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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
OFFICE OF THE SECRETARY

ATOMIC SAFETY AND LICENSING BOARD

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

In the Matter of	)	
	)	Docket No. 50-0219-LR
AMERGEN ENERGY COMPANY, LLC	)	
	)	
(License Renewal for the Oyster Creek	)	November 1, 2007
Nuclear Generating Station)	)	
	)	

CITIZENS' MOTION TO STRIKE
AMERGEN'S UNAUTHORIZED ANSWER

PRELIMINARY STATEMENT

On October 10, 2007, Citizens filed their Post-Hearing Proposed Findings of Fact and Conclusions of Law with the Board.[1] These Findings contained a valid plea for relief contingent upon a Board decision to allow the relicensing to proceed. On October 22, 2007, AmerGen filed a so-called "Answer Opposing Citizens' Demand to Hold the Proceeding Open."[2] AmerGen has tried to manufacture a right to "Answer" by claiming that Citizens' alternative plea for relief was actually a motion in disguise. However, AmerGen's interpretation is erroneous and unsupported by controlling decisional law. As AmerGen acknowledges, under the Part 2 rules there is no provision for a response to a party's proposed findings of fact and conclusions of

[1] See Citizens' Post-Hearing Proposed Findings of Fact and Conclusions of Law (Oct. 10, 2007) at 89 (hereinafter "Findings").
[2] See AmerGen's Answer Opposing Citizens' Demand to Hold the Proceedings Open (Oct. 22, 2007) (hereinafter "Answer").

TEMPLATE = SECY-037

SECY-02

law.[3] Similarly, there are no orders from the Board permitting the filing of such an answer. Citizens therefore request that the Board strike AmerGen's "Answer" as an unauthorized pleading.[4]

ARGUMENT

I. AmerGen Failed To Justify Why Its Answer Was Permissible

All parties to this proceeding recognize that they do not generally have a right to respond to each other's proposed finding of facts and conclusions of law. Additionally, all parties include suggested ultimate conclusions in their proposed conclusions of law. The proposed conclusions of law necessarily request the Board to grant or deny substantive relief and may also include some procedural aspects of that relief. For example, AmerGen suggested a license condition within its ultimate conclusions of law. AmerGen Proposed Findings of Fact and Conclusions of Law at 93. Similarly, motions may also request procedural or substantive relief. However, this does not mean that all final conclusions of law are motions, which is the logical result of AmerGen's argument.

Perhaps recognizing that arguing overtly that there is no distinction between motions and final conclusions of law would be beyond the pale, AmerGen instead appears to argue that because Citizens made a request in the alternative for procedural relief, this converted the conclusions of law into a motion. AmerGen Answer at 1-2. AmerGen fails cite any law whatsoever to support this novel proposition. Indeed, it offers only one short sentence and a cite to the wrong section of the Part 2 rules to try to justify its action. NRC Staff has informed

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[3] See 10 C.F.R. § 2.1209; AmerGen Motion To Strike, dated October 22, 2007 at 2 ("in a Subpart L proceeding . . . the parties are not permitted to file a substantive response to each other's Findings')

[4] Prior to filing this Motion, Citizens consulted both NRC Staff and AmerGen. NRC Staff indicated that they do not believe that Citizens' Proposed Findings of Fact and Conclusions of Law contained a motion. Staff therefore did not respond to Citizens' Proposed Findings of Fact and Conclusions of Law. However, neither Staff nor AmerGen have taken a position on this Motion.

Citizens that they share Citizens' view that Citizens' conclusions of law were precisely that, which is why NRC Staff did not file a similar "Answer." Because AmerGen's "Answer" lacks any serious attempt to justify why it is permissible, it should be recognized for what it is; a late-filed attempt to offer a legal argument on a point AmerGen failed to address in its conclusions of law. As such, it borders on the frivolous and wastes the time of this Board, Citizens and the NRC Staff. Thus, this Board should strike it out of hand and should ignore AmerGen's arguments about the treatment of the forthcoming finite element analysis.

