

January 25, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE COMMISSION

January 25, 2008 (4:50pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of)
)

AMERGEN ENERGY COMPANY, LLC)
(Oyster Creek Nuclear Generating Station))
_____)

Docket No.
50-219-LR

In the Matter of)
)
ENERGY NUCLEAR OPERATIONS, INC.)
(Indian Point Nuclear Generating)
Units 2 and 3))
_____)

Docket Nos.
50-247-LR
and 50-286-LR

In the Matter of)
)
ENERGY NUCLEAR OPERATIONS, INC.)
(Pilgrim Nuclear Power Station))
_____)

Docket No. 50-293-LR

In the Matter of)
)
ENERGY NUCLEAR OPERATIONS, INC.)
(Vermont Yankee Nuclear Power Station))
_____)

Docket No. 50-271-LR

**MOTION BY 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
FOR LEAVE TO REPLY TO OPPOSITIONS TO PETITION 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**

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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; (“Oyster Creek Organizations”); Riverkeeper, Inc. (“Riverkeeper”); Pilgrim Watch; and New England Coalition (“NEC”) (collectively “Petitioners”) hereby move for leave to reply to oppositions by the NRC Staff, Entergy Nuclear Operations, Inc. (“Entergy”), and AmerGen Energy Company, L.L.C. (“AmerGen”) (collectively “Respondents”) to Petitioners’ “Petition 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” (January 3, 2008; corrected January 11, 2008) (“Petition”).¹

While the Commission’s regulations in 10 C.F.R. § 2.323(c) do not permit the filing of replies to motions without permission from the Commission, Petitioners respectfully submit that this case presents the type of “compelling circumstances” which warrant a reply. First, the Petition is unusual both substantively and procedurally, and therefore Petitioners could not have anticipated all of the arguments that the Respondents would make in opposition. In particular, Petitioners could not have anticipated that Respondents would fault the Petition for its failure to comply with an array of procedural requirements that are not appropriate to apply to the Petition. In addition, Petitioners could not have reasonably anticipated the arguments that Respondents would make in order to

¹ NRC Staff Answer to Petition for Suspension of License Renewal Reviews Pending Investigation of NRC Staff License Renewal Process (January 18, 2008) (“NRC Staff Response”); Answer of Entergy Nuclear Operations, Inc. Opposing Petition to Suspend License Renewal Reviews and Proceedings (January 18, 2008) (“Entergy Response”); AmerGen’s Answer Opposing Petition for Stay and to Reopen the Record (January 15, 2008) (“Amergen Response”).

minimize the safety significance of the Inspector General Report that forms the basis for the Petition (Audit of NRC's License Renewal Program (*OIG-07-A-15*) (*September 6, 2007*) ("*OIG Report*")), or that Respondents would advocate a variety of inappropriate standards for invoking the Commission's supervisory authority over the license renewal process.

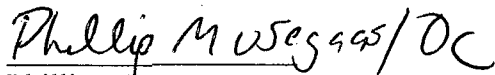
Second, Petitioners seek leave to reply to an incorrect factual assertion by Entergy Nuclear Operations, Inc. that each of the Petitioners has improperly sought to appear in proceedings to which they are not parties and in which they have not filed appearances. This mischaracterization of Petitioners' actions should be corrected to clarify that none of the Petitioners has sought to participate in a proceeding to which that petitioner is not a party or a petitioner. As set forth in the Petition at 4-6, the Oyster Creek Petitioners seek relief from the Commission only with respect to the Oyster Creek nuclear power plant, Riverkeeper seeks relief only with respect to the Indian Point nuclear power plant, Pilgrim Watch seeks relief only with respect to the Pilgrim nuclear power plant, and NEC seeks relief only with respect to the Vermont Yankee plant.

In conformance with 10 C.F.R. § 2.323, Petitioners sought the consent of the NRC Staff, Entergy and AmerGen to the filing of the attached Reply, but consent was denied by all three opposing parties.

