

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S ANSWER IN OPPOSITION TO
CITIZENS' PETITION FOR REVIEW OF LBP-08-12

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.341(b)(3), the Staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby responds to Citizens' petition for review of the Atomic Safety and Licensing Board's ("Board") July 24, 2008, Memorandum and Order (Denying Citizens' Motion to Reopen the Record and Add a New Contention), LBP-08-12, 67 NRC ____ (2008) ("LBP-08-12").¹ For the reasons set forth herein, the Staff submits that the Petition should be denied, on the grounds that Citizens have not met the criteria set forth in 10 C.F.R. § 2.341(b)(4)(i)-(v) for Commission review.

BACKGROUND

On July 22, 2005, AmerGen submitted to the U.S. Nuclear Regulatory Commission ("NRC") an application for renewal,² pursuant to 10 C.F.R. Part 54, of Operating License No. DPR-16 for the Oyster Creek Nuclear Generating Station ("Oyster Creek"). The current license expires April 9, 2009. On September 24 and 25,

¹ Citizens' Petition for Review of LBP-08-12 (August 1, 2008) ("Appeal").

² Letter from C. N. Swenson, AmerGen, to NRC (July 22, 2005) (ML052080172). See Applicant Exh. 2.

2007, the Board held an evidentiary hearing on the only remaining contention in the proceeding, Citizens' contention concerning the drywell shell.³ On December 18, 2007, the Board issued an initial decision resolving Citizens' drywell contention in AmerGen's favor. *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-07-17, 66 NRC 327, 372 (2007). An appeal of the Board's initial decision⁴ as well as two other motions filed by Citizens⁵ are pending before the Commission.

On April 3, 2008, the Staff notified the Commission, the Board, and the parties that it was "reviewing the use of a simplified method to calculate cumulative usage factors ["CUF"] that may not be conservative" and that, because Oyster Creek used this simplified method to calculate the CUF for one type of nozzle, the recirculation nozzle, the Staff "plan[ned] to ask AmerGen to perform a confirmatory analysis." 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) (ML080930335) ("Staff Notification"). The Staff Notification

³ As admitted by the Board the Contention read:

[I]n light of the uncertain corrosive environment and correlative uncertain corrosion rate in the sand bed region of the drywell shell, AmerGen's proposed plan to perform UT tests prior to the period of extended operations, two refueling outages later, and thereafter at an appropriate frequency not to exceed 10-year intervals is insufficient to maintain an adequate safety margin.

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), LBP-06-22, 64 NRC 229, 255-56 (2006).

⁴ Citizens' Petition for Review of LBP-07-17 and Interlocutory Decisions in the Oyster Creek Proceeding (Jan. 14, 2008).

⁵ The two motions are: (1) Petition by Nuclear Information and Resource Service [*et al.*] 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), (2) Supplemental Petition by Nuclear Information and Resource Service [*et al.*] 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). These Petitions were filed jointly by Citizens and the intervenor groups in the Pilgrim, Indian Point, and Vermont Yankee license renewal proceedings.

stated that the Staff was informing the Commission of its review because of potential public interest. The Staff Notification further noted that the issue is irrelevant to the litigated contention. Lastly, relying upon “risk assessments performed by the Staff in resolving generic safety issues (GSI)-166 and GSI-190,” the Staff Notification stated that “the safety significance of using the simplified analysis method is low.”

On April 18, 2008, Citizens filed a motion with the Commission seeking to reopen the record in the Oyster Creek proceeding and file a new contention.⁶ Citizens claimed that their motion satisfied the requirements of 10 C.F.R. § 2.326 for reopening the record and § 2.309(c), (f)(1), and (f)(2) for admission of a late-filed contention. Citizens’ contention stated:

The predictions of metal fatigue for at least the recirculation nozzles at Oyster Creek are not conservative. A confirmatory analysis using a conservative method is required to establish whether these nozzles could exceed the allowable metal fatigue limits during any period of extended period or reactor operation. In addition, similar confirmatory analyses must be carried out for other structures for which the non-conservative analysis was used. Finally, the current stress-based metal fatigue monitoring program at Oyster Creek is inadequate because it relies upon non-conservative analysis techniques.

