

RAS 14177

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
OFFICE OF THE SECRETARY

ATOMIC SAFETY AND LICENSING BOARD

DOCKETED
USNRC

September 20, 2007 (7:38am)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Before Administrative Judges:

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

In the Matter of)	
)	Docket No. 50-219
AMERGEN ENERGY COMPANY, LLC)	
OYSTER CREEK NUCLEAR)	
GENERATING STATION)	
)	September 19, 2007
License Renewal for Oyster Creek Nuclear)	
Generating Station)	

CITIZENS' OPPOSITION TO AMERGEN AND NRC MOTIONS IN LIMINE

PRELIMINARY STATEMENT

AmerGen Energy Company LLC ("AmerGen") and the NRC Staff have yet again moved to exclude portions of arguments and testimony submitted on behalf of 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 (collectively "Citizens"). AmerGen's motion is yet another attempt to avoid the central issues in this litigation by excluding testimony that was carefully tailored to respond to the framework provided by the Atomic Safety and Licensing Board (the "Board") and allegations by AmerGen's witnesses that the contour plots were somehow inaccurate or designed to exaggerate the corrosion problem. NRC Staff's motion is a smorgasbord of legal arguments that have already been

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rejected by the Board and unjustified assertions. Both motions are entirely devoid of merit and should be denied.

ARGUMENT

AmerGen argues that certain portions of Citizens' sur-rebuttal filing are inadmissible. AmerGen misconstrues the scope of the Board's prior orders, however, and attempts to unduly restrain Citizens' ability to respond fully and completely to testimony and materials filed by the other parties, as well as to the Board's questions. Furthermore, AmerGen and NRC have both apparently lost sight of the fact that this Board, as recently as August 9, 2007, has reminded the parties that "Licensing Boards are accustomed to weighing evidence, including expert testimony, and determining its relevance to the issues presented." Memorandum and Order (Ruling on Motions in Limine and for Clarification) at 2 (Aug. 9, 2007). Moreover, on September 12, 2007, the Board completely rejected the most recent motions in limine from AmerGen and the NRC Staff. Memorandum and Order (Ruling on Motion to Conduct Cross-Examination and Motions in Limine and for Clarification) (Sept. 12, 2007).

I. Citizens' Exhibit 39 Satisfies the Board's Requirement For Rebuttal Testimony

As has become its habit, AmerGen complains that most of Dr. Hausler's latest Memorandum (Citizens Ex. 61) is not responsive to Rebuttal testimony and asks the Board to disregard it. AmerGen Mot. in Limine. at 2-3. AmerGen apparently overlooked the fact that it made a wholesale attack on the contouring analysis previously presented by Citizens. Specifically, it accused Dr. Hausler of using an inappropriate or improper statistical treatment, AmerGen Rebuttal Test. Part 3 at A2, A40, A46, using the "wrong data and the wrong methods," *Id.* at 30, being inaccurate, *id.* at Part 2 A7 and plotting "drywell shell thinning that has not been observed or measured by AmerGen." *Id.* Furthermore, AmerGen

suggested that its own analysis of the external data was superior. *See* AmerGen Rebuttal Test. Part 3 at A46 (“Dr. Hausler in wrong. . . AmerGen has evaluated as acceptable those locations. . .”); *id* at 43 (“AmerGen’s Evaluation of the Local Buckling Criterion in the 24 Calc. is Appropriate”). AmerGen also provided additional information about the procedures used to carry out its evaluation. *Id.* at A53.

To rebut this blistering attack, Dr. Hausler went back and rechecked his calculations and those of AmerGen. He then refuted AmerGen’s claim that he had exaggerated the extent of corrosion by showing that his previous presentations were actually quite conservative and appropriately extrapolating the data leads to even worse results.¹ In addition, he showed definitively that AmerGen’s evaluation was merely a crude approximation of his own and was riddled with minor errors. This is a classic battle of the experts. Now, having lost the battle, AmerGen is now attempting to win the war by obliterating Dr. Hausler’s response showing that his calculations are far superior to those of AmerGen. The Board should categorically reject this attempt. AmerGen can hardly expect to impugn the reputation and competence of Citizens’ expert in its rebuttal filing and then strike his response filed in sur-rebuttal.