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January 23, 2008



January 25, 2008

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**REPLY BY NUCLEAR INFORMATION AND RESOURCE SERVICE; JERSEY
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FOR ENERGY SAFETY; NEW JERSEY PUBLIC INTEREST RESEARCH
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ENGLAND COALITION
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REVIEWS FOR OYSTER CREEK, INDIAN POINT, PILGRIM, AND VERMONT
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TABLE OF CONTENTS

Table of Contents.....	i
Table of Authorities.....	ii
I. INTRODUCTION.....	1
II. ARGUMENT.....	2
A. Respondents Fail to Show an Investigation is Unwarranted.....	2
B. Respondents Fail to Show that Suspension of Licensing Renewal Reviews is Unwarranted.....	4
C. Respondents' Procedural Objections Are Without Merit.....	8
III. CONCLUSION.....	11

TABLE OF AUTHORITIES

ADMINISTRATIVE DECISIONS

Duke Cogema Stone and Webster (Mixed Oxide Fuel Fabrication Facility),
CLI-01-28, 54 NRC 393 *reconsid. denied*, CLI-02-2, 55 NRC 5 (2002).....7

Duke Energy Corp. (McGuire Nuclear Station, Units 1 &2); Catawba
Nuclear Station, Units 1 & 2), CLI-01-27, 54 NRC 385 (2001).....4, 6

Exelon Generating Company, L.L.C. (Early Site Permit for Clinton ESP Site),
CLI-07-12, 65 NRC 203(2007).....3

Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM),
LBP-98-9, 47 NRC 261 (1998).....7

Nuclear Fuel Services, Inc., (Erwin, Tennessee), LBP-03-01, 57 NRC 9 (2003).....7

Pacific Gas and Electric Company (Diablo Canyon Power Plant Independent
Spent Fuel Storage Installation), CLI-02-23, 56 NRC 230 (2002).....6

Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation),
CLI-01-26, 54 NRC 376 (2001).....6

Statement of Policy on Conduct of Adjudicatory Proceedings,
CLI-98-12, 48 NRC 18 (1998).....5

U.S. Army (Jefferson Proving Ground Site), LBP-04-01, 59 NRC 27 (2004).....7

Vermont Yankee Nuclear Power Corp. & AmerGen Vermont LLC
(Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151 (2000).....4

NRC REGULATIONS

10 C.F.R. § 2.323.....10

10 C.F.R. § 2.326.....9

NRC GUIDANCE DOCUMENTS

NRR Office Letter No. 805, License Renewal Application
Review Process (June 19, 1998).....3

MISCELLANEOUS

Audit of NRC's License Renewal Program (OIG-07-A-15) (September 6, 2007)....passim

Memorandum from William F. Kane, NRC Deputy Executive Director for Reactor and Preparedness Programs, to Stephen D. Dingbaum, Assistant Inspector General for Audits, re: Audit of NRC's License Renewal Program (OIG -07-A-15).....5, 6

Safety Evaluation Report Related to the License Renewal of Oyster Creek Generating Station (March 2007).....10

I. INTRODUCTION

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; (“Oyster Creek Organizations”); Riverkeeper, Inc. (“Riverkeeper”); Pilgrim Watch; and New England Coalition (“NEC”) (collectively “Petitioners”) hereby respond to oppositions by the NRC Staff, Entergy Nuclear Operations, Inc. (“Entergy”), and AmerGen Energy Company, L.L.C. (“AmerGen”) (collectively “Respondents”) to Petitioners’ “Petition 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” (January 3, 2008; corrected January 11, 2008) (“Petition”).¹ As demonstrated below, the Respondents have failed to show that the relief requested by Petitioners is unwarranted, or that the Petition is procedurally infirm. As demonstrated in the Petition, the results of the Office of Inspector General’s (“OIG’s”) 2007 audit regarding the NRC Staff’s license renewal process (*Audit of NRC’s License Renewal Program* (OIG-07-A-15) (September 6, 2007) (“OIG Report”)) demand further investigation by a body independent of the NRC Staff, and reform of the Staff’s review process. Meanwhile, to conserve the resources of the NRC and parties and to ensure the efficiency of the license renewal process, the Commission should suspend the pending license renewal proceedings.

¹ NRC Staff Answer to Petition for Suspension of License Renewal Reviews Pending Investigation of NRC Staff License Renewal Process (January 18, 2008) (“NRC Staff Response”); Answer of Entergy Nuclear Operations, Inc. Opposing Petition to Suspend License Renewal Reviews and Proceedings (January 18, 2008) (“Entergy Response”); AmerGen’s Answer Opposing Petition for Stay and to Reopen the Record (January 15, 2008) (“Amergen Response”).

