

November 9, 2007 (12:17pm)

**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 9, 2007

AmerGen Energy Company, LLC)

Docket No. 50-219

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

**AMERGEN'S ANSWER OPPOSING
CITIZENS' NOVEMBER 1, 2007 MOTION TO STRIKE**

I. INTRODUCTION

In accordance with 10 C.F.R. §§ 2.1204 and 2.323, 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 November 1, 2007 Motion to Strike AmerGen's Unauthorized Answer ("Citizens' Motion"). The Board should deny Citizens' Motion because Citizens' original demand was effectively a new procedural motion, and AmerGen had the right to respond.

¹ Memorandum and Order (Prehearing Conference Call Summary, Initial Scheduling Order, and Administrative Directives) (unpublished).

² Memorandum and Order (Prehearing Conference Call Summary, Case Management Directives, and Final Scheduling Order) (unpublished) ("April 17 Order").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. CITIZENS' DEMAND TO "HOLD THE PROCEEDING OPEN" CONSTITUTED A MOTION AND AMERGEN MUST BE PERMITTED TO RESPOND

Despite Citizens' representations to the contrary, their demand to hold the proceeding open was effectively a new motion, and AmerGen had the right to respond. AmerGen agrees with Citizens that the parties' proposed findings of fact and conclusions of law may suggest "ultimate conclusions" and request "substantive" relief from the Board,⁴ including proposals that the Board grant, deny, or condition the requested renewed license in its initial decision. The Board cannot, however, "hold the proceeding open" if it issues a full initial decision.⁵ Thus, Citizens' demand was, in effect, a new request for ancillary procedural relief hidden in their proposed findings. This is a request that would, at any other point in the proceeding, clearly require a motion and prior consultation with the parties pursuant to 10 C.F.R. § 2.323(b), so fundamental fairness dictates that AmerGen be given the opportunity to respond to this new demand for additional relief.⁶

Citizens' argument that the "Federal Rules of Civil Procedure allow a party to include alternative prayers for relief in their pleadings"⁷ is entirely off-point. Rule 8(a) and the associated case law cited by Citizens address pleadings.⁸ This rule gives a claimant the

⁴ Citizens' Motion at 2.

⁵ 10 C.F.R. § 2.340(a) ("[T]he presiding officer *shall make* findings of fact and conclusions of law on the matters put into controversy by the parties . . .") (emphasis added); *id.* § 2.1210(a) ("[T]he presiding officer *shall render* an initial decision after completion of an informal hearing . . .") (emphasis added). Once the Board issues an initial decision and a party appeals, the Board loses jurisdiction over the proceeding. *See Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), CLI-00-25, 52 N.R.C. 355, 357 n.3 (2000). If there is no appeal or Commission review, the Board's initial decision will become final agency action. 10 C.F.R. § 2.1210(a).

⁶ *E.g., Union Electric Co.* (Callaway Plant, Unit 1), ALAB-740, 18 N.R.C. 343, 349-50 (1983). Further, as explained in AmerGen's Answer Opposing Citizens' Demand to Hold the Proceeding Open (Oct. 22, 2007) ("AmerGen's Answer"), contrary to Citizens' allegation, AmerGen did not "fail[] to address" this issue in its conclusions of law—Citizens improperly demanded this additional procedural relief in theirs. AmerGen's Answer at 3-4.

⁷ Citizens' Motion at 3.

⁸ Fed. R. Civ. P. 8(a) ("General Rules of Pleading . . . Claims for Relief").

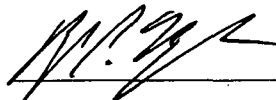
opportunity to request alternative relief *at the pleadings stage*.² No analogy can be drawn between Rule 8 and the current post-hearing stage of this administrative proceeding.

Citizens' Motion, is therefore, an unauthorized reply and a transparent attempt to rehabilitate their procedurally deficient demand to hold the proceeding open. It also serves to "prolong[]" the "motion practice" in this proceeding in a "frivolous" manner and "get[]" in the 'last word'" prior to a Board decision in this proceeding.¹⁰ There is no basis to strike AmerGen's Answer.

III. CONCLUSION

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

Respectfully submitted,



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² This argument also illustrates Citizens' confusion: proposed findings are not an opportunity to offer "pleas" for new relief unrelated to the litigated contention, but must address only issues properly in controversy at the hearing. See AmerGen's Answer at 2-4 (explaining that Citizens' demand is unrelated to the admitted contention); see also 10 C.F.R. § 2.1209 ("Each party shall file written post-hearing proposed findings of fact and conclusions of law *on the contentions* addressed in an oral hearing" (emphasis added); see also 10 C.F.R. § 2.340(a) ("[T]he presiding officer shall make findings of fact and conclusions of law *on the matters put into controversy by the parties*" (emphasis added). The "alternative" nature of Citizens' demand is irrelevant, because Citizens cite no law supporting their argument that proposed findings may request alternative procedural relief unrelated to the litigated contention.

¹⁰ Citizens' Motion at 3-5.

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Dated in Washington, D.C.
this 9th day of November 2007

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CERTIFICATE OF SERVICE

I hereby certify that copies of "AmerGen's Answer Opposing Citizens' November 1, 2007 Motion to Strike" were served this day upon the persons listed below, by e-mail and first class mail, unless otherwise noted.

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