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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
E. Roy Hawkens, Chair
Dr. Paul B. Abramson
Dr. Anthony J. Baratta

In the Matter of:	)	
	)	June 6, 2008
AmerGen Energy Company, LLC	)	
(License Renewal for Oyster Creek Nuclear	)	Docket No. 50-219-LR
Generating Station)	)	
	)	

AMERGEN'S ANSWER OPPOSING CITIZENS' MOTION TO SUPPLEMENT

More than six months after the closure of the evidentiary record, Citizens[1] have proffered a purported new basis for their pending motion to reopen and late-filed contention.[2] By styling their request as a "motion to supplement the basis" of their pending new contention, Citizens are simply attempting to sidestep the stringent requirements applicable to what is, in effect, a new motion to reopen and yet *another* late-filed amended contention. Their word-play cannot hide the further fact that they have failed to meet the stringent pleading requirements in Part 2, thereby rendering this filing deficient as a matter of law.

Specifically, in their original motion to reopen and subsequent pleadings, Citizens argued that the record should be reopened to admit a contention requesting that AmerGen Energy Co., LLC ("AmerGen") be required to perform a "conservative" confirmatory analysis for the

1 "Citizens" are Nuclear Information and Resource Service, Jersey Shore Nuclear Watch, Inc., Grandmothers, Mothers and More for Energy Safety ("GRAMMES"), New Jersey Public Interest Research Group, New Jersey Sierra Club, and New Jersey Environmental Federation.

2 Citizens' Response to Board Order and Motion to Supplement the Basis of Their Contention (May 27, 2008) ("Motion").

TEMPLATE = SECY-035

DS03

recirculation outlet nozzles at Oyster Creek.[3] Now that this analysis is complete,[4] Citizens look backward and seek to litigate a different issue: "the adjudicatory process [should] determine whether [in light of Citizens' criticisms of the original and confirmatory analyses,] the *original* fatigue analysis . . . is sufficiently conservative."[5] Thus, the Motion is, in effect, a revised motion to reopen and a late-filed amended contention.

Pursuant to 10 C.F.R. § 2.323(c), AmerGen hereby files its Answer opposing Citizens' Motion.[6] As demonstrated below, the Board must reject Citizens' "supplemented" contention because it fails to meet the stringent requirements for a motion to reopen or the requirements for a late-filed amended contention.[7]

I. LEGAL STANDARDS

Citizens' "supplemented" contention must meet the same standards as any other late-filed contention.[8] As explained in AmerGen's Answer, by proffering a new or an amended contention at this extremely late date, Citizens face an extraordinary burden.[9] First, under 10 C.F.R. §

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[3] 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) at 11-12 ("Petition").

[4] Letter from M. Gallagher to NRC Document Control Desk, "Response to NRC Request for Additional Information on Metal Fatigue Analysis Related to Oyster Creek Nuclear Generating Station License Renewal Application (TAC No. MC7624)" (May 1, 2008) *available at* ADAMS Accession No. ML081270386 ("RAI Response").

[5] Motion at 2 (emphasis added).

[6] This Motion is subject to 10 C.F.R. § 2.323. Thus, Citizens certified that they consulted with the other parties prior to filing. Motion at 7. This Answer is timely filed within ten days from the service of Citizens' Motion, it is subject to the Board's ten page limit for all motions, and Citizens may not file a reply. 10 C.F.R. § 2.323(c); *see also* Licensing Board Memorandum and Order (Prehearing Conference Call Summary, Initial Scheduling Order, and Administrative Directives) at 9-10 (Apr. 19, 2006) (unpublished).

[7] *See also* AmerGen's Answer Opposing Citizens' Motion to Reopen Record and Petition to Add a New Contention (Apr. 28, 2008) ("Answer") and AmerGen's Response to May 21 Board Order (May 27, 2008) ("Response").

[8] *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-11, 63 NRC 391, 400-02 (2006) (denying Citizens' request to "supplement" their original drywell contention because the new information failed to meet the requirements of 10 C.F.R. §§ 2.309(f)(2) or 2.309(c), and failed to alter the Board's previous conclusions under § 2.309(f)(1)).

[9] *See* Answer at 4-7.

