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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION**

In the Matter of:)	January 24, 2008
AmerGen Energy Company, LLC)	
)	Docket No. 50-219-LR
(License Renewal for Oyster Creek Nuclear)	
Generating Station))	
)	

**AMERGEN'S ANSWER OPPOSING CITIZENS' PETITION FOR REVIEW OF
LBP-07-17 AND THE INTERLOCUTORY DECISIONS IN THE OYSTER CREEK
PROCEEDING**

On January 14, 2008, Citizens¹ filed a Petition seeking Commission review of the Atomic Safety and Licensing Board's ("Board") Initial Decision ("LBP-07-17") in the Oyster Creek Nuclear Generating Station ("Oyster Creek") license renewal proceeding, certain earlier Board rulings that denied admission of late-filed contentions, and various procedural rulings ("Petition" or "Pet."). Citizens allege that the Board committed a variety of errors and that the Board's decisions cumulatively violate the Administrative Procedure Act ("APA"), Atomic Energy Act of 1954, as amended ("AEA"), and Citizens' Constitutional due process rights.² AmerGen Energy Company, LLC ("AmerGen") hereby opposes the Petition because it does not meet the Commission's standards for appellate review, and because it is based on gross, self-serving mischaracterizations of the record.

I. STATEMENT OF THE CASE

The sole admitted contention in this license renewal proceeding challenges the frequency of ultrasonic testing ("UT") in the "sand bed region" of the steel drywell containment shell during the period of extended operation. The drywell shell is shaped like an inverted light bulb,

¹ Citizens consist of 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 the New Jersey Environmental Federation.

² Pet. at 1-2, 6.

and is approximately 100 feet tall and 70 feet in diameter in its spherical section. The sand bed region is a small area near the base, between approximately elevations 8 feet 11 inches and 12 feet 3 inches.³ When the drywell was originally constructed, a bed of sand surrounded this region for purposes of structural support.⁴ Following the discovery of water leakage into the sand bed and subsequent corrosion of the drywell shell in the 1980s, however, the then-licensee removed the sand, eliminated the sources of leakage, cleaned the shell, coated the shell with an epoxy coating system, and took other corrective actions that arrested corrosion such that the drywell could continue to perform its intended safety functions.⁵

Citizens proffered multiple challenges to the effectiveness of these measures, but ultimately the Board admitted only one:

AmerGen's scheduled UT monitoring frequency in the sand bed region [during the period of extended operation] is insufficient to maintain an adequate safety margin. More precisely, ... the issue presented is whether, in light of the uncertainty regarding the existence vel non of a corrosive environment in the sand bed region ... AmerGen's UT monitoring plan is sufficient to ensure adequate safety margins.⁶

The Board—in a robust 58-page Initial Decision—concluded that Citizens' contention lacked merit, and found the testimony of AmerGen and NRC Staff witnesses to be more credible than the testimony of Citizens' sole expert—Dr. Rudolph Hausler.⁷ The Board's Initial Decision confirms that the drywell shell will continue to meet its intended safety functions during the

³ LBP-07-17, slip op. at 2-3 (Dec. 18, 2004).

⁴ *Id.*

⁵ *See id.* at 3-7. The Board's decision provides additional details on AmerGen's aging management program commitments for the drywell shell, including full scope sand bed region UT inspections at four-year intervals throughout the period of extended operation, visual inspections of the epoxy coating system, inspection of the seal at the junction between the sand bed region concrete floor and the drywell shell, and periodic inspection of the sand bed drains for the presence of water. *Id.* at 7-8.

⁶ Memorandum and Order (Denying AmerGen's Motion for Summary Disposition) at 2 (June 19, 2007) (unpublished) ("June 19 Order") (citations and internal quotations omitted).

⁷ *See* LBP-07-17, slip op, at 17, 22 n.22, 27 n.30, 28-31 & 31 n.33, 32 n.35, 33 n.36, 34, 38-46.

period of extended operation, as set forth in AmerGen's LRA and documented in the Staff's SER per 10 C.F.R. § 54.29.

The Board's Initial Decision rests upon multiple, independent bases. The Board inquired about the acceptance criteria for minimum thickness of the drywell shell in the sand bed region, and confirmed that they are part of the Oyster Creek current licensing basis ("CLB").⁸ The Board then held that the remaining available margin (between the existing shell thickness and the acceptance criteria) is not less than 0.064 inches.⁹ Having determined the acceptance criteria and remaining available margin, the Board then found multiple reasons why "there is no reasonable likelihood that corrosion will occur in the sand bed region during the renewal period":¹⁰

- First, "AmerGen has taken effective steps to eliminate a corrosive environment [*i.e.*, water] on the outer [drywell] wall";¹¹
- Second, "even if water were to leak onto that wall, the robust, triple-layered epoxy coating will protect the wall from corrosion";¹²
- Third, "there is no evidence of measurable past corrosion on the inner wall, nor does its benign environment pose a significant risk of future corrosion";¹³
- Fourth, "even assuming, arguendo that corrosion were to occur in the sand bed region during the renewal period, AmerGen's plan to take UT measurements every four years is sufficiently frequent to ensure an adequate safety margin will be maintained";¹⁴
- Fifth, "the available margin of 0.064 inch is based on UT measurements at the top of the sand bed region, which is the most heavily corroded area due to the presence of sand that retained the moisture and kept it in direct contact with the shell at the air/water interface. Because the sand has been removed . . . any future leakage will not be retained at the top of the region; rather, any leakage will drain to the bottom of the region where much less corrosion has occurred and where the available margin is at least 0.229 inch (*i.e.*, 300 percent greater than at the top)

⁸ *Id.* at 18-22.

⁹ *Id.* at 16.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 16-17.

¹⁴ *Id.* at 17.

thus increasing our confidence that the frequency of AmerGen's UT measurements will be adequate."¹⁵

Given the multiple independent factual bases for the Board's decision, there simply is no reason for the Commission to accept review of the Board's decision. Citizens have failed to demonstrate that any of these factual findings is clearly erroneous or that the Board's decision is contrary to established law, as required by Section 2.341(b)(4). Rather, Citizens' Petition mischaracterizes the record and raises disputes over determinations that are not material to the fundamental rulings of the Board.

As for Citizens' challenges to prior Board rulings that denied the admission of late-filed contentions, Citizens provide no legitimate justification to overturn those decisions.

Citizens' further arguments that the Board violated their APA and due process rights, in part by denying them use of Subpart G procedures, and then denying a Motion to cross-examine one of AmerGen's witnesses, are not timely and lack merit.

II. STANDARD OF REVIEW

Under 10 C.F.R. § 2.341(b)(4), the Commission *may* grant a petition for review of a Board decision if the petition raises a substantial question with respect to the following:

- (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) A substantial and important question of law, policy, or discretion has been raised;
- (iv) The conduct of the proceeding involved a prejudicial procedural error; or
- (v) Any other consideration which the Commission may deem to be in the public interest.

