

RAS-H-22

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
OFFICE OF THE SECRETARY

DOCKETED
USNRC

May 6, 2008 (2:22pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

BEFORE THE COMMISSION

_____)	
In the Matter of)	
)	Docket No. 50-0219-LR
AMERGEN ENERGY COMPANY, LLC)	
)	
(License Renewal for the Oyster Creek)	
Nuclear Generating Station))	May 6, 2008
_____)	

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

PRELIMINARY STATEMENT

On April 28, 2008, the NRC Staff answered the motion to reopen this proceeding (the “Motion”) and the metal fatigue Petition (the “Petition”) filed by Nuclear Information and Resource Service, Inc., Jersey Shore Nuclear Watch, Inc., Grandmothers, Mothers and More for Energy Safety, New Jersey Public Interest Research Group, New Jersey Sierra Club, and the New Jersey Environmental Federation (collectively “Citizens”).¹ Because the Commission’s regulations in 10 C.F.R. § 2.323(c) do not permit the filing of replies to motions without leave from the presiding adjudicatory body, Citizens are filing this motion to obtain such leave. In conformance with 10 C.F.R. § 2.323(b), Citizens sought the consent of the NRC Staff and AmerGen Energy Co. LLC to the filing of the attached Reply, but both opposing parties objected to the filing of the Reply.

Replies to answers to motions are only permitted in “compelling circumstances, such as where the moving party demonstrates that it could not reasonably have anticipated the arguments

¹ Citizens received the Staff’s answer at 10 p.m., which extended Citizens’ time to reply by one day in accordance with 10 C.F.R. § 2.306.

to which it seeks to reply.” 10 C.F.R. § 2.323(c). Citizens find themselves in precisely such circumstances. Citizens could not have reasonably anticipated that, after notifying the Commission on April 3, 2008 about “significant new information” concerning metal fatigue and the need for additional analysis of the recirculation nozzles at the Oyster Creek Nuclear Generation Station, the Staff would argue that the information underlying that notice was neither new, nor significant. In addition, Citizens could not have anticipated that the Staff would make the impermissible argument that a violation of the ASME Code standard, which is incorporated into the regulations, would not be safety significant and would not likely lead to a different result in a license renewal hearing.

For the foregoing reasons, Citizens respectfully request that the Commission grant leave for Citizens to reply to the NRC Staff’s opposition to the Motion.

Respectfully submitted



Richard Webster, Esq.
Eastern Environmental Law Center
Attorneys for Citizens

Dated: May 6, 2008

May 6, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

_____)	
In the Matter of)	
)	
AMERGEN ENERGY COMPANY, LLC)	Docket No.
(Oyster Creek Nuclear Generating Station))	50-219-LR
_____)	

REPLY 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 THE NRC STAFF'S OPPOSITION TO THEIR MOTION TO REOPEN

Submitted by:

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Counsel for 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

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE COMMISSION

In the Matter of)
) Docket No. 50-0219-LR
AMERGEN ENERGY COMPANY, LLC)
)
(License Renewal for the Oyster Creek)
Nuclear Generating Station) May 6, 2008
_____)

REPLY TO THE NRC STAFF'S OPPOSITION TO CITIZENS' MOTION TO REOPEN

PRELIMINARY STATEMENT

On April 28, 2008, the NRC Staff answered the motion to reopen this proceeding (the “Motion”) and the metal fatigue Petition (the “Petition”) filed by Nuclear Information and Resource Service, Inc., Jersey Shore Nuclear Watch, Inc., Grandmothers, Mothers and More for Energy Safety, New Jersey Public Interest Research Group, New Jersey Sierra Club, and the New Jersey Environmental Federation (collectively “Citizens”).¹ Having notified the Commission on April 3, 2008 about “significant new information” concerning metal fatigue and the need for additional analysis of the recirculation nozzle at the Oyster Creek Nuclear Generation Station (“Oyster Creek”), the Staff now argues that the information underlying that notice was neither new, nor significant. Clearly, the Staff’s position is hopelessly contradictory.

NRC Staff objects to the motion to reopen on multiple grounds, including that it does not raise a significant safety issue. However, to judge whether the issue raised was significant, the Staff disregarded the ASME code and argued that even a violation of the Code would not be

¹ Citizens received the Staff’s answer at 10 p.m., which extended Citizens’ time to reply by one day in accordance with 10 C.F.R. § 2.306.

significant. This amounts to an impermissible, irrelevant attack on the ASME code and the Commission's regulations. It is also a troubling indication that the Staff are prepared to second guess the safety standards that are in place in their effort to prevent Citizens from having access to full information regarding the metal fatigue issue.

NRC Staff objected to the new contention on grounds that are similar to those raised by AmerGen Energy Co. LLC ("AmerGen"). Citizens rely upon their response to AmerGen, filed On May 5, 2008, to also respond to the similar issues raised by the NRC Staff regarding the Petition.

