

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
AMERGEN ENERGY COMPANY, LLC)	Docket No.
(Oyster Creek Nuclear Generating Station))	50-219-LR
)	
In the Matter of)	
)	
ENTERGY NUCLEAR OPERATIONS, INC.)	Docket Nos.
(Indian Point Nuclear Generating)	50-247-LR
Units 2 and 3))	and 50-286-LR
)	
In the Matter of)	
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ENTERGY NUCLEAR OPERATIONS, INC.)	Docket No.
(Pilgrim Nuclear Power Station))	50-293-LR
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In the Matter of)	
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ENTERGY NUCLEAR OPERATIONS, INC.)	Docket No.
(Vermont Yankee Nuclear Power Station))	50-271-LR
)	

NRC STAFF ANSWER TO PETITION FOR SUSPENSION OF LICENSE RENEWAL REVIEWS
PENDING INVESTIGATION OF NRC STAFF LICENSE RENEWAL PROCESS

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January 18, 2008

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c) and the Commission's January 11, 2008 Order,¹ the Staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby responds to "Petition by

¹ The Order states that the Petition is governed by 10 C.F.R. § 2.323, but because not all certificates of service indicated service by electronic mail, the deadline for answers to the Petition is January 18, 2008, to provide a uniform filing date in all four proceedings.

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; New Jersey Environmental Federation; Riverkeeper, Inc; Pilgrim Watch and New England Coalition ("Petitioners") to Suspend License Renewal Reviews for Oyster Creek, Indian Point, Pilgrim, and Vermont Yankee Nuclear Power Plants Pending Investigation of NRC Staff Review Process and Correction of Deficiencies" ("Petition") served January 3, 2008. For the reasons set forth below, the Staff submits that this joint Petition should be denied.

BACKGROUND

On January 3, 2008, Petitioners served the instant Petition on the parties to the Oyster Creek, Vermont Yankee, Indian Point and Pilgrim license renewal proceedings. The Petition was procedurally filed under 10 C.F.R. § 2.323, which governs motions in NRC adjudications. The Petition requests: (1) suspension of all aspects of the Oyster Creek, Pilgrim, Vermont Yankee, and Indian Point license renewal proceedings, including Staff technical reviews; (2) a comprehensive overhaul of the manner in which the Staff carries out license renewal reviews; and (3) reopening of the record in the Oyster Creek proceeding and in any other proceeding in which the record closes before final Commission resolution of this Petition so that revised safety reviews resulting from the overhaul can be used to form the basis of new contentions. Petition at 1-2. The Petition asserts that it is based upon three separate matters: (1) the NRC Office of Inspector General ("OIG"), *Audit of NRC's License Renewal Program* (OIG-07-A-15) (Sept. 6, 2007) ("OIG Report"); (2) a claimed inadequacy in the Oyster Creek license renewal safety evaluation; and (3) licensing board decisions in three Early Site Permit ("ESP") cases.

The proceedings that the petitioners seek to suspend are in differing stages of the license renewal application review and adjudication process. In the Oyster Creek proceeding,

the Board has issued its Initial Decision, and the intervenors in that proceeding² have filed an appeal of that decision. Citizens' Petition for Review of LBP-07-17 and Interlocutory Review of Decisions in the Oyster Creek Proceeding (Jan. 14, 2008); AmerGen Energy Company LLC (License Renewal for Oyster Creek Nuclear Generating Station), LBP-07-12, 66 NRC ____ (Dec. 18, 2007). In the Pilgrim proceeding, a hearing on the admitted contention is scheduled for April 2008. See Order (Revising Schedule for Evidentiary Hearing and Responding to Pilgrim Watch's December 14 and 15 Motions), Dec. 19, 2007 (unpublished). In the Vermont Yankee proceeding, three contentions propounded by New England Coalition, Inc. ("NEC"), have been admitted. A hearing on NEC's contentions will likely occur in 2008. The Indian Point proceeding is still in the very early stages, the Board having not yet ruled on the standing of parties and admissibility of contentions.

The OIG audit, which was conducted between March and December of 2006,³ only considered "draft" safety evaluations reports ("SER") for Oyster Creek⁴ and Vermont Yankee.⁵ The final SER for Oyster Creek – NUREG-1875 *Safety Evaluation Report Related to the License Renewal of Oyster Creek Generating Station* – was completed after the OIG audit in March 2007 and published in April 2007. The SER for Pilgrim – NUREG-1891 *Safety Evaluation Report Related to the License Renewal of Pilgrim Nuclear Power Station* – was completed in September and published in November 2007. The OIG Audit did not evaluate

² The six organizations, referred to collectively as "Citizens," are Nuclear Information and Resource Service (NIRS), 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.

³ OIG Report at 42.

⁴ "Safety Evaluation Report With Open Items Related to the License Renewal of Oyster Creek Generating Station" (August 2006).

⁵ Safety Evaluation Report With Confirmatory Items Related to the License Renewal of Vermont Yankee Nuclear Power Station (March 2007).

either the applications or the NRC license renewal audit, inspection, and SERs for Pilgrim and Indian Point. See OIG Report, Table 2, at 46. There is no final SER for Vermont Yankee, and, because the Staff's review has just begun, no SER has been issued for Indian Point.