Citizens' Petition does not satisfy any of these standards. As discussed in Section III.B, below, Citizens have failed to demonstrate clear error in any of the Board's findings on material facts supporting its determination that the frequency of ultrasonic testing in the sand bed region

¹⁵ *Id.*

will be adequate. In challenging the Board's factual determinations, Citizens are faced with a deferential standard of review under Section 2.341(b)(4)(i):

[O]ur "standard of 'clear error' for overturning a Board factual finding is quite high." "A 'clearly erroneous' finding is one that is not even plausible in light of the record viewed in its entirety." . . . Thus, unless there is a strong reason to believe that in a particular case a board has overlooked or misunderstood important evidence, we will defer to its findings of fact.¹⁶

Many of Citizens' challenges involve disputes over the weight the Board accorded certain expert testimony. For these challenges, the Board is accorded the highest deference:

[W]here a Presiding Officer has reviewed an extensive record in detail, with the assistance of a technical advisor, the Commission is generally disinclined to upset his findings and conclusions, particularly on matters involving fact-specific issues or where the affidavits or submissions of experts must be weighed.¹⁷

As to the Board's conclusions of law, under Section 2.341(b)(4)(ii), the petitioner must show that there was "error of law or abuse of discretion" by the Board.¹⁸ The Commission "will reverse a licensing board's legal rulings if they are a departure from or contrary to established law."¹⁹ As discussed in Sections III.A and C, below, the Board's legal rulings are fully consistent with prior decisions of the Commission and the courts and with the Commission's regulations.

As to an appeal of a Board decision denying the admission of a contention, the

¹⁶ *Private Fuel Storage L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-19, 62 NRC 403, 411 (2005) (citing *Tenn. Valley Auth.* (Sequoyah Nuclear Plant, Units 1 and 2; Watts Bar Nuclear Plant, Unit 1; Browns Ferry Nuclear Plant, Units 1, 2, and 3), CLI-04-24, 60 NRC 160, 189 (2004)).

¹⁷ *Hydro Res., Inc.* (P.O. Box 777, Crownpoint, NM 87313), CLI-06-1, 63 NRC 1, 2 (2006); *see also La. Energy Servs., LP* (National Enrichment Facility), CLI-05-28, 62 NRC 721, 723 (2005). Although the Hydro Resources proceeding involved a single presiding officer and two special technical assistants, the same principle applies to this proceeding, which involved a three-judge panel, including one legal judge, one technical judge, and one judge with both legal and technical qualifications.

¹⁸ *USEC, Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 439 n.32 (2006).

¹⁹ *Tenn. Valley Auth.* (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 and 2; Browns Ferry Nuclear Plant, Units 1, 2, and 3), CLI-04-24, 60 NRC 160, 190 (2004) (internal quotations omitted).

Commission, “give[s] ‘substantial deference’ to our boards’ determinations on threshold issues, such as standing and contention admissibility.”²⁰ Under this deferential standard, and as explained in Section III.D, below, Citizens have not demonstrated that the Commission must revisit the Board’s denial of any of their numerous late-filed contentions.

Finally, Citizens now, after 18 months, appeal the Board’s selection of hearing procedures. As demonstrated in Sections III.E and F, below, that appeal is incurably late and the Board’s decisions were fully consistent with the applicable regulations, the APA, AEA, and Citizens’ Constitutional due process rights.

III. CITIZENS HAVE NOT DEMONSTRATED THAT COMMISSION REVIEW IS WARRANTED UNDER 10 C.F.R. § 2.341

A. The Board’s Interpretation of “Reasonable Assurance” Is Fully Consistent With Judicial and Commission Precedent (Citizens’ Issue D1)

Citizens claim that the Board erred in defining the term reasonable assurance, as found in 10 C.F.R. § 54.29(a). The Board found that the reasonable assurance standard is satisfied “based on sound technical judgment applied on a case-by-case basis.”²¹ Citizens argue that “‘reasonable assurance’ refers to the required degree of assurance that the ‘adequate protection’ standard contained in the [AEA] is met.”²² Thus, although Citizens seem to acknowledge that a preponderance of the evidence is sufficient to demonstrate reasonable assurance,²³ they believe that “reasonable assurance of adequate protection” requires a greater degree of proof than a preponderance of the evidence.²⁴ *Referencing their own Proposed Findings of Fact*, Citizens

²⁰ *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006) (citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 324 (1999); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-855, 24 NRC 792, 795 (1986)).

²¹ LBP-07-17, slip op. at 15.

²² Pet. at 3.

²³ *Id.* at 3-4 (citing *Commonwealth Edison Co.* (Zion Units 1 and 2), ALAB-616, 12 NRC 419, 421 (1980)).

²⁴ See Pet. at 4.

then assert that “[i]n general, courts have found that to be admissible in civil proceedings, scientific facts must be at least 95% certain” and that 95 percent confidence has been defined as the “equivalent” of reasonable assurance in other contexts.²⁵ Thus, Citizens conclude that “the Board erroneously “conflated” reasonable assurance with adequate protection by accepting AmerGen’s showing of compliance with various acceptance criteria by a preponderance of the evidence.”²⁶

This convoluted argument is contrary to clear Commission and Court of Appeals interpretations of “reasonable assurance” under the AEA and its implementing regulations. The Commission has ruled that an applicant is “not obliged to meet an absolute standard but to provide ‘reasonable assurance’ that the public health, safety and environmental concerns were protected, and to demonstrate that assurance ‘by a preponderance of the evidence.’”²⁷

In a more recent rulemaking, the Commission addressed—and rejected—the very argument that Citizens raise here:

[u]se of “reasonable assurance” as a basis for judging compliance was not intended to imply a requirement for more stringent analyses (e.g., use of extreme values for important parameters) or for comparison with a potentially more stringent statistical criteria [than mean values of calculations] (e.g., use of the 95th percentile of the distribution of the estimated dose).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Commonwealth Edison Co.*, ALAB-616, 12 NRC at 421 (citing *Consol. Edison Co. of N. Y.* (Indian Point Station, Unit No. 3), CLI-75-14, 2 NRC 835, 839 n.8 (1975)). Similarly, the Commission has ruled, with respect to an applicant’s financial qualifications, that “‘reasonable assurance’ does not mean a demonstration of near certainty It does mean that the applicant must have a reasonable financing plan in light of the relevant circumstances.” *Public Serv. Co. of N. H.* (Seabrook Station, Units 1 and 2), CLI-78-1, 7 NRC 1, 18 (1978).