Finally, the Commission should order the re-opening of the Oyster Creek adjudicatory record to protect the integrity of the hearing process. The Petition should be granted.

II. ARGUMENT

A. Respondents Fail to Show an Investigation is Unwarranted.

Respondents argue that the only problem revealed by the OIG Report is that the Staff did not adequately document its license renewal reviews, not that the quality of the reviews themselves was deficient. NRC Staff Response at 16-17, Entergy Response at 6-7. Their argument is incorrect in several respects. First, the OIG did indeed find that in spite of the conceded importance of operating experience to the license renewal review process, the NRC Staff often fails to review *or* audit licensees' operating experience. OIG Report at 18-23. Consequently, the OIG found that a majority of audit team members do not independently verify operating experience. Rather, they depend purely on information supplied by the licensee. *Id.* at 18. Thus, the problems discussed in the OIG Report are not limited to inadequate documentation.

Second, Respondents ignore the fact that the scope of the OIG Report did not include determining whether NRC Staff assertions in Safety Evaluation Reports ("SERs") were contradicted by actual conditions in nuclear plants. *See* Petition at 15 n.3. Nevertheless, the OIG stumbled upon a disturbing example of an NRC Staff assertion that was contradicted by plant conditions. *See* Petition at 14-15, citing OIG Report at 21-23. In addition, as Petitioners point out, the record of the Oyster Creek license renewal proceeding shows that the NRC Staff failed to independently verify whether the licensee was fulfilling its commitment to maintain plant equipment, a deficiency that has serious implications with respect to aging management. *See* Petition at 17-19.

Third, Respondents inappropriately minimize the significance of the lack of adequate documentation of the license renewal reviews. In particular, the NRC Staff asserts that there is nothing wrong with a circular process where licensees parrot generic NRC guidance and then the NRC Staff safety reviews cut and paste that guidance. NRC Response at 18. This is surprising because the safety reviews are supposed to check site specific compliance, or exceptions to compliance, against the generic guidance. Merely repeating the guidance is worse than not reporting at all because it provides no useful information at all about how the review was conducted at the particular plant under review, but gives the illusion of substantive reporting. Obviously, the NRC Staff would not accept an SER that was blank as adequate documentation. An SER that merely repeats generic guidance is equally inadequate.

The Staff's position is also surprising because NRC guidance provides that the Staff's "technical review" of an applicant's license renewal programs, plus "a series of on-site inspections," are "key elements" of a license renewal review. See Petition at 11, citing NRC Office Letter No. 805, *License Renewal Application Review Process*, Attachment 2 (*Guidelines for Technical and Process Lessons Learned for License Renewal*) at 2 (June 19, 1998). The technical review and inspections must be documented. See Petition at 12, citing NRC Office Letter No. 805. Without adequate documentation, the Commission has no supportable basis for concluding that nuclear plants can and will operate safely under renewed licenses.

Respondents err in citing the Commission's decision in *Exelon Generating Company, L.L.C.* (Early Site Permit for Clinton ESP Site), CLI-07-12, 65 NRC 203, 207-08 (2007) for the proposition that the NRC Staff is entitled to rely on licensee assertions

without verifying that they are correct. CLI-07-12's conclusion that it is appropriate for the Staff to generally accept the veracity of licensee assertions is premised on the assumption that the Staff has an effective program for selectively auditing those assertions. 65 NRC at 208. The OIG Report shows that the Staff failed to use the license renewal audit system in a systematic or effective manner, and therefore lacks a supportable basis for its reasonable assurance findings.²

B. Respondents Fail to Show that Suspension of Licensing Renewal Reviews is Unwarranted.

In contending that suspension of licensing proceedings is warranted only where there is an "immediate threat to public health and safety" (NRC Staff Brief at 4, citing *Vermont Yankee Nuclear Power Corp. & AmerGen Vermont LLC* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 173-74 (2000)), the NRC Staff contradicts itself and misconstrues Commission precedents. As the NRC Staff recognizes, it is also appropriate for the Commission to consider "whether moving forward with an adjudication will . . . prove an obstacle to fair and efficient decision making, or prevent appropriate implementation of any pertinent rule or policy changes." NRC Staff Response at 4 and 5, citing *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2); *Catawba*

