

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
OFFICE OF THE SECRETARY

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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

BEFORE THE COMMISSION

In the Matter of:)	
)	April 21, 2008
AmerGen Energy Company, LLC)	
)	Docket No. 50-219
(License Renewal for Oyster Creek Nuclear Generating Station))	
)	

AMERGEN'S ANSWER OPPOSING CITIZENS' MOTION TO STAY PROCEEDING

AmerGen Energy Company, LLC ("AmerGen") hereby files its Answer opposing the Motion that Citizens¹ filed on April 11, 2008,² requesting a stay of the above-captioned license renewal proceeding. As demonstrated below, Citizens have no regulatory basis for filing the Motion and have failed to demonstrate the requisite compelling circumstances warranting such extraordinary relief. Therefore, the Commission should deny the Motion.³

I. BACKGROUND

AmerGen submitted its license renewal application for the Oyster Creek Nuclear Generating Station ("Oyster Creek") on July 22, 2005.⁴ In September 2007, the Atomic Safety and Licensing Board ("Board") held a hearing on the only remaining contention in the

¹ The six organizations comprising "Citizens" are Nuclear Information and Resource Service ("NIRS"), Jersey Shore Nuclear Watch, Inc. ("JSNW"), Grandmothers, Mothers and More for Energy Safety ("GRAMMES"), New Jersey Public Interest Research Group ("NJPIRG"), New Jersey Sierra Club ("NJ Sierra Club"), and New Jersey Environmental Federation ("NJEF").

² 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; and New Jersey Environmental Federation to Stay License Renewal Proceedings for Oyster Creek Nuclear Power Plant Pending Resolution of the Significant New Issue Notified by Staff (Apr. 11, 2008) ("Motion").

³ On April 18, 2008, Citizens also filed a motion to "Reopen the Record and for Leave to File a New Contention, and Petition to Add a New Contention." AmerGen will reply to this petition in a timely manner under separate cover.

⁴ Letter from C. Swenson, AmerGen, to NRC, Application for Renewed Operating License (July 22, 2005).

proceeding, relating to corrosion of the drywell shell, and resolved the contention in favor of AmerGen.⁵ Citizens' appeal of the Board's decision is pending before the Commission.⁶

On April 3, 2008, the Nuclear Regulatory Commission ("NRC") Staff notified the Commission that it is reviewing a calculation methodology related to metal fatigue and plans to request that AmerGen perform a confirmatory analysis for its own calculations.⁷ The Staff not only explained that the calculation "is not relevant to the [drywell] contention," but also stated that "the safety significance of using the simplified analysis method is low based on the risk assessments performed by the staff in resolving generic safety issues (GSI)-166 and GSI-190."⁸

II. ARGUMENT

Citizens' two major arguments are: (1) the Commission should stay issuance of the renewed license until it resolves the metal fatigue issue,⁹ and (2) the Commission should suspend the license renewal proceeding until final resolution of an unrelated rulemaking petition.¹⁰ As discussed below, these arguments are procedurally-defective, without merit, and do not support delaying either this proceeding or issuance of the renewed license.¹¹ Instead, Citizens' Motion is

⁵ *AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), LBP-07-17, 66 NRC 327, 372 (Dec. 18, 2007).

⁶ Citizens' Petition for Review of LBP-07-17 and the Interlocutory Decisions in the Oyster Creek Proceeding (Jan. 14, 2008) (hereinafter "Citizens' Petition for Review").

⁷ Board Notification 2008-01, Notification of Information in the Matter of Oyster Creek Nuclear Generating Station License Renewal Application (Apr. 3, 2008) (hereinafter "Commission Notification").

⁸ *Id.*

⁹ Motion at 1-2, 6-9.

¹⁰ *Id.* at 1-3, 9-10.

¹¹ Citizens make additional arguments that do not support the Motion. For example, Citizens argue that the Commission Notification is deficient. *Id.* at 5-6. This argument is unrelated to Citizens' request for a stay of the proceeding, and Citizens have not requested any change to the proceeding based on the purported inadequacy of the Commission Notification. Similarly, Citizens claim that the Commission Notification supports its January 3, 2008 petition requesting suspension of four ongoing license renewal proceedings. *Id.* at 10. This argument is likewise irrelevant to the Motion and these issues are already before the Commission.

yet another attempt to delay issuance of Oyster Creek's renewed license by raising any conceivable argument, while disregarding procedure, regulation, and fact.

