

October 23, 2007 (8:00am)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

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

In the Matter of:)	October 22, 2007
AmerGen Energy Company, LLC)	
(License Renewal for Oyster Creek Nuclear Generating Station))	Docket No. 50-219
)	
)	
)	

**MOTION TO STRIKE PORTIONS OF
CITIZENS' FINDINGS OF FACT**

I. INTRODUCTION

Citizens¹ filed their Findings² with the Board on October 10, 2007. Instead of limiting their Findings to facts in the record and conclusions of law, Citizens include: (1) new facts, and (2) arguments that are outside the scope of this proceeding. In accordance with 10 C.F.R. §§ 2.1204 and 2.323, and in order to preserve its objections for any appeal, AmerGen Energy Company, LLC ("AmerGen") hereby moves to strike those portions of the Findings discussed below.³

¹ "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.

² Citizens' Post-Hearing Proposed Findings of Fact and Conclusions of Law (Oct. 10, 2007) ("Findings").

³ Pursuant to 10 C.F.R. § 2.323(a), AmerGen contacted counsel for the other parties. Citizens' counsel plans to oppose this Motion. Counsel for the Staff has not yet taken a position on the Motion.

TEMPLATE = SECY-041

SECY-02

II. THE BOARD SHOULD STRIKE FINDINGS THAT ARE NOT SUPPORTED BY THE RECORD

The record officially closed at the end of the evidentiary hearing on September 25, 2007.⁴ Findings of Fact, and accordingly a Board's Initial Decision,⁵ must be based on facts and exhibits that are already in the record.⁶ New facts, exhibits, and arguments may not be presented for the first time in Findings of Fact because that would violate principles of fundamental fairness.⁷ New arguments using existing exhibits are impermissible for the same reason. This is particularly the case in a Subpart L proceeding where the parties are not permitted to file a substantive response to each other's Findings.⁸ Even Citizens appear to acknowledge that new exhibits and additional analyses are not permitted now that the record is closed.⁹ Yet Citizens' Findings contain the following facts and additional arguments that are not "confined to the

⁴ Hearing Transcript ("Tr") at 603 ("The record is closed subject to the motion for transcript corrections") (Judge Hawkens).

⁵ See, e.g., *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-580, 11 N.R.C. 227, 230-31 (1980) (vacating the Board's security plan findings because they were not based on evidence in the record); accord *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 N.R.C. 479, 499 n.33 (1986) (refusing to consider letters as evidence because "they are not part of the record on appeal").

⁶ *Inquiry Into Three Mile Island Unit 2 Leak Rate Data Falsification*, LBP-87-15, 25 N.R.C. 671, 687-88 (1987) (rejecting documents not part of the record that were attached to a party's Findings).

⁷ "Interested parties. . . 'must have an effective chance to respond to crucial facts.'" *Union Electric Co.* (Callaway Plant, Unit 1), ALAB-740, 18 N.R.C. 343, 349-50 (1983) (quoting *Carson Products Co. v. Califano*, 594 F.2d 453, 459 (5th Cir. 1979) and citing Administrative Procedure Act, § 7(d), 5 U.S.C. § 556(e))(rejecting arguments presented for the first time in post-hearing findings even when "rely[ing] on officially noticeable information"); cf. *Texas Utilities Generating Station* (Comanche Peak Steam Electric Station, Units 1 & 2), LBP-84-10, 19 N.R.C. 509, 516 (1984) (rejecting challenge to Findings because "arguments to which Applicant alleges that it had no opportunity to respond were . . . based on record evidence . . . clearly set forth by witnesses").

⁸ 10 C.F.R. § 2.1209.

