

**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 )

Docket No. 50-219

(License Renewal for Oyster Creek Nuclear )  
Generating Station) )

**AMERGEN'S ANSWER OPPOSING  
CITIZENS' DEMAND TO HOLD THE PROCEEDING OPEN**

**I. INTRODUCTION**

Citizens<sup>1</sup> filed their post-hearing Findings<sup>2</sup> with the Board on October 10, 2007. The Conclusion section to those Findings requests that the Board hold the proceeding open to allow Citizens to further litigate the existing drywell contention and propose future contentions if the Board conditions issuance of a renewed license for the Oyster Creek Nuclear Generating Station upon future drywell shell thickness computer modeling.<sup>3</sup> AmerGen Energy Company, LLC ("AmerGen") interprets this request embedded in Citizens' Findings to be a motion to hold the

<sup>1</sup> "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.

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

<sup>3</sup> Findings at 89.

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proceeding open, and, consistent with 10 C.F.R. §§ 2.1204 and 2.323, hereby strongly opposes that motion.<sup>4</sup>

## II. ARGUMENT

In Section VIII of their Findings, Citizens argue that the 3-dimensional modeling that AmerGen has committed to perform before the period of extended operation<sup>5</sup> may not be considered by the Board.<sup>6</sup> AmerGen agrees. The record before the Board does not include the results of that analysis and, therefore, the analysis cannot properly become part of the Board's Initial Decision.<sup>7</sup>

Citizens, however, then demand that

[S]hould the Board decide to allow the relicensing to proceed, conditioned upon a future analysis showing compliance with the CLB [current licensing basis] . . . . this Board must hold this proceeding open until the [3-dimensional computer] modeling study is complete, allow the current contention to be fully litigated based upon the new study, and must afford Citizens the opportunity to base a contention upon the new information that will be generated by the future analysis.<sup>8</sup>

With the completion of the evidentiary hearing and closing of the record,<sup>9</sup> there is now sufficient evidence available for the Board to make its required findings in this proceeding; *i.e.*,

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<sup>4</sup> Because Citizens' demand is effectively a motion to hold the proceeding open, there is no right to reply to this Answer. 10 C.F.R. § 2.323(c).

<sup>5</sup> Applicant's Exhibit 10, Encl. at 11 of 13.

<sup>6</sup> Findings at 79-84.

<sup>7</sup> See, e.g., *Pacific Gas & Elec. 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 Elec. 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").

<sup>8</sup> Findings at 89.

<sup>9</sup> Hearing Transcript ("Tr.") at 603 (Judge Hawkens) ("The record is closed subject to the motion for transcript corrections and the hearing is closed."); see also *id.* at 559 (Judge Hawkens) (suggesting that if Citizens attempt to submit any additional evidence after the hearing, then they must show "a basis to reopen the record").

that “there is reasonable assurance that the activities authorized by the renewed license will continue to be conducted in accordance with the CLB,” during the period of extended operation.<sup>10</sup> The admitted contention relates to the frequency of ultrasonic testing (“UT”) in the sand bed region.<sup>11</sup> The adequacy of this frequency is governed by the available margin, which is the difference between the established acceptance criteria and the measured thickness of the shell, and the potential rate of future corrosion.<sup>12</sup> There is more than enough evidence in the record to allow the Board to find the UT frequency adequate even if an additional “confirmatory analysis” remains ongoing at the time of its decision.<sup>13</sup> The Part 2 rules provide mechanisms for Citizens to raise issues in the future, either before or after this proceeding is terminated.

Citizens’ request also constitutes yet another challenge to the adequacy of the OCNGS’ CLB. As pointed out in the Board’s September 12, 2007 Order (Hearing Directives),<sup>14</sup> and as reiterated at the hearing, the Board recognizes that the origin, derivation, and adequacy of the acceptance criteria that are part of the OCNGS’ CLB are outside the scope of this proceeding.<sup>15</sup> The results of future computer modeling of the drywell shell will have no direct impact on the CLB, and are expected to confirm that there is more than adequate margin to the current

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<sup>10</sup> 10 C.F.R. § 54.29(a).

<sup>11</sup> Memorandum and Order (Denying AmerGen’s Motion for Summary Disposition) at 2 (June 19, 2007).

<sup>12</sup> *Id.* at 7.

<sup>13</sup> *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 N.R.C. 445, 519 (1983); *see also Carolina Power & Light Co., et al.* (Shearon Harris Nuclear Power Plant), ALAB-843, 24 N.R.C. 200, 208-09 (1986) (upholding a Licensing Board decision as “fully supported by the record” and rejecting argument that the proceeding should continue until additional data became available).

<sup>14</sup> “[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.” Memorandum and Order (Hearing Directives) at 4-5 n.4 (Sept. 12, 2007) (emphasis in original).

<sup>15</sup> Tr. at 151 (Judge Abramson).

acceptance criteria.<sup>16</sup> In fact, the results of the modeling would not become part of the CLB unless AmerGen takes affirmative steps to change the CLB.<sup>17</sup> Thus, Citizens' demand must be denied for the independent reason that it is outside the scope of this proceeding.

Finally, under 10 C.F.R. § 2.323(b),

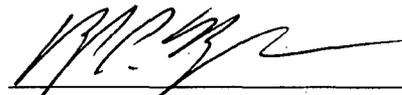
A motion *must* be rejected if it does not include a certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant's efforts to resolve the issue(s) have been unsuccessful.<sup>18</sup>

Citizens did not consult with AmerGen regarding their demand. The Board must reject Citizens' demand because Citizens' have failed to certify that they have consulted with the other parties.

### III. CONCLUSION

For the reasons set for above, Citizens' demand should be denied in its entirety.

Respectfully submitted,



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<sup>16</sup> See Tr. at 535, 538 (Gallagher).

<sup>17</sup> 10 C.F.R. § 54.3 (definition of CLB).

<sup>18</sup> Emphasis added.

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