The Commission does not believe that the NRC's use of 'reasonable assurance' as a basis for judging compliance compels focus on extreme values (i.e., tails of distributions)"²⁸

At least one Court of Appeals, interpreting the AEA, also did not include any requirement that reasonable assurance be demonstrated with 95% confidence. In *North Anna Environmental Coalition v. NRC*, an intervenor argued that "reasonable assurance of safety" required proof beyond a reasonable doubt.²⁹ The reviewing court rejected this view.³⁰

Moreover, Citizens' focus on only one aspect of AmerGen's aging management program ("AMP") is fatally myopic.³¹ Reasonable assurance is determined by an assessment of an AMP in its entirety, not by an exclusionary assessment of a single part or aspect thereof. The Board properly evaluated Citizens' contention in the larger context that the frequency of AmerGen's planned UT of the drywell shell in the sand bed region is only one *part* of AmerGen's overall AMP for the drywell shell.³² The Board found that AmerGen's AMP for managing corrosion in the sand bed region, taken as a whole, will provide the requisite reasonable assurance, and that AmerGen therefore has satisfied the applicable requirements of 10 C.F.R. Part 54.³³

Finally, Citizens mischaracterize Judge Baratta's "Additional Statement" and attempt to restyle it as a dissent, which it is not. Judge Baratta *concurrs with the majority*,³⁴ but expresses

²⁸ Disposal of High-Level Radioactive Wastes in a Proposed Geologic Repository at Yucca Mountain, Nevada, 66 Fed. Reg. 55,732, 55,739-40 (Nov. 2, 2001).

²⁹ 533 F.2d 655, 658 (D.C. Cir. 1976) ("Had the regulations been intended to require proof beyond a reasonable doubt we believe it would have been clearly so stated.").

³⁰ *Id.* at 667. The ASME Code, Section XI, Subsection IWE, which is the governing industry guidance on inspection and evaluation of the drywell shell, also contains no requirement that data be evaluated using a 95% confidence level. AmerGen Exh. C, Part 3, A.21.

³¹ Pet. at 4 ("the Board should have required a preponderance of the evidence to show *reasonable assurance of compliance* with all the acceptance criteria") (emphasis in original).

³² See LBP-07-17, slip op. at 15.

³³ See *id.* at 56-57.

³⁴ *Id.*, Additional Statement of Administrative Judge Anthony J. Baratta, Ph.D., at 1 ("Although I join with my colleagues in the previous decision in the main"), 4 ("While I concur with my colleagues that

(footnote continued)

the reservation that although “future corrosion was unlikely, it can not be ruled out. Thus, I consider it essential to have a conservative best estimate analysis of the drywell shell before entering the period of extended operation.”³⁵ In fact, AmerGen has committed to conduct such an analysis, including sensitivity analyses that Judge Baratta refers to in his Additional Statement.³⁶

Thus, Citizens have failed to demonstrate that the Board’s interpretation of the reasonable assurance standard in 10 C.F.R. § 54.29(a) is contrary to governing precedent or is a departure from established law.

B. The Board Appropriately Determined that the Frequency of Ultrasonic Testing in the Sand Bed Region Is Adequate (Citizens’ Issue D2)

Citizens dispute no less than ten of the Board’s factual findings, but they identify none that are clearly erroneous, and none that would alter the outcome of this proceeding. As explained in Section II above, the deference given the Board, as the primary fact-finding body, is at its highest when it is reviewing an extensive technical record and weighing the testimony of expert witnesses, as it did in this proceeding.

Citizens argue that the acceptance criteria, as defined by the Board, will not ensure compliance with the CLB, because if the drywell shell experiences additional corrosion that *uniformly* thins the shell to the minimum thickness values, then it would exceed the safety factor identified in the applicable ASME code.³⁷ This argument ignores the facts and the Board’s decision. The Board unambiguously concluded that the drywell shell is not in any danger of

further corrosion of the drywell is unlikely; . . .”), 6 (“While I concur with the majority with their findings of fact, . . .”).

³⁵ *Id.*, Additional Statement of Administrative Judge Anthony J. Baratta, Ph.D., at 4.

³⁶ *See* AmerGen Exh. 10, encl. at 11 (“The analysis will include sensitivity studies to determine the degree to which uncertainties in the size of thinned areas affect Code margins.”).

³⁷ *Pet.* at 7.

thinning to these minimum values at any location, let alone uniformly over the entire shell.³⁸

More importantly, the Board recognized that consistency with the acceptance criteria alone is not sufficient: “Oyster Creek’s CLB presently requires it to maintain a safety factor of 2.0 [in accordance with the ASME Code].”³⁹ It is unclear what material fact Citizens are attempting to dispute, because, as reiterated at the hearing, AmerGen has committed to perform a detailed, finite element analysis of the drywell shell prior to the period of extended operation, and has committed to report to the NRC and take corrective action should this analysis determine that the applicable ASME Code safety factors are not met.⁴⁰

Citizens also take issue with the Board’s finding that “no *data* has been presented to this Board indicating that such a large area [18 inches by 18 inches] in the sand bed region is degraded to 0.800 inches on average.”⁴¹ Citizens point to Dr. Hausler’s *testimony*, in which he alleged that AmerGen’s “assessment [in AmerGen Exh. 16] shows an area larger than 3 feet by 3 feet in Bay 1 that has an average thickness of 0.699 inches.”⁴² In fact, the Board found that the value in AmerGen’s Exhibit 16 is a conservative representation of four locally thinned points that intentionally ignores known thicker material in between those points.⁴³ Thus, the Board did not ignore any *data*. Rather, Citizens ignored the thickness of the shell between locally thinned

³⁸ See LBP-07-17, slip op. at 52-53 (concluding that any “future corrosion will not be significant in the thinnest, most corroded areas at the top of the sand bed region [but] will occur toward the bottom of the sand bed region, which experienced less historical corrosion”).

³⁹ LBP-07-17, slip op. at 20 n.20. Citizens also once again mischaracterize Judge Baratta’s Additional Statement: he did not state that “there is insufficient analysis to provide reasonable assurance that this requirement is met.” Pet. at 7. Rather, he “join[ed his] colleagues in the previous decision in the main” but, because he believed that future corrosion could not be entirely ruled out, expressed reservations “regarding whether the licensee has fully shown that there is reasonable assurance that the factor of safety required by the regulations *will be met throughout* the period of extended operation.” LBP-07-17, Additional Statement of Administrative Judge Anthony J. Baratta, Ph.D., at 1 (emphasis added).

⁴⁰ AmerGen Exh. 10, encl. at 11; Tr. at 810-13.

⁴¹ Pet. at 8 (quoting LBP-07-17, slip op. at 25 n.25) (emphasis added).

⁴² Citizens’ Exh. C.1, A7.