² One of the flaws of the safety reviews is that they are not sufficiently thorough. For example, the NRC Staff does not deny that it failed to review the untracked historic commitments at Oyster Creek. Instead, the NRC Staff asserts without any support that review of these commitments at Oyster Creek was out of scope. NRC Staff Response at 20. This could only be true if these commitments were unrelated to aging management. In fact, a number of those commitments related to aging management of the drywell shell. Because NRC reviewers did not look deeper into the issue, neither Citizens nor the NRC Staff have any further information on the nature of the other untracked commitments. Although AmerGen has access to such information, it has failed to even argue that the untracked commitments are out of scope. Therefore, at this stage, the Commission cannot dismiss this safety issue as out of scope. Furthermore, the significance of this issue can only be determined by further investigation.

Nuclear Station, Units 1 & 2), CLI-01-27, 54 NRC 385, 389-90 (2001). In this case, it would be grossly unfair and inefficient to proceed with license renewal reviews that are facially inadequate to reasonably assure protection of public health and safety during license renewal terms for the Oyster Creek, Indian Point, Pilgrim and Vermont Yankee nuclear power plants. Because the Staff is now proposing new procedures and guidance for conducting future renewal reviews (*see* Memorandum from William F. Kane, NRC, to Stephen D. Dingbaum, OIG, re: Audit of NRC's License Renewal Program (OIG-07-A-15) (October 30, 2007) ("Kane Memorandum"), the license renewal reviews and associated adjudicatory hearings should be suspended until adequate and effective review procedures are in place. By the Staff's own estimates their proposed improvements to renewal reviews will not become effective until April 30, 2008 or later, and are purely prospective in nature. Kane Memorandum at 1-3. To continue license renewal reviews that must be repeated all over again would constitute a gross waste of NRC resources. And to force the parties to raise issues in litigation that might be resolved if the NRC Staff were doing an adequate job in its license renewal reviews would waste the resources of the parties and the Atomic Safety and Licensing Board ("ASLB").³

In support of its position, the NRC Staff cites several cases that are inapposite to the instant petition. NRC Brief at 4-5. In *Vermont Yankee Nuclear Power Corp.*, CLI-00-20, for example, the Commission refused to suspend a license transfer proceeding for a

³ The NRC Staff argues that the Commission should denied this Petition because Petitioners have not demonstrated that they will be "irreparably harmed" under the Commission's standard for issuance of a stay. But the Commission has never required that a party seeking efficiency and fairness in a proceeding to demonstrate that inefficiency and unfairness would cause the type of irreparable physical harm that must be demonstrated under the Commission's stay standard. Instead, as a matter of policy the Commission seeks to ensure that NRC proceedings are conducted efficiently. *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 (1998).

nuclear plant, finding that the petitioner had not presented a litigable claim that the procedure for reviewing license transfer applications was deficient. In contrast, in this case the OIG has concluded, and the NRC Staff has conceded, that its procedures for conducting license renewal reviews should be reformed.

The Staff also cites *Duke Energy Corp.*, CLI-01-27, for the proposition that the Commission “did not suspend adjudicatory proceeding pending the results of the agency’s reexamination of its rules following the Three Mile Island accident.” NRC Staff Brief at 4. In fact, however, the Commission *did* suspend licensing decisions pending the outcome of the NRC’s review of “lessons learned” from the TMI accident. *Id.*, 54 NRC at 390 n.10. And in that case, the NRC had not even made a determination that new regulations were required. *Id.* In this case, in contrast, the NRC Staff has already determined that its license renewal review process should be reformed. *See Kane Memorandum.*

The NRC Staff also cites *Duke Energy Corp.* and three other cases in which the Commission refused to suspend licensing proceedings pending its review of security requirements after the 9/11 attacks. NRC Staff Brief at 4. *Duke Energy Corp.*, however, was a license renewal case in which security issues were at best tangentially related. 54 NRC at 391. In the instant proceedings, however, the conceded inadequacy of the NRC Staff’s license renewal review process fundamentally threatens the integrity of the NRC’s licensing decisions. In addition, in none of the four cases cited by the Staff had the Commission yet determined whether its security regulations needed an overhaul. *Duke Energy Corporation*, 54 NRC at 391; *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage 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); *Duke Cogema Stone and Webster* (Mixed Oxide Fuel Fabrication Facility), CLI-01-28, 54 NRC 393, 400, *reconsid. denied*, CLI-02-2, 55 NRC 5 (2002). As the Commission stated in *Pacific Gas and Electric Co.*, “every license the Commission issues is subject to the possibility of additional requirements.” 54 NRC at 240. Here, there is no “possibility” of additional requirements with respect to the NRC Staff’s process for conducting license renewal reviews; the Staff has already agreed to make comprehensive changes. It would be a gross waste of resources to continue license renewal reviews using procedures that are concededly inadequate for the purpose of ensuring continued safe operation of the Facilities during the license renewal term.