2.326, they must satisfy, through expert affidavit, all of the requirements to reopen the record. To the extent Citizens seek to amend their proposed "new" contention to broaden its scope, they must show that they meet the requirements to reopen the record with respect to that new evidence.[10] Then they must demonstrate that their amended contention meets the timeliness requirements of Sections 2.309(f)(2) and, if necessary, 2.309(c). Finally, they must demonstrate that their amended contention is admissible under Section 2.309(f)(1). Citizens have done none of these things, rendering their filing totally defective.

II. ARGUMENT

A. Citizens Have Failed to Demonstrate That The Record Must Be Reopened to Admit Their Amended Contention

As explained above, Citizens retain the burden of demonstrating that the new evidence they seek to rely upon justifies reopening the record to admit their "supplemented" contention.[11] Citizens' Motion and supporting affidavit fail to address, much less meet, the criteria for a motion to reopen, so the Board *must* reject the supplement for these reasons alone.

In fact, the Board "*must*" reject Citizens' Motion solely because their supporting affidavit[12] fails to address the motion to reopen criteria "separately" and "specific[ally,]" contrary to 10 C.F.R. § 2.326(b).[13]

1. Citizens Make No Showing of Timeliness

Twenty-two days passed between AmerGen's service of its RAI Response on May 5 and Citizens' Motion. Section 2.326 requires Citizens to provide a "specific explanation" showing

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[10] *Cf. Metro. Edison Co.* (Three Mile Island, Unit 2), ALAB-486, 8 NRC 9, 22 (1978) ("These [motion to reopen] criteria govern each issue to be reopened; the fortuitous circumstance that a proceeding has been or will be reopened on other issues has no significance.").

[11] *See* 10 C.F.R. § 2.326. Citizens implicitly acknowledge as much when they argue that the RAI Response "confirm[s] that the contention raises a significant safety issue." Motion at 2.

[12] Exh. MFC-2, Second Declaration of Dr. Joram Hopenfeld (May 23, 2008) ("Second Hopenfeld Decl.").

[13] Emphasis added. Also, Dr. Hopenfeld once again curiously states that he has been retained only by GRAMMES. Second Hopenfeld Decl. ¶ 1. If the Board entertains his affidavits at all, it should treat the affidavit as supporting only GRAMMES, and not Citizens as a whole.

that their motion is timely.[14] Citizens do not explain why their revised motion is timely,[15] so the Board should deny Citizens' Motion for this failure alone.

2. Citizens Fail to Show that Their Amended Contention Raises A Significant Safety Issue

Citizens argue that the RAI Response "confirms" that their "new" contention raises a significant safety issue for two reasons. They first claim, without any explanation or citation, that the original analysis "is known to be non-conservative in some respects and non-compliant with the ASME [American Society of Mechanical Engineers] code."[16] Counsel's statement does not raise a significant safety issue because it does not contradict the evidence in the RAI Response, which "confirms that the results of the original analysis are conservative and remain acceptable."[17]

Citizens then argue, based on Dr. Hopenfeld's misreading of the RAI Response, that the confirmatory analysis is inadequate because it inappropriately neglects the nozzle cladding.[18] Dr. Hopenfeld claims that the

> [RAI] Response merely states that the change in assumption regarding nozzle cladding is permitted by the ASME Code under certain circumstances, but fails to address whether the operating experience with the recirculation outlet nozzle at Oyster Creek would permit such a change. Because the Response contains no reactor-specific justification for the use of the less conservative assumption in the reanalysis, it fails to show that the reanalysis is conservative.[19]

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[14] 10 C.F.R. § 2.326(a)(1), (b); *cf. 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 4 weeks thereafter, especially given that the record had long since closed and the Commission's immediate effectiveness decision was expected imminently").

[15] Instead, Citizens admit that they chose not to act promptly because they "assumed, erroneously, that the Commission and the Board would ignore such a procedurally deficient submission." Motion at 3. Citizens miss the point that the RAI Response is new information, regardless of whether it was served on the parties or appeared, without notice, in ADAMS.

[16] Motion at 9.

[17] RAI Response, encl. at 2; Affidavit of Gary Stevens (May 27, 2008) ("Stevens Aff.") ¶ 9; *see also* Answer at 14-16; Response at 4-5 (explaining that Citizens' previous evidence does not raise a significant safety issue).

