

November 5, 2007 (4:45pm)

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

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:)	November 5, 2007
AmerGen Energy Company, LLC)	
(License Renewal for Oyster Creek Nuclear Generating Station))	Docket No. 50-219
)	
)	
)	

**AMERGEN'S ANSWER OPPOSING
CITIZENS' OCTOBER 26, 2007 MOTION TO STRIKE**

I. INTRODUCTION

In accordance with 10 C.F.R. §§ 2.1204, 2.323 and 2.326, and the Atomic Safety and Licensing Board's ("Board") Orders of April 19, 2006,¹ and April 17, 2007,² AmerGen Energy Co., LLC ("AmerGen") hereby files its Answer to Citizens'³ October 26, 2007 Motion to Strike ("Citizens' Motion") certain testimony from one of AmerGen's witnesses. The Board should deny Citizens' Motion because it is incurably late, procedurally flawed, and substantively baseless. Citizens' Motion also contains an alternative request to reopen the record. The Board should deny that request because it fails to address the requirements of 10 C.F.R. § 2.326.

¹ Memorandum and Order (Prehearing Conference Call Summary, Initial Scheduling Order, and Administrative Directives) (unpublished).

² Memorandum and Order (Prehearing Conference Call Summary, Case Management Directives, and Final Scheduling Order) (unpublished) ("April 17 Order").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 "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.

II. ARGUMENT

A. Citizens' Motion Is Incurably Late

Citizens' Motion must be rejected as untimely because: (1) it was filed at least one month after the challenged testimony was proffered; and (2) the underlying information has been available for years.

In their October 26, 2007 Motion, Citizens seek to strike portions of Mr. Jon Cavallo's⁴ pre-filed direct testimony dated July 20, 2007, and certain of Mr. Cavallo's testimony at the evidentiary hearing on September 25, 2007.⁵ 10 CFR § 2.323(a) requires that all motions be filed "no later than ten (10) days after the occurrence or circumstance from which the motion arises." Citizens, however, filed their Motion over three months after AmerGen filed its direct pre-filed testimony, and one month after the close of the evidentiary hearing, so their request to exclude testimony is incurably late. Also, to the extent Citizens seek to exclude portions of AmerGen's pre-filed direct testimony, their request is effectively an untimely motion in limine. The Board set a July 27, 2007 deadline for motions in limine relating to the parties' pre-filed direct testimony.⁶ That deadline has obviously passed.

Citizens could easily have raised this issue at an earlier time because the information that allegedly contradicts Mr. Cavallo's testimony is not new. Citizens claim that they did not come "into possession" of this information until October 12, 2007.⁷ But Citizens' Motion confirms that the underlying information has been in the public record for years. In support of their

⁴ Mr. Cavallo is AmerGen's coatings expert.

⁵ Citizens' Motion at 3-4.

⁶ April 17 Order at 5 ("To the extent a party seeks to exclude any portion of another party's initial written submission, it shall file a motion in limine to that effect on or before July 27, 2007."). Further, the Board entertained objections to the admission of testimony into the record at the September 20, 2007 evidentiary hearing, Tr. at 251-256, and Citizens raised no objections to Mr. Cavallo's pre-filed testimony at that time.

⁷ Citizens' Motion at 2.

Motion, Citizens cite two Inspection Reports that discuss the Oconee coating condition: (1) an April 26, 2004 Inspection Report (available at ML041180451 on ADAMS since April 30, 2004); and (2) a July 2004 Inspection Report (available at ML042050511 on ADAMS since July 30, 2004).⁸ These documents, as their dates indicate, have been available for years. Even the allegedly “new” document, the NRC Office of Inspector General (“OIG”) Audit of NRC’s License Renewal Program (ADAMS ML072490486), has been available to the public since September 7, 2007—*before* the evidentiary hearing. The fact that Citizens only learned of these documents recently does not excuse their filing this motion at this late date.⁹ Because the relevant information was available to all members of the public (including Citizens) years ago, the time for any objections to testimony presented at or before that hearing has long since passed.