DISCUSSION

I. The Petition is Procedurally Defective

A. The Necessary Legal Basis for Suspension is Lacking

Petitioners' request that the Commission suspend license renewal proceedings lacks the necessary legal basis. When determining whether to suspend a proceeding, the Commission considers "whether moving forward with the adjudication will jeopardize the public health and safety, prove an obstacle to fair and efficient decision making, or prevent appropriate implementation of any pertinent rule or policy changes." *Duke Energy Corp.*, (McGuire Nuclear Station Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-01-27, 54 NRC 385, 389-90 (2001).

The Commission considers suspension of proceedings a "drastic action" that is not warranted in the absence of "immediate threats to public health and safety." *Vermont Yankee Nuclear Power Corp. & AmerGen Vermont, LLC* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 173-174 (2000) (refusing to suspend license transfer proceeding). The Commission did not suspend adjudicatory proceedings pending the results of the agency's reexamination of its rules following the Three Mile Island accident. See *McGuire*, CLI-01-27, 54 NRC at 390 (referring to *Interim Statement of Policy and Procedure*, 44 Fed. Reg 58,559 (Oct. 10, 1979)). More recently, the Commission refused requests to suspend licensing proceedings pending review of security requirements following the terrorist attacks of September 11, 2001. See, e.g., *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Installation), CLI-02-23, 56 NRC 230, 240 (2002); *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 380 (2001); *McGuire*, CLI-01-27, 54 NRC at 389-90; *Duke Cogema Stone & Webster* (Savannah River

Mixed Oxide Fuel Fabrication Facility), CLI-01-28, 54 NRC 393, 399, *reconsid. denied*, CLI-02-2, 55 NRC 5 (2002).⁶

The Commission is reluctant to suspend proceedings in light of the “substantial public interest in efficient and expeditious administrative proceedings.” *Duke Energy Corp.* (Oconee Nuclear Station Units 1, 2 & 3), CLI-99-11, 49 NRC 328, 339 (1999).

Petitioners have not shown that moving forward with license renewal proceedings will jeopardize the public health and safety. Petitioners’ request relies, primarily, on the OIG Report as well as licensing board decisions in early site permit proceedings and commentary of Petitioners’ counsel on the Oyster Creek proceeding. Petition at 3. These do not demonstrate any potential threat to public safety, let alone a threat equivalent to the potential threats to public health and safety evidenced by the Three Mile Island accident or the terrorist attacks of September 11, 2001, two particularly significant events when the Commission nonetheless declined to suspend proceedings. Petitioners’ speculative safety concerns based on the OIG Report do not create the type of situation—more urgent than the terrorist attacks of September 11 or the Three Mile Island accident—which might justify suspension of license renewal proceedings, and so their request to suspend license renewal proceedings should be denied. Nothing in the OIG Report indicates a threat to public health and safety; rather, it recommends that the Staff improve its documentation in its safety reports.

⁶ The Commission has held its decision on appeal in abeyance as to one issue pending rulemaking that could assist the Commission in dispositioning the appeal. See *Philadelphia Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 & 3), *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 2), *Public Serv. Elec. & Gas Co.* (Hope Creek Generating Station, Units 1 & 2), CLI-83-14, 17 NRC 745 (1983). In so doing, however, the Commission “concluded that the licenses can be issued and remain in effect” pending final Commission resolution. *Id.* at 751. In addition, 10 C.F.R. § 2.802(d), which governs petitions for rulemaking, provides that a rulemaking petitioner “may request that the Commission suspend all or any part of any licensing proceeding to which the petitioner is a party pending disposition of the petition for rulemaking.” Here petitioners have specifically stated that they are not requesting a rulemaking. See Petition at 7. Thus the aforementioned case and rule are inapplicable.

Suspending license renewal proceedings would prove an obstacle to fair and efficient decision making. Petitioners assert that Staff review of license renewal applications is inadequate, but under the Commission's established case law, the adequacy of the Staff's review cannot be challenged in license renewal proceedings. See *Changes to Adjudicatory Process*, Final Rule, 69 Fed Reg. 2,182, 2,202 (Jan. 14, 2004) (citing Commission case law). Further, the Commission has stated that requiring that "the hearing process await completion of NRC Staff review would turn our adjudicatory process on its head" because "a petitioner has an 'ironclad obligation' to examine the application, and other publicly available documents, with sufficient care to uncover any information that could serve as the foundation for a contention." *Duke Energy Corp.* (Oconee Nuclear Station Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 338 (1999) (refusing a request to stay license renewal proceeding to allow petitioners time to review all requests for additional information ("RAI") issued by the Staff and all licensee responses to RAIs). Likewise, requiring license renewal proceedings to await the requested overhaul of the Staff license renewal review process and potential revision of license renewal SERs would turn the Commission's adjudicatory process on its head.

Finally, even if the Commission orders the requested overhaul, moving forward with license renewal reviews would not prevent appropriate implementation of any resulting policy changes, because the Commission has the authority to modify licenses by rule, regulation, or order when it finds that a modification is necessary to assure adequate protection of public health and safety or to bring a facility into compliance with a license or order or rule of the Commission. See *Diablo Canyon*, CLI-02-23, 56 NRC at 240; 10 C.F.R. § 50.109.