[18] Motion at 9-10.

[19] Second Hopenfeld Decl. ¶ 10.

He is wrong—the RAI Response does not say this. It clearly states that the decision to neglect the nozzle cladding is permissible, without the qualifications Dr. Hopenfeld wishes to apply: "In the new analysis, the nozzle cladding was neglected for the fatigue calculation, as permitted in NB-3122.3 of Section III of the ASME Code. . . . This is consistent with . . . the approach used in NUREG/CR-6260 . . . ."[20] Dr. Hopenfeld does not explain what he means by "certain circumstances" nor does he explain the relevance of "operating experience" or a "reactor-specific justification" *to the decision to neglect the nozzle cladding* in the confirmatory analysis.[21] Absent any reasoned explanation of alleged deficiencies in the confirmatory analysis, Dr. Hopenfeld's disjointed remarks fail to show that there is a significant safety issue.[22]

Citizens also suggest, absurdly, that "AmerGen may not rely on the revised analysis to suggest that the issue is of minor safety significance."[23] Allegedly, this is because AmerGen is "currently relying on the original analysis."[24] This interpretation is contrary to the stated intent and conclusions in the RAI Response. The confirmatory calculation was intended to "develop an independent ASME Code . . . fatigue calculation . . . to determine whether or not the original analysis results were conservative."[25] It concludes that "the results of the original analysis are conservative and remain acceptable."[26] Citizens provide no explanation of why AmerGen may not rely on this conclusion.[27]

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20 RAI Response, encl. at 3; *see also* Stevens Aff. ¶ 10.

21 *See* Second Hopenfeld Decl. ¶ 10.

22 *See Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 363 (1981) (requiring that the moving party provide more than "bare allegations"); *Kan. Gas & Elec. Co.* (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978) (noting that the proponent of a motion to reopen has a heavy burden).

23 Motion at 10.

24 *Id.* (*citing* RAI Response "at 4").

25 RAI Response, encl. at 3.

26 *Id.* at 2.

27 Citizens' do express complaints about AmerGen's notification of the completion of the confirmatory analysis. *See* Motion at 2-3. These complaints are fully addressed in AmerGen's Response.

Thus, Citizens' have failed to demonstrate that their amended contention raises a significant safety issue.[28] Furthermore, because they fail to raise a significant safety issue, they clearly do not raise an "exceptionally grave" issue that might otherwise justify waiving the timeliness requirements of Section 2.326(a)(1).[29]

3. Citizens Fail To Show That a Materially Different Result Is Likely

Dr. Hopenfeld and Citizens fail to specifically address, much less demonstrate, whether a materially different result "would be or would have been likely," contrary to 10 C.F.R. § 2.326(a)(3). Instead, Citizens erroneously attempt to shift the burden to AmerGen by identifying showings that AmerGen has allegedly failed to make.[30] This is a fundamental flaw in Citizens' Motion: to meet their burden, they must *demonstrate* that the recirculation outlet nozzle will not be likely to meet ASME Code requirements.[31] Because both the original and confirmatory analyses show that the recirculation outlet nozzle will do so,[32] Citizens bear the burden of demonstrating that *both* analyses are inadequate, and the recirculation outlet nozzle has an environmentally assisted cumulative usage factor ("CUF_{en}") greater than 1.0.

Dr. Hopenfeld expresses the opinion that, if a new analysis was done using only the most conservative assumptions from each of the two analyses, then the CUF_{en} would not meet ASME

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[28] The Second Hopenfeld Declaration also fails to specifically and separately address why the amended contention raises a significant safety issue. The Motion fails to meet 10 C.F.R. § 2.326 for this reason alone.

[29] *See* Answer at 4, 14.

[30] For example: (1) "AmerGen . . . has failed to show which assumptions are actually justified," Motion at 6; (2) "[T]he revised analysis can have no detrimental effect on the pending contention unless and until AmerGen makes a reactor-specific showing that the revised analysis is sufficiently conservative, seeks to replace the flawed original analysis with the revised analysis . . . and then makes a motion for appropriate relief," *id.* at 10; (3) [T]he Response . . . fails to address whether the operating experience with the recirculation outlet nozzle at Oyster Creek would permit such a change," Second Hopenfeld Decl. ¶ 10; and (4) "AmerGen must now make the case that the old analysis was overly conservative, by showing why the nozzle cladding may be neglected." *Id.* ¶ 11.