B. Citizens’ Motion Is Procedurally Flawed

A motion to strike is normally used to strike “redundant, immaterial, impertinent, or scandalous matter” contained in a pleading.¹⁰ It is *not* a tool to be used by one party to challenge testimony from another party with which the first party substantively disagrees.

Citizens, however, have chosen to use this procedural tool to raise substantive challenges to AmerGen’s pre-filed and oral testimony.¹¹ A motion to strike is simply not the appropriate procedural tool to use to raise a substantive challenge to the validity of another party’s testimony.

⁸ Citizens’ Motion at 3.

⁹ See *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-22, 64 N.R.C. 229, 252 (2006) (“petitioners have an affirmative obligation to obtain documentation in support of a proffered contention”). Further, as this Board has previously observed, “[t]he fact that a new document has come to light” does not mean that the information in that document is new. Memorandum and Order (Denying Citizens’ Motion for Leave to Add a Contention and Motion to Add a Contention) at 6-7 (Apr. 10, 2007) (unpublished) (“April 10 Order”).

¹⁰ Fed. R. Civ. P. 12(f). Similarly, in this proceeding the Board has afforded the parties the opportunity to challenge “irrelevant or otherwise inadmissible” pre-filed material by filing a motion in limine. See Licensing Board Memorandum and Order (Ruling on Motions in Limine and Motion for Clarification) at 2 (Aug. 9, 2007) (unpublished).

¹¹ Citizens’ Motion at 1.

Citizens had the opportunity, in rebuttal, sur-rebuttal, *and* at the hearing, to offer their substantive response to Mr. Cavalló's testimony. To do so now, in a late-filed motion to strike, is entirely inappropriate. Thus, Citizens' Motion must be denied because it is procedurally flawed.

C. Citizens' Motion Is Substantively Baseless

Moreover, Citizens' Motion is based on counsel's incorrect technical assumptions. Counsel analyzes the technical data himself—without the benefit or assistance of a supporting expert affidavit—and reaches the wrong technical conclusions.

Although Citizens' counsel accuses AmerGen of “legal sophistry,”¹² it is Citizens' *counsel* who pieces together the technical evidence to conclude that the cause of the coating condition at Oconee was “end of life deterioration.”¹³ As described in the attached affidavit, however, Mr. Cavallo has reviewed the documents cited by Citizens. Mr. Cavallo's affidavit shows that Citizens' counsel is wrong: Mr. Cavallo is very familiar with the technical facts of the Oconee degradation; the Oconee internal containment coating is significantly different from the external coating used in the Oyster Creek sand bed region; and the Oconee degradation was not an end-of-life failure, but was due to improper application of the coating.

Mr. Cavallo's technical analysis of the Oconee coating failure is confirmed in a December 20, 2005 slide presentation, submitted by the Oconee licensee to NRC, describing the coating manufacturer's “independent failure analysis which confirmed failure due to improper

¹² *Id.* at 6.

¹³ Citizens' Motion at 3, 6; *see also* Section D, below (discussing expert affidavit requirement for motions to reopen the record).

application during original construction.”¹⁴ None of the documents Citizens cite actually provide any contrary information.

Thus, Citizens’ Motion is based solely on faulty speculation by Citizens’ counsel which is refuted by AmerGen’s expert, and so must be denied for a lack of substantive merit.

D. Citizens’ Motion Fails to Meet the Standards for Reopening the Record

Citizens also request that “the Board should use its discretion to reopen the record and hear further testimony on the coatings issue.”¹⁵ Citizens apparently seek Board “discretion”, because they fall far short of satisfying the requirements for a motion to reopen the record under 10 C.F.R. § 2.326.

First, under Section 2.326(a)(1), the motion must be timely. As described in Section A above, information about the Oconee coating condition has been publicly available for years. Citizens only recently “came into possession” of this information, but that does not make the underlying information “new,” justifying a motion to reopen.¹⁶

Second, under Section 2.326(a)(2) and (3), the motion must address a significant safety issue and demonstrate that a materially-different outcome would be “likely” based on the new information. These criteria, and the timeliness criterion discussed above, “*must* be separately

¹⁴ Containment Coatings Long Range Plans, Oconee Nuclear Station at 6 (Dec. 20, 2005) available at ML053630166; at 6. This document has been available on ADAMS since January 9, 2006. Before Citizens’ filed their Motion, AmerGen’s counsel brought this document to Citizens’ counsel’s attention to demonstrate that Citizens’ counsel might be ignoring publicly-available evidence which undermined Citizens’ position.

