

H-27

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
OFFICE OF THE SECRETARY

DOCKETED
USNRC

May 23, 2008 (12:04pm)

BEFORE THE COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of:)	May 23, 2008
AmerGen Energy Company, LLC)	
(License Renewal for Oyster Creek Nuclear Generating Station))	Docket No. 50-219

AMERGEN'S ANSWER OPPOSING CITIZENS' SUPPLEMENTAL PETITION

AmerGen Energy Company, LLC ("AmerGen") hereby files its timely Answer opposing the Supplemental Petition¹ that Citizens² filed on May 15, 2008.³ The Supplemental Petition reiterates Citizens' requests in their January 3, 2008 Petition to Suspend,⁴ and further requests that the Commission, among other things, provide them with the opportunity to engage in discovery against the NRC Staff, reopen the record "if necessary" following such discovery, and

¹ Supplemental Petition by Nuclear Information and Resource Service; Jersey Shore Nuclear Watch, Inc.; Grandmothers, Mothers and More for Energy Safety; New Jersey Public Interest Research Group; New Jersey Sierra Club; New Jersey Environmental Federation; Riverkeeper, Inc.; Pilgrim Watch and New England Environmental Coalition for Additional Investigation and Correction of Deficiencies Regarding License Renewal Reviews for Oyster Creek, Indian Point, Pilgrim, and Vermont Yankee Nuclear Power Plants (May 15, 2008).

² "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").

³ This Answer is timely. The Supplemental Petition is not filed under any specific regulatory provision. It purports to "supplement the basis of their initial Petition [to Suspend dated January 3, 2008]." Supplemental Petition at 2. The Petition to Suspend stated that it was a "general motion," Petition to Suspend dated January 3, 2008 at 7, so the Supplemental Petition should be treated as a motion as well. See also Supplemental Petition at 2 n.1 ("This supplemental *motion* . . .") (emphasis added). Thus, under 10 C.F.R. § 2.323(c), the deadline for this response is ten days from the filing of Citizens' Supplemental Petition.

⁴ Petition By Nuclear Information and Resource Service; Jersey Shore Nuclear Watch, Inc.; Grandmothers, Mothers and More For Energy Safety; New Jersey Public Interest Research Group; New Jersey Sierra Club; New Jersey Environmental Federation; Riverkeeper, Inc.; Pilgrim Watch and New England Coalition to Suspend License Renewal Reviews for Oyster Creek, Indian Point, Pilgrim, and Vermont Yankee Nuclear Power Plants Pending Investigation of NRC Staff Review Process and Correction of Deficiencies (Jan. 3, 2008) ("Petition to Suspend").

TEMPLATE= SECY-037

DS03

allow them the opportunity to file unspecified late contentions in the license renewal proceeding for the Oyster Creek Nuclear Generating Station (“Oyster Creek”) based on such discovery. The instant petition, like the Petition to Suspend that it supplements, fails to address, much less carry, Citizens’ burden of meeting any of the standards for the relief that they seek. Citizens now lodge additional complaints against the NRC Staff and the license renewal process, in the desperate hope that the Commission will grant them the opportunity to relitigate a proceeding that ended over six months ago.⁵ The Supplemental Petition, however, is only successful in confirming Citizens’ litigation strategy of serving baseless filings intended to delay this proceeding as long as possible.⁶

Citizens also are apparently not done arguing this issue. They threaten that the Supplemental Petition is only a preliminary filing and that they “reserve the right to file a more comprehensive motion . . . at a later date.”⁷ They have no such “right,” and this threat merely confirms Citizens’ true desires, which are to continue to delay this proceeding and waste the resources of the Commission, the Staff, and the applicant with additional baseless filings.

As demonstrated below, the Commission should dismiss the Supplemental Petition in its entirety because it: (1) requests a variety of types of relief from the Commission, without even purporting to comply with any of the requirements for obtaining such relief; (2) is based on the erroneous assumption that Citizens are entitled to submit late-filed contentions challenging the adequacy of the Staff’s review of a license renewal application; and (3) mischaracterizes the May

⁵ *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-07-17, 66 NRC 327, 338 (2007) (“[O]n October 29, the Board issued an order adopting transcript corrections and closing the record . . .”).