II. Citizens’ Briefing About Reasonable Assurance Is An Argument Of Counsel Submitted In Response To A Board Request

Strangely, both AmerGen and the NRC Staff attempt to attack through a Motion in Limine an additional briefing that Citizens provided to assist the Board to fully understand the extent to which federal courts and indeed the federal government has required scientific facts to be established to 95% certainty. This briefing is not evidentiary and is therefore not subject to a motion in limine. Furthermore, two days before the briefing was submitted, the Board asked to the parties to provide additional information on the meaning of the term

¹ It is unclear why AmerGen makes the claim that the plots do not properly represent the observed data. It has offered no substantiation on this point.

“reasonable assurance.” Memorandum and Order (Ruling on Motion to Conduct Cross-Examination and Motions in Limine and for Clarification), 3 (September 12, 2007).

Responding to that request, Citizens provided additional briefing on the need for at least 95% certainty. Thus, AmerGen and the NRC Staff’s attempt to use an evidentiary motion to strike non-evidentiary material is not only procedurally deficient, it also flies in the face of the Board’s request for more information on this issue.

III. NRC Staff’s Other Evidentiary Arguments Are Without Merit

NRC staff alleges that Dr. Hausler’s sur-rebuttal testimony at A10, which discusses the need to use the external measurements to determine compliance with the local area acceptance criterion, calls into question the spatial scope of the monitoring program. This is straightforwardly incorrect. Dr. Hausler merely responded to testimony from AmerGen alleging that the external data are not sufficient to allow the margin above the local area acceptance criterion to be calculated. If NRC considered AmerGen’s testimony to be out of scope it should have moved to strike it. It cannot now challenge Citizens’ response to that testimony and try to favor AmerGen by selective motion practice. Moreover, the Board is fully qualified to weigh Citizens’ arguments.

Next the NRC Staff allege that because Dr. Hausler has refined his analysis in Citizens’ Ex. 61, all the previous contour plots should be excluded. This is incorrect on many levels. First, the Board has already ruled against Motions in Limine seeking to strike the original plots. Second, Citizens’ Ex. 61 only discussed Bays 1 and 13, so it does not have any effect on plots submitted for other Bays. Third, the refinements only affected the placement of a few points in Bay 1 and were minor. Fourth, far from being an admission that the plots were inaccurate, the refinements represented diligent work on the part of Dr. Hausler to try to make sense of inconsistent presentations of the underlying data provided by

AmerGen. Finally, the Board is fully capable of according all of Dr. Hausler's plots and AmerGen's analysis of the same data the weight they are due.

NRC next attempts to strike testimony about the cracking in the epoxy floor. This request is far too late. This testimony has its roots in testimony that the Board refused to exclude from Citizens' initial testimony. Having allowed the initial testimony and a rebuttal to that testimony, it would be unjust to exclude the sur-rebuttal. Once again, the Board is perfectly capable of deciding what weight to give this testimony.

IV. The Board Already Decided That Dr. Hausler Is Suitably Qualified to Opine On Epoxy Coatings

NRC Staff now waste the Citizens' and the Board's time with an argument concerning Dr. Hausler's expertise on epoxy coatings that has already been rejected. In its Motion in Limine submitted on July 27, 2007 (pages 6-7) NRC made precisely the same argument. This argument was rejected by the Board and therefore NRC Staff are precluded from raising it again according to the doctrines of the law of the case and issue preclusion. Memorandum and Order (Ruling on Motions in Limine and for Clarification) at 3 (Aug. 9, 2007); *see also* Memorandum and Order (Hearing Directives) at 2 (Sept. 12, 2007) (not striking any testimony of Dr. Hausler regarding epoxy coatings).

CONCLUSION

For the foregoing reasons, AmerGen's and NRC Staff's Motions in Limine should be denied in their entirety.

Respectfully submitted,



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Dated: September 19, 2007

UNITED STATES OF AMERICA
BEFORE THE NUCLEAR REGULATORY COMMISSION
OFFICE OF THE SECRETARY

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

CERTIFICATE OF SERVICE

I, Karen Hughes, of full age, certify as follows:

I hereby certify that on September 19, 2007, I caused Citizen's Opposition to AmerGen and NRC Motions in Limine in the above captioned matter to be served via email and U.S. Postal Service (as indicated) on the following:

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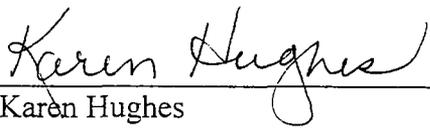
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Signed: 
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Dated: September 19, 2007