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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
OFFICE OF THE SECRETARY

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June 5, 2008 (4:20pm)

ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

Before Administrative Judges:

E. Roy Hawkens, Chair

Dr. Paul B. Abramson

Dr. Anthony J. Baratta

In the Matter of	)	
	)	Docket No. 50-0219-LR
AMERGEN ENERGY COMPANY, LLC	)	
	)	ASLB No. 06-844-01-LR
(License Renewal for the Oyster Creek	)	
Nuclear Generating Station)	)	June 5, 2008

**CITIZENS' MOTION TO STRIKE AND FOR OTHER APPROPRIATE RELIEF**

**PRELIMINARY STATEMENT**

This motion is filed on behalf of 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 (collectively "Citizens"). On May 21, 2008, the Atomic Safety and Licensing Board (the "Board") ordered the parties to brief the legal effect of AmerGen's May 1, 2008 response to the NRC Staff's request for additional information (the "Response") attached to a letter dated May 5, 2008 (the "Letter") from counsel for AmerGen Energy Co. LLC ("AmerGen"). On May 27, 2008, both the NRC Staff and AmerGen provided briefs and affidavits in response to the Board's Order (the "Briefings").

Neither the Letter nor the Response was a motion. Therefore their submission could not lead to action by the Board. While the filing of a motion based upon the Response could have

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led to Board action, in the absence of a motion, the Board should not consider the contents of the Response when deciding whether to admit Citizens' pending contention regarding metal fatigue (the "Contention"). Unfortunately, instead of briefing these issues, which were within the scope of the Board's May 21, 2008 request for further briefing, both AmerGen and the NRC Staff attempted to supplement their answers and suggest additional grounds for dismissal of the Contention. This should not be permitted, because AmerGen and the Staff are well aware of the need to make a motion to supplement their answers and move to dismiss. AmerGen is trying to gain advantage by using procedurally dubious tactics that deny Citizens the ability to respond and deliberately withholding critical information from Citizens. The Board should therefore invoke the "cardinal rule of fairness" and strike these attempts by AmerGen and the NRC Staff to supplement their Answers and move to dismiss.

If the Board deems it appropriate to consider any portion of the Briefings, Citizens must be allowed a full and fair opportunity to respond fully to the facts alleged in the Letter and the new affidavits from AmerGen and the Staff. Citizens can only respond fully if they are granted access to the analyses from which the Response is derived and the supporting documents justifying the assumptions used. Thus, if the Board does not completely strike the Briefings, it should order AmerGen to provide this information to Citizens and grant Citizens sufficient time to review the material and respond.<sup>1</sup>

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<sup>1</sup> Citizens consulted with AmerGen and NRC Staff about this motion. Both parties said that they would oppose.

## ARGUMENT

- I. The Responses Of The NRC Staff And AmerGen Went Beyond Permitted Limits**
- A. AmerGen And NRC Staff Responses Are In Part An Improper Attempt To Supplement Their Answers To Citizens Contention Regarding Metal Fatigue**

Both AmerGen and the NRC Staff make a fundamental error in their responses by claiming that the May 5, 2008 letter from Mr. Polonsky to the Commission could have a detrimental effect on Citizens' pending motion to reopen (the "Motion") and petition for a new contention regarding metal fatigue (the "Petition") by supplementing the factual information provided by their answers to the Motion and the Petition. For example, AmerGen states that it intended the Letter to communicate to the Commission information about the result of the confirmatory analysis that it could not include in its Answer. AmerGen Response at 3-4. The rules on admission of new contentions explicitly require that after an answer is given to a petition for a new contention "no other written answers or replies will be entertained," unless specifically authorized. 10 C.F.R. § 2.309(h)(3). Because AmerGen failed to make a motion for leave to supplement its answer with the information in the Response, the Response cannot affect the Board's adjudication of the pending contention.

Instead of admitting this fundamental fact, both AmerGen and the NRC Staff have used the Board's May 21, 2008 order as an excuse to submit what are in part supplements to their Answers. For example, both AmerGen and the NRC Staff argue incorrectly that the Letter showed that the Motion did not raise a significant safety issue. AmerGen Response at 4-5, NRC Staff Response at 3-4. However, once again neither AmerGen nor NRC Staff made such a motion in conjunction with their response. Without a properly authorized motion, the Board should not allow Amergen and the Staff to supplement their answers in this way.