⁴³ LBP-07-17, slip op. at 27 n.30; *see also* Tr. at 500 (Polaski); Tr. at 502 (Tamburro).

areas. In sum, Citizens' argument disputes the Board's decision not to credit Dr. Hausler's testimony, a decision that the Commission accords great deference.⁴⁴

Third, Citizens accuse the Board of "fail[ing] to adjudicate the issue" of whether the ultrasonic testing ("UT") measurements taken at internal grids were "representative of all [b]ays."⁴⁵ This issue, like all of Citizens' challenges to the spatial scope of AmerGen's UT monitoring program in the sand bed region, is outside the scope of the admitted contention.⁴⁶ Nevertheless, the Board assessed the internal grid measurements in detail, including the methods used to select the measurement locations, and determined, based on a number of conservative assumptions, that the "sand bed region satisfies the acceptance criteria, and that there will be an available margin of at least 0.064 inch when Oyster Creek enters the renewal period."⁴⁷

Fourth, Citizens dispute the Board's determination that the UT measurements taken at external points were not representative of the overall shell thickness, in part because these points were ground by approximately 0.1 to 0.2 inches to allow proper readings to be taken from the UT probe.⁴⁸ Once again, Citizens cite only the hearing testimony and ignore the multiple bases of the Board's factual determinations, and mischaracterize the record. The Board based its conclusion that the external measurements could not be averaged (and, therefore, compared to the general buckling criterion) on the oral *and* written testimony of AmerGen and NRC Staff

⁴⁴ Moreover, there is no "burden" of demonstrating the precise "margin above the mean local area acceptance criterion" as Citizens' suggest. Pet. at 7. The applicant's burden is to show that there is "reasonable assurance that the Oyster Creek drywell shell will continue to perform its intended function consistent with the CLB during the period of extended operation." LBP-07-17, slip op. at 15.

⁴⁵ Pet. at 10.

⁴⁶ LBP-07-17, slip op. at 10 n.14.

⁴⁷ *Id.*, slip op. at 22-26.

⁴⁸ Pet. at 10; LBP-07-17, slip op. at 27 n.30.

witnesses.⁴⁹ Finally, contrary to Citizens' characterization, AmerGen's sur-rebuttal testimony did not "concede that the grinding did not cause significant bias in the external results."⁵⁰

Rather, the referenced testimony clarified that "[u]ltimately the question of whether these areas were 'overground' or not is significantly less important than the fact that they are biased thin when compared with the rest of the shell."⁵¹

Fifth, pointing to alleged inconsistencies in the testimony of an NRC Staff witness, Dr. Hartzman, Citizens challenge the Board's factual determination that the acceptance criteria are consistent with the applicable ASME Code safety factor of 2.0 for the refueling accident case.⁵² Again, Citizens mischaracterize the basis of the Board's factual determinations. Dr. Hartzman testified that *if* he accepted Dr. Hausler's contour plots as accurate, then the drywell shell would be at a thickness that correlates to slightly less than a safety factor of 2.0.⁵³ Dr. Hartzman concluded that this would be acceptable to the NRC because of all of the conservatism inherent in the underlying structural analysis.⁵⁴ As discussed in Section III.C below, the Board rejected Citizens' contour plots as reliable representations of the condition of the drywell shell, so the argument surrounding Dr. Hartzman's testimony is academic.⁵⁵

⁴⁹ LBP-07-17, slip op. at 27-28 & n.30. This testimony, in turn, was supported by AmerGen Exh. 27 at 15-16 (documenting the selection of locations for UT measurements) and AmerGen Exh. 16 at 101-102 (showing depth micrometer measurements of dimples at UT locations on the exterior drywell shell surface).

⁵⁰ Pet. at 11.

⁵¹ AmerGen Exh. C.1, Pt. 3, A.17.

⁵² Pet. at 11.

⁵³ Staff Exh. C, A.28 (errata); *see* Tr. at 449-51 (Hartzman).

⁵⁴ *See* Staff Exh. C, A.28 (errata); *see* Tr. at 432-33, 760-61 (Hartzman).

⁵⁵ Citizens' argument is irrelevant for another reason. AmerGen interprets the Oyster Creek CLB to require a safety factor of 2.0 for the refueling accident case. AmerGen Exh. C, Pt. 2, A.10; AmerGen Exh. C.1, Part 2, A.6; Tr. at 848 (Gallagher). The NRC Staff's alleged more lenient interpretation, therefore, is not material to the proceeding. Moreover, the Board's determination that the drywell shell currently has a safety factor greater than 2.0 was based not only on Dr. Hartzman's opinion, but also on the significant conservatism in the analysis that established the acceptance criteria in the early 1990s, on a more recent report by Sandia National Laboratories, and on the expert opinions of AmerGen witness Dr. Mehta—who

(footnote continued)

Citizens also express their bare disagreement with the Board over a number of other instances in which it found AmerGen and NRC Staff witnesses more credible than Dr. Hausler:

- i. Citizens disagree with the Board's decision to accord little weight to Dr. Hausler's speculation that defects discovered in the epoxy floor suggested that similar defects could appear on the drywell shell epoxy coating system.⁵⁶ Specifically, Citizens object to the Board's finding that "the degraded epoxy coating on the *floor of the shell exterior* was not designed to prevent moisture penetration."⁵⁷ This misrepresents the facts and the Board's language. The Board correctly described the function and design of the floor coating, and correctly distinguished that coating (which was designed to ensure proper drainage), with the shell coating (which is the barrier that has arrested the historical corrosion).⁵⁸
- ii. Citizens' legal counsel offers his own structural engineering opinion to dispute a Board finding, regarding the historical structural analyses, based on documentary evidence and the testimony of multiple expert witnesses.⁵⁹ This is clearly impermissible, as counsel cannot testify where his client did not even provide a structural expert during the proceeding.⁶⁰
- iii. Citizens resurrect an issue that the Board resolved based on Dr. Hausler's admission that his previous testimony was incorrect, and on the testimony of multiple expert witnesses.⁶¹
- iv. Citizens disagree with the Board's ruling that Dr. Hausler's concerns about ongoing trough deterioration were pure speculation.⁶²

Finally, Citizens allege "similar burden-shifting errors" in the Board's factual findings about the potential for future leakage, when the Board's decision rested upon documentary

was involved with the original structural analyses that were performed in the early 1990s. LBP-07-17, slip op. at 19 n.20.

⁵⁶ Pet. at 13. The Board based its determination that the epoxy coating system was not subject to "rapid deterioration" on "the persuasive testimony provided by the exceedingly knowledgeable and experienced witnesses on behalf of AmerGen and the NRC Staff." LBP-07-17, slip op. at 46.

⁵⁷ Pet. at 13 (citing LBP-07-17, slip op. at 46) (emphasis added).

⁵⁸ LBP-07-17, slip op. at 46 n.48; *see also id.* at 46 ("even if water were to leak onto the exterior wall of the drywell shell . . . the epoxy coating system will adequately protect that region against corrosion").

⁵⁹ LBP-07-17, slip op. at 22 n.22 (citing AmerGen Exh. 39; NRC Staff Exh. C.1, A.48; NRC Staff Exh. 6; Tr. at 403, 411-12 (Mehta), Tr. at 410-11 (Gallagher)). This issue also speaks to the derivation of the CLB acceptance criteria and is therefore outside the scope of issues Citizens may litigate in this proceeding. LBP-07-17, slip op. at 18 n. 19.

