

RAS-4-18

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
OFFICE OF THE SECRETARY
BEFORE THE COMMISSION

DOCKETED
USNRC

April 28, 2008 (4:47pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of:)	April 28, 2008
AmerGen Energy Company, LLC)	
(License Renewal for Oyster Creek Nuclear Generating Station))	Docket No. 50-219

**AMERGEN'S ANSWER OPPOSING CITIZENS' MOTION TO REOPEN RECORD
AND PETITION TO ADD A NEW CONTENTION**

Pursuant to 10 C.F.R. §§ 2.323(c), 2.326, and 2.309(h)(1), AmerGen Energy Company, LLC ("AmerGen") hereby files its Answer opposing the Petition that Citizens¹ filed on April 18, 2008,² requesting that the Commission reopen the record and admit a new late-filed contention regarding metal fatigue in the above-captioned license renewal proceeding. As demonstrated below, Citizens' Petition is yet another attempt to delay this proceeding by any possible means with another untimely and unsupported claim. Reopening the record and admitting a late-filed contention at this extremely late stage in the proceeding is unjustified as a matter of fact or law because the instant Petition is based on information that is neither new nor safety significant.

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 Although Citizens filed a combined "motion" to reopen the record and a "petition" to add a new late-filed contention, these are collectively referred to as "Petition" in this Answer. See 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 Reopen the Record and for Leave to File a New Contention, and Petition to Add a New Contention (Apr. 18, 2008). Because the Petition includes a motion to reopen and a new contention, the ten-page limit imposed by the Board in this proceeding for motions clearly does not apply. See Memorandum and Order (Prehearing Conference Call Summary, Initial Scheduling Order, and Administrative Directives) at 9 (April 19, 2006) (unpublished). In addition, Citizens cannot use any reply filed pursuant to 10 C.F.R. § 2.309(h)(2) as an opportunity to bootstrap a reply to AmerGen's arguments in response to the motion to reopen the record; a reply that the rules do not permit. See 10 C.F.R. § 2.323(c).

TEMPLATE = SECY-035

SECY-02

For the reasons set forth below, the Commission should dismiss the Petition in its entirety because it is untimely and Citizens have failed to satisfy the very high standards for either reopening the record or admitting a late-filed contention.

I. BACKGROUND

AmerGen submitted its license renewal application (“LRA”) for the Oyster Creek Nuclear Generating Station (“Oyster Creek”) on July 22, 2005.³ In September 2007, the Atomic Safety and Licensing Board (“Board”) held a hearing on the only remaining contention in the proceeding, relating to corrosion of the drywell shell, and resolved the contention in favor of AmerGen.⁴ The Commission’s decision on Citizens’ appeal of the Board’s decision could be announced as early as tomorrow.⁵

Recently, as an entirely unrelated matter, the Nuclear Regulatory Commission (“NRC”) Staff notified the Commission that it is reviewing a calculation methodology related to metal fatigue used throughout the industry and plans to request that AmerGen perform a confirmatory analysis of its own calculations (“Commission Notification”).⁶ 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.”⁷

³ Letter from C. Swenson, AmerGen, to NRC, Application for Renewed Operating License (July 22, 2005).

⁴ *AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), LBP-07-17, 66 NRC 327, 372 (2007).

⁵ Sunshine Federal Register Notice, Nuclear Regulatory Commission, 73 Fed. Reg. 20,333 (Apr. 15, 2008) (Affirmation Session, April 29, 2008, 1:25 p.m. re. AmerGen Energy Company, LLC (License Renewal for Oyster Creek Nuclear Generating Station), Docket No. 50-219-LR, Citizens’ Petition for Review of LBP-07-17 and Other Interlocutory Decisions in the Oyster Creek Proceeding (Tentative)).

⁶ Board Notification 2008-01, Notification of Information in the Matter of Oyster Creek Nuclear Generating Station License Renewal Application (Apr. 3, 2008) (“Commission Notification”).

⁷ *Id.*

The Staff followed the Commission Notification by issuing Regulatory Issue Summary (“RIS”) 2008-10 to all licensees—not just AmerGen—informing them that the fatigue analysis methodology in question “could be nonconservative if not correctly applied.”⁸ As described in the RIS, this analysis uses a Green’s Function to calculate fatigue usage during plant transients.⁹ A number of license renewal applicants apparently have used this methodology, and the Staff has requested that applicants perform a confirmatory analysis to demonstrate that the simplified methodology provides acceptable results.¹⁰ Prior to issuance of the RIS, the Staff already had asked AmerGen to perform the confirmatory analysis,¹¹ and AmerGen is doing so for the Oyster Creek plant. Thus, Citizens’ Petition relates to a generic issue that the Staff is already addressing in license renewal reviews, including Oyster Creek.

To prevent the Commission from issuing the license, Citizens filed a motion on April 11, 2008 to, among other things, stay the license renewal proceeding based on this Commission Notification.¹² Both AmerGen and the NRC Staff filed timely answers opposing this motion on April 21, 2008, arguing that Citizens have not satisfied the requirements for a stay.¹³ This motion is currently before the Commission for its decision. Citizens filed their current Petition on April 18, 2008.

⁸ NRC Regulatory Issue Summary 2008-10, “Fatigue Analysis of Nuclear Power Plant Components” at 1 (Apr. 11, 2008) (“RIS 2008-10”).

⁹ *Id.* at 2.

¹⁰ *See id.*

¹¹ *See id.*

¹² 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).

¹³ *See* AmerGen’s Answer Opposing Citizens’ Motion to Stay Proceeding (Apr. 21, 2008); NRC Staff’s Response in Opposition to Citizens’ Motion to Stay (Apr. 21, 2008).

II. LEGAL STANDARDS

Given the timing of this Petition—only days from a scheduled-Commission ruling on Citizens' appeal of the drywell contention, and about six months after the end of the hearing, closure of the evidentiary record, and the Board's Initial Decision—Citizens face an extremely high standard for re-opening of the record and admission of a late-filed contention. As discussed below, Citizens must satisfy *all* of the requirements in (1) 10 C.F.R. § 2.326 to reopen the record; (2) 10 C.F.R. § 2.309(c) for nontimely filings; and (3) 10 C.F.R. § 2.309(f)(1) and (2) for contention admissibility. Failure to satisfy *any* of these standards must result in rejection of the entire Petition.

A. **Motion To Reopen**

The general requirements for a motion to reopen in 10 C.F.R. § 2.326(a) are threefold:

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

Reopening the record is “an extraordinary action.”¹⁴ The moving party, therefore, has a heavy burden to provide considerable support for these three criteria.¹⁵ As a part of that burden, 10 C.F.R. § 2.326(b) requires that the motion be accompanied by affidavits that support *each* of

¹⁴ *Metro. Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), LBP-82-34A, 15 NRC 914, 914 (1982).

¹⁵ *See Kan. Gas & Elec. Co.* (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978).

the bases satisfying the three criteria in § 2.326(a). The moving party must submit relevant, material, and reliable evidence in support of its motion.¹⁶

Further, 10 C.F.R. § 2.326(d) unambiguously requires that “[a] motion to reopen which relates to a contention not previously in controversy among the parties must also satisfy the requirements for nontimely contentions in § 2.309(c).” This plain language does not apply to all contentions, but only to those which are unrelated to the contentions litigated previously between the parties, such as the contention Citizens now proffer.

