

May 15, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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 FOR LEAVE TO
FILE A REPLY TO THE NRC STAFF'S OPPOSITION TO CITIZENS' MOTION TO REOPEN

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the Staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby responds to Citizens'¹ "Motion for Leave to File a Reply to the NRC Staff's Opposition to Citizens' Motion to Reopen" ("Motion") dated May 6, 2008. For the reasons set forth herein, Citizens' Motion should be denied.

BACKGROUND

On December 18, 2007, the Atomic Safety and Licensing Board (Board) issued an Initial Decision on the sole contention remaining in the proceeding.² Citizens subsequently appealed that decision to the Commission.³ A Commission decision on the appeal is still pending.⁴ On

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 Initial Decision (Rejecting Citizens' Challenge to AmerGen's Application to Renew Its Operating License For The Oyster Creek Nuclear Generating Station), LBP-07-17, 66 NRC 327 (2007).

³ See Citizens' Petition for Review of LBP-07-17 and the Interlocutory Decisions in the Oyster Creek Proceeding (Jan. 14, 2008).

⁴ The Commission has tentatively scheduled an Affirmation Session to decide Citizens' appeal on May 16, 2008. See NRC Sunshine Federal Register Notice for Weeks of May 12, 19, 26, June 2, 9, 16, 2008, 73 Fed. Reg. 27580 (May 13, 2008).

April 11, 2008, Citizens filed with the Commission “Motion by [Citizens] to Stay License Renewal Proceedings for Oyster Creek Nuclear Power Plant Pending Resolution of the Significant New Issue Notified by Staff” (“Motion for Stay”), which addressed, among other things, an issue regarding calculation of cumulative usage factors (CUF) for metal fatigue that had been the subject of a Staff Notification⁵ to the Commission.⁶ On April 18, 2008, Citizens filed another motion with the Commission dealing with this metal fatigue issue, this one entitled “Motion by [Citizens] to Reopen the Record and for Leave to File a New Contention, and Petition to Add a New Contention” (“Motion to Reopen”) in the Oyster Creek license renewal proceedings. On April 28, 2008, the Staff and AmerGen responded to Citizens’ Motion to Reopen. On May 6, 2008, Citizens filed the instant Motion with the Commission and attached “Reply to NRC Staff’s Opposition to Citizens’ Motion to Reopen” (“Reply”).

On May 9, 2008, the Commission referred the matter regarding whether to reopen the record to the Board for appropriate action, directing that “[a]ny further pleadings related to [Citizens’] motion should be directed to the Board.”⁷

⁵ Memorandum from Samson S. Lee, Acting Director of the Division of License Renewal, to the Commission, the Atomic Safety and Licensing Board, and the Parties, Board Notification 2008-01 (April 3, 2008) (ADAMS Accession No. ML080930335) (“Notification”).

⁶ The Staff and AmerGen both filed timely responses to this Motion for Stay with the Commission on April 21, 2008. See “NRC Staff’s Response in Opposition to Citizens’ Motion to Stay” (Apr. 21, 2008); “AmerGen’s Answer Opposing Citizens’ Motion to Stay Proceeding” (Apr. 21, 2008).

⁷ The Commission retained for its review Citizens’ Motion to Stay. Additionally, the Commission has before it another petition for a stay of these proceedings (as well as three other renewal proceedings) which was filed jointly by Citizens and parties (and prospective parties) in the three other renewal application review proceedings. See “Petition by [Citizens]; Riverkeeper, Inc.; Pilgrim Watch and New England Coalition 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, 2007). This petition did not specifically address the Oyster Creek metal fatigue issue raised in Citizens’ other recent filings. The Staff and the various applicants filed timely (continued. . .)

DISCUSSION

In their Motion, Citizens claim that they could not have reasonably anticipated that the Staff would argue that its April 3, 2008 Notification to the Commission⁸ regarding Oyster Creek's reactor recirculation nozzle did not contain new and significant information nor could they anticipate that the Staff would make the "impermissible" argument that violation of the ASME Code would not be a significant safety issue. Motion at 2. They claim therefore, that the compelling circumstances contemplated by 10 C.F.R. § 2.323(c) for the filing of replies exist. Motion at 1-2. Citizens, however have not met the standard, and their Motion should be denied.

Section 2.323(c) of the Commission's regulations requires that any party wishing to file a reply pleading after filing an initial motion and receiving a responsive pleading must first seek, and obtain, leave to file the reply. This is because, as § 2.323(c) states, "[t]he moving party has no right to reply, except as permitted by the Secretary, the Assistant Secretary, or the presiding officer." Section 2.323(c) also states that leave "may be granted only in compelling circumstances, such as where the moving party demonstrates that it could not reasonably have anticipated the arguments to which it seeks leave to reply."

Citizens could have reasonably anticipated that the Staff would point out that the information in the Staff's April 3, 2008 Notification was not new and significant. Citizens rely heavily upon the Staff's Notification to support their claim that the record in this proceeding

(. . .continued)

responses with the Commission opposing this joint petition for a stay. A Commission decision on this petition is tentatively set for the Commission's May 16, 2008 Affirmation Session. See 73 Fed. Reg. at 27580.