II. A Request For Alternative Relief Alone Cannot Constitute A Motion

The Federal Rules of Civil Procedure allow a party to include alternative prayers for relief in their pleadings.[5] In their proposed conclusions of law, Citizens included an alternative conclusion that the Board should consider a certain computer modeling study *only if* it decides to allow the relicensing of the Oyster Creek Nuclear Generating Station to proceed and holds the hearing open.[6] However, AmerGen has ignored the contingent nature of the proposed conclusion of law. On page 2 of its "Answer," AmerGen omits the beginning of the first sentence reading "**In the alternative**, should the Board decide to allow the relicensing to proceed...."[7] The omitted language is common to virtually every alternative plea for relief or conclusion of law and is explicit in its conditional nature. Considering the passage in its entirety, it is clear AmerGen's fanciful interpretation of Citizens' alternative conclusion of law is incorrect. AmerGen's failure to recognize the contingent nature of the conclusion merely illustrates how hard it is straining to find any justification for filing the "Answer." Because a

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[5] See Fed. R. Civ. Proc. 8(a)(3) ("Relief in the alternative or of several different types may be demanded"). Cf. R.M.S. Titanic, Inc. v. The Wrecked & Abandoned Vessel, 435 F.3d 521, 534 (4th Cir. 2006) (plaintiff well within its rights to include an alternative pleading).
[6] Citizens' Findings Of Fact And Conclusions Of Law at 89.
[7] Id. (omitted portion emphasized).

motion cannot consist solely of a request for contingent relief, AmerGen conveniently decided to omit any mention of the contingency and filed the "Answer" in disregard of the rules.

III. Lack Of Consultation Shows That Citizens Did Not File A Motion

Almost as an afterthought, AmerGen cites to 10 C.F.R. § 2.323(b), asserting that not only was the alternative conclusion of law actually a motion, but also that the Board should reject Citizens' proposed conclusion because Citizens' did not consult with the other parties.[8] AmerGen wisely did not stress this particular point. The fact that Citizens' did not consult with the other parties merely confirms that its alternative conclusion of law was exactly what it seemed.

IV. Efficiency And Fairness Require AmerGen's Answer To Be Struck

If the Board adopts AmerGen's novel notion that a proposed conclusion of law can metamorphose into a motion under unspecified circumstances, future proceedings would inevitably involve all parties filing Answers followed by the even more inevitable motions to strike. The Part 2 rules appropriately attempt to ensure that, barring unforeseen factual circumstances, the final filing in a Subpart L proceeding should be the proposed findings of fact and conclusions of law. Citizens have no doubt that by now the Board has sufficient filings to be fully aware of the positions of all parties. Allowing unauthorized pleadings would needlessly prolong the agony for us all and allow well-resourced parties to hold the Board and other parties hostage to threats of prolonged motion practice even after the hearing is completed and the record is closed.

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[8] See "Answer" at 4.

Furthermore, the remainder of AmerGen's argument merely rehashes the same contentions previously debated in both the pre-filed documents and the Hearing itself.[9] The Board has heard all these arguments before, and should not indulge AmerGen's thinly-veiled attempt at getting in a "last word" on the matter. Thus, in addition to striking AmerGen's "Answer" because filing it was a straightforward violation of the rules, this Board should strike it for reasons of efficiency and fairness.

V. AmerGen Has Stated It Has No Right To File The Answer

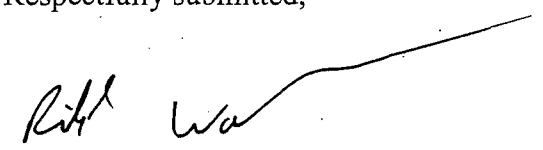
AmerGen inexplicably filed two contradictory motions on the same day. In the Motion to Strike, AmerGen made much of its general inability to respond substantively to Citizens' proposed findings under the Subpart L rules. Motion to Strike at 2, 5-7. However, in its "Answer," AmerGen simultaneously provided a substantive response to a portion of Citizens' proposed findings. Although the two filings obviously contain a legal contradiction, the common theme to both is that AmerGen is seeking to make up for deficiencies in its proposed findings and conclusions of law by finding the flimsiest of excuses to make additional substantive arguments. To deter such conduct in the future, Citizens request the Board to strike the unauthorized "Answer" and deny the accompanying Motion to Strike.

[9] Namely, whether there is reasonable assurance the activities authorized by the renewed license will continue to be conducted in accordance with the CLB. See "Answer" at 3. Additionally, AmerGen's cited authority in this reiteration is inapposite and does not address the issue here debated: whether or not Citizens' facially-valid alternative plea can be interpreted as a motion to stay. See id. at fn.13

CONCLUSION

For the foregoing reasons, the Board should strike AmerGen's "Answer."

Respectfully submitted,



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Dated: November 1, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges
E. Roy Hawkens
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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)	)	November 1, 2007
	)	

CERTIFICATE OF SERVICE

I, Richard Webster, of full age, certify as follows:

I hereby certify that on November 1, 2007, I caused Citizens' Answer to AmerGen's Motion to Strike and Citizens' Motion to Strike AmerGen's unauthorized response to be served via email and U.S. Postal Service (as indicated) on the following:

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Dated: November 1, 2007