B. The Petition Does Not Satisfy Requirements for a Stay

The petitioners' request could also be analyzed using the stay factors in 10 C.F.R. § 2.342(e).⁷ See *Sequoyah Fuels Corp & General Atomics* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6 (1994) (analyzing a stay request filed pursuant to § 2.730 (now § 2.323) using the "general stay standards" in § 2.788(e) (now § 2.342(e)). Those factors are: (1) whether the moving party has made a strong showing that it is likely to prevail on the merits; (2) whether the party will be irreparably injured unless a stay is granted; (3) whether the granting of a stay would harm other parties; and (4) where the public interest lies. The most important of these factors is irreparable harm. *Sequoyah Fuels*, CLI-94-9, 40 NRC at 6. To obtain a stay, a party must show "imminent irreparable harm that is both 'certain and great.'" *Entergy Nuclear Vermont Yankee, LLC, & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237 (2006). Even "raising the specter of a nuclear accident does not demonstrate irreparable harm." *Id.* (quoting *Massachusetts Coalition of Citizens with Disabilities v. Civil Defense Agency*, 649 F.2d 71, 75 (1st Cir. 1981)). If there is no showing of irreparable harm, there must be an overwhelming showing of likely success on the merits. *Sequoyah Fuels*, CLI-94-9, 41 NRC at 6.

Petitioners are not entitled to a stay under the § 2.342(e) factors. Petitioners have not shown that they are likely to prevail on any contentions. Rather, petitioners speculate that they would file new contentions with the licensing board based on revised SERs resulting from the

⁷ Petitioner Riverkeeper is not eligible to file a motion to stay a proceeding because 10 C.F.R. § 2.342(a) states that only a *party* to a proceeding may request a stay. Riverkeeper has filed a petition to intervene in the Indian Point license renewal proceeding but has not been admitted as a party to that proceeding. Riverkeeper can only become a party upon a showing of standing and submission of an admissible contention. See *Entergy Nuclear Vermont Yankee, LLC, & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-07-13, 65 NRC 211, 214-15 (Mar. 15, 2007); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Unit 1), LBP-07-11, 65 NRC 41, 97-98 (2007) (holding that a petitioner that had not yet been admitted as a party could not request a stay). Thus, unless and until the Board admits at least one of Riverkeeper's contentions, Riverkeeper cannot request a stay.

requested overhaul of license renewal reviews. See Petition at 2. Petitioners have also not shown irreparable harm unless a stay is granted. Petitioners have not shown that the SERs for the above-captioned proceedings are or will be inadequate. Nor have they demonstrated any relationship between the alleged inadequacies in the SERs and the applicants' ability to conduct safe plant operations. They have neither shown that allowing these proceedings to continue poses risk to public health and safety nor demonstrated that any deficiencies in the SERs that might be discovered during the requested overhaul could not be rectified after the proceedings have concluded.

Refusing to grant a stay will not irreparably harm the petitioners because they either currently have, or already have had, the opportunity to challenge the adequacy of the license renewal application in each proceeding through submission of contentions. Since the "adequacy of the applicant's license application, not the NRC staff's safety evaluation, is the safety issue in any licensing proceeding," 69 Fed. Reg. at 2,202, continuation of the proceedings would not harm petitioners.

As to the third and fourth § 2.342(e) factors, the interest of the petitioners in a stay does not outweigh the harm to other parties and the public interest in efficient and expeditious administrative proceedings. The stay that petitioners request is of indefinite and uncertain duration, in sharp contrast to the public interest in efficient and expeditious administrative proceedings. The requested stay will harm the license renewal applicants by denying them determinations on their applications for an indefinite period.

C. The Petition is Untimely

Petitioners claim to be filing this Petition pursuant to 10 C.F.R. § 2.323, which governs the filing of motions in Commission adjudicatory proceedings. That regulation states that “[a] motion must be made no later than ten (10) days after the occurrence or circumstance from which the motion arises.”⁸ The Petition was filed on January 3, 2008. The “occurrence or circumstance” from which the Petition arises, therefore, must have taken place between December 24, 2007, and January 3, 2008. Otherwise, the Petition would be untimely under § 2.323.

The Petition asserts that it is based upon three separate matters: (1) the OIG Report; (2) a claimed inadequacy in the Staff’s Oyster Creek SER that, according to the Petition, supports the OIG Report’s conclusions; and (3) decisions in the three Early Site Permit (“ESP”) cases that the Board has adjudicated thus far, which, according to Petitioners, also support the OIG Report’s conclusions. None of these “bases” for the Petition is an “occurrence or circumstance” that took place during the ten-day period prior to January 3, 2008. The OIG report was issued on September 6, 2007, nearly four months prior to January 3; the Oyster Creek SER was issued in March 2007, over nine months prior to January 3, 2008; and the most recent of the Board’s ESP decisions – *Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), LBP-07-09, 65 NRC 539, 563 (2007) – was issued on June 29, 2007, which was over six months prior to January 3. Accordingly, the Petition is untimely.