⁶⁰ *See* LBP-07-17, slip op. at 22 n.22.

⁶¹ Pet. at 13; LBP-07-17, slip op. at 32 n.35 (citing Tr. at 687 (Hausler) ("I don't think that condensation on the outside [of the drywell shell] is really a source of water that we might have to worry about.")).

⁶² Pet. at 13; LBP-07-17, slip op. at 34.

evidence and the written testimony of AmerGen's witnesses, which the Board credited over Dr. Hausler's speculation.⁶³

In sum, the Board's factual rulings regarding the existing condition of the drywell shell and the potential for corrosive conditions in the exterior sand bed region are fully supported by the record, and Citizens have in no way demonstrated that these rulings are clearly erroneous. Accordingly, the Commission should defer to the Board's factual findings on these questions.

C. The Board's Decisions Regarding Litigation of the Current Licensing Basis Were Fully Consistent With Commission Regulation and Precedent (Citizens' Issue D3)

Citizens challenge the Board's rulings with respect to the CLB on two fronts. First, Citizens argue that the minimum thickness "acceptance criteria" developed in the early 1990s "are not part of the CLB because they were only referred to in a reference to a reference and the work deriving them was not approved by the NRC Staff at the time they were allegedly added."⁶⁴ Second, Citizens allege that the Board "refused to consider contour plots" presented by Dr. Hausler that purportedly "compared the measured thickness of the [drywell shell] with the acceptance criteria."⁶⁵

As to the first argument, the Board's ruling is correct. Consistent with Commission precedent, including precedent *from this proceeding*,⁶⁶ the Board ruled that "Citizens may not challenge Oyster Creek's CLB in this proceeding."⁶⁷ The Board requested, and the NRC Staff and AmerGen provided, testimony on the development and documentation of the CLB

⁶³ Pet. at 13; LBP-07-17, slip op. at 35.

⁶⁴ Pet. at 15 (citing Citizens' Post-Hearing Proposed Findings of Fact and Conclusions of Law ("Citizens' Proposed Findings") at 58-65).

⁶⁵ *Id.*

⁶⁶ *Oyster Creek*, CLI-06-24, 64 NRC at 117-18 ("[R]eview of a license renewal application does not reopen issues relating to a plant's current licensing basis, or any other issues that are subject to routine and ongoing regulatory oversight and enforcement.").

⁶⁷ LBP-07-17, slip op. at 14 n.17 (citing *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 8-9 (2001)).

acceptance criteria because such information is a necessary “backdrop against which [the Board’s] subsequent finding regarding current available margin may be understood.”⁶⁸ In this respect, Citizens’ appeal simply repeats arguments that the Board properly rejected, in Citizens’ ongoing attempt to challenge NRC regulations set forth in 10 C.F.R. Part 54.⁶⁹

Citizens’ second argument mischaracterizes the Board’s reasons for rejecting Dr. Hausler’s contour plots. The Board found that the contour plots “are not reliable representations of the condition of the drywell shell, because they are based on the exterior UT measurements, which are significantly biased in the thin direction.”⁷⁰ The Board accorded the contour plots little weight because they ignore thickness data taken from the inside of the drywell shell, and they extrapolate thicknesses to areas where no data existed.⁷¹ Moreover, there is no contradiction between the Board’s decision to admit Dr. Hausler’s contour plots into evidence, and its decision to accord them little or no evidentiary weight.⁷² The Petition, therefore, presents no legitimate challenge to the Board’s factual finding, much less does it demonstrate that this determination was clearly erroneous, as required by 10 C.F.R. § 2.341(b)(4)(i).

⁶⁸ *Id.* at 18 n.19 (citing Tr. at 413 (Ashar); Tr. at 415 (Gallagher); Tr. at 448 (Hartzman); *see also* NRC Staff Exh. C.1, A.42; AmerGen Exh. C.1, Pt. 2, A.3. Moreover, Citizens’ presented arguments related to the development and establishment of the acceptance criteria. Citizens’ Proposed Findings at 58-65. Although AmerGen moved to strike such arguments, the Board did not exclude this information from its consideration. *See* LBP-07-17, slip op. at 53.

⁶⁹ Citizens also mischaracterize their own position before the Board, where Citizens acknowledged that the general thickness acceptance criteria (*i.e.*, a uniform thickness in the sand bed region of 0.736”) was approved by the NRC Staff; and was properly part of the CLB. Citizens’ Proposed Findings at 12 (“AmerGen has established that, on average, each Bay must be thicker than 0.736 inches”) Citizens challenged only the local area acceptance criteria (*i.e.*, 0.536” in an area shown on AmerGen’s Exhibit 11), which the Staff confirmed was part of the CLB because the Oyster Creek UFSAR explicitly incorporates by reference an Oyster Creek Technical Data Report on the drywell shell, which explicitly cites and relies upon structural analyses performed in the early 1990s. *See* LBP-07-17, slip op. at 19.

⁷⁰ LBP-07-17, slip op. at 28 n.30.

⁷¹ *See id.*

⁷² *See* Licensing Board Memorandum and Order (Ruling on Motion to Conduct Cross Examination and Motions in Limine) (Sept. 12, 2007) at 8 (unpublished) (denying AmerGen’s Motion in Limine with the observation that “with respect to Citizens’ and Dr. Hausler’s statements, the Board is fully capable of determining their reliability and the appropriate weight they should be accorded”).

D. The Board Correctly Denied Admission of Citizens' Multiple Late-Filed Contentions (Citizens' Issues P1, P2, and P3)

Citizens claim that the Board erred by rejecting Citizens' late-filed contentions as untimely, by prematurely adjudicating facts related to Citizens' challenges to AmerGen's quality assurance program, and by unduly restricting the scope of Citizens' admitted contention.⁷³ As explained in Section II above, the Commission gives substantial deference to a Board's determinations with respect to contention admissibility. Here, the Board's decisions are fully consistent with the requirements of 10 C.F.R. § 2.309, and Citizens have provided no reason to upset the Board's determinations on these issues.

Citizens once again mischaracterize the record regarding the untimely aspects of their July 25, 2006 contentions that the Board properly rejected. First, Citizens ignore the Board's rationale for rejecting their belated challenge to the acceptance criteria. As the Board explained, the acceptance criteria had been in effect for years, and had been used to evaluate the 1992, 1994, and 1996 UT results.⁷⁴ In fact, Citizens' Request for Hearing had identified the "minimum required" sand bed region thickness as 0.736 inches and contained other references to the acceptance criteria.⁷⁵ Thus, the Board properly rejected Citizens' untimely challenge to the acceptance criteria, filed some eight months after their Request for Hearing.⁷⁶

Second, as the Board fully explained, Citizens' June 23, 2006 challenge to the spatial scope of UT measurements also was late because it was not filed promptly after AmerGen's December 9, 2005 *license renewal* commitment to perform a one-time set of confirmatory UT

⁷³ Pet. at 15.