A. Citizens' Motion For A Stay Based On The Commission Notification Must Be Rejected

1. The Motion Is Untimely

Citizens filed their Motion pursuant to 10 C.F.R. § 2.323,¹² which states that “[a] motion must be made no later than ten (10) days after the occurrence or circumstance from which the motion arises.”¹³ Although the NRC Staff issued the Commission Notification on April 3, 2008, information on the fatigue issues discussed therein—including the claimed basis for Citizens' Motion—was publicly-available *long before* Citizens filed the present Motion. In this regard, Citizens rely on a February 7, 2008 ACRS meeting transcript, a March 6, 2008 ACRS meeting transcript, the March 17, 2008 Seventh Declaration of Dr. Joram Hoppenfeld, and a May 1, 2006 AmerGen Response to a Request for Additional Information.¹⁴ This information has been long-available to Citizens, and highlights the untimely nature of the Motion. For this reason alone, the Motion must be dismissed pursuant to 10 C.F.R. § 2.323(a).

2. The Motion Provides No Basis To Stay Issuance Of The Renewed License

Citizens' Motion also must be dismissed because it fails to satisfy the requirements for a stay in 10 C.F.R. § 2.342. This governing regulation only contemplates requests for stays of “decisions.” Citizens do not cite to this regulation, and their Motion is devoid of authority as there is no “decision” from which to request a timely stay.¹⁵

¹² *Id.* at 1.

¹³ 10 C.F.R. § 2.323(a).

¹⁴ Motion at 4.

¹⁵ The most recent decision which Citizens could attempt to stay was the Board's Initial Decision issued in December 2007, much earlier than the ten day time limit allowed by 10 C.F.R. § 2.342(a).

Indeed, Citizens recognize that the Motion has no regulatory basis because they loosely plead for the Commission to exercise its “supervisory authority over this proceeding,” rather than cite any regulatory or precedential basis for the Motion.¹⁶ Furthermore, the metal fatigue claims set forth in the Motion have no nexus to the drywell contention currently on appeal; Citizens themselves acknowledge “the new information does not concern any of the evidence related to the admitted contention.”¹⁷

Nonetheless, even if the Commission disregards these fatal procedural defects, Citizens may not ignore the standards for issuing a stay.¹⁸ Section 2.342(e) defines the four factors that must be weighed before the Commission will issue a stay:

1. Whether the moving party has made a strong showing that it is likely to prevail on the merits;
2. Whether the party will be irreparably injured unless a stay is granted;
3. Whether the granting of a stay would harm other parties; and
4. Where the public interest lies.

Inexplicably, Citizens fail to address these factors in their Motion, even though the burden of persuasion rests with them.¹⁹ For example, the Motion does not explain how Citizens will be irreparably injured unless a stay is granted.²⁰ As a result, Citizens have not met their burden for issuance of a stay, and the Motion must be denied on its merits.²¹

¹⁶ Motion at 6.

¹⁷ *Id.* at 7.

¹⁸ See *Sequoyah Fuels* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6 (1994) (treating a stay request filed under § 2.730 (now § 2.323) using the standard in § 2.788(e) (now § 2.342(e))).

¹⁹ See *Ala. Power Co.* (Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981).

²⁰ See *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 258 (1990) (denying a stay based on lack of showing of irreparable harm and absence of a strong showing on the other factors). Simply “‘raising the specter of a nuclear accident’ does not demonstrate irreparable harm.” *Entergy Nuclear Vt. Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237-38 (2006). See also *Int’l Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-02-10, 55 NRC 251, 259 (2002) (denying a stay, in part because movant’s mere allegations, until substantiated, fell short of meeting the “likelihood of success” and “irreparable injury” requirements); *Duke Energy Corp.* (Oconee Nuclear Station Units 1, 2, & 3),

Even beyond these four factors, Citizens do not provide *any* sufficient basis for staying this proceeding. For example, Citizens engage in blatant fearmongering by selectively quoting a news article, which posits that if the recirculation nozzle breaks, “it could lead to a severe accident.”²² Citizens ignore the remainder of the article, however, which quotes an NRC spokesperson as stating: “We have decided to have AmerGen and other companies do this reanalysis out of an *abundance of caution*” and “[t]he initial analysis done on these nozzles was performed using *proven methods* and the results showed’ they met a metal fatigue factor.”²³ Additionally, the Commission Notification specifically states that the NRC Staff believes the safety significance of the metal fatigue issues to be low.²⁴

Citizens’ arguments are laden with speculation and supported by absolutely no factual basis. For example, Citizens’ attorney performs a “back of the envelope” calculation in an attempt to demonstrate that the same increase in the cumulative usage factor in the *Vermont Yankee* proceeding also would apply in the instant proceeding.²⁵ In this speculative exercise, he fails to indicate, cite, or provide any basis for his assumptions. Similarly, Citizens speculate that “the facts strongly suggest that the requested reanalysis could well find that the metal fatigue would go beyond its allowable limits during any period of extended operation if no further action

CLI-99-11, 49 NRC 328, 339 (1999) (stating that the Commission is reluctant to suspend proceedings due to the “substantial public interest in efficient and expeditious administrative proceedings”).