⁸ Section 2.323(b) requires that the moving party make a sincere effort to contact other parties in the proceeding in order to resolve the issue or issues to be raised in the motion, and that each motion contain a certification by the moving party that such an effort has been made. Section 2.323(b) further provides that if a motion fails to provide such a certification, it must be rejected. Petitioners made no effort to contact the parties to the above-caption proceedings and have not provided justification for that failure.

D. Petitioners Have Not Met the Standard to
 Reopen the Records in License Renewal Proceedings

Petitioners request that the Commission reopen the record in Oyster Creek⁹ and in any other proceeding in which the record closes before final Commission resolution of this Petition, so that any revised safety reviews resulting from the requested Commission overhaul of the license renewal review process can form the basis of new contentions to the Atomic Safety and Licensing Board. Petition at 2. Petitioners have not met the standard for reopening the record.

A motion to reopen the record must meet the following criteria:

- (1) The motion must be timely. However, an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented.
- (2) The motion must address a significant safety or environmental issue, and
- (3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

10 C.F.R. § 2.326(a). *See also Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit No. 3), LBP-01-01, 53 NRC 75, 78, 79 (2001). Furthermore, the motion must be accompanied by affidavits, given by competent individuals with knowledge of facts alleged or by experts in the discipline appropriate to the issue, setting forth the factual or technical basis for the movant's claim. *See* 10 C.F.R. § 2.326(b). The basis provided to support the conclusion must be something "other than the opinion of counsel." *See Northeast Nuclear Energy Co.*, LBP-01-01, 53 NRC at 80. Petitioners did not submit affidavits. Even if the Commission were to overlook the affidavit requirement of § 2.326(b), however, the three regulatory criteria would

⁹ The intervenors in the Oyster Creek proceeding attempted to raise some of the specific content in the OIG Report as material and relevant to the record for the Oyster Creek proceeding. *See* Motion to Strike Erroneous Testimony (Oct. 26, 2007). The Board found the intervenors' arguments were substantively baseless. *See Oyster Creek*, LBP-07-17, 66 NRC ____ (slip op. at 55). Moreover, in its recent appeal to the Commission, the Oyster Creek intervenors elected not to appeal the Board's determination on this point.

still apply. Speculation by Petitioners' counsel that an overhaul of the license renewal review process, and any revised SERs that are issued as a result, might facilitate the filing of new contentions does not demonstrate that materially different results would occur, or be likely to occur. Therefore, Petitioners' request for reopening of the record should be denied.

II. The Relief Requested is Beyond the Scope of These Adjudicatory Proceedings

Not only does the Petition contain a number of legal and procedural defects, it also requests relief that cannot be obtained in an adjudicatory proceeding.¹⁰ The Petition recommends that the Commission, in response to this OIG report,¹¹ "conduct a comprehensive overhaul" of Staff license renewal application reviews and suspend all pending license renewal reviews and proceedings until this overhaul is complete.¹² The primary justification for the suspension request is not that petitioners have identified any particular deficiencies in any of the specific license renewal applications for which proceedings are pending; rather, petitioners

¹⁰ The Staff notes that the Petitioners refer to their petition as a "general motion" citing *Diablo Canyon*, CLI-02-23, 56 NRC at 230, 236-373. The Commission's use of the term "general motion" in *Diablo Canyon* appears to have been simply another way of stating that the petition in that case was being analyzed as an ordinary adjudicatory motion (rather than as a petition for rulemaking or enforcement). See CLI-02-23, 56 NRC at 237 (referencing, as authority for "general motions," only 10 C.F.R. § 2.730 – the precursor to current regulation 10 C.F.R. § 2.323 – which governs motions in NRC adjudicatory proceedings generally). Thus, the instant Petition referred to by Petitioners as a "general motion" and citing to *Diablo Canyon* for support, is simply asserting that it is an adjudicatory motion being filed in the proceedings listed in the Petition's caption.

¹¹ The Petition also references some specific matters relating to the Oyster Creek license renewal proceeding, as well as certain Board findings in Early Site Permit cases, as providing further support for the general conclusions reached by the OIG Report. See Petition at 3.

¹² Specifically, the Petition requests an "overhaul" of the Staff's review processes, which would include, at minimum, the following six components: (1) a "comprehensive investigation" into the Staff's reviews conducted by an entity other than the Staff; (2) development and/or revision, with Commission oversight, of procedures to ensure independent verification by the Staff of "key applicant-supplied facts"; (3) development, with Commission oversight, of a quality assurance program for ensuring the sufficiency of Staff review of license renewal applications; (4) Commission oversight of the Staff's review of license renewal applications; (5) independent review by the Commission of the Staff's application review work to determine if required safety findings have sufficient basis; and (6) reopening of any license renewal proceedings whose records have closed by the time the Petition is finally resolved. Petition at 1-2.

argue that the NRC Staff's license renewal application review process *as a general matter* needs to be reassessed, and, if necessary, revised.