⁷⁴ *AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station) LBP-06-22*, 64 NRC 229, 238-39 (2006).

⁷⁵ *Id.* at 238.

⁷⁶ *See id.*

measurements, at the same locations tested in the 1990s.⁷⁷ *Because Citizens' argued, incorrectly, that the December 9 commitment "did not specify . . . where the measurements would be carried out," the Board also based its ruling on the fact that Citizens' had been aware, prior to their Request for Hearing, of the locations of drywell UT testing during the 1990s.*⁷⁸ There simply is no inconsistency between this ruling and a later Board decision that Citizens could not challenge the adequacy of the "*interval between the 2006 UT monitoring and the next scheduled monitoring in 2008*" that AmerGen later committed to take, because these measurements would take place prior to the period of extended operations.⁷⁹

Further, Citizens' alleged "novel legal test" was, as the Board explained, fully supported by law and logic. "[I]f – as Citizens allege – AmerGen's *enhanced* [Protective Coating Monitoring and Maintenance Program ("PCMMP")] is inadequate, then AmerGen's *unenanced* monitoring program was a fortiori inadequate, and Citizens had a regulatory obligation to challenge it in their original Petition to Intervene."⁸⁰ Thus, an enhancement to an existing program is not "materially different than information previously available" that would permit the filing of a late-filed contention under 10 C.F.R. § 2.309(f)(2). Citizens have identified no legal authority that suggests otherwise.⁸¹

⁷⁷ *Id.* at 232-33; 250-51.

⁷⁸ *Id.* at 238, 251.

⁷⁹ Licensing Board Memorandum and Order (Clarifying Memorandum and Order Denying AmerGen's Motion for Summary Disposition) at 2 (July 11, 2007) (unpublished) (emphasis added) ("July 11 Order"). Moreover, Citizens presented testimony challenging the spatial scope of AmerGen's UT program, *see, e.g.*, Citizens' Exh. B, Attach. 3 at 5 ("[t]he location of these measurements is rather arbitrary"); Citizens' Exh. B, Attach. 4 at 10 (criticizing the scope of UT measurements based on contour plot results); Tr. at 590-92, and the Board did not strike this testimony. So, ultimately, the Board gave Citizens the opportunity to litigate this issue. *See* Licensing Board Memorandum and Order (Hearing Directives) at 1-2, Attach. A (Sept. 12, 2007) (unpublished).

⁸⁰ *Oyster Creek*, LBP-06-22, 64 NRC at 246 (citing *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 251 (2001)) (emphasis in original).

⁸¹ Further, although Citizens' Petition purports to show that the Board should have admitted "all" aspects of their July 25 Petition, Pet. at 16, Citizens' provide no further justification for their challenge to the Board's
(footnote continued)

Citizens' challenge to the Board's denial of their contention based on the Sandia Report⁸² attempts to rewrite history. Citizens claim that the "most important part" of this contention was "the need for an accurate realistic finite element analysis."⁸³ A review of the text of the proposed contention and Citizens' motion proffering that contention, however, reveals that the proposed contention focused entirely on challenges to the acceptance criteria and did not even mention the need for a new "finite element analysis" of the drywell shell.⁸⁴ Thus, the Board appropriately denied this late-filed contention, for the same reason that the Board denied Citizens' other belated challenges to the acceptance criteria.

Next, Citizens claim that the Board incorrectly excluded Citizens' quality assurance contention because AmerGen "consistently refused to provide the 1996 [UT] data to Citizens."⁸⁵ The Board dismissed this argument because Citizens failed to provide *any* additional specificity, support, or further explanation of this allegation.⁸⁶ Now, on appeal, Citizens attempt to provide some additional purported details related to this allegation, in a last-ditch effort to claim that the Board should have considered the unsupported statements and "construed the facts in favor of Citizens."⁸⁷ In doing so, Citizens have not provided any reason to overturn the Board's decision,

decision to exclude challenges to AmerGen's response to wet conditions and coating failure, so there is no reason for the Commission to review this aspect of the Board's decision.

⁸² Jason P. Petti, "Sandia Report: Structural Integrity Analysis of the Degraded Drywell Containment at the Oyster Creek Nuclear Generating Station" (January 2007), *available at* ADAMS Accession No. ML070120395 ("Sandia Report") (excerpts submitted as NRC Staff Exh. 6).

⁸³ Pet. at 18.

⁸⁴ Licensing Board Memorandum and Order (Denying Citizens' Motion for Leave to Add a Contention and Motion to Add a Contention) at 4 (Apr. 10, 2007) (unpublished) ("April 10 Order"); Citizens' Motion for Leave to Add and Motion to Add a Contention at 6 (Feb. 6, 2007).

⁸⁵ Pet. at 19.

⁸⁶ LBP-06-22, 64 NRC at 252 n.27.

⁸⁷ Pet. at 19.

because they may not rely on arguments that were not previously raised below.⁸⁸ Moreover, Citizens failed to pursue or challenge any alleged improper withholding of proprietary documents in a timely manner, as they failed to raise this issue before the Board until nearly a year after the alleged events took place.⁸⁹

This argument also ignores the other reasons the Board denied Citizens' quality assurance contention: (1) AmerGen's quality assurance program is excluded from the scope of license renewal review, and so the contention was outside the scope of the proceeding; (2) the contention relied upon "broad unsupported assertion[s]" that failed to raise a genuine dispute on a material issue of law or fact; and (3) it failed to reference any specific portion of AmerGen's license renewal application.⁹⁰

Citizens' allege "similar errors" by the Board in rejecting their late-filed contention regarding the embedded region of the drywell shell, located below the sand bed region.⁹¹ Citizens' original contention challenged AmerGen's UT program for "all levels of the drywell liner, including . . . the sand bed region . . . and that additional UT measurements be greatly expanded into areas not previously inspected."⁹² The Board, however, admitted a much narrower contention addressing only the sand bed region, excluding Citizens' challenges to the AMPs for the upper region of the drywell (*i.e.*, above the sand bed region) and the embedded

⁸⁸ *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant Independent Spent Fuel Storage Installation), CLI-03-12, 58 NRC 185, 191 (2003); *see also Hydro Res., Inc.* (P.O. Box 777, Crownpoint, NM 87313), CLI-06-29, 64 NRC 417, 421 (2006) ("The Commission deems waived arguments or legal theories not raised before a Presiding Officer or Licensing Board . . .").

⁸⁹ *See* Pet. at 19 ("Citizens made a request for the 1996 data to AmerGen on September 6, 2005," which was before there was an opportunity for hearing). Citizens raised this issue before the Board in their August 18, 2006 Reply to AmerGen's Answer to the Petition to Add a New Contention and Supplement Thereto. LBP-06-22, 64 NRC at 252 n.27.