⁶ In view of the repeated cancellations of Commission affirmation sessions in the proceeding, Citizens already have accomplished the transparent short-term goal of the Supplemental Petition, which is to postpone any Commission decision on their Petition to Suspend. See Supplemental Petition at 2 n.1 (“This supplemental motion has been prepared quickly . . . in advance of the scheduled May 16, 2008 affirmation session . . .”).

⁷ Supplemental Petition at 2 n.1.

2, 2008 Inspector General (“IG”) Memorandum,⁸ as well as spewing blatant speculation without regard to fact or law.⁹

I. BACKGROUND

AmerGen provided the relevant background information on the Petition to Suspend in its Answer to that petition.¹⁰ The parties completed briefings on the Petition to Suspend on February 4, 2008.¹¹ Recently, however, the NRC IG provided the Commission with the IG Memo summarizing reviews of Staff documentation of license renewal reviews of eight aging management programs (“AMPs”) at four plants, including Oyster Creek. The IG Memo concluded that license renewal reviews had taken “significant numbers of hours,” but noted that it was “difficult to verify specific details of staff on-site review activities” because the Staff does not preserve applicant documents or its audit working papers.¹² It did not find fault with the license renewal review process or violations of NRC regulations or internal procedures.¹³

On May 15, 2008, on the eve of the scheduled Affirmation Session on the Petition to Suspend, Citizens filed the instant Supplemental Petition. In it, they distort the IG’s narrow critique beyond all recognition by claiming that “the IG Memo confirms that the NRC Staff

⁸ Memorandum from H. Bell to Chairman D. Klein, “NRC Staff Review of License Renewal Applications” (May 2, 2008) (“IG Memo”), available at ADAMS Accession No. ML081280227.

⁹ The Commission can also summarily reject the Supplemental Petition under 10 C.F.R. § 2.323(b) for failure to certify that Citizens have made a sincere effort to contact other parties to resolve their concerns prior to filing. The Supplemental Petition contains no such certification, and Citizens did not contact AmerGen.

¹⁰ AmerGen’s Answer Opposing Petition for Stay and to Reopen the Record at 2-3 (Jan. 15, 2008) (“Answer to Petition to Suspend”). In sum, Citizens and various other organizations requested that the Commission “suspend the currently pending license renewal proceedings” for Oyster Creek and other plants, “reopen the record” such that new contentions could be filed, and take other actions to investigate Staff license renewal reviews, without even addressing any of the requirements for obtaining such relief. *See generally* Petition to Suspend.

¹¹ See AmerGen’s Answer Opposing Citizens’ Motion for Leave to Reply (Feb. 4, 2008); NRC Staff’s Response in Opposition to Motion for Leave to Reply (Feb. 4, 2008).

¹² IG Memo at 4, 5.

¹³ *See id.*

cannot document that it carried out license renewal reviews adequately and suggests that the Staff has destroyed essential records.”¹⁴

II. ARGUMENT

A. **Citizens Have Not Complied With The Procedural Requirements For Their Requested Relief**

Citizens allege that the IG Memo and the purported “facts” provided in the Supplemental Petition “reinforce the request in the initial Petition for the Commission to suspend relicensing proceedings for [Oyster Creek and other] Facilities while it investigates and attempts to remedy the deficiencies in the relicensing process.”¹⁵ The Supplemental Petition then goes on to request additional remedies, including that the Commission order “release [of] all the non-public documents upon which the NRC Staff relied during the safety review, reopen the record if necessary, and allow Petitioners an opportunity to file new contentions based upon . . . the documents.”¹⁶ It further demands generic changes in the Commission’s document retention and publication practices.¹⁷

As explained in AmerGen’s Answer to the Petition to Suspend, Citizens’ demands in that filing included elements of a petition for review, an application for a stay, and a motion to reopen the record.¹⁸ The Petition to Suspend did not address, much less carry, Citizens’ burden to meet any of the requirements for any of those types of relief.¹⁹ The Supplemental Petition also fails to do so, thereby rendering it defective for the same reasons set forth in AmerGen’s previous Answer to Petition to Suspend.