¹⁵ Citizens’ Motion at 8.

¹⁶ See April 10 Order at 6-7; see also *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-815, 22 N.R.C. 198, 201 (1985) (denying motion to reopen the record because the relevant information was available one year before the motion was filed); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-6, 31 N.R.C. 483, 487 (1990) (denying motion to reopen the record because the relevant information was available for ten months before the motion was filed).

addressed, with a specific explanation of why it has been met.”¹⁷ Citizens’ Motion does not address *any* of these requirements.¹⁸

Finally, Section 2.326(b) also specifies that a motion to reopen the record “*must be accompanied by affidavits that set forth the factual and/or technical bases*” and that the affidavits “*must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised.*”¹⁹ Citizens’ Motion provides no such affidavits.²⁰

Thus, Citizens have offered no basis for the Board to reopen the record.

¹⁷ 10 C.F.R. § 2.326(b) (emphasis added).

¹⁸ See Citizens’ Motion at 2, 7-8. Moreover, AmerGen’s pre-filed testimony includes an analysis that assumes that the coating fails completely during the period of extended operation. See AmerGen Dir., Part 6, A.12-A.16; AmerGen Reb., Part 6, A.14-A.17. Thus, even if Citizens’ allegations were correct (which, as described in Section C above, they are not), there would be no significant safety issue.

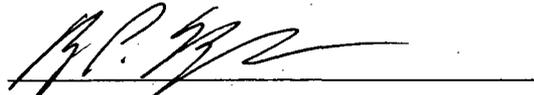
¹⁹ Emphasis added. See also *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-89-38, 30 N.R.C. 725, 734 (1989) (rejecting motion to reopen the record in part due to failure to include an affidavit); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-915, 29 N.R.C. 427, 431-32 (1989) (upholding the denial of another request to reopen the record in the same proceeding, because the petition contained no expert affidavit, only a statement of the *pro se* petitioner’s opinion regarding the safety significance of the new information).

²⁰ As explained in Section C above, Citizens’ Motion relies solely on counsel’s speculation regarding the meaning of the technical documents at issue. The affidavit requirement is intended, however, to avoid this problem by ensuring the reliability of the evidence used to support a motion to reopen the record. See *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 N.R.C. 1361, 1367 n.18 (1984). Even in the single case cited by Citizens, the Board “recognize[d] the importance of the affidavit requirement” but rejected the motion to reopen on other grounds. *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), LBP-01-01, 53 N.R.C. 75, 78 (2001).

III. CONCLUSION

For the reasons set forth above, Citizens' Motion should be denied in its entirety.

Respectfully submitted,



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Dated in Washington, D.C.
this 5th day of November 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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In the Matter of:)
)

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

Docket No. 50-219

AFFIDAVIT OF JON R. CAVALLO

City of Portsmouth)

State of New Hampshire)

Jon R. Cavallo, being duly sworn, states as follows:

INTRODUCTION

1. This Affidavit is submitted to support AmerGen Energy Company, LLC's Answer Opposing Citizens' October 26, 2007 Motion to Strike ("Citizens' Motion"). The purpose of my Affidavit is provide information regarding the containment liner coating at the Oconee Nuclear Station to demonstrate that: (1) the Oconee coating condition identified by Citizens was not an "end of life" failure, but was due to improper application; (2) the Oconee containment liner coating is not "similar" to the multi-layered epoxy coating system used on the exterior of the Oyster Creek Nuclear

Generation Station (“OCNGS”) drywell shell in the sand bed region; and (3) nothing identified by Citizens calls into question the accuracy of my previous testimony.