The requested "overhaul" is not an available form of adjudicatory relief in any of the license renewal proceedings included in the Petition's caption. NRC adjudicatory proceedings regarding license renewal applications are limited in scope. See *McGuire*, CLI-01-20, 54 NRC at 212. They seek to evaluate not agency practices, but the adequacy of the specific, individual license applications. See *Oconee*, CLI-99-11, 49 NRC at 334 (stating "that a petitioner may not demand an adjudicatory hearing to attack generic NRC requirements or regulations or express generalized grievances about NRC policies"). Accordingly, generic assessments of the agency's review practices must be left to other agency processes and avenues.¹³

The Commission was previously presented with a comparable request for generic relief during the Diablo Canyon Independent Spent Fuel Storage Installation ("ISFSI") licensing proceedings. In that case, petitioners requested that the Commission

(1) complete a comprehensive review of the adequacy of NRC safety requirements to protect against the terrorist threat [to ISFSIs]; (2) suspend the pending ISFSI license proceeding while the NRC conducts its review; (3) expand the scope of the pending proceeding to allow consideration of interim measures (if the Commission declines to suspend the proceeding); and (4) provide for public participation in considering new requirements.

Diablo Canyon, CLI-02-23, 56 NRC at 230, 236.

As in the instant Petition, the *Diablo Canyon* petitioners requested that the Commission suspend pending licensing proceedings while a generic issue relating to the review of the respective type of license application (in that case, ISFSI applications) was examined. The

¹³ For instance, the license renewal process could be revised generically through rulemaking, or through the other usual modes by which the NRC amends Staff policies and practices. Note, though, that the Petition explicitly asserts that it is *not* requesting a rulemaking. Petition at 7.

Commission refused to grant the non-adjudicatory aspects of the requested relief. The Commission held that, of the four requested forms of relief, only the request for a suspension fell within the scope of the *Diablo Canyon* proceedings. CLI-02-23, 56 NRC at 236. The other requested forms of relief were simply beyond the scope of the adjudicatory proceeding.¹⁴

Here, the only adjudicatory forms of relief that the Petitioners request are (1) the suspension of four pending license renewal proceedings and (2) the reopening of the record in at least one of those proceedings (to allow for the possibility that the requested “overhaul” of the Staff’s license renewal application review processes will yield new bases for contentions). As explained in previous sections of this answer, the Petition fails to satisfy the standards for both suspension and the reopening of closed adjudicatory records. What remains, therefore, are forms of relief that are not specific to the cases listed in the Petition’s caption and therefore the relief requested is beyond the scope of these adjudications.

Moreover, these remaining forms of relief are being sought not because of the contents of any particular renewal application or applications, but because of concerns about the Staff’s overall approach to *reviewing* license renewal applications. As the Board has previously held, “general attack[s] upon the methods used by the Staff to insure compliance with regulations . . . are not appropriate for resolution in a particular licensing proceeding.” *Commonwealth Edison Co.* (Byron Nuclear Power Station, Units 1 and 2), LBP-80-30, 12 NRC 683, 690 (1980). Similarly, the Commission has previously rejected, in a license transfer proceeding, arguments by intervenors that it characterized as “general attacks on the agency’s regulations and competence.” *Vermont Yankee Nuclear Power Corp. and AmerGen Vermont, LLC* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 165 (2000). Adjudicatory proceedings

¹⁴ The *Diablo Canyon* petition did contain specific security recommendations regarding ISFSIs, but rather than ruling on them when disposing of the petition, the Commission referred them to the Staff for consideration as part of the Staff’s ongoing reviews of security issues. CLI-02-23, 56 NRC at 236.

regarding specific license renewal applications are simply not the proper arena for determining whether the license renewal staff *as a whole* is doing its job properly.

According to the Petition, contentions are sometimes inspired by information revealed as a result of the Staff's SERs, and inadequate SERs might provide less aid in the development of contentions than would adequate SERs. Petition at 28-30. But the Petition here is making a practical observation; it is not identifying a substantive right.¹⁵ The mere fact that SERs can sometimes aid intervenors in the development of contentions does not mean that intervenors have a right to request that the Staff redo SERs so that the SERs will support development of contentions. Moreover, safety contentions must be filed long before the SER issues and the mere presence of information in an SER which gives rise to a late-filed contention does not by itself make that contention admissible. In fact, allowing such adjudicatory challenges to the Staff's preparation of SERs would pose a direct conflict with the licensing boards' lack of authority to direct the Staff in its preparation of SERs. See *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 2 and 3), LBP-83-36, 18 NRC 45, 48-49 (1983) ("Palo Verde").¹⁶ In other words, the petitioners are challenging SERs in adjudicatory proceedings, and by so doing, seek to have the Board direct the Staff's preparation of SERs.

¹⁵ Petitioners suggest that the adequacy of the Staff's review is material to the NRC's decision whether to issue a license (Petition at 8-9) and "inadequate" SERs deprive them of meaningful hearing rights (Petition at 28-29). Petitioners are correct that 42 U.S.C. § 2239(a) "prohibits the NRC from preventing all parties from ever raising in a hearing on a license decision a specific issue it agrees is material to the decision." *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 54 (D.C. Cir. 1990). However, the Commission has determined that the adequacy of Staff's review as documented in the SER is not material. See 69 Fed. Reg. at 2,202.