¹⁴ Supplemental Petition at 1-2.

¹⁵ *Id.* at 16.

¹⁶ *Id.* at 18 (footnotes omitted).

¹⁷ *Id.*

¹⁸ *See* Answer to Petition to Suspend at 3-7.

¹⁹ *See generally id.*

Citizens' instant request for Staff documents is an unauthorized request for discovery, contrary to 10 C.F.R. § 2.336(f), which provides that mandatory disclosures are the "sole discovery permitted for NRC proceedings." All parties completed their mandatory disclosures in this proceeding nearly one year ago,²⁰ so Citizens' demand for additional documents at this extremely late date is baseless and must be denied.

Moreover, "longstanding agency precedent precludes an intervenor from obtaining discovery to assist it in framing contentions."²¹ Yet this is *precisely* what Citizens request: the release of additional documents, followed by the opportunity to file new contentions based on those documents.²² The Supplemental Petition should be denied for this reason alone.

Finally, to the extent Citizens object to the NRC Staff's document retention and publication policies, such topics are generic in nature and unrelated to this adjudication, so the Commission cannot grant any relief for these complaints.²³

B. The Supplemental Petition Is Based On The Erroneous Assumption That Citizens May Challenge The Adequacy Of The Staff's Review

The Supplemental Petition is based on the unjustified assumption that Citizens are entitled to file any number of late-filed contentions in this proceeding, after the close of the

²⁰ See Licensing Board Memorandum and Order (Prehearing Conference Call Summary, Case Management Directives, and Final Scheduling Order) at 8 (Apr. 17, 2007) (unpublished).

²¹ *Balt. Gas and Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 351 (1998) (denying motion to postpone deadline for contention submittal until after intervenor could conduct discovery against the staff) (citing *No. States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-107, 6 AEC 188, 192, *recons. den.*, ALAB-110, 6 AEC 247, *aff'd*, CLI-73-12, 6 AEC 241 (1973). See also *Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process*, 54 Fed. Reg. 33,168, 33,170-71 (explaining that the requirement to submit contentions at the start of a proceeding is intended to "preclude a contention from being admitted where an intervenor has no facts to support its position and . . . contemplates using discovery . . . as a fishing expedition which might produce relevant supporting facts.")).

²² Supplemental Petition at 18.

²³ Cf. 10 C.F.R. § 2.802(d) (permitting a petitioner that has submitted a petition for rulemaking to request the Commission "to suspend" a licensing proceeding "to which the petitioner is a party pending disposition of the petition for rulemaking"). Citizens, of course, have submitted no petition for rulemaking. See Petition to Suspend at 7 ("[N]or do Petitioners request a rulemaking under 10 C.F.R. § 2.802 . . .").

record, regarding the adequacy of the Staff's review and the propriety of the Staff's actions. In this regard, Citizens' complaints relate *solely* to the adequacy of the Staff's review.²⁴

This assumption is wrong. Citizens conceded as much in their Petition to Suspend, but seem to have forgotten this fact:

The Commission has made it clear that "[t]he adequacy of the applicant's license application, not the NRC staff's safety evaluation, is the safety issue in any licensing proceeding, and under longstanding decisions of the agency, contentions on the adequacy of the [content of the] SER are not cognizable in a proceeding"²⁵

Thus, the entire premise of the Supplemental Petition is flawed. Citizens' *stated* intent is to engage in a fishing expedition to identify and file new contentions based on documents related to the Staff's review of the license renewal application. This will waste the time and resources of the Staff and applicant by requiring them to respond to an unknown number of future contentions on impermissible topics, after the close of the record of the proceedings.²⁶ The Commission must end this process now.