⁹ Findings at 82 (information not submitted to the Board and subject to challenge is "clearly not part of the record"); *id.* at 84 ("to consider at the close of the hearing . . . the results of additional analysis that were not part of the record would violate the NRC's hearing requirements under both the AEA and the APA").

material issues of fact presented on-the-record, with exact citations to the transcript of record and exhibits in support of each proposed finding.”¹⁰

- 1) Citizens’ appear to have created a new exhibit identified as “Table 1,” in an attempt to compare the external, internal, and trench ultrasonic testing (“UT”) data.¹¹ This Table was not included in Dr. Hausler’s pre-filed testimony or submitted as an Exhibit during the hearing. Accordingly, AmerGen did not have an opportunity to respond to it. Because Dr. Hausler did not offer this table as part of his testimony before the record was closed, it may not be offered now where AmerGen has no opportunity to respond and is thereby harmed by its introduction.

Citizens may attempt to argue that this table is merely a compilation of data from existing Exhibits that are in the record. That is not the case, as Citizens include no references to underlying on-the-record sources for important parts of this analysis. Specifically, the second and fourth “Notes” to Table 1 demonstrate that Citizens’ counsel performed new statistical calculations and estimates on the existing data.¹² This is not an issue of mere addition or subtraction of data already in the record, but unverified *statistical* calculations by counsel. Only an expert can offer such new

¹⁰ 10 C.F.R. § 2.712(c) (“Proposed findings of fact must be clearly and concisely set forth in numbered paragraphs and must be confined to the material issues of fact presented on-the-record, with exact citations to the transcript of record and exhibits in support of each proposed finding”). While Subpart L has its own provision for Findings of Fact, *see* 10 C.F.R. § 2.1209, logic dictates that the standard remain the same. To do otherwise would allow sur-surrebuttal testimony to be filed in the guise of Findings of Fact. That is particularly impermissible in a Subpart L proceeding, where the parties are not authorized to file answers and replies to Findings of Fact. *Id.*; *compare* § 2.712 (Subpart G) (authorizing answers and replies).

¹¹ *Id.* at 20.

¹² *Id.* (“95% confidence intervals for external data *calculated using methods described in* AmerGen Exhibit C Part 3 and standard tables of the Student’s t distribution”); *id.* (“95% confidence intervals for internal grids *estimated from* AmerGen Ex. 25.”) (emphasis added).

statistical calculations and estimates, and these may not be submitted now that the evidentiary record is closed.¹³

- 2) Citizens cite to two articles to support their statement that “many academic papers confirm that Dr. Hausler’s statistical technique is valid.”¹⁴ One of the articles, *Statistical and Stochastic Approaches to Localized Corrosion*,¹⁵ is not in the record. Nor does it appear that Citizens identified this article in their mandatory disclosures as a publication upon which Dr. Hausler intended to rely.¹⁶ Accordingly, AmerGen did not have an opportunity to review it or respond to it while the evidentiary record remained open. Accordingly, AmerGen’s interest in the proceeding is harmed. Such a reference may not be included now for the first time.

Citizens also cite to Applicant’s Exhibit 57 for the same proposition. That Exhibit appears to be a non-peer reviewed paper submitted during the “NACE International Annual Conference and Exposition” in 1996.¹⁷ Dr. Hausler is listed as the sixth of eight co-authors.¹⁸ While Citizens previously identified this article in response to AmerGen’s allegations in a Motion in Limine¹⁹ that Dr. Hausler was not qualified to provide expert testimony on statistics, they did so only for the purpose of

¹³ In an earlier part of the Findings, Citizens make similar arguments about standard deviations and 95% confidence limits. Findings at 12 (“However, because this standard deviation is only estimated from 3 readings, the Student’s t distribution . . .”). They again provide no citations demonstrating that this information is contained in the record. *See id.*

¹⁴ *Id.* at 25 (citing T. Shibata, *Statistical and Stochastic Approaches to Localized Corrosion*, W.R. Whitney Award Lecture, *Corrosion* 52 (11) 813 (1996)).

¹⁵ *Id.*

¹⁶ *See* 10 C.F.R. § 2.336(a)(1).

¹⁷ Applicant’s Exh. 57, at 1 (title block).

¹⁸ *Id.* at 1.