AmerGen and the NRC Staff may attempt to argue that the Board's May 21, 2008 Order obviated the need to seek permission to supplement their answers. However, this is not correct. The Board merely requested an affidavit about the Response and a "pleading that explains the impact (if any) of that Response" on the disposition of Citizens' Motion and Petition. Board Order, dated May 21, 2008 at 4. In addition to their response to the Board's question, Citizens properly submitted a motion to supplement the basis of their contention with material in the Response that supported the Petition. In contrast, neither AmerGen nor the NRC Staff made a motion to supplement their answers. The Briefings are mainly an attempt to add supplementary facts to the Answers regarding the Motion and the Petition without making any motion for leave to supplement. The Briefings should therefore be struck from the hearing record and ignored by the Board.

To do otherwise would severely prejudice Citizens because it denies them a full and fair opportunity to respond, and violates the cardinal rule of fairness that requires parties to be afforded a meaningful opportunity to respond to new facts presented by an opponent's motion or contention. 10 C.F.R. § 2.309 (h); *Houston Lighting & Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 N.R.C. 521, 524-25 (1979); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 N.R.C. 61, 83 n. 17 (1996); rev'd in part on other grounds, CLI-96-7, 43 NRC 235.

**B. NRC Staff And AmerGen Have Impermissibly Asked For Additional Relief**

As well as attempting to supplement their answers, both AmerGen and the NRC Staff have argued that the contention is moot. The NRC Staff explicitly alleged that the Response "moots Citizens' proposed new contention." NRC Staff Response at 4. However, the NRC Staff failed to move for dismissal on the grounds of mootness. Somewhat more subtly, AmerGen

states that “the relief Citizens requested . . . had already been granted.” AmerGen Response at 6. This is either a disguised call for the Board to dismiss on the grounds of mootness or is an impermissible attempt to supplement AmerGen’s answer. Thus, the briefings based upon the letter are effectively motions to dismiss in all but name.

The Part 2 rules implicitly require parties to make a motion if they wish to be granted relief, because they are based on and guided by the Federal Rules of Civil Procedure. *See Boston Edison Co., et. al.* (Pilgrim Nuclear Generating Station, Unit 2), LBP-75-30, 1 N.R.C. 579, 581 (1975) (The Board ruled that discovery requests during its proceedings are guided by the Federal Rules of Civil Procedure); *Consol. Edison Co. of N.Y.* (Indian Point, Unit No. 2), *Power Auth. of the State of N.Y.* (Indian Point, Unit No. 3), LBP-83-29, 17 N.R.C. 1117, 1119 (1983) (The Board ruled that Federal Rules of Civil Procedure, Rule 32(a)(2) regarding the use of depositions is applicable in Board adjudications). The rule concerning motions, 10 C.F.R. § 2.323(b), is analogous to Fed. R. Civ. P. 7. As stated in 10 C.F.R. § 2.323(b), “. . . a motion must be in writing, state with particularity the grounds and relief sought. . .” Similarly, Fed. R. Civ. P. 7(b) states, “A request for a court order must be made by motion. The motion must: (A) be in writing. . .; state with particularity the grounds for seeking the order; and (C) state the relief sought.” Fed. R. Civ. P. 7(b).

The two rules are extremely similar and must be evaluated under the same set of standards. *Advanced Med. Sys. Inc.*, CLI-93-22, 38 N.R.C. 98, 102 (1993). Furthermore, “guidance in construing the Commission’s rules may be found in legal authorities and court decisions construing the Federal Rules.” *Boston Edison Co.*, LBP-75-30, 1 N.R.C. at 579. When applying Commission rules, the governing body must utilize the corresponding rules within the Federal Rules of Civil Procedure as guidance. Further, the Commission may rely upon judicial

decisions interpreting the Federal Rules of Civil Procedure to support its findings. *Boston Edison Co.*, 1 N.R.C. at 579.

Thus, “motions are required when an order is sought,” *Sec. Ins. Co. Of Hartford v. Trustmark Ins. Co.*, 218 F.R.D. 24, 26 (2003). Furthermore, Rule 7 (b) is not a “mere technical requirement.” *U.S. v. 64.88 Acres of Land et. al*, 25 F.R.D. 88, 90 (1960). Instead, the requirements of Rule 7 (b) “are mandatory”. *Id.* Thus, the Board should disregard the attempts by NRC Staff and AmerGen to have the Petition dismissed as moot, without making a motion. Once again, to do otherwise would severely prejudice Citizens because it denies them a full and fair opportunity to respond, violating the cardinal rule of fairness implicit in all adjudicatory proceedings. *Allen Creek, supra*, 10 N.R.C. at 524.

