic specifically asked for the Staff to discuss the “reasonable assurance standard that [the Staff] has used in matters involving measurements of parameters that are at issue *in license renewal proceedings . . .*” Citizens’ “response” offers the Board Citizens’ interpretation of a wide range of case law on toxic tort litigation and the interpretation of DNA evidence, in an effort to convince the Board to apply this irrelevant body of case law to NRC proceedings. Thus, this material should also be accorded no weight because it not responsive to the other parties’ rebuttal submittals, and because it is irrelevant.

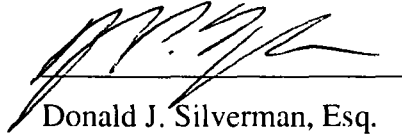
² Sept. 12 Order at 3-4 (emphasis added). The Order does note that, “[t]o the extent AmerGen or Citizens believe they *have an expert* who can contribute relevant information on this matter, they should be prepared to have their expert *testify*.” *Id.* at 4 (emphasis added). Citizens’ legal essay on judicial case law from other contexts utterly fails to respond to the Board’s request for additional expert testimony on this narrow topic.

For these reasons, the Board should accord no weight to Section I of the "Argument" in Citizens' Sur-rebuttal.

III. CONCLUSION

Because Citizens' Sur-rebuttal, Testimony, and Exhibit 61 impermissibly present new arguments for the first time on sur-rebuttal, the Board should accord no weight to the section of Citizens' Sur-rebuttal identified in this Motion, and should exclude portions of Citizens' Testimony and Exhibit 61 identified in this Motion.

Respectfully submitted,



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Dated in Washington, D.C.
this 18th day of September 2007.

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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

ATOMIC SAFETY AND LICENSING BOARD

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CERTIFICATE OF SERVICE

I hereby certify that copies of "AmerGen's Motion in Limine to Exclude Portions of Citizens' Sur-rebuttal" were served this day upon the persons listed below, by E-mail and first class mail, unless otherwise noted

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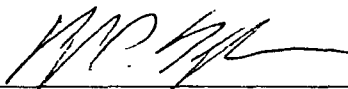
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