¹⁹ AmerGen’s Motion in Limine to Exclude Portions of Citizens’ Initial Written Submission (July 27, 2007).

further bolstering Dr. Hausler's purported qualifications.²⁰ AmerGen thus included it as an Exhibit to demonstrate that Dr. Hausler's experience with epoxy coatings appeared to be limited to oil field applications.²¹ While the evidentiary record remained open, however, AmerGen did not have an opportunity to respond to the now-new argument proffered in Citizens' Findings that this article showed that Dr. Hausler's "statistical technique is valid."²² This article, therefore, may not be used for this new purpose now that the evidentiary record is closed.

- 3) Citizens also argue that AmerGen should have conducted additional Monte Carlo simulations to "test the sensitivity of the predicted areas to the uncertainty in the [UT] data."²³ Only an expert can offer this argument. Yet AmerGen is not aware of any testimony from Dr. Hausler presenting this argument, and Citizens provide no citations to assist AmerGen (or the Board) in identifying where it might have previously been submitted. AmerGen yet again did not have an opportunity to respond to this argument while the evidentiary record remained open, and its interest in the proceeding has been harmed. Citizens may not include this information for the first time in Findings now that the evidentiary record is closed.
- 4) Citizens also attempt to rehabilitate Dr. Hausler as an expert, claiming that the supporting information for this rehabilitation effort is in Dr. Hausler's Curriculum

²⁰ Citizens' Opposition to AmerGen's and NRC Motions in Limine, Attach. (Select papers by Dr. Rudolph H. Hausler on the Application of Statistics in Diverse Corrosion Studies) (Aug. 1, 2007).

²¹ AmerGen Surr. Part 5, A.7.

²² It is not clear what part of the article is attributable to Dr. Hausler's work because he is listed sixth out of eight authors. Applicant's Exh. 57, at 1. And it is questionable whether an article presented at a conference necessarily implies that the statistical techniques used within are valid.

²³ Findings at 32 (last par.).

Vitae (“C.V.”)²⁴ For example, Citizens claim that Dr. Hausler earned a Ph.D. in “Technical Sciences”, suggesting that this is a superior technical degree when compared to a degree in “Chemical Engineering” because the former involves “a broad spectrum of sciences in general” while the latter is limited to the study of “Chemistry and Engineering.”²⁵ They must be working from a different version than what is in the record, however, because these statements are not in his C.V.²⁶ Dr. Hausler’s C.V. unambiguously states that he received his Ph.D. in “Chemical Engineering.”²⁷

Citizens then list four Nobel Prize recipients under whom Dr. Hausler apparently studied—in the context of *one course*—decades ago.²⁸ They also allege that Dr. Hausler “completed 5 Master’s theses prior to embarking on his PhD thesis which was in the field of inorganic solid state catalysis.”²⁹ Again, none of this new information is included in Dr. Hausler’s C.V. And AmerGen is not aware of this information being in any other document that is part of the record in this proceeding. As with the other new facts discussed above, AmerGen did not have an opportunity to respond to these statements while the evidentiary record remained open, or to provide additional information about its experts in response. Accordingly, AmerGen’s interest in the proceeding is harmed. Citizens’ attempt to rehabilitate their witness now that the evidentiary record is closed is impermissible.

²⁴ *Id.* at 85 (“as his CV indicates”).

²⁵ *Id.*

²⁶ Citizens Exh. D (Dr. Hausler’s C.V.).

²⁷ Citizens Exh. D at 3 (Education).

²⁸ Findings at 85.

²⁹ *Id.*

5) Finally, Citizens also argue for the first time that the base of the exterior drywell shell above the concrete sand bed floor was not covered with an epoxy primer before it was coated with two coats of epoxy.³⁰ The only citation they provide in support of this “finding” is to a photograph which appears to show just the opposite.³¹ Such an argument must be made by an expert, not by counsel interpreting a photograph for the first time in Findings, therein incorrectly speculating about its meaning. And such an argument must be made before the close of the evidentiary record. Dr. Hausler did not raise this argument in testimony. AmerGen was not provided, therefore, with an opportunity to respond to this incorrect assertion. Accordingly, AmerGen’s interest in the proceeding is harmed. Such an argument may not be raised now in Findings for the first time.