Motion to Reopen at 12. On April 28, 2008, the Staff and AmerGen responded in opposition to Citizens’ Motion to Reopen.⁷ On May 5, 2008, Citizens filed a reply to AmerGen’s Answer, and, on May 6, Citizens filed a motion for leave to reply (along with a reply) to the Staff’s April 28 Response.⁸ In the former, Citizens

⁶ 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”).

⁷ Staff’s Response in Opposition to Citizens’ Motion to Reopen the Record and for Leave to File and Add a New Contention (“Staff’s April 28 Response”); AmerGen’s Answer Opposing Citizens’ Motion to Reopen Record and Petition to Add a New Contention (“AmerGen’s April 28 Answer”).

⁸ Reply by [Citizens] to AmerGen’s Opposition to their Petition to Add a New Contention (Citizens’ Reply to AmerGen); Motion for Leave to Reply to the NRC Staff’s Opposition to (continued. . .)

dropped their assertions that (1) “similar confirmatory analyses must be carried out for other structures for which the non-conservative analysis was used” and (2) “the current stress-based metal fatigue monitoring program at Oyster Creek is inadequate because it relies upon non-conservative analysis techniques.”⁹ See Citizens’ Reply to AmerGen at 13.¹⁰

On April 29, 2008, the Staff issued AmerGen a request for additional information (“RAI”) in which the Staff asked AmerGen to perform a confirmatory environmentally corrected cumulative usage factor (“CUFen”) analysis for its reactor recirculation outlet (“RR”) nozzles and confirm that the RR nozzle was the only nozzle location analyzed using the simplified method. On May 1, 2008, AmerGen responded to the Staff’s RAI. See Letter Michael P. Gallagher, AmerGen to NRC, “NRC Request for Additional Information, dated April 29, 2008, Related to OysterCreek Generating Station License Renewal Application,” (ML081270386) (“RAI Response”).¹¹ The RAI Response reported the results of

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[Citizens’] Motion to Reopen; Reply by Citizens to the NRC’s Staff’s Opposition to Their Motion to Reopen.

⁹ The Contention Citizens now seek to have admitted reads: “The predictions of metal fatigue for the recirculation nozzles at Oyster Creek are not conservative. A confirmatory analysis using a conservative method is required to established whether these nozzles could exceed allowable metal fatigue limits during any extended period of reactor operation.” LBP-08-12, 67 NRC __ (slip op. at 4).

¹⁰ It should be noted that unlike some of the other pending license renewal proceedings, such as Vermont Yankee, in which intervenors have challenged the applicant’s *program* for managing metal fatigue, this case involves a challenge to AmerGen’s *calculation* of the CUFen for the RR nozzles.

¹¹ Counsel for AmerGen also transmitted this letter directly to the Chairman, the Board, and the Parties. See Letter from Alex S. Polonsky, Counsel for AmerGen, to Dale E. Klein, Chairman of the U.S. Nuclear Regulatory Commission, Enclosing RAI Response (May 5, 2008) (ML081290455).

AmerGen's confirmatory analysis and confirmed that the RR nozzle was the only nozzle location where the simplified method had been used.

On May 9, 2008, the Commission referred Citizens' Motion to Reopen to the Board for appropriate action. See Commission Order, *AmerGen Energy Co., LLC* (License Renewal for Oyster Creek), Dkt. No. 50-219-LR (May 9, 2008) (unpublished).