²¹ *Tex. Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-2, 37 NRC 55, 58 & n.2 (1993) (rejecting stay request because the Petitioners did not address stay factors).

²² Motion at 3.

²³ Todd B. Bates, *NRC Wants Nuclear Plant’s Water Nozzles Rechecked*, Asbury Park Press (Apr. 7, 2008) (emphasis added), <http://www.app.com/apps/pbcs.dll/article?AID=/20080407/NEWS/804070368>.

²⁴ See Commission Notification.

²⁵ Motion at 4-5.

is taken.”²⁶ This claim, along with the rest of the Motion, is unsupported by facts and must be rejected in its entirety.

3. Citizens Have No Right To The Confirmatory Analysis

Citizens further request that the Commission order AmerGen to provide them with a copy of the confirmatory analysis,²⁷ in order to (1) prevent the NRC Staff from failing to spot a deficiency,²⁸ and (2) preserve their hearing rights.²⁹ In seeking such an Order, however, Citizens again cite no supporting legal authority.

The only issue for which Citizens are a party in this proceeding is the drywell contention, which is on appeal to the Commission.³⁰ Nonetheless, the hearing record on that issue is closed.³¹ Citizens have no right to any additional discovery—regarding that issue, metal fatigue, or any other matter—beyond that allowed pursuant to Section 2.336(f). In sum, Citizens simply have no right to a confirmatory analysis that is beyond the scope of the single issue on appeal, and have not provided sufficient justification otherwise.

B. Citizens’ Request To Suspend The Proceeding Until Final Resolution Of A Rulemaking Petition Also Must Be Rejected

A rulemaking petitioner may request that the Commission suspend a licensing proceeding. In this regard, 10 C.F.R. § 2.802(d) states: “The petitioner may request the Commission to suspend all or any part of any licensing proceeding to which the petitioner is a party pending disposition of the petition for rulemaking.” Citizens claim that NJ Sierra Club and

²⁶ *Id.* at 7.

²⁷ *Id.* at 2, 8-9.

²⁸ *Id.* at 2.

²⁹ *Id.* at 8.

³⁰ *See* Citizens’ Petition for Review.

³¹ *See* LBP-07-17, 66 NRC at 338.

NJEF “filed” a rulemaking petition regarding the criteria for license renewal,³² which was rejected by the Commission.³³ Now, as members of Citizens, NJ Sierra Club and NJEF request a stay of the Commission’s final licensing decision in the Oyster Creek proceeding pending judicial review³⁴ of this rulemaking petition. For the reasons explained below, this request must fail.

1. Only Rulemaking Petitioners May Request Suspension Of A Related Proceeding

NJ Sierra Club and NJEF did not submit a rulemaking petition as claimed in the Motion; rather, they only submitted letters supporting a rulemaking petition by Joseph Scarpelli, mayor of the Township of Brick.³⁵ In the *Federal Register* notice for the petition, the NRC explained that “[t]he *petitioner* is the Mayor of Brick Township, New Jersey” and “[t]he petitioner also included letters from the New Jersey Chapter of the Sierra Club and the New Jersey Environmental Federation *in support of the petition.*”³⁶ In fact, in the notice rejecting the petition, the NRC stated that NJ Sierra Club and NJEF “do not appear to request petitioner status.”³⁷ By its terms, 10 C.F.R. § 2.802(d) only allows a rulemaking “petitioner” to submit a request to suspend a proceeding. Neither NJ Sierra Club nor NJEF—much less Citizens in piggy-back mode—are “petitioners” within the meaning of this regulation, and Citizens may not twist the regulation to suit their own purposes.³⁸

³² Motion at 9.

³³ Joseph Scarpelli, Mayor of Brick Township, NJ; Receipt of Petition for Rulemaking, 70 Fed. Reg. 54,310, 54,310 (Sept. 14, 2005); Andrew J. Spano and Joseph C. Scarpelli; Denials of Petition for Rulemaking, 71 Fed. Reg. 74,848, 74,848 n.1 (Dec. 13, 2006).

³⁴ See *N.J. Sierra Club v. NRC*, No. 07-1276 (2d Cir. filed Mar. 29, 2007).

³⁵ See Letter from M. Donato to NRC, Petition for Rulemaking and Adjudications Staff (July 20, 2005).

³⁶ 70 Fed. Reg. at 54,310 (emphasis added).

³⁷ 71 Fed. Reg. at 74,848 n.1.