If Citizens have citations to pre-filed or oral hearing *testimony* which are the sources of the assertions challenged in this Motion, then they should provide them in their Answer to this Motion. If Citizens’ Answer does not demonstrate that these facts are supported by testimony in the record, then the Board must strike them. Under no circumstances may the Board base its decision on this new factual material or new arguments that are not supported by testimony in the record.³²

³⁰ *Id.* at 37 (“Epoxy was applied to the shell in the sandbed region in two different ways . . .”).

³¹ *Id.* (citing AmerGen’s Exh. 40, at 60).

³² *See supra* note 5. AmerGen also urges the Board to disregard Citizens’ Answer to this Motion to the extent it raises additional substantive arguments. As discussed in *supra* note 7, arguments may not be presented for the first time in Findings of Fact because that would violate principles of fundamental fairness. They certainly cannot therefore be raised in an Answer to a Motion to Strike those arguments.

III. THE BOARD SHOULD STRIKE FINDINGS THAT ARE OUTSIDE THE SCOPE OF THE PROCEEDING

Citizens proffer and raise arguments that AmerGen continues to believe are outside the scope of the proceeding. First, Citizens yet again raise the issue of real-time UT thickness monitoring for the drywell shell.³³ This time, however, the source is not Dr. Hausler, but a letter from the New Jersey Department of Environmental Protection to the NRC.³⁴ Regardless of the source, the Board has unambiguously ruled that this issue is outside the scope of the admitted contention.³⁵ Citizens are not permitted to shoe-horn it back into the proceeding merely because it is mentioned in one of their Exhibits. And they are certainly not permitted to do so in their Findings.

Second, Citizens' Findings include arguments that relate to the derivation of the acceptance criteria.³⁶ As pointed out in the Board's September 12, 2007 Order (Hearing Directives),³⁷ and as reiterated at the hearing, the Board recognizes that the origin, derivation, and adequacy of the acceptance criteria that are part of the Oyster Creek Nuclear Generating Station's Current Licensing Basis are outside the scope of this proceeding.³⁸ AmerGen therefore once again objects to this line of argument.

³³ Findings at 46.

³⁴ *Id.* (citing Citizens' Exh. 30).

³⁵ Memorandum and Order (Ruling on Motions In Limine and Motion for Clarification) at 6-7 (Aug. 9, 2007) (unpublished) ("Citizens are foreclosed from arguing that AmerGen's UT monitoring program must be supplemented with, or replaced by, a real-time corrosion monitoring program.")

³⁶ *See, e.g.*, Findings at 80 ("GE study took too much credit for hoop stress when it applied the capacity reduction faction [sic]").

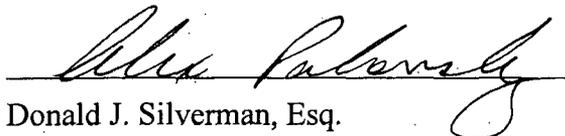
³⁷ "[A]lthough we may ask questions about the derivation of the acceptance criteria . . . our inquiries should *not* be construed as questioning the validity of the acceptance criteria. Nor should our inquiries about non-litigable topics be construed as rendering those topics litigable. Rather, the purpose of such questions is to acquire an understanding of the subject matter sufficient to enable us to accompany our decision with a fully explicated rationale." September 12 Order (Hearing Directives) at 4-5 n.4 (emphasis in original).

³⁸ Tr. at 151 (Judge Abramson).

IV. CONCLUSION

For the reasons stated above, the Board should strike portions of Citizens' Findings.

Respectfully submitted,



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Dated in Washington, D.C.
this 22nd day of October 2007