Moreover, the Board should take extreme care not to legitimize the tactic of sending letters to the adjudicatory body enclosing additional allegations in the hope that those allegations will influence pending matters. This approach violates the intent of the rules forbidding unauthorized supplementation of an answer. Thus, the Board should not allow AmerGen to gain any advantage from this approach. To do otherwise would only encourage other litigants to ignore the rules and attempt to undermine the cardinal rule of fairness. Thus, the Board should strike the implicit requests for relief contained in the Briefings.

## **II. If The Briefings Are Not Struck Completely, Citizens Must Be Permitted To Respond Fully**

As Citizens stated in their original briefing, “Citizen’s right to be heard would be unreasonably curtailed if the Board allows AmerGen to gain an advantage from the Letter or explanation concerning the Letter.” Citizen’s Response To Board Order And Motion To Supplement The Basis Of Their Contention at 3-4. Within all adjudicatory proceedings, including NRC proceedings, the cardinal rule of fairness must be obeyed and parties should be

given a full and fair opportunity to respond to new factual allegations. *Allens Creek, supra*, 10 N.R.C. at 525. Thus, if the Board does not strike all of the Briefings, it should allow Citizens a full and fair opportunity to respond to any residual portion that the Board admits. *Id.*

As also discussed by Citizens in their original briefing, Citizen can only make a full response to the factual allegations in the Briefings if AmerGen provides the underlying fatigue analyses and any documents that were referenced by the analyses to support the assumptions made. Citizen's Response To Board Order And Motion To Supplement The Basis Of Their Contention at 4. Without full disclosure, any attempt by Citizens to submit a full response will be compromised and AmerGen would obtain an advantage by refusing to respond to Citizens' requests for essential information.

In addition, the Board has previously found that Citizens have a duty to "obtain information" from AmerGen to support a contention if the information is part of the LRA or is contained in supporting documentation to the LRA. *E.g.* Board Order, dated October 10, 2006, LBP-06-22 at 31 *citing* CLI-06-24, 64 N.R.C. 111 n. 71. Citizens have no ability to fulfill such a duty, unless there is a corresponding duty upon AmerGen to respond to requests for such information. Here, the fatigue analyses are clearly supporting documents to the LRA. Citizens have requested the documents, but have been flatly refused.<sup>2</sup> It would be grossly unfair to impose a duty upon Citizens to "obtain information" without imposing a corresponding duty upon applicants to provide such information. Thus, if the Board does not completely strike the Briefings, the Board should apply the cardinal rule of fairness by ordering AmerGen to provide the supporting documents and allowing Citizens a reasonable time to review them and respond.

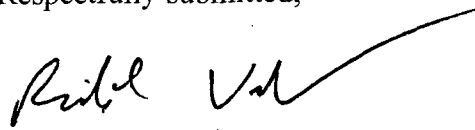
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<sup>2</sup> In this instance, there is no need for counsel to discuss a protective order, because one is already in place.

CONCLUSION

For the foregoing reasons, to the extent the Briefings supplemented the Answers of the NRC Staff and AmerGen or requested dismissal of the pending contention, they should be struck from the record. If the Board chooses not to strike the Briefings completely, the Board should grant Citizens the full and fair opportunity to respond required by the cardinal rule of fairness.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Richard Webster", with a long, sweeping flourish extending to the right.

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Richard Webster, Esq  
Eastern Environmental Law Center  
Attorneys for Citizens

Dated: June 5, 2008



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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	)	

CERTIFICATE OF SERVICE

I, Richard Webster, of full age, certify as follows:

I hereby certify that on May 27, 2008, I caused Citizens' Motion To Strike And For Other Appropriate Relief to be served via email and U.S. Postal Service (as indicated) on the following:

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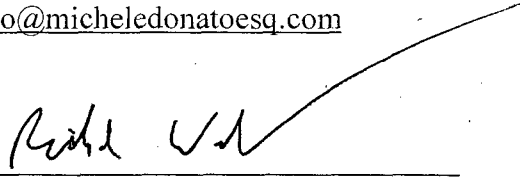
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Signed:   
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Dated: June 5, 2008