Thus, Citizens must also satisfy the following eight-factor balancing test set forth in 10 C.F.R. § 2.309(c)(1) for non-timely filings:

- (i) Good cause, if any, for the failure to file on time;
- (ii) The nature of the requestor’s/petitioner’s right under the Act to be made a party to the proceeding;
- (iii) The nature and extent of the requestor’s/petitioner’s property, financial or other interest in the proceeding;
- (iv) The possible effect of any order that may be entered in the proceeding on the requestor’s/petitioner’s interest;
- (v) The availability of other means whereby the requestor’s/petitioner’s interest will be protected;
- (vi) The extent to which the requestor’s/petitioner’s interests will be represented by existing parties;
- (vii) The extent to which the requestor’s/petitioner’s participation will broaden the issues or delay the proceeding; and
- (viii) The extent to which the requestor’s/petitioner’s participation may reasonably be expected to assist in developing a sound record.

The burden is on the petitioner to demonstrate “that a balancing of these factors weighs in favor of granting the petition.”¹⁷ The eight factors in Section 2.309(c)(1) are not of equal

¹⁶ *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1367 (1984).

importance: absence of good cause (factor one) and the likelihood of substantial broadening of the issues and delay of the proceeding (factor seven) are the most significant.¹⁸ Factors five (availability of other means) and six (interests represented by other parties) are entitled to the least weight.¹⁹

B. Petition For Late-Filed Contention

The late-filed contention also must meet the requirements of 10 C.F.R. § 2.309(f)(2), which provides that a petitioner may submit a new contention only with leave of the presiding officer upon a showing that:

- (i) The information upon which the amended or new contention is based was not previously available;
- (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
- (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.²⁰

Apart from the late-filing criteria set forth in 10 C.F.R. §§ 2.309(c) and (f)(2), a late-filed contention must meet the substantive admissibility criteria set forth in 10 C.F.R. § 2.309(f)(1). These criteria are: (1) specify the issue to be raised; (2) briefly explain the basis for the contention; (3) demonstrate that the issue is within the scope of the proceeding; (4) demonstrate that the issue is material to the proceeding; (5) provide a concise statement of the alleged facts or expert opinion that support the petitioner's opinion; and (6) demonstrate that a genuine dispute exists on a material issue of law or fact, including specific references to allegedly deficient

¹⁷ *Texas Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 609 (1988).

¹⁸ *See, e.g., Project Mgmt. Corp.* (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 395 (1976).

¹⁹ *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-08, 51 NRC 146, 154 (2000) (citing *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244-45 (1986)).

²⁰ 10 C.F.R. § 2.309(f)(2)(i)-(iii).

portions of the application. Failure to comply with any one of the six admissibility criteria is grounds for dismissal of a proposed new contention.²¹

III. ARGUMENT

The Petition is merely Citizens' latest attempt to delay the issuance of the renewed license for Oyster Creek by any conceivable means. At this extremely late date in the proceeding, Citizens must demonstrate that their motion to reopen is timely, that it raises a *significant* safety issue, that the alleged new information would likely lead to a materially different outcome in the proceeding, and that they have good cause for their untimely motion. Then they must also demonstrate that their late-filed contention is admissible. As demonstrated below, Citizens have failed to carry this extraordinary burden.

A. **Citizens' Motion To Reopen The Record In This Proceeding Must Be Rejected**

1. The Motion To Reopen Is Not Timely

The NRC regulations state that a motion to reopen "must be timely."²² Although 10 C.F.R. § 2.326(a)(1) does not provide a specific deadline, the Commission has held that even a delay of four weeks does not satisfy this timeliness requirement.²³ In this regard, the Commission stated that it

cannot overemphasize the obligation of Intervenors to raise contentions at the earliest possible time. The Commission reasonably demands that contentions filed after the hearing is

²¹ See Changes to the Adjudicatory Process, 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004); see also *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

²² 10 C.F.R. § 2.326(a)(1).

²³ *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 and 2), CLI-90-6, 31 NRC 483, 487 (1990) (holding that intervenors "should have moved more promptly than a full four weeks [after an NRC bulletin was published], especially given that the record had long since closed and the Commission's immediate effectiveness decision was expected imminently").

underway – let alone concluded – be filed promptly after receipt of the information needed to frame these contentions.²⁴

Citizens' motion to reopen, coming days before the Commission is expected to rule on the pending drywell contention appeal, months after the issuance of the Board's Initial Decision and the briefing of all issues on appeal, and based on information that has long been available (as discussed below), does not satisfy these timeliness requirements and must be rejected.

a. Citizens Could Have Filed Their New Contention Long Ago

The appropriate time for Citizens to submit a proposed contention on metal fatigue issues was nearly three years ago, following the notice of hearing in this proceeding. As explained above, AmerGen submitted the Oyster Creek LRA in July 2005 and the notice of hearing was published in the *Federal Register* on September 15, 2005 (*i.e.*, over two and a half years ago).²⁵

Section 4.3 of the LRA includes a thorough discussion of metal fatigue calculations. Although Dr. Joram Hopfenfeld, Citizens' purported expert, complains that the Oyster Creek LRA does not "provide any warning" that his concerns regarding the use of a simplified Green's Function might apply to any components at Oyster Creek,²⁶ the original LRA states, with respect to the metal fatigue aging management program ("AMP") that "Stressed-based fatigue monitoring consists of computing a 'real time' stress history for a given component . . . based on a Green's Function approach. CUF is then computed from the computed stress history . . ." ²⁷

²⁴ *Id.*; see also *Diablo Canyon*, ALAB-775, 19 NRC at 1366 (holding that, "for a reopening motion to be timely presented, the movant must show that the issue sought to be raised could not have been raised earlier").

²⁵ American Energy Company, LLC Oyster Creek Nuclear Generating Station; Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License No. DRP-16 for an Additional 20-Year Period, 70 Fed. Reg. 54,585 (Sept. 15, 2005). In fact, another intervenor in this proceeding, the New Jersey Department of Environmental Protection, did submit a contention on metal fatigue issues in 2005. See LBP-06-07, 63 NRC 188, 204-07 (2006). Nothing prevented Citizens from doing the same at that time.

²⁶ See Citizens' Exhibit MFC-1, Declaration of Dr. Joram Hopfenfeld (Apr. 15, 2008) ¶ 8 ("Hopfenfeld Declaration").

²⁷ LRA at 4-25 (July 26, 2005), available at ADAMS Accession No. ML052080185.

Moreover, a comparison of the Oyster Creek LRA with Dr. Hopenfeld's declarations in another license renewal proceeding involving the Vermont Yankee LRA reveals that, at the least, the essential information supporting Citizens' Petition was clearly available nearly ten months ago. Throughout the Vermont Yankee proceeding, the intervenor New England Coalition, Inc. ("NEC") has relied upon declarations from Dr. Hopenfeld to support its metal fatigue contentions.²⁸ Citizens describe Dr. Hopenfeld as "the expert who first alerted the NRC Staff to the metal fatigue issue in the Vermont Yankee proceeding,"²⁹ and claim that the NRC Staff referred them to the Vermont Yankee filings for more information on the metal fatigue issues.³⁰

Dr. Hopenfeld's Fourth and Sixth Declarations in the Vermont Yankee proceeding include criticisms of the applicant's use of the Green's Function methodology that is at issue in this Petition. For example, in his Fourth Declaration, Dr. Hopenfeld states that, "To obtain stress histories during plant transients, Entergy used the Green's Function Methodology Green's Function is a simplification that is used to linearize non-linear equations. Such simplifications can result in errors"³¹ As noted above, the Oyster Creek LRA clearly states that AmerGen relies upon the Green's Function methodology for stress-based fatigue monitoring in its metal fatigue AMP.