The Staff also ignores relevant cases in which NRC licensing proceedings have been suspended pending completion of NRC Staff reviews. In *U.S. Army* (Jefferson Proving Ground Site), LBP-04-01, 59 NRC 27, 30 (2004), for example, the Presiding Officer held a proceeding for a possession-only license in abeyance after granting a hearing request, pending completion of the Staff’s technical review and completion of a hearing file. In *Nuclear Fuel Services, Inc.*, (Erwin, Tennessee), LBP-03-01, 57 NRC 9, 14-15 (2003), the Presiding Officer held a licensing proceeding for a uranium processing plant in abeyance pending the submission of additional portions of the license application. In *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM), LBP-98-9, 47 NRC 261, 266 and n.8 (1998), the Presiding Officer suspended, for two years, a licensing proceeding for a proposed uranium mine, pending completion of the NRC Staff’s review of the license application and preparation of a hearing file.⁴

⁴ The NRC Staff also argues that Petitioners may not seek suspension of the license renewal proceedings because the Staff’s review process is not subject to challenge in a licensing proceeding. NRC Staff Brief at 6. As Petitioners have pointed out, however,

Finally, the Staff erroneously argues that a suspension would harm licensees, while failing to suspend the license renewal process would not cause irreparable harm to Petitioners. NRC Staff Response at 8. On the former point, the Staff fails to present any reasoned analysis. In fact, a delay in the license renewal process pending Commission investigation would cause no great hardship to licensees because their ability to operate would not be impaired in any way. In contrast, the Staff concedes that the inadequate documentation of safety reviews makes it more difficult for Petitioners to file contentions. *Id.* In fact, because many licensee documents are not in the public domain, it is impossible for Petitioners to make certain claims unless the failings of licensees are discovered and then documented in the safety reviews.⁵ Because Petitioners will not be granted a similar opportunity to contest any license changes made after the Commission renews the licenses, the deprivation of this right causes irreparable harm. Moreover, where safety reviews omit important issues, as happened at Oyster Creek and Oconee, the public is harmed by the increased risk of equipment failure.

C. Respondents' Procedural Objections Are Without Merit.

Respondents do not directly challenge Petitioners' right to invoke the Commission's supervisory authority over these licensing proceedings. Nevertheless, Respondents make a number of objections to the Petition that are based on the implicit assumption that the Petitioners have no legal option other than to file contentions on the license renewal applicants' license renewal applications, or add new evidence to a proceeding regarding the inadequacy of a license renewal application. For example,

their Petition requests exercise of the Commission's supervisory jurisdiction over the NRC Staff by suspending *both* the Staff's review and the licensing proceedings.

⁵ For example, prior to discovery in the Oyster Creek case, Petitioners had no way of finding out that the commitment tracking system at Oyster Creek was inadequate.

Respondents argue that Petitioners may not attack the Staff's performance in a license renewal adjudication. NRC Staff Response at 13, AmerGen Response at 5, Entergy Response at 14 n.6. But they ignore the fact the Petitioners acknowledge this prohibition and therefore have brought their concerns directly to the Commission. *See* Petition at 7-9.

The Staff and AmerGen also argue that Petitioners must satisfy the standard for reopening the record to admit new evidence regarding the adequacy of a license application. NRC Staff Response at 10, AmerGen Response at 6. The Staff also argues that Petitioners must show they will prevail on contentions. NRC Staff Brief at 8. But Respondents fail to recognize that the Petition is neither asserting a new contention nor trying to add additional evidence to support an admitted contention after the record has closed. Instead, the Petition requests the Commission to exercise its supervisory authority to ensure the integrity and efficiency of the Staff's license renewal process, and to ensure that hearings on the pending license renewal applications are meaningful. As a result, application of the Commission's Part 2 rules for consideration of issues and evidence in adjudicatory proceedings have no meaningful application.