[31] *See* 10. C.F.R. § 2.326(a)(3); Answer at 17-19.

[32] RAI Response, encl. at 2 ("This new analysis confirms that the results of the original analysis are conservative and remain acceptable.").

Code requirements.[33] His desire to pick and choose assumptions from the two analyses is just the type of "outcome-driven exercise" that he criticizes AmerGen for undertaking.[34] Nor has Dr. Hopenfeld demonstrated, as he must, that the choice of only the most conservative assumptions is *required* under the ASME Code.

AmerGen must provide an *acceptable* analysis under the ASME Code, not, as Citizens seem to believe, the most conservative possible analysis.[35] As discussed above, Dr. Hopenfeld does not explain why any of the input assumptions or parameters in either analysis is unacceptable, much less has he demonstrated that either analysis, taken as a whole, is inadequate.

Finally, Dr. Hopenfeld opines that the changes in assumptions between the original and confirmatory analyses "are material to the outcome of the fatigue analysis and if accepted by the NRC they would represent a material change to the Final Safety Evaluation Report [("FSER")].[36] This statement *once again* appears to misconstrue the "materially different result" standard.[37] A Staff decision to revise the FSER to account for the confirmatory analysis would *not* be a materially different result because it would not change the outcome of the licensing proceeding.[38] Only a determination that the original analysis was in fact flawed, and that the applicable requirements will not be met, would be a materially different result.[39]

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33 *See* Second Hopenfeld Decl. ¶ 8-9, 11. These various statements also fall far short of the required separate and specific explanation, contrary to Section 2.326(b). Again, the Motion must be denied for this reason alone.

34 *See id.* ¶ 7.

35 *See* RAI Response, encl. at 2.

36 Second Hopenfeld Decl. ¶ 5.

37 *See also* Petition at 9-10; AmerGen Answer at 17.

38 *See* Petition at 9 (*citing Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1142 (1983).

39 *See Shoreham*, LBP-83-30, 17 NRC at 1142.

4. Citizens Do Not Address Requirements For Nontimely Motions to Reopen

Finally, contrary to 10 C.F.R. § 2.326(d), Citizens fail to address the nontimely filing criteria in Section 2.309(c). The Board should not be required to articulate for Citizens why they satisfy the balancing test in that regulation.[40] The Motion likewise fails for this reason alone.

B. Citizens' Have Failed to Demonstrate That Their Amended Contention is Timely

Under 10 C.F.R. § 2.309(f)(2), "contentions may be *amended* or new contentions filed after the initial filing *only with leave* of the presiding officer upon a *showing*" that the timeliness requirements are met.[41] Citizens do not even mention these requirements; much less do they meet them.[42] The Board should not articulate this showing for Citizens, particularly when it has already repeatedly instructed Citizens on the requirements for late-filed contentions.[43] Furthermore, as explained above, Citizens make no attempt to show that they meet the balancing test of Section 2.309(c), so the Motion must be rejected.

C. Citizens' Amended Contention Is Inadmissible

In any event, should the Board entertain the substance of Citizens' amended contention, it is inadmissible under 10 C.F.R. § 2.309(f)(1) because there is no longer a specific statement of the issues Citizens seek to litigate and because the issues they raise in their amended contention fail to raise a genuine dispute.[44]

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[40] *Oyster Creek*, LBP-06-11, 63 NRC at 396 n.3 ("NIRS made no attempt to show that its newly presented contentions satisfy section 2.309(c), and this omission provides an independent and sufficient basis for not admitting its belated contentions.").

[41] Emphasis added; *see also, e.g.*, Licensing Board Memorandum and Order (Denying Citizens' Motion for Leave to Add Contentions and Motion to Add Contention at 5-7 (Feb. 9, 2007) (unpublished) ("Feb. 9, 2007 Order").

[42] Again, Citizens have admitted that they chose not to act after AmerGen filed the RAI Response, Motion at 3, so it is not clear that Citizens could demonstrate that their amended contention was timely.