Thus, it is clear from the Oyster Creek LRA that AmerGen's metal fatigue AMP relies upon the methodology that Dr. Hopenfeld criticized in the Vermont Yankee LRA nearly 10

²⁸ See, e.g., Hopenfeld Declaration ¶ 2; Fourth Declaration of Dr. Joram Hopenfeld (July 10, 2007), Attachment A to New England Coalition, Inc.'s (NEC) Motion to File a Timely New or Amended Contention (July 12, 2007) available at ADAMS Accession No. ML072010437 ("Hopenfeld Fourth VY Declaration"); Sixth Declaration of Dr. Joram Hopenfeld (Aug. 31, 2007), Attachment 2 to New England Coalition, Inc.'s (NEC) Motion to File a Timely New or Amended Contention (Sept. 4, 2007) available at ADAMS Accession No. ML072530900 ("Hopenfeld Sixth VY Declaration").

²⁹ Petition at 12-13.

³⁰ *Id.* at 2, 3 n.2.

³¹ Hopenfeld Fourth VY Declaration ¶ 19; see also Hopenfeld Sixth VY Declaration ¶ 9.

months ago. Citizens fail to explain this fundamental discrepancy: although NEC was able to submit an admissible contention on this very issue nearly ten months ago, Citizens claim the information for the instant late-filed contention was available only following the Commission Notification published earlier this month. Such an argument must fail.

b. *Citizens' Reliance On A 2006 Request For Additional Information ("RAI") Also Demonstrates That They Are Late*

Citizens also rely on a 2006 Oyster Creek RAI for various information, including the fatigue usage factor, from which Citizens conclude that "within the margin of error of the calculation, the recirculation valve [sic] is already predicted to reach the allowable limit."³² Similarly, Dr. Hopenfeld relies on this RAI to support his claims.³³ Given that this RAI is almost two years old, any arguments or contentions based upon it are grossly late.

c. *The April 3, 2008 Commission Notification Does Not Provide Any New Information*

Citizens rely entirely on the Commission Notification to justify the timeliness of the Petition.³⁴ That reliance is misplaced, however, because the relevant, substantive information therein was previously available. Citizens' Petition must be dismissed for this reason alone.

The Commission Notification consists of only three paragraphs. The first paragraph merely explains that the Notification is made in accordance with Commission policy. The third paragraph only states that the Staff plans to ask AmerGen to perform a confirmatory analysis and states that the safety significance of using the simplified analysis is low; therefore, these

³² Petition at 3.

³³ Hopenfeld Declaration ¶ 9 (citing the 2006 RAI for the recirculation outlet nozzle environmentally adjusted CUF ("CUF_{em}") value of 0.978, and concluding that "[w]ithin the margin of error of these calculations . . . [i]t is therefore likely that an analysis that complies with the ASME Code would predict that the CUF would become greater than one during the proposed period of extended operation").

³⁴ See Petition at 7, 15, 17.

paragraphs do not provide any new information to support the Petition. The second paragraph states:

The staff is reviewing the use of a simplified method to calculate cumulative usage factors (CUF) that may not be conservative. Oyster Creek Nuclear Generating Station (Oyster Creek) used this simplified fatigue calculation method for one type of nozzle, the recirculation nozzle at the plant. This type of calculation was not applicable to the drywell shell analysis, which is the subject of the appealed contention pending before the Commission. Although, this simplified calculation is not relevant to the contention in the proceeding that was before the ASLB, we are providing this information, because this may be an issue of public interest.³⁵

The only information in this paragraph that could conceivably form the basis for Citizens' mistaken belief that they may file a new contention are the first and second sentences stating that the method used to calculate the CUF for the recirculation nozzle may not be conservative.

This information, however, is not new. Citizens' Petition *itself* states that this information was available much earlier than the Commission Notification.³⁶ In addition, Dr. Hopenfeld acknowledges that "[a]t an NRC public meeting on January 8, 2008 Structural Integrity Associates ('SI'), the consultant that did the metal fatigue analysis at Vermont Yankee, stated that the simplified methodology was also used by *Oyster Creek* and a number of other plants as part of their license renewal applications."³⁷ Dr. Hopenfeld attended this meeting in person, as did Citizens' purported drywell corrosion expert, Dr. Hausler, via telephone bridgeline.³⁸ The Entergy presentation for that meeting, identifying Oyster Creek as a plant that

³⁵ Commission Notification.

³⁶ Petition at 6.

³⁷ Hopenfeld Declaration ¶ 4 (emphasis added).

³⁸ See Summary of Meeting Held on January 8, 2008, Between the U.S. Nuclear Regulatory Commission Staff and Entergy Nuclear Operations, Inc., Representatives to Discuss the Response to a Request for Additional Information Pertaining to the Vermont Yankee Nuclear Power Station License Renewal Application (Jan. 31, 2008), available at ADAMS Accession No. ML080220508.

used a similar methodology, has been available in ADAMS since January 18, 2008.³⁹

Additionally, Citizens and Dr. Hopenfeld both assert that the NRC Staff concluded in February 2008 that this methodology was non-conservative.⁴⁰ Thus, the information in the Commission Notification was available months ago, so the Petition is untimely.

This is not the first time that Citizens have attempted to submit a nontimely late-filed contention based on an allegedly “new” document that contained previously-available information.⁴¹ In rejecting one of these attempts, the Board noted Citizens’ “fundamental misunderstanding of 10 C.F.R. § 2.309(f)(2)”⁴² and explained that “10 C.F.R. § 2.309(f)(2) allows admission of a new or amended contention when the *information* on which the contention is based is materially different from that which was previously available [but] . . . the fact that a new *document* has come to light does not, in and of itself, satisfy section 2.309(f)(2).”⁴³

Citizens do not appear to have corrected their fundamental misunderstanding of this regulatory requirement. They attempt to execute the same maneuver here by relying on the April 3, 2008 Commission Notification for timeliness, even though, as explained above, it contains no new information.

d. Other Documents Cited By Citizens Provide No New Information

As stated by Citizens, “the Commission and on occasions the ASLB has [sic] interpreted the ‘timely fashion’ requirement of 10 C.F.R. § 2.309(f)(2)(iii) as being 30 days from the

³⁹ See Presentation to NRC Staff Regarding Reactor Pressure Vessel Nozzle Environmental Fatigue Analyses for License Renewal, Vermont Yankee Nuclear Power Station (VYNPS), (Jan 8, 2008), available at ADAMS Accession No. ML080100282.

⁴⁰ Petition at 6; Hopenfeld Declaration ¶ 5.

⁴¹ See, e.g., *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-11, 63 NRC 391 (2006); Memorandum and Order (Denying Citizens’ Motion for Leave to Add a Contention and Motion to Add a Contention), 6 (Apr. 10, 2007) (unpublished) (“April 10, 2007 Order”).

⁴² April 10, 2007 Order at 6.