ARGUMENT

A. The Motion To Reopen Raises A Significant Safety Issue

It has long been settled that in licensing proceedings, litigants may not attack the regulations or the Current Licensing Basis ("CLB"). Thus, a potential violation of the regulations is highly significant because it could be dispositive in a licensing proceeding. Furthermore, the Staff and the applicant cannot permissibly argue that failing to meet the regulations would not raise a significant safety issue. These principles were laid out in 1973 by the Atomic Safety and Licensing Appeals Board ("ALAB"):

As a general rule, the Commission's regulations preclude a challenge to applicable regulations in a licensing proceeding. 10 C.F.R. § 2.758.2. This rule has frequently been applied in such proceedings to preclude challenges by intervenors to Commission regulations. Generally, then, an intervenor cannot validly argue on safety grounds that a reactor which meets applicable standards should not be licensed. *By the same token, neither the applicant nor the staff should be permitted to challenge applicable regulations, either directly or indirectly. Those parties should not generally be permitted to seek or justify the licensing of a reactor which does not comply with applicable standards. Nor can they avoid compliance by arguing that, although an applicable regulation is not met, the public health and safety will still be protected.* For, once a regulation is adopted, the standards it embodies represent the Commission's definition of what is required to protect the public health and safety. *In short, in order for a facility to be licensed to operate, the applicant must establish*

that the facility complies with all applicable regulations. If the facility does not comply, or there has been no showing that it does comply, it may not be licensed.

In the Matter of Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138 6 AEC 520, 528 (1973) (emphasis added). In the Vermont Yankee licensing proceeding, the NRC Staff argued against a motion to reopen by stating that even though there was no showing of compliance with a certain requirement, the probability of an accident as a result was low, leading to low safety significance. *Id.* at 529. Based on the principles stated, the ALAB disregarded this argument as “legally irrelevant” because it was an indirect attack on the regulations and decided that a motion to reopen the proceeding to consider the issue was properly granted. *Id.* at 529-31.

The issue under consideration was whether the lack of a fuel densification factor in a model that predicted that the plant would approach a safety limit on the peak cladding temperature justified reopening the proceeding. *Id.* at 529-30. There was a lack of certainty on how inclusion of the new factor would affect the result, which meant the staff could not assess compliance with the peak temperature requirements. *Id.* at 530. Under these circumstances, the ALAB held that “the motion to reopen should have been granted . . . with respect to the fuel densification issue.” *Id.* at 528. This case is generally considered to explain the first two prongs of the current regulatory test for motions to reopen, which was a codification of NRC case law. *In the Matter of Pacific Gas And Electric Company* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-756, 18 N.R.C. 1340, 1344 (1983).

The situation considered by the ALAB in the initial licensing hearing concerning Vermont Yankee is closely analogous to the present situation at Oyster Creek. Indeed, the basic principle that parties cannot challenge the regulations or the CLB has often been cited by the

NRC Staff and AmerGen to try to exclude arguments by Citizens. However, this has not prevented Staff from impermissibly arguing that even though there is no adequate showing that the environmentally corrected fatigue factor will continue to comply with the applicable ASME Code standard of 1.0, which is required by the regulations, including 10 C.F.R. § 54.21(c)(1)(ii), this does not raise a significant safety issue. NRC Staff Ans. at 7-8. NRC Staff attached the declaration of John R. Fair, dated April 28, 2008 (“Fair Decl.”) to make this argument. However, this factual issue should not be evaluated by the Commission because the standard for judging significance is whether the new information about the metal fatigue calculations leads to a conclusion that regulations, which incorporate the applicable ASME Code metal fatigue standards, could be violated.

In fact, the NRC Staff’s opposition to the motion to reopen actually provides additional factual support for Citizens’ argument. Mr. Fair, the expert for the NRC Staff, agrees with Citizens that “the results of the detailed analysis [at Vermont Yankee] indicated that the simplified method could under-predict the CUF by 40%” and then acknowledged that a similar result at Oyster Creek would lead to an environmentally corrected CUF of less than 1.4 for the recirculation nozzle. Fair Decl. at ¶ 9. The applicable Code standard is 1.0. Therefore this confirmation reinforces Citizens position that there is currently no reliable time-limited aging analysis (“TLAA”) showing that the environmentally corrected CUF for the recirculation nozzles would remain less than 1.0 during any extended period of operation.² Because there is a

² At around 6 p.m. on May 5, 2008, AmerGen e-mailed a response to a Staff Request for Additional Information to the Commission and the parties in this proceeding. This document is apparently a very brief summary of the reanalysis of the recirculation nozzles and, according to AmerGen, shows that the simplified analysis was conservative. This development makes the current situation even more like that in the Vermont Yankee licensing proceeding, where there was also an unsworn report submitted by the applicant that dismissed the safety concerns of the intervenors. However, here, unlike Vermont Yankee, the mode of submission of the brief summary is highly irregular and the underlying report has not been provided. AmerGen appears to be attempting to add evidence to the hearing record without moving to reopen. These unsigned and unsupported statements from AmerGen should therefore have no influence on the substance of this proceeding beyond illustrating the need to

regulatory requirement for such a showing, this issue is highly significant and justifies granting of the Motion to Reopen in accordance with the standards laid out by the ALAB in the Vermont Yankee licensing proceeding.

