

April 21, 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))

NRC STAFF'S RESPONSE IN OPPOSITION TO CITIZENS' MOTION TO STAY

INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.323(c) and 2.342(c), the Staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby responds to "Motion by [Citizens¹] to Stay License Renewal Proceedings for Oyster Creek Nuclear Power Plant Pending Resolution of the Significant New Issue Notified by the Staff" ("Motion to Stay") dated April 11, 2008.² For the reasons set forth herein, Citizens' Motion to Stay the Oyster Creek license renewal proceeding should be denied.

DISCUSSION

I. Citizens Have Not Addressed or Met the Commission's Requirements for a Stay

Citizens request, for various reasons, that the Commission stay this proceeding.

See Motion to Stay at 2. Citizens have not demonstrated, or even attempted to

¹ "Citizens" comprise 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.

² Citizens have subsequently filed "Motion by Nuclear Information and Resource Service; Jersey Shore Nuclear Watch, Inc.; Grandmother, Mothers and More for Energy Safety; Jersey Public Interest Research Group; New Jersey Sierra Club; and New Jersey Environmental Federation to Reopen the Record and for Leave to File a New Contention, and Petition to Add a New Contention," April 18, 2008, ("April 18 Motion"). The Staff will separately respond to Citizens' April 18 Motion in accordance with the Commission's regulation.

demonstrate, that the legal standards applicable to stay requests are satisfied here. When considering stay requests, the Commission generally looks to the factors set forth in 10 C.F.R. § 2.342(e). *Sequoyah Fuels Corp & General Atomics* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6 (1994) (stating that “because section 2.730 [now § 2.323] contains no standards by which to decide stay motions, we [the Commission] turn instead for guidance to the general stay standards in section 2.788 [now § 2.342]”). The burden is on the moving party to demonstrate that the standards for a stay are satisfied. See *Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 & 2), CLI-81-27, 14 NRC 795, 897 (1981); see also 10 C.F.R. § 2.342(b)(2) (requiring “[a] concise statement of the grounds for a stay, with reference to the factors specified in paragraph (e) of this section”). Citizens, though, do not even mention these factors, and the contents of their Motion to Stay do not support finding that the § 2.342(e) factors have been met.

For instance, the irreparable injury requirement, which is the most important of the § 2.342(e) factors, see *Sequoyah Fuels*, CLI-94-9, 40 NRC at 6, can hardly be met here, given that Citizens have the means and opportunity necessary to propose a new or amended contention on the issues they raised in their Motion to Stay. See Citizens’ April 18 Motion. In addition, although Citizens’ Motion to Stay alludes to some facts, see Motion to Stay at 4-5, it fails to make the necessary “strong showing,” see § 2.342(e)(1), that they are likely to prevail on the merits of such a contention. Citizens have also not demonstrated that a stay is in the public interest, which is another of the § 2.342(e) factors, because the safety significance of Oyster Creek’s use of the simplified methodology to calculate the CUF for the reactor recirculation nozzle is low.

“Memorandum from Samson S. Lee, Acting Director of the Division of License Renewal, to the Commissioners, Atomic Safety and Licensing Board, and the parties,” April 3, 2008 (“Notification”). In sum, the § 2.342(e) factors do not weigh in favor of granting a stay.

II. A Stay is Unnecessary

As demonstrated by Citizens' April 18 Motion for Reopening the Record and Leave to File a New Contention, and Petition to Add a New Contention, a stay of this proceeding is unnecessary because the information necessary for Citizens to file a motion to reopen the record and submit a proposed late-filed contention is available and was articulated in Citizens' April 18 Motion.³ There is also no basis for Citizens' stay request insofar as it relates to Citizens' request for information regarding the confirmatory analysis discussed in the Notification.

The Commission's regulations provide for reopening of the record and filing of additional proposed contentions in licensing proceedings up until issuance of the license without prior approval or grant of a stay. See *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-06-4, 63 NRC 32, 36 n.4 (2006); 10 C.F.R. § 2.326.⁴ Issuance of a renewed license is not imminent, because once the Commission issues a decision on the pending appeal and responds to the pending Petition to Suspend License Renewal Proceedings,⁵ which it has not yet done, the Staff

³ Regardless of whether the Commission grants Citizens' request for stay, Citizens must successfully move to reopen the closed record in this proceeding and satisfy the requirements of 10 C.F.R. § 2.309(c) for late contentions in addition to the requirements of 10 C.F.R. § 2.309(f). See *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-06-4, 63 NRC 32, 37 (2006). The Staff does not concede that Citizens' can satisfy the requirements for reopening and admission of late-filed contentions.

⁴ Pursuant to § 2.326, a motion to reopen a closed record for consideration of additional evidence must demonstrate that all of the following criteria are satisfied (1) the motion is timely; (2) the motion must address a significant safety or environmental issue; (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. In addition, § 2.326(d) requires that "[a] motion to reopen which relates to a contention not previously in controversy among the parties must also satisfy the requirements for non-timely contentions in § 2.309(c)." The Staff makes no claim here as to whether Citizens have met these requirements in their April 18 Motion. The Staff will address the April 18 Motion in a separate filing. See *supra* note 2.