⁴³ *Id.* at 6-7.

availability of the new information upon which the new contention is based.”⁴⁴ Other than the Commission Notification, Citizens only reference in the Petition a limited number of documents from the last 30 days: RIS 2008-10 and two news articles.⁴⁵

These documents do not provide any new information to support a late-filed contention. As explained above, RIS 2008-10 includes information substantially similar to that found in Dr. Hopenfeld’s declarations in the Vermont Yankee proceeding and to the public documentation of the January 8, 2008 public meeting discussed above. Furthermore, RIS 2008-10 does not provide a basis for the Petition, because it does not provide any additional material information beyond that in the Commission Notification, which, as demonstrated above, does not include any new material information. Citizens’ selectively quote from one newspaper article, and in doing so mischaracterize an NRC spokesperson’s opinions regarding the safety significance of this issue⁴⁶ and the second article merely reiterates Exelon’s longstanding position that the calculations at issue are conservative,⁴⁷ therefore, the news articles provide no new information.

e. *The New Documents Cited By Citizens Do Not Address The Metal Fatigue Monitoring Program*

Citizens also challenge the adequacy of the metal fatigue monitoring program,⁴⁸ and Dr. Hopenfeld questions alleged “non-conservative assumptions in calculating the environmental fatigue correction factor.”⁴⁹ None of the allegedly “new” documents referenced by Citizens and

⁴⁴ Petition at 15.

⁴⁵ Todd Bates, *NRC Wants Nuclear Plant’s Water Nozzles Rechecked*, Asbury Park Press (Apr. 7, 2008) (“Bates News Article”), available at <http://www.app.com/apps/pbcs.dll/article?AID=/20080407/NEWS/804070368>; Rebecca Smith, *Nuclear Plant Analyses Ordered*, Wall Street Journal (Apr. 18, 2008), available at http://online.wsj.com/article/SB120847674445424819.html?mod=googlenews_wsj.

⁴⁶ Petition at 2, 7-8.

⁴⁷ *Id.* at 14

⁴⁸ *Id.* at 4, 12; Hopenfeld Declaration ¶ 10.

⁴⁹ Hopenfeld Declaration ¶ 11.

Dr. Hopenfeld, however, even address this program. Instead, Dr. Hopenfeld cites to the 2005 LRA, the 2006 RAI, and NUREG/CR-6909, published in February 2007.⁵⁰ All of this information is at least a year old, making any argument based on these documents also unjustifiably late.

2. Citizens' Motion To Reopen Does Not Raise An Exceptionally Grave Issue

Because the motion to reopen is late, it must be rejected if it does not raise an “exceptionally grave issue” pursuant to 10 C.F.R. § 2.326(a)(1). Citizens do not allege that their motion raises such an issue,⁵¹ and it does not. Thus, it must be rejected on this basis as well. As discussed below, Citizens only speculate about the safety significance of their allegations and blatantly ignore the Staff’s assessment that use of the simplified analysis method is of *low* safety significance.⁵² Absent any demonstration that the motion raises a significant safety issue, the motion clearly does not raise an “exceptionally grave issue.”⁵³

To support their motion to reopen, Citizens assume that the increase in the CUF identified for a Vermont Yankee feedwater nozzle indicates that a similar increase would apply to a different nozzle (*i.e.*, the recirculation nozzle) at Oyster Creek.⁵⁴ But Citizens provide no explanation or basis for this assumption. Dr. Hopenfeld’s declaration similarly fails to provide any meaningful reason to conclude that the Vermont Yankee results would predict the results of

⁵⁰ *Id.* ¶¶ 10-11.

⁵¹ See Petition at 7 (“even if this Motion is not timely, it should be granted because it raises a number of important issues that it is in the public interest to resolve”).

⁵² Commission Notification (emphasis added).

⁵³ See *Public Serv. Co. of N.H.* (Seabrook Station, Units 1 and 2), ALAB-886, 27 NRC 74, 78 (1988) (“because the motion is untimely, the [movant’s] burden is considerably greater: it must establish that the issue it would now add to the proceeding is not merely ‘significant’ but ‘exceptionally grave’”); Final Rule: Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,536 (1986) (“the Commission anticipates that this exception [for exceptionally grave issues] will be granted rarely and only in truly extraordinary circumstances”).

⁵⁴ See Petition at 7.

a confirmatory analysis of the recirculation nozzle at Oyster Creek.⁵⁵ This amounts to blatant speculation that provides neither the factual nor technical bases to demonstrate the existence of a significant safety issue that warrants the extraordinary action of reopening the record at this late date in the proceeding.⁵⁶

Citizens also selectively quote a news article that purportedly quotes an NRC spokesperson's statement that, if the recirculation nozzle breaks, "it could lead to a severe accident."⁵⁷ Newspaper allegations, however, are insufficient grounds for reopening the record,⁵⁸ and such information falls far short of the affidavit requirement in 10 C.F.R. § 2.326(b).⁵⁹ Moreover, Citizens ignore the remainder of the article, which quotes the same individual 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."⁶⁰

Finally, the Commission Notification, which is the basis of Citizens' motion to reopen, notably states that "the staff believes that the safety significance of using the simplified analysis method is *low*."⁶¹ This statement is directly contrary to Citizens' claim that the method raises a

⁵⁵ See Hopenfeld Declaration ¶¶ 6-7 (speculating only that "I expect that the simplified method has underestimated the CUF of the recirculation nozzle at Oyster Creek").

⁵⁶ See, e.g., *Kansas Gas*, ALAB-462, 7 NRC at 338.

⁵⁷ Petition at 7-8.

⁵⁸ See *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 & 2), LBP-84-3, 19 NRC 282, 286 (1984).

⁵⁹ See also *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-81-5, 13 NRC 361, 363 (1981) (requiring that the moving party provide more than "bare allegations"); *Kansas Gas*, ALAB-462, 7 NRC at 338 (finding insufficient support for reopening the record, noting that the proponent of a motion to reopen has a heavy burden).

⁶⁰ Bates News Article (emphasis added).

⁶¹ Commission Notification (emphasis added).

significant safety issue, but Citizens do not even mention this conclusion, much less explain why they believe it is incorrect.

In sum, Citizens' allegations of safety significance rely solely upon speculation and misquotes. Such information cannot support a finding that the Commission Notification raises a significant safety issue, and is further refuted by the Staff's *unchallenged* assessment that the safety significance of the simplified analysis method is low. Because the motion to reopen does not raise a significant safety issue, it clearly does not raise the requisite "exceptionally grave issue." For these reasons alone, the Petition must be rejected in its entirety.⁶²

3. Citizens' Motion To Reopen Does Not Raise A Significant Safety Issue

While the motion to reopen fails because it is unjustifiably late and does not raise an exceptionally grave issue, the Commission also must reject the motion because it fails to satisfy the requirement in 10 C.F.R. § 2.326(a)(2) that a "significant safety or environmental issue"⁶³ be "at stake."⁶⁴ Under 10 C.F.R. § 2.326(b), affidavits must "set forth the factual and/or technical bases" that support the safety significance of the issue. As discussed immediately above in Section III.A.2, neither the Hopenfeld Declaration, nor any other document cited by Citizens, demonstrates that the motion to reopen raises a significant safety issue. For this reason alone, the Petition must be denied.

⁶² Citizens provide other irrelevant arguments regarding the impact of the Commission Notification on other plants and on their January 3, 2008 petition. Petition at 8-9. None of these arguments have any relationship to the motion to reopen or the late-filed contention.

⁶³ 10 C.F.R. § 2.326(a)(2).

⁶⁴ *Texas Utils. Generating Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), LBP-83-55, 18 NRC 415, 418 (1983).