2. My education and experience are already in the record of this proceeding, having been submitted as part of Applicant’s Exhibit D.
3. I have reviewed the following documents submitted or referenced by Citizens.
 - Citizens’ Motion to Strike Erroneous Testimony (Oct. 26, 2007);
 - NRC Office of Inspector General (“OIG”) Audit of NRC’s License Renewal Program, pages 21-23;
 - Oconee Nuclear Station – Integrated Inspection Report dated April 26, 2004;
 - Oconee Nuclear Station – Final Significance Determination – Integrated Inspection Report dated July 23, 2004;
 - Oconee Nuclear Station, License Renewal Application, page 2.3-6;
 - Oconee Nuclear Station Corrective Actions for Generic Letter 2004-02, pages 56-57.
4. I am very familiar with the Oconee Nuclear Station containment liner coatings.

Specifically,

- During 2004 and 2005, I conducted an in-depth documentation review and visual examination of the containment liner coatings at Oconee. I examined the condition of all containment coatings at Oconee and assessed the potential for and/or reasons for the degradation of these coatings.
- During my 2004-2005 investigations, I investigated the original containment coating work at Oconee and the condition of the coating over time.

OPINIONS OF JON R. CAVALLO

5. The Oconee Nuclear Station containment liner coating is not “similar” to the epoxy coating system used on the OCNGS drywell shell exterior in the sand bed region, for the following reasons:

- The OCNGS drywell sand bed coating system is a three-coat, 100-percent solids epoxy coating system, manufactured by Devoe, while the Oconee containment

liner coating system, manufactured by Carboline, is a solvent-borne ethyl silicate inorganic zinc primer top-coated with a solvent-borne epoxy phenolic topcoat. The OCNGS Devoe epoxy coating system and the Oconee Carboline system are not comparable.

- Citizens have correctly stated, on page 2 of their Motion, that the Oconee containment liner coating system primer is an inorganic zinc primer. The OCNGS sand bed region epoxy coating system uses an epoxy primer.
 - The epoxy phenolic topcoat applied to the Oconee containment liners shrinks as it cures, due to evaporation of the formulation solvents. If the initial application of the zinc primer is too thick, or if other application-related problems occur, such as inadequate cure of the primer, then the top-coat shrink-stresses will leave the zinc primer susceptible to cohesive failure, resulting in potential cracking and peeling of the top-coat. In contrast, the epoxy coating system applied to the OCNGS drywell sand bed region is 100-percent solids epoxy, which does not shrink and, therefore, is not prone to this type of application-related failure.
6. The degradation experienced in the containment liner coatings at the Oconee Nuclear Station was not an “end of life” failure, but was due to improper application of the zinc primer.
- The term “end of life,” refers to the condition where the effects of aging alone render a properly applied coating system unable to perform its design functions.
 - Based on my investigations of the Oconee coating conditions, I have learned that the coating degradation identified at Oconee occurred in locations where the ethyl silicate inorganic zinc primer was improperly applied, *i.e.*, the primer layer was too thick, and in the case of the Unit 1 Polar Crane, the primer was inadequately cured. In locations where the zinc primer was prepared and applied correctly, no degradation has been observed. This is explained on pages 6 and 7 of a presentation given by the Oconee licensee to the NRC, a presentation that Citizens’ counsel cites on page 6 of Citizens’ Motion.
 - Based on my investigation of the Oconee coating systems, I determined that coating visual defects were present in the containment liner coatings prior to 1995, but plant procedures did not require formal documentation of such defects until 1995. The NRC did not require such documentation until even later, in 1998. Thus, Citizens’ statement that the Oconee “degradation was first observed in 1995” is unsupported by the evidence and incorrect.
 - Thus, the condition of the Oconee containment liner coatings was not an “end of life” failure. The condition developed progressively over many years, due to improper original application of the zinc primer.

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)	
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CERTIFICATE OF SERVICE

I hereby certify that copies of "AmerGen's Answer Opposing Citizens' October 26, 2007 Motion to Strike" and the "Affidavit of Jon R. Cavallo" were served this day upon the persons listed below, by e-mail and first class mail, unless otherwise noted.

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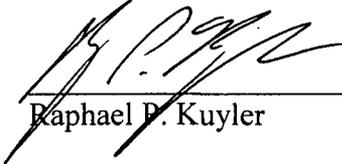
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