¹⁶ Note that the *Palo Verde* decision identified a distinction between (1) revising of an SER by the Board during the adjudication, and (2) exercising authority over the reviews that the Staff conducts when the Staff initially develops an SER. LBP-83-36, 18 NRC at 48-49. The Board reasoned that it was empowered to do the former, but not the latter, because the latter would intrude upon an area of the regulatory process that had been entrusted solely to the Staff. *Id.*

Finally, it should be noted that the two forms of requested relief which *are* ostensibly adjudicatory in nature – the requests for case suspension and record reopening – are essentially contingent upon the granting of the non-adjudicatory forms of relief being requested. After all, the duration of the case suspension envisioned by the Petition would presumably be driven by the duration and results of the requested license renewal review “overhaul.” And the stated purpose for reopening closed records is to allow for the admission of new contentions inspired by the revised SERs that petitioners expect would result from the “overhaul.” Without the “overhaul,” therefore, these two adjudicatory forms of relief are meaningless. This provides further grounds for rejecting the Petition’s request for case suspension and record reopening.

Consequently, Petitioner’s request for an overhaul of the Staff’s license renewal review process should be denied as beyond the scope of these adjudicatory proceedings.

III. Petitioners’ Demand for a Complete Overhaul is Unsupported

Even if the Petition were a procedurally viable motion requesting valid adjudicatory forms of relief, it would nonetheless merit denial. This is because its primary substantive claim – that the Staff’s license renewal safety reviews are “grossly inadequate” to meet statutory requirements – is founded upon mischaracterizations of the OIG report. The OIG Report, stated: “Overall, NRC has developed a comprehensive license renewal process to evaluate applications for extended periods of operation.” OIG Report at 7. Accordingly, neither the Petition, nor the OIG Report that prompted it, provides sound justification for ordering a “complete overhaul” of the Staff’s license renewal review process.¹⁷

¹⁷ The OIG has reviewed the Staff’s proposed response to the OIG Report’s recommendations and, with the exception of the recommendation related to the Backfit Rule, has concluded that the Staff’s proposed responses resolve the OIG Report’s recommendations. The Staff’s response to the OIG Report does not reflect the overhaul requested by the Petition. See Memo From Stephen Dingbaum, Assistant Inspector General for Audits, to Luis A. Reyes, Executive Director of Operations Re: Status of Recommendations: Audit of NRC’s License Renewal Program (OIG-07-A-15) (Jan. 7, 2008) *available* at ML080070247.

The Petition is based primarily on an inaccurate interpretation of the findings contained in the OIG Audit report issued in September 2007. Petitioners allege that the OIG Report reveals that safety reviews for license renewal conducted by the NRC Staff are grossly inadequate to satisfy the safety requirements of the AEA. Petition at 3 and 22. There is no merit to this claim. As documented in the OIG Report, the OIG found no structural or systemic defects in the license renewal review process. See OIG Report at 7. Although the OIG found some documentation issues and suggested improvements that would enhance the program, there is simply nothing in the OIG Report that would warrant the conclusion that the license renewal process needs a complete overhaul.

A. OIG Report Simply Indicates that Better Documentation
Would Enhance License Renewal Review Process

Petitioners allege that a comprehensive overhaul of the license renewal process is necessary to ensure compliance with the safety requirements of the AEA and to ensure that members of the public who request a hearing on license renewal applications are given an opportunity to be heard. Petition at 2. An overhaul of the license renewal process is not one of the recommendations set forth in the OIG Report.¹⁸

Petitioners' claim that the OIG Report indicates a problem with the license renewal review process more serious than a documentation problem is unfounded. The examples

¹⁸ OIG recommendations:

- License renewal reporting efforts need improvements
- Guidance for removing licensee documents from audit sites could be clarified
- Consistent evaluation of operating experience would improve NRC reviews
- More attention is needed to planning for post-renewal inspections
- License renewal issues need evaluation for backfit application

provided in the OIG Report involve documentation of the Staff's conclusions. See OIG Report at 7 (stating that the inadequate descriptions of audit methodology or support for conclusions is due to the fact that the Division of License Renewal "has not fully established report writing standards and does not have a report quality assurance process to ensure adequate documentation"). The OIG Report states that such documentation inadequacies "could" or "may" lead the reader to question whether NRC reviewers performed an independent review. Petitioners, however, fail to give proper weight to the fact that the OIG Report carefully uses words such as "could" and "may" when discussing the inadequate documentation in the license renewal reporting efforts. Further, when quoting from the OIG Report, Petitioners omit important qualifying language--language which makes clear that a lack of adequate documentation in the reporting efforts is the problematic portion in the license renewal process cited in the OIG findings. For example, in one of the quotations Petitioners omit the first part of a sentence where the OIG states: "NRC reviewers may have actually performed such an independent review. . ." but a comparison between the license renewal application and the audit report "may cast doubt. . ." on what NRC reviewers did to independently review the licensee's program. *Compare* Petition at 23 *and* OIG Report at 10.