4. Citizens' Motion To Reopen Does Not Demonstrate That A Materially Different Result Is Likely

Citizens' motion to reopen likewise fails to satisfy 10 C.F.R. § 2.326(a)(3), which requires that "a materially different result would be or would have been likely had the newly proffered evidence been considered initially." As discussed below, Citizens present only a flawed argument that the fatigue calculations are material, and do not establish that reopening the record would likely affect the outcome of the proceeding.⁶⁵

In this regard, Citizens again rely exclusively on the Commission Notification, stating: "The materiality of this issue is confirmed by the NRC Staff's decision to notify the Commission of 'significant new information.'"⁶⁶ Citizens thereby erroneously conflate "materiality" with the requirement that, to reopen the record, new information must be *likely to produce a materially different result*.⁶⁷ Building on this error, Citizens conclude that the issuance of a Commission Notification requires reopening the record on the new information.⁶⁸ This argument is inherently flawed, and Citizens' motion to reopen fails in this regard.

Moreover, contrary to Citizens' apparent assumption that the *only* purpose of such Notifications is to alert the presiding officer to significant safety concerns that might produce a materially different result in the proceeding, such Notifications are only expected to explain the effect of the new information on the proceeding.⁶⁹ In the Commission Notification, the Staff

⁶⁵ See *S. Cal. Edison Co.* (San Onofre Nuclear Generating Station, Units 2 & 3), LBP-82-46, 15 NRC 1531, 1535 (1982).

⁶⁶ Petition at 9-10.

⁶⁷ See 10 C.F.R. § 2.326(a)(3); see also *Va. Elec. & Power Co.* (North Anna Nuclear Power Station, Units 1 & 2), ALAB-551, 9 NRC 704, 710 (1979) (instructing that a Board Notification should include an analysis of the extent to which the issue may have an impact on the facility under review, so that the Board may determine whether to *consider* the new information).

⁶⁸ See Petition at 9-10.

⁶⁹ See *La. Power & Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1114 n.59 (1983).

clearly explains that “we are providing this information because this may be an issue of public interest.” Additionally, the Staff explained that “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.”⁷⁰ Plainly, Citizens’ motion to reopen is at odds with the Staff’s stated intent in providing the Commission Notification, as well as its substantive message regarding low safety significance. For these reasons, any claimed support by Citizens that the Commission Notification will likely lead to a materially different result in the proceeding disappears, and the motion to reopen fails.

In a desperate scramble, Citizens proffer additional arguments to support their flawed and baseless motion to reopen. For example, Citizens argue that the Atomic Energy Act requires that they Citizens have an opportunity to request a hearing on the subject of the Commission Notification.⁷¹ This argument is does not support Citizens’ motion to reopen the record, because, contrary to Citizens’ misleading interpretation of the law, the *UCS* Cases they cite do not hold that the Commission must entertain contentions on all material issues at any stage in a licensing proceeding. Although *UCS I* held that the Commission generally may not eliminate consideration of issues material to licensing from the hearing process,⁷² *UCS II* clarified this principle by holding that it was within the Commission’s authority to establish a hearing

⁷⁰ NRC Staff’s Response In Opposition To Citizens’ Motion To Stay, 7 (Apr. 21, 2008); *see also id.* at 6 (clarifying that the Staff’s intent 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.’”).

⁷¹ Petition at 10 (*citing Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1438-50 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1132 (1985) (“*UCS I*”); *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 53 (D.C. Cir. 1990) (“*UCS II*”; collectively, “*UCS Cases*”)).

⁷² *See* 735 F.2d at 1451.

schedule and require parties to raise issues in a timely manner.⁷³ The court further explained that,

we think it unreasonable to suggest that the NRC must disregard its procedural timetable every time a party realizes based on NRC environmental studies [for example] that maybe there was something after all to a challenge it either originally opted not to make or which simply did not occur to it at the outset.⁷⁴

Thus, contrary to Citizens' suggestion, the *UCS* Cases provide no support for Citizens' motion to reopen.⁷⁵ In making this argument, Citizens fail to meet 10 C.F.R. § 2.326(a)(3) and their motion to reopen must be rejected accordingly.

5. Citizens' Motion To Reopen Does Not Satisfy 10 C.F.R. § 2.309(c)

Section 2.326(d) unambiguously states: "A motion to reopen which relates to a contention not previously in controversy among the parties must also satisfy the requirements for nontimely contentions in § 2.309(c)." Citizens have filed a motion to reopen related to its petition for a late-filed contention on metal fatigue issues, which were not previously in controversy in this proceeding. Thus, Citizens must satisfy the requirements for untimely contentions found in Section 2.309(c).

Citizens attempt to avoid this requirement by asking the Commission to disregard this rule.⁷⁶ While acknowledging that the "stated requirement in 10 C.F.R. § 2.326(d)" requires satisfaction of the Section 2.309(c) standards, Citizens attempt to argue that Section 2.309(c) should not apply, because the drafters of the revised Part 2 rules failed to account for the

⁷³ See 920 F.2d at 55-56 ("the Commission can certainly adopt a pleading schedule designed to expedite its proceedings").

⁷⁴ *Id.* at 55.

⁷⁵ Similarly, Citizens' argument that NRC is responsible for all safety findings on a license application, is unrelated to the requirements for reopening the record in 10 C.F.R. § 2.326. Petition at 10-11.

⁷⁶ Petition at 11, 15-16.

circumstance in which Citizens now find themselves.⁷⁷ Citizens' argument is not only illogical, but also a direct challenge of the Commission's regulations. Such a challenge violates the long-standing rule that "no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding."⁷⁸

Perhaps understanding that the Commission is unlikely to accept their argument that Sections 2.326(d) and 2.309(c) do not apply—as it lacks legal foundation—Citizens nevertheless provide a cursory, and ultimately insufficient, discussion of the relevant factors set forth in Section 2.309(c).⁷⁹ As set forth below, full consideration and balancing of the factors, however, demonstrates that the Commission should reject Citizens' untimely Petition. As discussed above, the eight factors in Section 2.309(c)(1) are not of equal importance, and absence of good cause for late filing (factor one) and the likelihood of substantial broadening of the issues and delay of the proceeding (factor seven) are the most telling.⁸⁰

Turning to the first factor, Citizens merely state: "Citizens have good cause for not submitting the contention earlier, because they could not have filed the proposed contention before the NRC Staff issued its notification on April 3, 2008 and they have filed this motion promptly thereafter."⁸¹ This statement is incorrect and unsupported by fact, and does not carry Citizens burden of demonstrating good cause for late filing.⁸² To demonstrate good cause, a petitioner must show not only that it "acted promptly after learning of the new information, but

⁷⁷ *Id.* at 15-16.

⁷⁸ 10 C.F.R. § 2.335(a). Citizens do not attempt to meet the standards for a waiver under Section 2.335(b).

⁷⁹ Petition at 17-18.

⁸⁰ *See, e.g., Clinch River*, ALAB-354, 4 NRC at 395.

⁸¹ Petition at 17.

⁸² *See, e.g., Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), LBP-82-96, 16 NRC 1408, 1432 (1982).

the information itself must be *new* information, not information already in the public domain.”⁸³

As discussed in detail above in Section III.A.1.c, the Commission Notification does not provide any new information and Citizens were not prevented from filing a contention much earlier.

Because Citizens base their entire good cause argument on the Commission Notification, the Petition fails.

The Commission has stated that “[l]acking a favorable showing on good cause, a petitioner must show a compelling case on the remaining [applicable] factors.”⁸⁴ Factors two through six speak towards standing and the protection of a petitioner’s interests. Therefore, as the Board in this proceeding has explained, these factors “seemingly should be limited in application to situations where a petitioner seeks nontimely intervention rather than where, as here, an intervenor who has already established standing seeks to file a nontimely contention.”⁸⁵ Even if these factors are assumed to be germane to the balancing test, they should be accorded *de minimis* weight.⁸⁶ Thus, only the seventh and eighth factors remain to be evaluated.