³⁸ See, e.g., *Fla. Power & Light Co.* (Turkey Point Power Plant, Unit Nos. 3 & 4), DD-82-2, 15 NRC 1343, 1345-46 (1982) (“[Petitioner] was not a party to the license amendment proceeding and therefore would not be entitled to invoke Section 2.802(d) in any event.”).

2. The Rulemaking Petition Already Has Been Dispositioned

Commission regulations only allow a request for suspension of a proceeding “pending disposition of the petition for rulemaking.”³⁹ As acknowledged by Citizens, the rulemaking petition already has been rejected by the Commission.⁴⁰ Thus, the petition has been fully dispositioned and 10 C.F.R. § 2.802(d) no longer applies. The ongoing Second Circuit judicial review of this rejection is irrelevant to the Commission’s actions in response to Citizens’ instant request for stay.

3. Citizens’ Suspension Request Is Untimely

The timing of Citizens’ request to suspend the proceeding under Section 2.802(d) is unjustifiably late. The rulemaking petition at issue was filed by Mr. Scarpelli in 2005, at about the same time as submission of the Oyster Creek license renewal application. Even if NJ Sierra Club and NJEF were rulemaking petitioners—which they were not—then they should have filed a request to suspend the instant proceeding much earlier. NJ Sierra Club and NJEF have been parties, as part of Citizens, to this proceeding since February 2006 (*i.e.*, over two years).⁴¹ It is evident that Citizens filed this request on the eve of issuance of the renewed license, hoping to further delay this proceeding. Such motivation is an inadequate justification for suspension.

Furthermore, Citizens’ Motion is based on the April 3, 2008 Commission Notification. Citizens themselves describe the 2005 rulemaking petition as requesting “that a renewed license would issue only if the facility operator demonstrates that the plant meets all criteria and requirements that would be applicable if the plant was being proposed for initial construction.”⁴²

³⁹ 10 C.F.R. § 2.802(d).

⁴⁰ Motion at 9; *see also* 71 Fed. Reg. at 74,848.

⁴¹ *See AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), LBP-06-7, 63 NRC 188, 193-94 (2006).

⁴² Motion at 9.

The underlying NRC regulations governing license renewal are not at issue in this proceeding. Thus, the rulemaking petition is beyond the scope of this proceeding and cannot serve as a basis for a suspension request herein.

Finally, Citizens characterize their pleading as a “motion.” Under 10 C.F.R. § 2.323(a), motions “must be made no later than ten (10) days after the occurrence or circumstance from which the motion arises.” This requirement is not satisfied in this case.

4. The Motion Specifies No Basis For The Suspension Request

Yet again, Citizens have provided absolutely no basis, or explanation, for why the Commission should suspend the proceeding until final resolution of the rulemaking petition. Citizens simply claim that the regulations allow them to request a suspension of the proceeding, without any argument whatsoever of the justification for such a suspension.⁴³

In a 2003 decision, the Commission rejected a request by intervenors to suspend a proceeding under 10 C.F.R. § 2.802(d), providing the following standard for the request:

[W]e consider whether moving forward with the adjudication will 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 important ongoing evaluation of terrorism-related policies.⁴⁴

The articulation of this standard demonstrates that the Commission sets a high bar for granting a Section 2.802(d) request. Additionally, as with the stay request, Citizens must satisfy the general

⁴³ *Id.* at 9-10.

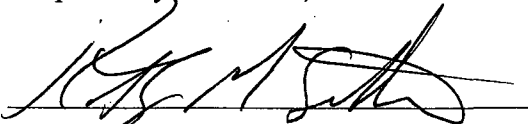
⁴⁴ *Pac. Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation)*, CLI-03-4, 57 NRC 273, 277 (2003).

stay standards in 10 C.F.R. § 2.342(e), as discussed above, to suspend the proceeding.⁴⁵ Citizens do not discuss, much less attempt to satisfy, any of these standards.

III. CONCLUSION

For the foregoing reasons, the Commission should deny Citizens' Motion in its entirety.

Respectfully submitted,



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Dated in Washington, D.C.
this 21st day of April 2008

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⁴⁵ See *Environmental Radiation Protection Standards for Nuclear Power Operations*, 40 CFR 190, CLI-81-4, 13 NRC 298, 301 (1981); *Uranium Mill Licensing Requirements (10 CFR Parts 30, 40, 70 & 150)*, CLI-81-9, 13 NRC 460, 463 (1981).

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CERTIFICATE OF SERVICE

I hereby certify that copies of "AmerGen's Answer Opposing Citizens' Motion to Stay Proceeding" were served this day upon the persons listed below, by e-mail and first class mail.

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