Finally, the Staff alleges without citation that a newspaper quotation of an NRC spokesman that failure of the recirculation nozzles “could lead to a severe accident” is not “evidence.” NRC Staff Ans. at 8. While that is the general hearsay rule, this statement is not hearsay because it is an admission against interest that assists Citizens to litigate this motion.

B. Reopening Would Likely Lead To A Materially Different Result

As discussed in the initial Motion, here the SER found that there was reasonable assurance of adequate protection, based on a finding of continued compliance with the regulations. The issue regarding metal fatigue has arisen after the Staff nominally complete the SER. However, the NRC Staff’s Answer attempts to argue that a lack of safety significance, based on Staff’s assessment of the facts, necessarily means that a materially different result cannot be likely. NRC Staff Ans. at 13. In fact, as discussed above, the test of safety significance must be based on the regulations and the ASME. Furthermore, significant safety issues that arise after the completion of the SER necessarily dictate a materially different result, because they upset the finding of the SER and prevent licensing from proceeding, at least until they are resolved. Conversely, other issues, such as a failure to provide an adequate Environmental Impact Statement (“EIS”) could lead to a materially different result by delaying or preventing relicensing without raising a significant safety issue. As discussed above, the Fair Declaration, attached to the NRC Staff’s Answer, has now reinforced the evidence that the

reopen the record to adjudicate the contention and showing that AmerGen will be well-placed to make a prompt motion to moot the contention, minimizing any delay. At minimum, it is a general principle that a mootness finding cannot be made until the parties have had a reasonable opportunity to evaluate the underlying evidence supporting such a finding. The Commission should therefore at minimum ensure that Citizens are given access to the underlying documents so that their expert can evaluate the analyses that have been carried out, before making any final determination on the metal fatigue issue.

existing metal fatigue calculation for the recirculation nozzles is not adequate because it could underestimate the fatigue factor by 40%. Furthermore, the April 3, 2008 notification showed that the Staff viewed the existing TLAA for the recirculation nozzles as inadequate, because the analysis was potentially non-conservative. Therefore, the Staff's loss of confidence in the fatigue calculations for the recirculation nozzles undermines the finding of the SER that the TLAA is adequate, showing that it would likely lead to a materially different result.

The Fair Declaration provides further support for this conclusion. It affirmatively stated that the TLAA for the feedwater nozzle met 10 C.F.R. § 54.21(c)(1)(ii). Fair Decl. at ¶ 10. The NRC Staff notably failed to make a similar declaration about the recirculation nozzle. It is therefore reasonable to infer from the April 3, 2008 notification and the Staff's failure to plead that the recirculation nozzle TLAA complies with the regulation, that the original recirculation nozzle metal fatigue calculations no longer meet the regulatory requirements.

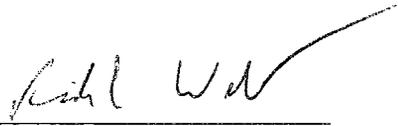
C. The Motion To Reopen Is Timely

The NRC Staff largely makes the same errors regarding timeliness of the Motion as AmerGen did regarding timeliness of the contention. *See* NRC Staff Ans. at 9-12. Thus, Citizens rely upon their reply to AmerGen to also reply to the timeliness arguments of the NRC Staff.

CONCLUSION

For the foregoing reasons, Citizens respectfully request that the Commission grant the Motion to Reopen. In addition, the Commission should order AmerGen to supply to the original and revised metal fatigue analyses for the recirculation nozzles to all parties and allow Citizens a reasonable time to decide whether the new analysis is sufficiently conservative. Should the Commission decide not to grant the motion to reopen and admit the contention, it should allow Citizens an opportunity to petition to add a new contention regarding the adequacy of the revised metal fatigue analysis after they obtain the metal fatigue analyses.

Respectfully submitted



Richard Webster, Esq.
Eastern Environmental Law Center
Attorneys for Citizens

Dated: May 6, 2008

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

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

I hereby certify that on May 6, 2008, I caused Citizens' Motion for Leave to Reply and Citizens' Reply to the NRC Staff's Opposition to Citizens' Motion to Reopen to be served via email and U.S. Postal Service (as indicated) on the following:

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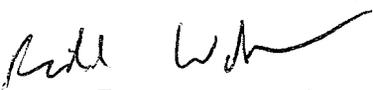
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Signed:


Richard Webster

Dated: May 6, 2008