⁵ See Petition by Nuclear Information and Resource Service [*et al.*] 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, Jan. 3, 2008.

must take the additional step of requesting, and receiving, Commission authorization to make the appropriate findings and issue the license. See Staff Requirements Memorandum-SECY-02-0088-Turkey Point Nuclear Plant, Units 3 & 4, Renewal of Full Power Operating Licenses (SRM-SECY-02-0088) (June 5, 2002). As demonstrated by Citizens' April 18 Motion, a stay therefore was and is not necessary to give Citizens time to move for reopening and propose a new contention.

In addition, as demonstrated by their April 18 Motion, Citizens had access to the information necessary to decide whether to request that the record be reopened and attempt to file a new contention.⁶ Thus, there is no need to await a new CUF calculation for Oyster Creek's recirculation nozzle.

Citizens also demand that the Commission order AmerGen (the Oyster Creek licensee) to provide them with a non-proprietary copy of AmerGen's confirmatory analysis in order to "preserve their hearing rights," as well as a stay sufficient to allow them time to decide whether to file a contention regarding the confirmatory analysis. Motion to Stay at 9. According to Commission case law, however, a party is not entitled to discovery in order to support a motion to reopen. See *Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1)*, CLI-85-7, 21 NRC 1104, 1106 (1985). In addition, Citizens fail to provide any basis or authority that would support such a measure in a proceeding in which disclosure obligations have ceased, the new information is irrelevant to any admitted contention, and the record is closed. Thus, only if Citizens are successful in reopening the record will they be entitled to review relevant and material AmerGen documents. Accordingly, given that this demand for information lacks merit, the

⁶ See *supra* note 2. In their Motion, however, Citizens stated that they were still "deciding" whether to file a new contention. See Motion at 2 n.2, 9.

accompanying request for a stay to give Citizens time to process the demanded information also lacks merit.

III. Section 2.802(d) Does Not Support Citizens' Request for Stay Pending Judicial Review

Section 2.802(d) of the Commission's regulations does not support Citizens' request that the Commission withhold its decision in this proceeding pending judicial review of the Commission denial of Petition for Rulemaking 54-03. Section 2.802(d) provides that a party to a proceeding who has also filed a petition for rulemaking may request that the Commission suspend all or part of the licensing proceeding pending disposition of the rulemaking petition. The Commission decided Petition for Rulemaking 54-03 on December 2, 2006. See 71 Fed. Reg. 74,848 (Dec. 13, 2006).⁷ Since the petition has been dispositioned, § 2.802(d) is inapplicable here and Citizens have provided no authority to the contrary.⁸

In addition, the Commission is not required by the Administrative Procedure Act (APA) to suspend this proceeding pending judicial review. The APA provides that an

⁷ Citizens did not file Petition for Rulemaking 54-03. The petitioner was Mayor Joseph Scarpelli of Brick Township, New Jersey. Two groups that are part of Citizens, New Jersey Environmental Federation ("NJDEF") and New Jersey Sierra Club ("NJSC") supported Mayor Scarpelli's petition, but NJDEF and NJSC did not "appear to request petitioner status" and therefore were not given that status. 71 Fed. Reg. at 74,848 n.1. An appeal of the Commission's decision by NJDEF and NJSC is now in the Second Circuit Court of Appeals Docket No. 07-1276.

⁸ Citizen's request to stay a proceeding pending judicial review of a denial of a petition for rulemaking is unprecedented. The Commission has, however, been asked to suspend proceedings when the Commission had not yet decided the rulemaking petition. See *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-03-4, 57 NRC 273 (2001). In *Diablo Canyon*, the Commission considered "whether moving forward with the adjudication [would] jeopardize the public health and safety, prove an obstacle to fair and efficient decisionmaking, or prevent appropriate implementation of any pertinent rule or policy changes that might emerge from our on going evaluations" and concluded that a stay was not warranted. *Id.* at 277. Citizens have not made, or even attempted to make the kind of showing required by the Commission in CLI-03-4. Citizens cannot demonstrate that proceeding will jeopardize public health and safety, prove an obstacle to fair and efficient decisionmaking, or prevent appropriate implementation of pertinent rule or policy changes because the Commission has dispositioned the petition and, in so doing, concluded that it has already considered the concerns raised by the petition and there is no need to reassess its regulations. See 71 Fed. Reg. at 74,848, 74,857.

agency may, if it “finds that justice so requires . . . postpone the effective date of action taken by it, pending judicial review.” 5 U.S.C. § 705. It further provides that the reviewing court “[o]n such conditions as may be required and to the extent necessary to prevent irreparable injury” may “postpone the effective date of agency action or take other action necessary to preserve status or rights.” *Id.* Consequently, in order to stay this proceeding pending judicial review, Citizens must demonstrate to the Commission that justice requires a stay. Citizens’ Motion to Stay neither attempts to nor demonstrates that justice requires a stay and, therefore, no stay is warranted.