Petitioners allege that the OIG Report's finding that, in 97% of the samples reviewed, the narrative portions of the reports are nearly identical to the description in the license renewal application shows that the NRC Staff failed to conduct an independent review.¹⁹ Petitioners'

¹⁹ This 97% figure is based upon review of only a small portion of each SER. The OIG only looked at the operating experience element of eleven aging management programs that were common to most of the SERs reviewed. See OIG Report at 45 n.25. License renewal applicants have upwards of three times that many aging management programs. See e.g., Safety Evaluation Report With Confirmatory Items Related to the License Renewal of Vermont Yankee Nuclear Power Station" (dated March 2007) at 3-7 to 3-10 (listing 39 aging management programs); "Safety Evaluation Report With Open Items Related to the License Renewal of Oyster Creek Generating Station" (dated August 2006) at 3-7 to 3-12 (listing over 40 aging management programs). Thus, the OIG reviewed only a small portion of each SER. Moreover, the Oyster Creek SER is replete with numerous references and discussions regarding Operating Experience that was considered by the Staff. Furthermore, regional inspectors (continued. . .)

allegation lacks merit. The OIG Report reflects that the license renewal review process must be strengthened in the reporting area because using a cut and paste approach does not inspire confidence that the Staff conducted a rigorous independent review as expected. Nevertheless, similarity between license renewal applications and SERs is to be expected. NUREG-1801, Rev. 1 *Generic Aging Lessons Learned (GALL) Report* (Sept. 2005), as a guidance document, includes a way of meeting the Commission's license renewal requirements that the Staff has found acceptable. In many instances licensees claim consistency with GALL, incorporating the technical justifications, operating experience, etc. contained in GALL into their own applications. Thus, when an applicant includes the GALL information in its application, and the Staff repeats this information in its SER, the Staff is repeating its own guidance.

Further, final SERs for Oyster Creek and Pilgrim were completed after the OIG audit, Pilgrim is not mentioned in the Report, a final SER for Vermont Yankee has not yet been issued, and no SER has been issued for Indian Point because the Staff review has just begun. The OIG stated that the Report "presents findings related to the sample only and does not extrapolate results from the sample to the entire universe of renewal reviews." OIG Report at 45 n.24. Therefore, the OIG Report does not demonstrate that 97% of the SERs for any of the plants at issue in the instant proceedings are cut-and-pasted from the applications. Any claim based on the OIG Report that the final Vermont Yankee and Indian Point SERs will be inadequate is speculation.

(. . .continued)

perform inspections to independently verify the accuracy of the information in the license renewal application, including operating experience, and the inspections are documented. See e.g. Oyster Creek Generating Station-NRC License Renewal Inspection Report 05000219/2006007 (Sept. 21, 2006).

B. Staff Review Methodologies Already Exist

Petitioners' assertion that failure to describe audit methodologies is a fatal flaw in the license renewal process is incorrect. Although OIG auditors found that the Staff failed to consistently provide adequate descriptions of audit methodology or support for staff conclusions in "license renewal reports," OIG Report at 7, adequate review methodologies exist that support the Staff's conclusions. The methodologies the Staff uses in the license renewal review process are described in detail in such documents as the GALL Report and NUREG-1800 *Standard Review Plan for Review of License Renewal Applications for Nuclear Power Plants (SRP-LR)* (Sept. 2005). Thus, a reasonable reading of the OIG Report is that the NRC's license renewal reviewers could improve their reporting efforts by simply providing appropriately placed citations to the established methodologies in the SERs.

C. Review and Verification of Licensee-Supplied Operating Experience is Adequate

Petitioners claim the OIG auditors found that in 76% of the report samples it reviewed the Staff failed to provide any substantive NRC comments about operating experience. Petitioners claim this finding is evidence of a problem in the license renewal review process serious enough to require a complete overhaul of the license renewal review process. There is no merit to this claim. The OIG Report cites this finding to support its conclusion that adequate guidance should be produced in order to improve the license renewal review process and as support for its recommendation that consistent evaluations of operating experience would improve NRC reviews. OIG Report at 18-19. Since there is no indication in the OIG Report that the auditors viewed the problem of verifying operating experience as being serious enough to require a complete overhaul of the process, petitioners' claim is unfounded and simply a mischaracterization of what the OIG findings actually indicate. Furthermore, it is the Commission's "longstanding regulatory practice [to] only verify[] facts as necessary based on expert judgment." *Exelon Generating Co. LLC*, (Early Site Permit for Clinton ESP Site), CLI-07-

12, 65 NRC 203, 208 (Mar. 8, 2007) (dismissing the license board's concerns about the Staff's audit methods for verifying information submitted by applicants).