⁸ Memorandum from Samson S. Lee, Acting Director of the Division of License Renewal, to the Commission, the Atomic Safety and Licensing Board, and the Parties, Board Notification 2008-01 (April 3, 2008) (ADAMS Accession No. ML080930335) ("Notification").

should be reopened. The Notification, however, expressly states that the Staff “believes that the safety significance of using the simplified analysis method is low.” Citizens thus should clearly have anticipated facing arguments that the information contained in the Notification did not qualify as a “significant safety issue.” After all, the safety significance of the issue raised is a key criterion for reopening a proceeding; indeed, both the Staff and the Applicant⁹ raised this safety significance argument independently in their responses, further demonstrating how predictable these arguments should have been. Moreover, the Notification’s stated purpose was to inform the Commission about an issue that “may be an issue of public interest.” Thus, the Notification’s suggestion that it contained “significant new information” merely indicated that the information, in the Staff’s view, may have public interest significance. Any suspicion that “significant new information” was intended to mean “*safety* significant new information” should have been assuaged by the subsequent statement in the Notification that the “safety significance” of the issue was deemed to be “low.”

In sum, Citizens reasonably could have, and should have, anticipated Staff and Applicant arguments that the Notification meant what it said when it deemed the safety significance of the issue to be “low.” Citizens’ Motion should therefore be denied, and the attached reply should be stricken from the record.

Citizens make an attempt, though, to avoid this seemingly fatal defect by arguing that the Staff’s reiteration of the Notification’s stated conclusion regarding the issue’s low safety significance constitutes an impermissible challenge to Commission regulations and/or an

⁹ See AmerGen Answer Opposing Citizens’ Motion to Reopen Record and Petition to Add a New Contention (April 28, 2008) at 16.

impermissible challenge to Oyster Creek's current licensing basis (CLB). Citizens rely on a 1973 Atomic Safety and Licensing Appeal Board (ALAB) case¹⁰ for the proposition that where the Commission sets forth a safety-related regulatory requirement, non-compliance with that requirement is *per se* safety significant for record reopening purposes.¹¹ For those reasons, Citizens claim, they could not have reasonably anticipated that Staff would argue that the issue being raised was not a significant safety issue.¹²

But Citizens' arguments here lack merit. First, there is no regulatory or other (e.g. ASME code) requirement that is alleged to have been violated here. Citizens contend that the environmentally adjusted CUF for Oyster Creek's reactor recirculation outlet nozzle could be 40% higher than predicted by the simplified method and thus would exceed the ASME code limit of 1.0. See, e.g., Reply at 4. The Affidavit of John R. Fair at ¶5, however, unequivocally stated that the ASME code does not require calculation of an environmentally adjusted CUF at all. The non-environmentally adjusted CUF is all that licensees must calculate under the ASME code's terms. In addition, there is no regulation – and Citizens have cited none – that sets forth a mandatory environmentally adjusted CUF limit of 1.0. Thus, the Staff is not arguing that an alleged potential violation of a Commission regulatory requirement would not be a safety issue, and Citizens are simply wrong to characterize the Staff's position as such. Accordingly,

¹⁰ *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-138, 6, AEC 520, 528 (1973).

¹¹ See Reply at 2-4. Note that Citizens utilize the Reply, rather than the Motion itself, to elaborate upon their assertion on p. 2 of the Motion that the Staff's safety significance argument was "an impermissible argument" that therefore could not have been reasonably anticipated. Accordingly, the Staff responds herein to both the Motion itself and the aspects of the Reply being utilized to support the Motion.

¹² *Id.*

Citizens' assertion that any violation of a safety-related regulatory requirement is *per se* safety significant for reopening purposes is immaterial here, and certainly does not demonstrate that Citizens could not reasonably have anticipated the Staff's (and the Applicant's) safety significance arguments.¹³

Second, the prohibition against challenging the CLB during license renewal proceedings relates to scope, not safety significance, and so is also not material to the issue of whether the safety significance factor is met for reopening purposes. The prohibition simply reflects the Commission policy that license renewal proceedings will focus on a limited set of aging-related issues, and that the applicant's CLB – except to the extent that it relates to these aging issues – is not included within that set. This license renewal scoping policy recognizes that non-aging-related CLB issues, regardless of their level of safety significance, are covered already by other aspects of the Commission's regulatory scheme and so do not need to be adjudicated in renewal proceedings. Thus, Citizens' reference to this prohibition against challenging the CLB during renewal proceedings is misplaced in light of the question at hand.

Citizens' assertion that they could not reasonably have anticipated the Staff's safety significance argument, therefore, fails to demonstrate the "compelling circumstances" that would be necessary to permit their reply. Commission regulations accordingly require that the Board deny their Motion for leave to reply.

¹³ It should also be noted that the language from the 1973 *Vermont Yankee* decision relied upon by Citizens at pp. 2-3 of its Reply to establish its purported legal proposition regarding *per se* safety significance in record reopening does not actually come from the ALAB's discussion of record reopening in that case. See *Vermont Yankee*, ALAB-138, 6 AEC at 528 (Part IV of the opinion). Rather, that language comes from the ALAB's discussion of whether to allow continued plant operation pending the outcome of the proceedings, which it had already decided to reopen based upon the "paramount importance" of the fuel densification issue being raised. See *id.* at 526-28.

CONCLUSION

For the reasons stated above, the Staff respectfully requests that the Board deny Citizens' Motion and strike Citizens' reply from the record.

Respectfully submitted,

/RA/

Mary C. Baty
Counsel for NRC Staff

/RA/

James E. Adler
Counsel for NRC Staff

Dated at Rockville, Maryland
this 15th day of May 2008

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE IN OPPOSITION TO CITIZENS' MOTION FOR LEAVE TO FILE A REPLY TO THE NRC STAFF'S OPPOSITION TO CITIZENS' MOTION TO REOPEN" 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 15th day of May 2008.

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