On May 21, 2008, the Board issued an Order to submit explanatory pleadings. Order (Directing Parties to Submit Explanatory Pleadings and Affidavits) (unpublished). Therein, the Board asked that the parties provide affidavits from appropriate experts discussing the significance, if any, of the RAI Response, accompanied by pleadings explaining the impact, if any, of the RAI Response on Citizen's motion to reopen the record and add a new contention. The Staff and AmerGen filed the requested affidavits and pleadings on May 27, 2008.¹² Also on May 27, 2008, Citizens responded with "Citizens Response to Board Order and Motion to Supplement the Basis of Their Contention" ("Supplemental Motion"). The Staff and AmerGen filed responses to Citizens' motion to supplement the basis of their contention on June 5 and 6, respectively.¹³ On June 5, 2008, Citizens filed a motion to strike the Staff's and AmerGen's affidavits and responsive briefs filed in response to the Board's May 21 Order.¹⁴

¹² AmerGen's Response to May 21 Board Order (May 27, 2008); NRC Staff's Explanatory Pleading and Affidavit (May 27, 2008); Citizens Response to Board Order and Motion to Supplement Basis of Their Contention (May 27, 2008).

¹³ NRC Staff's Answer to Citizens' Motion to Supplement the Basis of Their Contention (June 5, 2008); AmerGen's Answer Opposing Citizens' Motion to Supplement (June 6, 2008).

¹⁴ Citizens' Motion to Strike and for Other Appropriate Relief (June 5, 2008) ("Citizens' Motion to Strike"). The Staff and AmerGen responded to Citizens Motion to Strike on June 16, 2008. See NRC Staff's Answer to Citizens' Motion to Strike (June 16, 2008); AmerGen's Answer (continued. . .)

On July 24, 2008, the Board issued a decision denying Citizens' Motion to Reopen. See LBP-08-12, 67 NRC _____. Therein the majority of the Board concluded that Citizens' April 18 and May 27 motions failed to satisfy the regulatory requirements of 10 C.F.R. § 2.326 for reopening the record. *Id.* (slip op. at 1-2). Judge Baratta filed a dissenting opinion.

DISCUSSION

I. Standard Governing Petitions for Review

Citizens request that the Commission review the Board's decision in LBP-08-12 denying their Motion to Reopen and Supplemental Motion. Section 2.341(a)(1) provides that "except for appeals under § 2.311 . . . [or § 2.1015], review of decisions and actions of a presiding officer are treated under this section." The Board's decision in LBP-08-12 was a ruling on Citizens' motions to reopen. Accordingly, § 2.341(a) governs Citizens' Appeal.

Section § 2.341(b)(1) provides that whenever Commission review is authorized by the Commission's regulations, the Commission, in deciding whether to grant review, looks for the existence of a "substantial question" with respect to one or more of the following five considerations listed in § 2.341(b)(4):

- (1) a clearly erroneous finding of fact;
- (2) a necessary legal conclusion is without precedent or conflicts with existing law;
- (3) the appeal raises a substantial and important question of law or policy;
- (4) the proceeding involved a prejudicial procedural error; or
- (5) any other consideration the Commission determines to be in the public interest.

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Opposition Citizens' Motion to Strike (June 16, 2008).

Where, as here, the petitioners (Citizens) are claiming Board error as the basis for their petition for review, the burden is on the petitioners to clearly identify the error in the Board's decision and thus demonstrate that Commission review is warranted. See *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 40441), CLI-94-6, 39 NRC 285, 297-98 (1994). As explained below, Citizens have not met their burden: they have failed to demonstrate that the Board made any legal, factual, or procedural errors in denying their Motion to Reopen.

II. The Board Properly Applied the Standards of 10 C.F.R. § 2.326

A. The Board Applied the Correct Legal Standard

Citizens argue that the Board erred by applying the wrong legal standard to their Motion to Reopen by requiring Citizens to demonstrate, on their own, what the consequences would be if a CUFen value were to exceed 1.0. Citizens' argument, however, is based on a faulty premise and must be rejected.