IV. Arguments Concerning the Oyster Creek License Renewal Proceeding Do Not Support Petitioners' Request for Overhaul of the License Renewal Review Process

Petitioners' argument that the Staff's failure to "independently verify whether [Oyster Creek] was fulfilling its commitments to maintain plant equipment" evidences the need for an overhaul of the license renewal process lacks merit. Petition at 17. This argument amounts to an assertion that the scope of license renewal review, as defined in 10 C.F.R. § 54.4, should be expanded. The Commission has limited the scope of license renewal reviews to "plant structures and components that will require an aging management review for the period of extended operation and the plant's systems, structures and components that are subject to an evaluation of time-limited aging analyses." *Duke Energy Corp.*, (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-01-20, 54 NRC 211, 212 (2001). The scope of license renewal reviews is limited because "[l]icense renewal reviews are not intended to 'duplicate the Commission's ongoing review of operating reactors.'" *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 7 (2001) (citing Final Rule, "Nuclear Power Plant License Renewal," 56 Fed. Reg. 64,943, 64,946 (Dec. 13, 1991)). The adequacy of Oyster Creek's on-going commitment tracking system is not an aging management issue and thus is not within the scope of the Staff's license renewal review. Consequently, the Staff's alleged failure to investigate the licensee's operational commitment tracking system, which is not within the scope of license renewal review, does not support the Petition's request.

V. Early Site Permit Proceedings Do Not Support Petitioners' Request

Petitioners rely on licensing board decisions in ESP proceedings to support their request for an overhaul of the Staff's license renewal review process. See Petition at 19-21, 24-25. The board decisions cited by petitioners, however, do not support their request. Petitioners primarily

rely on statements in the initial decision on the Clinton ESP (*Exelon Generation Co. LLC* (Early Site Permit for Clinton ESP Site), LBP-06-28, 64 NRC 460 (2006)).²⁰ See Petition at 19-20. Specifically, the Petition references (1) Board criticisms about the thoroughness and consistency of the Staff's *documentation* of its ESP reviews; and (2) Board concerns about the Staff's audit method of fact verification. Petition at 19-20; LBP-06-28, 64 NRC at 474-75, 480-81, 492-93, 496.²¹ Although the Petition admits that neither of these concerns prevented the Board from making the findings necessary to authorize issuance of the ESP, Petition at 20, the Petitioner neglects to mention that the Commission subsequently found that the Board's concerns about the Staff's audit method for fact verification were unjustified. *Clinton ESP*, CLI-07-12, 65 NRC at 207-08. The Commission stated: "We consider our current regulatory approach, of relying on our licensees to submit complete and accurate information, and auditing that information as appropriate, to be entirely consistent with sound regulatory practice." *Id.* This is sound regulatory practice because information provided in all applications is provided under oath or affirmation and the Commission may revoke any license because of a material false statement. *Id.* at 208. Thus, the licensing board ESP decisions cited by the Petition do not support a conclusion that the drastic relief requested by Petitioners--suspension of license renewal reviews for an indefinite period of time--is warranted.

²⁰ The Petition also cites *Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), LBP-07-09, 65 NRC 539, 563, 599, 629 (2007) and *System Energy Res.* (Early Site Permit for Grand Gulf ESP Site), LBP-07-01, 65 NRC 27 (2007).

²¹ The Board, after expressing its concerns about the Staff's documentation, concluded that the problems identified "could have been avoided by a more detailed staff explanation of its analysis and reasoning." LBP-06-28, 64 NRC at 474-75. Thus, in the Board's view, the Staff's "analysis and reasoning" was not the problem; it just needed to be more thoroughly documented.

CONCLUSION

For the reasons set forth above, the Commission should deny the Petition.

Respectfully submitted,

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Dated at Rockville, Maryland
This 18th day of January 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
AMERGEN ENERGY COMPANY, LLC)	Docket No. 50-219-LR
)	
(Oyster Creek Nuclear Generating Station))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF ANSWER TO PETITION FOR SUSPENSION OF LICENSE RENEWAL REVIEWS PENDING INVESTIGATION OF NRC STAFF LICENSE RENEWAL PROCESS" in the above-captioned proceeding have been served on the following by electronic mail with copies by deposit in the NRC's internal mail system or, as indicated by an asterisk, by electronic mail, with copies by U.S mail, first class, this 18th day of January, 2008.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
ENTERGY NUCLEAR OPERATIONS, INC.)	Docket Nos. 50-247/286-LR
)	
(Indian Point Nuclear Generating)	
Units 2 and 3))	

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I hereby certify that copies of the foregoing "NRC STAFF ANSWER TO PETITION FOR SUSPENSION OF LICENSE RENEWAL REVIEWS PENDING INVESTIGATION OF NRC STAFF LICENSE RENEWAL PROCESS" have been served upon the following by electronic mail with copies by deposit in the NRC's internal mail system or, as indicated by an asterisk, by electronic mail, with copies by U.S mail, first class, this 18th day of January, 2008.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
ENTERGY NUCLEAR OPERATIONS, INC.)	Docket No. 50-293-LR
)	
(Pilgrim Nuclear Power Station))	
)	

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January 18, 2008

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
ENTERGY NUCLEAR VERMONT YANKEE,)	Docket No. 50-271-LR
LLC, and ENTERGY NUCLEAR)	
OPERATIONS, INC.)	
)	
(Vermont Yankee Nuclear Power Station))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF ANSWER TO PETITION FOR SUSPENSION OF LICENSE RENEWAL REVIEWS PENDING INVESTIGATION OF NRC STAFF LICENSE RENEWAL PROCESS" have been served upon the following by electronic mail with copies by deposit in the NRC's internal mail system or, as indicated by an asterisk, by electronic mail, with copies by U.S mail, first class, this 18th day of January, 2008.

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January 18, 2008