C. Citizens' Grossly Mischaracterize the Inspector General's Memorandum

At the very outset of the Supplemental Petition, Citizens level a variety of criticisms against the IG Memo: "it falls far short of the investigation envisaged by Petitioners"; it is

²⁴ Examples include: (1) "The most important question left unanswered by the IG Memo is whether the quality of the relicensing reviews was actually sufficient," Supplemental Petition at 2; (2) "Petitioners reserve the right to file a more comprehensive motion *concerning the adequacy of NRC relicensing reviews* at a later date," *id.* at 2 n.1; (3) "Petitioners have now shown that the NRC Staff broke the law," *id.* at 14; (4) "the Commission should . . . allow Petitioners the opportunity to file new contentions based upon . . . information in the documents [upon which NRC Staff relied during the safety review]" *id.* at 18; and (5) "it is important for the Commission to probe the culture of the NRC management." *id.* (emphasis supplied).

²⁵ Petition to Suspend at 7 (quoting *U.S. Army* (Jefferson Proving Ground Site), LBP-06-26, 64 NRC 438, 456 (2007); see also *Calvert Cliffs*, CLI-98-25, 48 NRC at 351-52 ("our requirement that contentions rest on the license application rather than on the NRC Staff's review has not prevented innumerable petitioners . . . from framing admissible contentions and moving forward toward a hearing").

²⁶ See *Oyster Creek*, LBP-07-17, 66 NRC at 338.

“vague,” “not exhaustive,” and “raises more questions that [sic] it answers.”²⁷ Indeed, it was the IG Memo, and its alleged deficiencies, that triggered Citizens to submit the Supplemental Petition.²⁸ Citizens then attempt to fill the gaps they perceive in the IG Memo with speculation and inflammatory language.

For example, the IG Memo states that “the staff does not preserve their own audit working papers as permanent records.”²⁹ Citizens restate this as “the NRC Staff destroyed their ‘audit working papers’”³⁰ Similarly, the IG Memo states that Staff document retention practices “made it difficult to verify specific details of staff on-site review activities.”³¹ Citizens distort this into “[t]he IG Memo confirms that the NRC Staff cannot document that it carried out license renewal reviews adequately.”³² Finally, while the IG Memo documents that NRC Staff technical reviewers spent, on average, over 10,000 hours on the license renewal review for each unit,³³ Citizens blatantly misstate this as “the investigation only attempted to examine the volume of work . . . and made no attempt to examine the quality of the work.”³⁴

Citizens also speculate, based on certain ADAMS searches, that Program Basis Documents (“PBDs”) prepared by applicants to provide supporting documentation for aging management programs (“AMPs”), which the NRC Staff reviews during license renewal audits, “are high level *summary* documents prepared by the applicant that appear designed to lead the

²⁷ Supplemental Petition at 2.

²⁸ *See id.* at 1-2.

²⁹ IG Memo at 4.

³⁰ Supplemental Petition at 3.

³¹ IG Memo at 5.

³² Supplemental Petition at 1.

³³ IG Memo at 4.

³⁴ Supplemental Petition at 3. This statement is based on Citizens’ characterization of their purported discussion with an IG representative.

reviewer through the review process requirements.”³⁵ This is wrong, and Citizens should have known better: among the “over 2,000 documents”³⁶ that Citizens obtained through mandatory disclosures during this proceeding were hundreds of pages of PBDs and associated supporting documentation for AMPs related to the drywell contention.³⁷ Thus, Section IV of the Supplemental Petition is baseless speculation, including Citizens’ self-serving conclusion that they “have shown that for Oyster Creek the relicensing process was inadequate.”³⁸ Many of the conclusions in the Supplemental Petition are also undercut by this false speculation, including Citizens’ desire that “where only the PBD is listed as having been reviewed, the Commission should regard the [NRC Staff’s] review [of an AMP] as inadequate *per se*.”³⁹

Thus, although the IG Memo appears to have been tailored to address specific questions, it expresses no ultimate opinions on the adequacy of the NRC Staff’s license renewal reviews and does not alter any of the conclusions of the original IG Audit Report.⁴⁰ Only through Citizens’ speculation and mischaracterization does the IG Memo “reinforce” Citizens’ Petition to Suspend or otherwise support the additional relief they now request.