Regarding the seventh factor (*i.e.*, the extent to which the participation will broaden the issues or delay the proceeding), Citizens merely state that “the request will not unduly delay the proceeding because AmerGen will be able to move for summary disposition of the proposed contention or argue that it has become moot.”⁸⁷

Citizens’ rationale is disingenuous. The procedural machinations they envision are themselves time-consuming and delay-inducing, not to mention based on a flawed motion to

⁸³ Apr. 10, 2007 Order at 8 (*quoting Texas Utils. Elec. Co. (Comanche Peak Steam Electric Station, Units 1 & 2)*, CLI-92-12, 36 NRC 62, 70 (1992)).

⁸⁴ *See id.* (*quoting State of New Jersey*, CLI-93-25, 38 NRC 289, 296 (1993)).

⁸⁵ Apr. 10 2007 Order at 11 n.10.

⁸⁶ *See id.*

⁸⁷ Petition at 18.

reopen and baseless late-filed contention. In view of Citizens' prior tactics,⁸⁸ if the contention were admitted, and AmerGen moved to moot the contention, then Citizens would likely file a reply to the motion, or another amended contention stating that the analysis is inadequate, thereby further delaying the proceeding unnecessarily. They already have used similar tactics in this proceeding, and their expert employed the same tactics in the *Vermont Yankee* proceeding on this very issue.⁸⁹

Admitting Citizens' proffered late-filed contention at this late date would delay this proceeding considerably and improperly, as the evidentiary hearing was completed and the record was closed months ago.⁹⁰ Additionally, the late-filed contention drastically broadens the issues in this proceeding because it raises an entirely new issue nearly three years after the notice of hearing, and days before the Commission is tentatively scheduled to rule on the pending drywell contention appeal. For these reasons, factor seven weighs heavily in favor of AmerGen.

The eighth factor (*i.e.*, extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record), also weighs against Citizens. On this factor, Citizens argue that their expert has "already helped the Staff to identify a problem with the metal fatigue calculations at nine reactors, including Vermont Yankee and Oyster Creek, that the Staff would otherwise have missed. Furthermore, at present the record is insufficient to allow the Commission to conclude that the TLAA at Oyster Creek is adequate."⁹¹

⁸⁸ See, e.g., Licensing Board Memorandum and Order (Denying Citizens' Motion for Leave to Add Contentions and Motion to Add Contentions) (Feb. 9, 2007) (unpublished) ("February 9, 2007 Order"); Apr. 10 2007 Order.

⁸⁹ Hopfenfeld Declaration ¶ 6.

⁹⁰ *Texas Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 167 (1993) (finding that "the potential for delay if the petition is granted, weighs heavily against Petitioner" because it "will result in the establishment of an entirely new formal proceeding, not just the alteration of an already established hearing schedule").

⁹¹ Petition at 18.

First, this conclusory statement is insufficient for purposes of Section 2.309. As stated by the Board in this proceeding, “[t]he Commission repeatedly has stressed that a petitioner has the burden of providing ‘specific and detailed information’ in support of an assertion that it may reasonably be expected to assist in developing a sound record.”⁹² Second, a petitioner must “set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony.”⁹³ Citizens’ sole reliance on Dr. Hopenfeld’s alleged prior successes is therefore misplaced.

Finally, Citizens’ late-filed contention is one of omission: “A confirmatory analysis using a conservative method is required to establish whether these nozzles could exceed allowable metal fatigue limits during any extended period of reactor operation.”⁹⁴ The Staff has already requested AmerGen to perform these confirmatory analyses, and AmerGen is performing them. And the RIS formally alerts the industry to the issue. Accordingly, Citizens are needlessly asking AmerGen to perform a task that AmerGen has already committed to perform.

In sum, weighing the factors in Section 2.309(c) demonstrates that the motion to reopen must be denied. For all these reasons, Citizens fail to meet 10 C.F.R. § 2.326. Accordingly, their motion to reopen must be rejected.

B. Citizens’ Late-Filed Contention Is Inadmissible And Must Be Rejected As A Matter Of Law And Fact

Citizens propose the following late-filed contention related to metal fatigue issues:

The predictions of metal fatigue for at least the recirculation nozzles at Oyster Creek are not conservative. A confirmatory analysis using a conservative method is required to establish whether these nozzles could exceed allowable metal fatigue limits

⁹² Apr. 10, 2007 Order at 8 (quoting *Comanche Peak*, CLI-92-12, 36 NRC at 74).

⁹³ *Id.* (quoting *Miss. Power & Light Co.* (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-704, 16 NRC 1725, 1730 (1982)).

⁹⁴ Petition at 12.

during any extended period of reactor operation. In addition, similar confirmatory analyses must be carried out for other structures for which the non-conservative analysis was used. Finally, the current stress-based metal fatigue monitoring program at Oyster Creek is inadequate because it relies upon non-conservative analysis techniques.⁹⁵

This proposed contention may be divided into three topics: (1) confirmatory analysis for the recirculation nozzle; (2) confirmatory analysis for other structures with non-conservative analyses; and (3) metal fatigue monitoring program. The reasons why none of these topics present an admissible late-filed contention are addressed below.

1. The Petition Does Not Satisfy The Late-Filed Contention Requirements

a. The Petition Does Not Satisfy The Requirements Of 10 C.F.R. § 2.309(c)

Because, as discussed above, Citizens' Petition was submitted long after the regulatory deadline for requests for hearing and petitions to intervene, and months after the close of the evidentiary record, it must meet the requirements for non-timely filings in 10 C.F.R. § 2.309(c). As discussed in Section III.A.5, above, Citizens' Petition fails the balancing test in Section 2.309(c), so their contention must be denied as untimely.

b. The Petition Does Not Satisfy The Requirements Of 10 C.F.R. § 2.309(f)(2)

Citizens acknowledge that their late-filed contention must meet the requirements of 10 C.F.R. § 2.309(f)(2).⁹⁶ This provision requires that any new contention be submitted in a "timely fashion" based on new information that was not previously available and is materially different than earlier information. For the reasons discussed below, Citizens also fail to meet the requirements of Section 2.309(f)(2).

⁹⁵ *Id.*

⁹⁶ *Id.* at 11.

Citizens do not satisfy the first and second criteria of 10 C.F.R. § 2.309(f)(2) for a late-filed contention, because they provide *no* information or arguments relevant to these criteria. The Petition's only statement regarding these criteria is: "Here, the Commission should now find that the new contention meets the requirements of 10 C.F.R. § 2.309(f)(2)(i) and (ii) because it is based upon new information that was 'not previously available,' and is 'materially different than information previously available.'"⁹⁷ Beyond this conclusory statement, and in view of the discussion above in Section III.A.1.a demonstrating that the information has been available since at least 2005, Citizens failure to explain how these criteria are satisfied for the instant late-filed contention is a fatal deficiency.

Addressing the third criterion in 10 C.F.R. § 2.309(f)(2), the Petition merely states that "the Commission and on occasions the ASLB has interpreted the 'timely fashion' requirement of 10 C.F.R. § 2.309(f)(2)(iii) as being 30 days from the availability of the new information upon which the new contention is based."⁹⁸ Citizens further claim that "[b]ecause this motion is based on the April 3, 2008 notification, which became available 15 days ago, it is easily within the timeliness requirement of 10 C.F.R. § 2.309(f)(2)(iii)."⁹⁹ This attempt to sidestep the regulatory requirements results in another fatal deficiency.