IV. Staff Notification Was Not Deficient and Provides No Basis for a Stay

In support of their Motion to Stay, Citizens assert that the Staff’s Notification was “deficient.” Motion to Stay at 5. Citizens, therefore, request that the Commission order the Staff to supplement the notification. Motion to Stay at 6. The Staff’s Notification, however, was not deficient and, thus, neither supplementation of the Notification nor a stay is warranted.

Parties to NRC proceedings are required to notify the appropriate adjudicatory body of “new information that is relevant and material to the matters being adjudicated.” *Duke Power Co.* (William B. McGuire Nuclear Power Station, Units 1 & 2), ALAB-143, 6 AEC 623, 625 (1973). Notifications of “new and material” information should explain the precise nature of the issue and the effect of the issue upon the proceeding. See *Louisiana Power & Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1114 n.59 (1983). The purpose of the Staff’s Notification, however, was not to notify the Commission of new information relevant and material to the matters being adjudicated in the Oyster Creek license renewal proceeding, but, as the Notification stated, to inform the Commission of information that “may be an issue of public interest.” Nevertheless, the Staff’s Notification precisely stated the issue: “The staff is reviewing the use of a simplified method to calculate cumulative usage factors (CUF) that may not be

conservative,” and Oyster Creek used the simplified method to calculate the CUF for its reactor recirculation nozzle. The Notification stated the effect of the issue on the proceeding: the use of the simplified methodology is not relevant to the admitted contention in the proceeding and the safety significance of using the simplified analysis is low. The Notification also stated how the Staff plans to address the issue: require Oyster Creek to perform a confirmatory analysis to demonstrate that the 60-year CUF for the reactor recirculation nozzle is less than 1.0. Furthermore, the Staff’s review of the simplified method to calculate CUFs is a matter of public record in docketed correspondence between the Staff and license renewal applicants for the Wolf Creek⁹ and Vermont Yankee nuclear power facilities, as well as in filings and disclosures in the Vermont Yankee license renewal proceeding. Finally, disclosure obligations in the Oyster Creek proceeding have terminated and the record has closed. *See AmerGen Energy Co. LLC*. (Oyster Creek Nuclear Generating Station), LBP-07-17, 66 NRC 327, 338 (2007). The Staff has no general obligation to supply or explain the significance of new information to Citizens unless the information is new, relevant, and material to the matters being adjudicated. Consequently, the Notification was not “deficient” and provides no support for Citizens’ stay request.

⁹ The Staff first raised questions about the simplified methodology while reviewing Wolf Creek Nuclear Generating Station’s application for license renewal, an application that has not been challenged. *See, e.g., Request for Additional Information for the Renewal of Wolf Creek Generating Station, Unit 1, License Renewal Application* (June 22, 2007) (ML071730352) (requesting additional information about Wolf Creek’s metal fatigue analysis). The Staff’s requests for additional information from Wolf Creek pre-date “New England Coalition, Inc.’s (NEC) Motion to File New or Amended Contention” filed July 2, 2007. Counsel for the Staff referred Citizens to the Vermont Yankee license renewal proceeding because the issue is being litigated in that proceeding and the Staff has completed its Safety Evaluation Report Related to the License Renewal of Vermont Yankee Nuclear Power Station (Feb. 2008) (ML0805604621).

V. Citizens' Reference to Their Petition to Suspend is Outside the Scope of This Proceeding and is Not Permissible Under NRC Regulations

Citizens' Motion to Stay argues that the Staff's reviews conducted in conjunction with license renewal are inadequate and the Commission must ensure that these reviews are "fully comprehensive." Motion to Stay at 10. This represents a challenge to the adequacy of the Staff's review, and is not within the scope of the Oyster Creek license renewal proceeding. See Changes to Adjudicatory Process, Final Rule, 69 Fed Reg. 2,182, 2,202 (Jan. 14, 2004) (citing Commission case law). Furthermore, Citizens' argument relating to their Petition to Suspend¹⁰ is an impermissible effort to revisit an issue that has already been addressed through a series of motions pending before the Commission.

The NRC's rule governing motions, set forth in 10 C.F.R. § 2.323, contemplates replies filed by moving parties only in "compelling circumstances" as determined by the Secretary or the presiding officer. It does not grant moving parties the right to reply, nor does it permit moving parties to reargue the substance of a pending motion in an unrelated proceeding before the same presiding officer. Citizens have already filed a Petition to Suspend and, subsequently, filed a Motion for Leave to Reply and Reply.¹¹ Citizens have no right to address the issues raised in those pleadings any further than they already have. Therefore, Citizens' attempt to circumvent the NRC's pleading requirements by arguing that the issue in their present motion demonstrates the need for a favorable result with respect to their petition to suspend is impermissible.

¹⁰ See *supra* note 5.

¹¹ Reply 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 to Opposition 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, Jan. 25, 2008.

CONCLUSION

For the reasons set forth above, the Commission should deny Citizens' Motion to Stay.

Respectfully submitted,

/RA/

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/RA/

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Dated at Rockville, Maryland
this 21st day of April 2008

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE IN OPPOSITION TO CITIZENS' MOTION TO STAY" 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 21st day of April 2008.

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