III. CONCLUSION

As demonstrated above, the Supplemental Petition is Citizens’ most recent attempt to throw as much baseless assertion, hyperbole and disparagement as possible at the NRC Staff and

³⁵ *Id.* at 4 (emphasis added).

³⁶ *Id.* at 15.

³⁷ Although, throughout the Supplemental Petition, Citizens complain about alleged inadequacies in the record for this proceeding, such complaints do not stand up to the facts. The record of the NRC Staff’s safety review alone includes the license renewal application of approximately 1,600 pages, approximately 130 requests for additional information, over 1,000 pages of AMP basis documentation in ADAMS, including PBDs, and a safety evaluation report (“SER”) of nearly 900 pages. For the litigated contention, AmerGen produced over 31,000 pages of documents and provided Citizens’ the opportunity to review all PBD binders associated with the drywell, and the parties submitted over 130 exhibits and hundreds of pages of pre-filed and oral testimony.

³⁸ Supplemental Petition at 16.

³⁹ *Id.* at 18.

⁴⁰ OIG-07-A-15, Audit of NRC’s License Renewal Program (Sept. 6, 2007).

AmerGen, without reference to law or regulation, in the desperate hope that the Commission will help them articulate a reason to continue this litigation. For the reasons set forth above, however, the Commission should deny Citizens' Supplemental Petition in its entirety.

Respectfully submitted,



Donald J. Silverman, Esq.
Kathryn M. Sutton, Esq.
Alex S. Polonsky, Esq.
Raphael P. Kuyler, Esq.
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004
Phone: (202) 739-5502
E-mail: dsilverman@morganlewis.com
E-mail: ksutton@morganlewis.com
E-mail: apolonsky@morganlewis.com
E-mail: rkuyler@morganlewis.com

J. Bradley Fewell
Associate General Counsel
Exelon Corporation
4300 Warrenville Road
Warrenville, IL 60555
Phone: (630) 657-3769
E-mail: Bradley.Fewell@exeloncorp.com

Dated in Washington, D.C.
this 23rd day of May 2008

COUNSEL FOR
AMERGEN ENERGY COMPANY, LLC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:)

) May 23, 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' Supplemental Petition" were served this day upon the persons listed below, by e-mail and first class mail.

Secretary of the Commission*
U.S. Nuclear Regulatory Commission
Attn: Rulemakings and Adjudications Staff
One White Flint North
11555 Rockville Pike
Rockville, Maryland 20852-2738
(E-mail: HEARINGDOCKET@nrc.gov)

Administrative Judge
E. Roy Hawkens, Chair
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: erh@nrc.gov)

Administrative Judge
Paul B. Abramson
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: pba@nrc.gov)

Administrative Judge
Anthony J. Baratta
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: ajb5@nrc.gov)

John A. Covino
Valerie Anne Gray
Division of Law
Environmental Permitting and Counseling Section
P.O. Box 093
Hughes Justice Complex
Trenton, NJ 08625
(E-mail: john.covino@dol.lps.state.nj.us)
(E-mail: valerie.gray@dol.lps.state.nj.us)

Suzanne Leta
NJPIRG
11 N. Willow Street
Trenton, NJ 08608
(E-mail: sleta@njpirg.org)

Mary C. Baty
Kimberly A. Sexton
James E. Adler
Office of the General Counsel, 0-15D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail: kas2@nrc.gov)
(E-mail: mcb1@nrc.gov)
(E-mail: jeal@nrc.gov)


Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: OCAAMail@nrc.gov)

Richard Webster
Julia LeMense
Eastern Environmental Law Center
744 Broad Street, Suite 1525
Newark, NJ 07102
(E-mail: rwebster@easternenvironmental.org)
(E-mail: jlemense@easternenvironmental.org)

Paul Gunter
Kevin Kamps
Beyond Nuclear
6930 Carroll Avenue
Suite 400
Takoma Park, MD 20912
(E-mail: paul@beyondnuclear.org)
(E-mail: kevin@beyondnuclear.org)

Emily Krause
Law Clerk
Atomic Safety and Licensing Board
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: eik1@nrc.gov)

* Original and 2 copies



Brian P. Oldham