⁹⁰ LBP-06-22, 64 NRC at 253.

⁹¹ Pet. at 18.

⁹² *AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), LBP-06-7, 63 NRC 188, 211 (2006) (emphasis in original).

region (*i.e.*, below the sand bed region), because Citizens failed to establish a genuine dispute on these issues.⁹³ Thus, Citizens had the opportunity to challenge these issues in a timely manner at the start of the proceeding, but failed to do so. Thus, the Board's decision to deny Citizens' late-filed contention on this issue was fully justified, and does not serve as a valid basis for Citizens' Petition.⁹⁴

Finally, Citizens complain that the Board thwarted their efforts to raise issues related to the derivation of the acceptance criteria, the methods for analyzing the UT results, and "additional uncertainties" that should be addressed in analyzing the UT results.⁹⁵ As explained above, the Board properly ruled that these issues are outside the scope of the admitted contention.⁹⁶ Further, Citizens raised these issues in their pre-filed written testimony and at the hearing, and the Board did not exclude these arguments from consideration.⁹⁷ Thus, Citizens' claim that they were precluded from raising these arguments below is disingenuous.

E. Citizens' Appeal of the Board's Selection of Hearing Procedures Is Incurably Late and Lacks Merit

Citizens argue that the Board's denials of their motions to apply Subpart G procedures and to cross-examine one of AmerGen's witnesses at the hearing violated the APA, the AEA, and Citizens' Constitutional due process rights.⁹⁸ The appeal of the Subpart G ruling is incurably

⁹³ *Id.* at 216 n.27, 217 n.28.

⁹⁴ Citizens' reliance upon another Board's decision in the Vermont Yankee license renewal proceeding is also misplaced. In *Vermont Yankee*, there was no dispute over whether the new contention was submitted in a timely manner after new and materially different information became available, so the language Citizens' rely upon to show a "sharp contrast" between the Boards was dicta. *Entergy Nuclear-Vt. Yankee* (Vermont Yankee Nuclear Power Station), LBP-07-15, slip op. at 8 (Nov. 7, 2007). And, as the Oyster Creek Board explained in its decision denying the Sandia contention, "the fact that a new document has come to light does not, in and of itself, satisfy section 2.309(f)(2). The information underlying any relevant conclusions in that document must also be new and materially different." April 10 Order at 6-7.

⁹⁵ Pet. at 19.

⁹⁶ LBP-06-22, 64 NRC at 237-40, 254-55; June 19 Order at 5; July 11 Order at 4.

⁹⁷ *E.g.*, Citizens' Exh C.1, A4; Citizens' Exh. B, A.16; Tr. at 562-64 (Hausler).

⁹⁸ Pet. at 21.

late, and both arguments lack merit because the Board's decisions were fully consistent with the governing regulations and were not prejudicial to Citizens. Moreover, Citizens have demonstrated no violation of the APA, AEA, or their due process rights.

Citizens' appeal of the Board's June 5, 2006 Subpart G Order⁹⁹ is 18 months late. Under 10 C.F.R. § 2.311(d), the deadline for filing such an appeal was June 15, 2006. The Petition does not address Citizens' egregious tardiness, and a reversal of this decision at this late date would significantly prejudice the other parties: AmerGen and the Staff (and the Board) have devoted extensive resources to prepare for and conduct this hearing under Subpart L.

Turning to the merits of Citizens' belated request to overturn the Board's selection of hearing procedures, Citizens have not shown that the Board committed any error, much less an error that ultimately prejudiced Citizens, pursuant to 10 C.F.R. § 2.341(b)(4)(iv).

Citizens also criticize the Board's Subpart G Order because "the Board erroneously and prematurely assumed that no fact witness would be presented by AmerGen."¹⁰⁰ This argument fails because it misconstrues 10 C.F.R. § 2.310(d), which permits use of Subpart G procedures "where the *credibility of an eyewitness* may reasonably be expected to be at issue." (Emphasis added.) The admitted contention is very technical in nature, and does not raise the issues that § 2.310(d) was intended to address.¹⁰¹ Subpart G procedures are not triggered merely because one party presents an eyewitness. Rather, the motive or intent of an eyewitness must be reasonably expected to be at issue. That was not the case here.

⁹⁹ Memorandum and Order (Denying NIRS's Motion to Apply Subpart G Procedures) ("Subpart G Order").
¹⁰⁰ Pet. at 23.

¹⁰¹ See Subpart G Order at 3 (citing Changes to Adjudicatory Process, 69 Fed. Reg. at 2222; *Entergy Nuclear Vt. Yankee, L.L.C.* (Vermont Yankee Nuclear Power Station), LBP-04-31, 60 NRC 686, 694 (2004)).

Citizens similarly complain that the Board erred in its Cross-Examination Order,¹⁰² because they allege that cross-examination of Mr. Tamburro was necessary to develop an adequate record.¹⁰³ Aside from vague references to “inconsistencies in his prior statements,” however, Citizens’ Petition identifies no specific inconsistencies in Mr. Tamburro’s statements.¹⁰⁴ Citizens also identify no specific aspect of the record that is inadequate, much less inadequate in a way that prejudiced the outcome of the proceeding. The Board is in the best position to determine where the record needs clarification, so cross examination is permitted *only* when the record would otherwise be inadequate.¹⁰⁵ And the Board’s Cross-Examination Order clearly demonstrates why Citizens’ request for cross-examination lacked merit.

Citizens also mischaracterize the record on this issue. Citizens first argue that the Board failed to probe alleged inconsistencies in Dr. Hartzman (NRC Staff) and Mr. Gallagher’s (AmerGen) statements.¹⁰⁶ As explained above, the Board examined Dr. Hartzman heavily during the proceeding on this very issue.¹⁰⁷ However, as described above, the Board did not rely solely upon Dr. Hartzman’s opinions in ruling on the current factor of safety for the drywell shell.¹⁰⁸ Citizens’ allegation, therefore, is incorrect and does not demonstrate a prejudicial procedural error.

The Petition’s allegation in footnote 15 regarding Mr. Gallagher’s testimony also mischaracterizes the record. First, it was Mr. Tamburro who made the statement about the effect

¹⁰² Licensing Board Memorandum and Order (Ruling on Motion to Conduct Cross-Examination and Motions in Limine) (Sept. 12, 2007) (unpublished) (“Cross-Examination Order”).

¹⁰³ Pet. at 23.

¹⁰⁴ See *id.*

¹⁰⁵ Cross Examination Order at 2 (citing Changes to Adjudicatory Process, 69 Fed. Reg. at 2196; *Citizens’ Awareness Network, Inc. v. NRC*, 391 F.3d 338, 351 (1st Cir. 2004) (“CAN”)).

¹⁰⁶ Pet. at 23.

¹⁰⁷ See, e.g., Tr. at 430-55; 751-62.