Similarly, Respondents' argument that Petitioners should have addressed the standard for a motion to reopen the record in 10 C.F.R. § 2.326 is misplaced. That standard applies to situations in which a petitioner seeks to provide "additional evidence" in a licensing hearing on the adequacy of an application. Here, Petitioners request the Commission to take a series of actions designed to protect the integrity of its safety reviews and hearings, including re-opening the Oyster Creek record to allow the presentation of evidence that may be yielded by a more thorough NRC Staff review. The

issue is, in the first instance, a question of the Commission's supervisory responsibilities rather than a particular inadequacy in AmerGen's license renewal application.

Similarly, application of the standard for issuance of a stay of a licensing decision pending review is not appropriate because the relief sought by Petitioners is much broader than what is typically sought in a stay motion: Petitioners seek suspension of current license renewal proceedings in order to ensure that the resources of the NRC and parties will not be wasted by continuation of facially inadequate license renewal reviews while the Commission conducts an independent investigation into the NRC Staff's license renewal process and directs an overhaul of the Staff's license renewal review procedures.⁶

Respondents also contend that the Petition should fail because the Petitioners did not contact the opposing parties before filing it. NRC Staff Response at 9., Entergy Response at 5. This assertion has no relevance in the present case. None of the parties could have granted Petitioners the relief they requested, namely the conduct of an independent investigation into the NRC Staff's license renewal review process as directed by the Commission. Therefore such contact would have been pointless.

In addition, Respondents argue that the Petition should be rejected because it is "untimely," given that Petitioners did not file it with ten days after the OIG issued its audit report or the Staff issued the Safety Evaluation Report ("SER") for the Oyster Creek nuclear power plant. NRC Staff Response at 9, AmerGen Response at 6-7, Entergy Response at 4-5, citing 10 C.F.R. § 2.323. But the "occurrence or circumstance" of which Petitioners complain is not the issuance of the OIG Report or the Oyster Creek SER.

⁶ For the same reason, it is not necessary for Riverkeeper to achieve "party" status in the Indian Point license renewal proceeding in order to request the Commission to exercise its supervisory authority to ensure the integrity and fairness of the Indian Point license renewal proceeding. See NRC Staff Response at 7 n.7.

Instead, Petitioners ask the Commission to address an ongoing failure by the NRC Staff to ensure the adequacy of its safety reviews of license renewal applications. That failure started years before the issuance of the OIG Report and the Oyster Creek SER, and it continues today – uninvestigated and uncorrected by either the NRC Staff or the Commission.

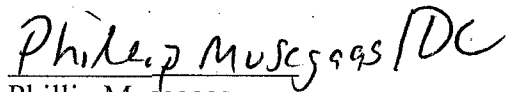
Finally, Entergy incorrectly contends that “each of the Petitioners has filed the Petition in proceedings in which they never made a hearing request or sought permission to participate on any other basis.” Entergy Response at 5. To the contrary, none of the Petitioners has filed the Petition in a proceeding to which that Petitioner is not already a party or a petitioner. Thus, the Petition was submitted in the Oyster Creek proceeding by Richard Webster, attorney for the Oyster Creek organizations. The Petition was submitted in the Indian Point proceeding by Diane Curran and Phillip Musegaas, attorneys for Riverkeeper. In the Pilgrim proceeding, the Petition was submitted by Mary Lampert, the representative of Pilgrim Watch. And in the Vermont Yankee proceeding, the Petition was submitted by Robert L. Steward, the representative of NEC. *See* Petition at 32. As also set forth in the Petition at 4-6, the Oyster Creek petitioners seek relief from the Commission only with respect to the Oyster Creek nuclear power plant, Riverkeeper seeks relief only with respect to the Indian Point nuclear power plant, Pilgrim Watch seeks relief only with respect to the Pilgrim nuclear power plant, and NEC seeks relief only with respect to the Vermont Yankee plant.

III. CONCLUSION


For the foregoing reasons, the Commission should grant the Petition.

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January 25, 2008

CERTIFICATE OF SERVICE

I certify that on January 25, 2008, copies of the foregoing Motion for Leave to Reply and Reply to Responses to Petition 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 were served on the following by e-mail and first-class mail:

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