Specifically, although the Notification itself is less than 30 days old, the information which it contains and upon which it is based is much older than 30 days—and Citizens simply do not explain how they satisfy the other criteria set forth in Section 2.309(f)(2). As discussed in detail in Section III.A.1.c, above, the Commission Notification does not provide any new information that was not previously available. Therefore, the Commission Notification does not

⁹⁷ *Id.* at 15.

⁹⁸ *Id.*; see, e.g., *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-4, 59 NRC 31, 46 (2004).

⁹⁹ *Petition* at 15.

satisfy the requirements of 10 C.F.R. § 2.309(f)(2)(i) or (ii). Also as noted above, if any one of the three criteria required by 10 C.F.R. § 2.309(f)(2) is not satisfied, then the proposed new contention must be rejected.¹⁰⁰ Therefore, the Petition does not satisfy the late-filed contention requirements, and it must be evaluated against the requirements of 10 C.F.R. § 2.309(c).

2. The Petition Does Not Satisfy The Requirements For An Admissible Contention

In addition to the timeliness and good cause requirements of 10 C.F.R. § 2.309(f)(2) and (c), respectively, Citizens' late-filed contention also must satisfy the substantive contention admissibility requirements of 10 C.F.R. § 2.309(f)(1). Citizens' late-filed contention alleges that metal fatigue calculations at Oyster Creek are "not conservative,"¹⁰¹ and follows with three separate demands. As discussed below, no aspect of Citizens' late-filed contention satisfies the substantive admissibility requirements of 10 C.F.R. § 2.309(f)(1).

a. Confirmatory Analysis For The Recirculation Nozzle

The proposed contention first states: "The predictions of metal fatigue for at least the recirculation nozzles at Oyster Creek are not conservative. A confirmatory analysis using a conservative method is required to establish whether these nozzles could exceed allowable metal fatigue limits during any extended period of reactor operation."¹⁰² This demand does not raise a genuine dispute on a material issue of fact or law because it requests relief that has already been granted, contrary to 10 C.F.R. §§ 2.309(f)(1)(vi), and relies upon speculation rather than fact or expert opinion, contrary to 10 C.F.R. § 2.309(f)(1)(v).

This aspect of the contention fails to show a genuine dispute because the April 3, 2008 Commission Notification already provides the relief Citizens request in this demand: "The staff

¹⁰⁰ February 9, 2007 Order at 6.

¹⁰¹ Petition at 12.

¹⁰² *Id.*

plans to ask Oyster Creek to perform a confirmatory analysis consistent with the methodology in Section III of the ASME Code.”¹⁰³ The Staff has already asked AmerGen to perform this confirmatory analysis,¹⁰⁴ and AmerGen has already taken steps to do so. Because additional confirmatory analysis will be performed by AmerGen, there is no genuine dispute.¹⁰⁵ This aspect of Citizens’ contention impermissibly parrots the Staff’s request in a desperate, last-ditch attempt to continue the litigation in this proceeding.

This aspect of Citizens’ late-filed contention also rests, in part, on Dr. Hopensfeld’s speculation about the results of the pending confirmatory analysis.¹⁰⁶ The Commission Notification states that the calculation methods in question “*may not be conservative.*”¹⁰⁷ RIS 2008-10 clarifies further: the methodology in question “could be nonconservative if not correctly applied.”¹⁰⁸ The RIS further explains:

The Green’s function methodology is not in question. . . . Simplification of the analysis to consider only one value of the stress may provide acceptable results for some applications; however, it also requires a great deal of judgment by the analyst to ensure that the simplification still provides a conservative result.¹⁰⁹

¹⁰³ Commission Notification.

¹⁰⁴ See RIS 2008-10 at 2. Cf. *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 349-350 (1998) (RAIs are a “standard and ongoing part of NRC licensing reviews” and intervenors may not rely on the existence of an RAI as a basis for a contention); *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 336 (1999) (“petitioners must do more than rest on the mere existence of RAIs as a basis for their contention”).

¹⁰⁵ Although Citizens allege that there is a genuine dispute over whether the alleged new information has “undermined the ultimate conclusion of the SER,” Petition at 13, contentions challenging the adequacy of the Staff’s analysis in the SER are inadmissible. Changes to Adjudicatory Process, 69 Fed. Reg. at 2202; *U.S. Army* (Jefferson Proving Ground Site), LBP-06-27, 64 NRC 438, 456 (2006).

¹⁰⁶ Dr. Hopensfeld curiously states that he has been retained only by GRAMMES. Hopensfeld Declaration ¶ 1. If the Commission entertains his affidavit at all, it should treat the affidavit as supporting only GRAMMES, and not Citizens as a whole.

¹⁰⁷ Commission Notification (emphasis added).

¹⁰⁸ RIS 2008-10 at 1.

¹⁰⁹ *Id.* at 2.

Citizens, however, jump to the conclusion that calculations done using the simplified Green's Function method "are not conservative."¹¹⁰ In doing so, Citizens rely only on Dr. Hopenfled's speculation that "I expect that the simplified method has under-estimated the CUF of the recirculation nozzle at Oyster Creek."¹¹¹ Dr. Hopenfled provides no explanation for this statement, so it cannot support an admissible contention.¹¹²

Citizens and Dr. Hopenfled both state that the revised analysis for the Vermont Yankee feedwater nozzle "yielded an estimate for the CUF that was approximately 40% higher than the simplified analysis."¹¹³ Neither Citizens nor Dr. Hopenfled, however, even attempt to demonstrate any connection between the revised results for the Vermont Yankee feedwater nozzle and any expected results for any component at Oyster Creek, including the recirculation nozzle.¹¹⁴ This is for good reason: the analyses would involve different plant designs, different components, and, as RIS 2008-10 explains, each individual fatigue calculation is a complex analysis involving a great deal of judgment by the analyst. Thus, this additional information cited by Citizens and Dr. Hopenfled fails to provide the requisite basis for a contention, and fails to demonstrate a genuine dispute on a material issue of law or fact, contrary to 10 C.F.R. § 2.309(f)(1)(vi).

¹¹⁰ Petition at 12 (emphasis added).

¹¹¹ Hopenfled Declaration ¶ 7.

¹¹² See *USEC, Inc. (American Centrifuge Plant)*, CLI-06-10, 63 NRC 451, 472 (2006) ("an expert opinion that merely states a conclusion (e.g., the application is 'deficient,' 'inadequate,' or 'wrong') without providing a reasoned basis or explanation for that conclusion is inadequate because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion" as it is alleged to support an admissible contention); *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, LBP-98-07, 47 NRC 142, 181, *aff'd on other grounds*, CLI-98-13, 48 NRC 26 (1998) ("the Board is not to accept uncritically the assertion that a document or other factual information or an expert opinion supplies the basis for a contention").

¹¹³ Hopenfled Declaration ¶ 6; see Petition at 3.