[43] *See, e.g.*, *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-22, 64 NRC 229, 234 n.7 (2006); Feb. 9, 2007 Order at 5-7.

[44] Tellingly, Citizens attempt to cover up the inadequacies in their Motion by impermissibly requesting that the Board allow them discovery in order to develop their arguments. Motion at 3-4. *E.g.*, *Balt. Gas and Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 351 (1998) ("longstanding agency precedent precludes an intervenor from obtaining discovery to assist it in framing contentions"); *Metro. Edison*

1. Citizens Provide No Specific Statement of the Contention To Be Litigated

Citizens provide no "specific statement of the issue of law or fact to be raised or controverted" contrary to 10 C.F.R. § 2.309(f)(1)(i). As explained above, the scope of issues Citizens seek to litigate under their amended contention no longer appears to be bound by their original contention statement. Thus, there is no longer a specific statement of the issue to be raised or controverted. Citizens' amended contention fails for this reason alone.

2. Citizens Raise No Genuine Dispute

Citizens argue that the RAI Response confirms that their contention raises a genuine dispute because it (1) does not clearly show the effect of eliminating the Green's Function simplification; and (2) does not show that the decision to neglect the nozzle cladding in the confirmatory analysis was justified.[45] Neither of these claims raises a genuine dispute on a material issue of law or fact, contrary to 10 C.F.R. § 2.309(f)(1)(vi).

As to the first claim, Dr. Hopenfeld desires that the Board require AmerGen to apply the most conservative elements of the confirmatory analysis to the most conservative elements of the original analysis in order to derive a new CUF_{en} value.[46] In accordance with the Staff's request, the ASME Code and applicable NRC guidance, AmerGen performed an *independent* confirmatory analysis, explaining all of the differences between the two analyses.[47] As explained in Section II.A.3, however, there is simply no requirement to conduct the artificial and overly conservative alternative analysis Dr. Hopenfeld desires.[48] Thus, Citizens fail to raise a genuine dispute.

Co. (Three Mile Island, Unit 1), CLI-85-7, 21 NRC 1104, 1106 (1985) ("The movant is not entitled to engage in discovery in order to support a motion to reopen.").

45 Motion at 8-9; *see also* Second Hopenfeld Decl. ¶¶ 4-5, 10-11.

46 *See* Second Hopenfeld Decl. ¶¶ 6, 9.

47 RAI Response, encl. at 2.

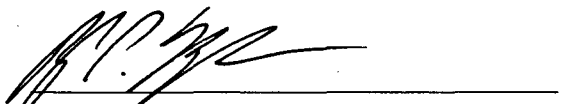
48 *E.g.*, *Philadelphia Elec. Co.* (Limerick Generating Station, Units 1 & 2), ALAB-819, 22 NRC 681, 742 (1985) ("Reasonable assurance that the plant will be operated safely and that public health, safety, and environmental

Finally, as explained above in Section II.A.2, Dr. Hopenfeld provides no explanation for why he believes that the decision to neglect the nozzle cladding in the confirmatory analysis is impermissible. Thus, Citizens fail to raise a genuine dispute,[49] and the Motion must be denied.

III. CONCLUSION

For the reasons set forth above, in addition to the reasons set forth in AmerGen's Answer and Response, the Board must not reopen the record to admit Citizens' "supplemented" contention.

Respectfully submitted,



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Dated in Washington, D.C.
this 6th day of June 2008

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concerns will be adequately protected is the standard by which a licensing board is to measure an application; a risk-free environment is not required.") (internal quotations omitted). Thus, Citizens' allegation that AmerGen has "admitted" that certain aspects of the original analysis were not conservative are irrelevant. Motion at 8.

[49] *See, e.g.*, *USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006) ("[A]n 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 [that is alleged to support the contention]").

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(License Renewal for Oyster Creek Nuclear Generating Station)	)	

CERTIFICATE OF SERVICE

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

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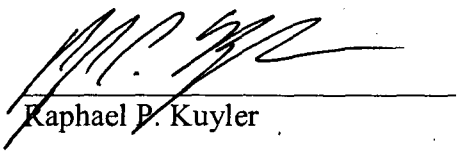

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