¹⁰⁸ LBP-07-17, slip op. at 19 n.20 (citing testimony of Dr. Mehta).

of grinding “100 miles” [sic] of metal from the exterior UT measurement locations, when those areas were prepared in the early 1990s, prior to application of the robust, three-layer epoxy coating.¹⁰⁹ More importantly, the very document which Citizens baldly allege “shows that [the testimony] is indeed without foundation,” actually supports Mr. Tamburro’s testimony.¹¹⁰

Finally, Citizens’ attempt to disparage Judge Abramson takes his remarks completely out of context.¹¹¹ This was not a jury trial where all evidence is presented to the jury at the trial itself. By the time of the oral evidentiary hearing in September 2007, the Board already had reviewed three rounds of pre-filed written testimony, consisting of hundreds of pages of direct, rebuttal, and sur-rebuttal testimony from each party, and over 130 admitted exhibits.¹¹² The purpose of the oral hearing was to allow the Board to ask questions “to clarify [the Board’s] view of the technical information that’s in front of [it].”¹¹³ Given the large volume of testimony provided prior to the evidentiary hearing, it is unsurprising that Board members would have formulated opinions about the merits of aspects of Citizens’ contention.

F. Issuance of the Renewed License Would Be Consistent with the APA and AEA

Finally, Citizens argue that because the Board failed to grant them the opportunity to cross-examine witnesses, and because of alleged inadequacies in the Board’s questioning of

¹⁰⁹ Tr. at 604-05 (Tamburro).

¹¹⁰ AmerGen. Exh. 16, at 101-102 (showing mean micrometer measurements of 131 mils and 118 mils at two locations in bay 13). In any case, Citizens had the opportunity, both at the hearing and in their Proposed Findings, to identify any alleged inconsistency in the testimony of AmerGen’s witnesses. Citizens failed to refute Mr. Tamburro’s testimony at the hearing, Tr. at 605, and failed to note any alleged inconsistency between AmerGen’s testimony and the micrometer readings in their Proposed Findings. Thus Citizens are, under the guise of arguing alleged failures in the Board’s examination of witnesses, attempting to correct their own mistakes and litigate factual “issues” that they failed to pursue below.

¹¹¹ Pet. at 23-24.

¹¹² LBP-07-17, slip op. at 10-12.

¹¹³ Tr. at 285 (Abramson); *see also* Changes to Adjudicatory Process, 69 Fed. Reg. at 2196 (“The presiding officer is ultimately responsible for the preparation of an initial decision . . . it would follow that the presiding officer is best able to . . . determine where the record requires further clarification or explanation in order to provide a basis for the presiding officer’s (future) decision.”); LBP-07-17, slip op at 12-13. In
(footnote continued)

witnesses, the Board violated the APA and Citizens' Constitutional due process rights. Citizens conclude that the NRC would violate the AEA if it issued the renewed license.

As explained above, the Board committed no prejudicial error in its selection of hearing procedures or in denying Citizens the opportunity to cross-examine witnesses. Further, as explained in Section III.B, above, the record belies any claim that the Board "seldom followed up" when clarification was required.¹¹⁴

Moreover, contrary to Citizens' suggestions, nothing in the *CAN* decision suggests that the Board violated the APA or AEA.¹¹⁵ *CAN* affirmed the principle that "the APA affords a right only to such cross-examination as may be necessary for a full and fair adjudication of the facts [and that] the party seeking to cross-examine bears the burden of showing that cross-examination is in fact necessary."¹¹⁶ Thus, *CAN* held that the Subpart L cross-examination rules were consistent with the APA.¹¹⁷ As shown above, the Board properly applied the Commission's rules for the selection of hearing procedures, and despite two opportunities, Citizens failed to meet their burden, under the Commission's regulations *and* the APA, of showing that cross-examination was necessary.

Citizens' argument that the Commission must grant them the opportunity for a hearing on all issues "material to safety" is also flawed.¹¹⁸ As explained above, the scope of license renewal proceedings is narrow, and the "review of a license renewal application does not reopen issues relating to a plant's current licensing basis, or any other issues that are subject to routine and

fact, under Subpart L, an oral hearing is not required, as the presiding officer may, with the consent of the parties, hold a hearing consisting of written submissions only. 10 C.F.R. § 2.1206.

¹¹⁴ See, e.g., Tr. at 430-55; 751-62.

¹¹⁵ Pet. at 22 (citing *CAN*, 391 F.3d at 350-51, 354).

¹¹⁶ 391 F.3d at 351.

¹¹⁷ *Id.*

¹¹⁸ Pet. at 24.

ongoing regulatory oversight and enforcement.”¹¹⁹ Thus, Citizens do not have the opportunity to litigate any issue that is “material to safety.”¹²⁰ Citizens cite *Union of Concerned Scientists v. NRC* (“UCS”), but at best, this case suggests that the NRC may not apply its rules “so as to prevent all parties from raising *a material issue*.”¹²¹ Thus, *UCS* does not prevent the Commission from excluding certain safety-related issues as *not material to a license renewal proceeding*, because those issues are addressed by ongoing regulatory oversight. Nor does *UCS* require the Commission to permit intervenors the opportunity to raise untimely contentions.¹²²

In sum, the Commission should affirm the Board’s decisions on the selection of hearing procedures because they were fully consistent with the APA and the Constitution, and issuance of the renewed license would be fully consistent with the AEA.¹²³

IV. CONCLUSION

For the reasons stated above, Citizens have not demonstrated that Commission review is warranted. The Board’s decisions regarding the definition of reasonable assurance, the exclusion of the CLB from litigation, the denial of late-filed contentions, and the selection of hearing procedures are fully consistent with legal precedent and the Commission’s regulations and involve no prejudicial procedural errors. None of the Board’s factual findings on the frequency of ultrasonic testing in the sand bed region is clearly erroneous. Accordingly, the Commission should reject Citizens’ Petition and affirm the Board’s Initial Decision.

¹¹⁹ *Oyster Creek*, CLI-06-24, 64 NRC at 117-18.

¹²⁰ *See* Pet. at 24.

¹²¹ 920 F.2d 50, 56 (D.C. Cir. 1990) (emphasis added).

¹²² *See id.* at 55 (“the Commission can certainly adopt a pleading schedule designed to expedite its proceedings”).

¹²³ Citizens present no legal support for their theory that Constitutional due process requirements prevent the Commission from renewing the Oyster Creek operating license “without full consideration of Citizens’ concerns that there is insufficient confidence that the reactor meets safety requirements designed to protect Citizens’ lives and property.” Pet. at 25. Accordingly, this argument must also be rejected.

Respectfully submitted,



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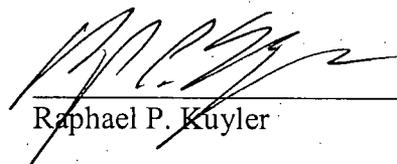
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