¹¹⁴ See *supra* Section III.A.2.

b. Confirmatory Analysis For Other Structures With Non-Conservative Analyses

Citizens next allege that: “In addition, similar confirmatory analyses must be carried out for other structures for which the non-conservative analysis was used.”¹¹⁵ As an example, Citizens point to the feedwater nozzle, based on Dr. Hopenfled’s statement that “the CUFs for the feedwater and spray nozzles *may* also have been based on the simplified method and therefore *may* also be under-predicted.”¹¹⁶ This aspect of Citizens’ contention is pure speculation, unsupported by facts or expert opinion, contrary to 10 C.F.R. § 2.309(f)(1)(v),¹¹⁷ and fails to raise a genuine dispute on a material issue of law or fact, contrary to 10 C.F.R. § 2.309(f)(1)(vi).¹¹⁸

Dr. Hopenfled is simply wrong when he speculates that the calculated CUFs for the feedwater and spray nozzles “may also have been based on the simplified method.”¹¹⁹ AmerGen did not use the calculation method in question to calculate the projected CUFs in the LRA for these components, or for any component other than the recirculation outlet nozzles.¹²⁰ Moreover, the Staff states that Oyster Creek “used this simplified fatigue calculation method for *one* type of nozzle, the recirculation nozzle at the plant.”¹²¹ Thus, Dr. Hopenfled’s and Citizens’

¹¹⁵ Petition at 12.

¹¹⁶ Hopenfled Declaration ¶ 9 (emphasis added); *see also* Petition at 4.

¹¹⁷ *See USEC, Inc.*, CLI-06-10, 63 NRC at 472; *Private Fuel Storage, L.L.C.*, LBP-98-07, 47 NRC at 191.

¹¹⁸ *See also, e.g., Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC 419, 424 (2003) (holding that the contention rules “bar contentions where petitioners have only what amounts to generalized suspicions, hoping to substantiate them later.”) (internal quotations omitted).

¹¹⁹ Hopenfled Declaration ¶ 9.

¹²⁰ Declaration of Frederick W. Polaski (Apr. 28, 2008), attached as Exhibit 1 to this Answer.

¹²¹ Commission Notification (emphasis added).

speculation is incorrect, unsupported, and fails to raise a genuine dispute on a material issue of fact or law.¹²²

c. *Metal Fatigue Monitoring Program*

Citizens' contention concludes that: "Finally, the current stress-based metal fatigue monitoring program at Oyster Creek is inadequate because it relies upon non-conservative analysis techniques."¹²³ This argument is based on Dr. Hopenfled's statement that "Because the NRC has now concluded that this approach [*i.e.*, the simplified CUF calculation method,] is inadequate, the entire stress based fatigue monitoring program at Oyster Creek" is inadequate and "must be reassessed."¹²⁴ This sweeping statement is incorrect for multiple reasons and this aspect of the late-filed contention is therefore unsupported by fact or expert opinion, contrary to 10 C.F.R. § 2.309(f)(1)(v).

Dr. Hopenfled's statement is incorrect because, first, he mischaracterizes the Commission Notification and other recent Staff documents on this issue. The NRC Staff has not concluded that the simplified calculation method "is inadequate," but only that it "may not be conservative."¹²⁵ Second, as explained in Section I, above, the Commission Notification discusses the Staff's intent to request a confirmatory analysis of the calculation of projected CUF for the recirculation outlet nozzle, and does not question the fatigue monitoring program at Oyster Creek. Dr. Hopenfled provides no additional information on the adequacy of the Oyster Creek fatigue monitoring program, beyond these mischaracterizations of the Commission Notification. Thus, because Citizens rely solely, and wrongly, on the Staff's alleged

¹²² Citizens effectively admit that this aspect of their contention is unsupported: "*at [a] minimum, there is a material dispute with AmerGen about whether the current metal fatigue analysis is conservative for the recirculation nozzles . . .*" Petition at 14 (emphasis added).

¹²³ Petition at 12; *see also id.* at 4.

¹²⁴ Hopenfled Declaration ¶ 10.

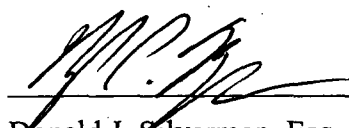
¹²⁵ Commission Notification; *see also* RIS 2008-10 ("The Green's function methodology is not in question.").

determination that the calculation methodology in question "is inadequate," this aspect of Citizens' contention is unsupported by the requisite fact or expert opinion.¹²⁶

IV. CONCLUSION

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

Respectfully submitted,



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Dated in Washington, D.C.
this 28th day of April 2008

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¹²⁶ See *Private Fuel Storage, L.L.C.*, LBP-98-7, 47 NRC at 181 ("the Board is not to accept uncritically the assertion that a document or other factual information or an expert opinion supplies the basis for a contention").

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
OFFICE OF THE SECRETARY**

BEFORE THE COMMISSION

In the Matter of:)

April 28, 2008)

AmerGen Energy Company, LLC)

Docket No. 50-219)

(License Renewal for Oyster Creek Nuclear)
Generating Station))

DECLARATION OF FREDERICK W. POLASKI

1. My name is Frederick W. Polaski. I am the Manager of License Renewal for Exelon. I have been in this position since 1996, first with PECO Energy Corporation, and since 2000 with Exelon. I work in the Exelon corporate office located in Kennett Square, Pennsylvania. I manage all aspects of the license renewal process for Exelon's and AmerGen's nuclear plants, including the OCNCS License Renewal Project. This includes oversight of the preparation of the License Renewal Application ("LRA") and Environmental Report, responding to requests for additional information from the Nuclear Regulatory Commission ("NRC"), participating in NRC audits and inspections associated with license renewal, and providing support for licensing proceedings before this Licensing Board. A copy of my résumé was attached as part of Applicant's Exhibit D in the evidentiary hearing in the Oyster Creek Nuclear Generating Station ("Oyster Creek") license renewal proceeding before the Atomic Safety and Licensing Board.
2. I have reviewed the April 18, 2008 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 Reopen the Record and for Leave to File a New Contention, and Petition to Add a New Contention ("Petition"), and the associated Declaration of Dr. Joram Hopenfeld, dated April 15, 2008 ("Declaration").

3. I have also reviewed NRC Regulatory Issue Summary 2008-10, "Fatigue Analysis of Nuclear Power Plant Components" (Apr. 11, 2008) ("RIS 2008-10") and Board Notification 2008-01, Notification of Information in the Matter of Oyster Creek Nuclear Generating Station License Renewal Application (Apr. 3, 2008) ("Commission Notification"), both of which discuss NRC Staff concerns about the use of a simplified method to calculate projected cumulative usage factors ("CUF") for fatigue analysis of nuclear power plant components.
4. Dr. Hopenfeld is simply wrong when he speculates, in paragraph 9 of his Declaration, that the calculated CUFs for the feedwater and spray nozzles at Oyster Creek "may also have been based on the simplified method." AmerGen did not use the simplified calculation method described in RIS 2008-10 and the Commission Notification to calculate the projected CUFs in the LRA for these components, or for any component at the Oyster Creek plant other than the recirculation outlet nozzles.

In accordance with 28 U.S.C. § 1746, I state under penalty of perjury that the foregoing is true and correct:



Frederick W. Polaski



Date

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

_____)	
In the Matter of:)	April 28, 2008
)	
AmerGen Energy Company, LLC)	
)	Docket No. 50-219
(License Renewal for Oyster Creek Nuclear)	
Generating Station))	
_____)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "AmerGen's Answer Opposing Citizens' Motion to Reopen Record and Petition to Add a New Contention" were served this day upon the persons listed below, by e-mail and first class mail.

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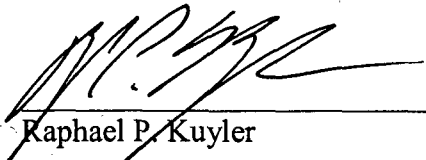
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* Original and 2 copies



Raphael P. Kuyler