Under 10 C.F.R. § 2.326(a), motions to reopen must address a "significant safety issue," and under § 2.326(b), this factor must be shown to have been met through "affidavits that set forth the factual and/or technical bases [in support of a safety significance finding]...given by competent individuals with knowledge of the facts alleged, or by experts in the discipline appropriate to the issues raised." Citizens argue that the requirement of § 2.326(a) to demonstrate a "significant safety issue" can be satisfied by a showing that a "possible" violation of a regulatory safety standard "could occur." Appeal at 4. In other words, Citizens contend that where violation of a regulatory safety standard is being alleged, the safety significance of the issue can be automatically assumed and need not be independently established. Citizens contend, therefore, it is enough that they raised a question as to whether the RR nozzle CUFen value could exceed 1.0.

There is, however, a gaping hole in Citizens' logic. Simply put, there is no regulation requiring that CUFen values not exceed 1.0. The Staff indicated this in the April 28, 2008 Affidavit of John R. Fair,¹⁵ and Citizens have provided no basis to dispute that conclusion. Therefore, Citizens clearly have the burden to explain and support why the issue they are raising is safety significant, as § 2.326 expressly requires them to do. There is accordingly no merit to Citizens' claim that the Board incorrectly required Citizens to demonstrate the safety significance of the issue they have raised.

B. The Board Did Not Ignore Evidence
that Citizens Raised a Significant Safety Issue

In their Appeal, Citizens argue that the Board ignored evidence that they raised a significant safety issue. This argument lacks merit. The only "evidence" Citizens presented that their motion raised a significant safety issue was a statement in a newspaper article attributed to an NRC spokesperson that breakage of the reactor recirculation nozzle "could lead to a severe accident." See Motion to Reopen at 7-8 (quoting Todd Bates, "NRC Wants Nuclear Plant's Water Nozzles Rechecked," *Asbury Park Press*, Apr. 7, 2008).¹⁶ The express language of § 2.326(b), the regulatory history

¹⁵ The Fair Affidavit states that the ASME Code does not require environmentally adjusted cumulative usage factors to be less than 1.0. Rather, it requires that cumulative usage factors (i.e. without environmental adjustment) be less than 1.0. See Affidavit of John R. Fair (Apr. 28, 2008) at ¶ 5. License Renewal applicants consider environmentally assisted fatigue ("EAF") not because it is required by the ASME code but because Commission guidance recommends they consider environmentally assisted fatigue when developing aging management programs. See *Id.* at ¶ 7 (citing Memorandum from A. Thadani to W. Travers, Closeout of Generic Safety Issue 190, "Fatigue Evaluation of Metal Components for 60-Year Plant Life" (Dec. 26, 1999) ML031480383). See also NUREG-1800 Standard Review Plan for Review of License Renewal Applications for Nuclear Power Plants, Rev. 1, (Sept. 2005), Section 4.3. Furthermore, the affidavits of Dr. Joram Hopenfeld presented by Citizens in support of their efforts to reopen the record of this proceeding fail to identify a violation of a safety standard and Citizens have not otherwise offered any evidence that the Commission regulations, Oyster Creek's current licensing basis, or the ASME code require that CUFens be less than 1.0.

¹⁶ Citizens' arguments regarding "broader safety significance" and the "need to develop" the record fail to address the key issue: whether Citizens raised a significant safety issue. Although Citizens argue that the public would benefit from better understanding of the (continued. . .)

of § 2.326, and Commission precedent, however, require that a party moving for reopening provide affidavits from competent individuals, containing evidence that meets the standards of 10 C.F.R. § 2.337, and setting forth with particularity the basis for their assertions. In addition, as the Board noted, “[b]inding case law establishes that a movant who seeks to reopen the record does *not* show the existence of a significant safety issue merely by showing that a plant component ‘perform[s] a safety function and thus ha[s] safety significance.’” LBP-08-12, 67 NRC at ___ (slip op. at 13-14) (citing *Public Serv. Co. of New Hampshire* (Seabrook Station, Units 1 & 2), CLI-90-06, 31 NRC 483, 487 (1999)) (emphasis and alterations in original). Thus, a newspaper article with a generic statement from an NRC spokesperson about the safety significance of RR nozzles does not meet the standard set by § 2.326(b) or binding precedent.

Moreover, in neither of the declarations of Dr. Joram Hopenfeld¹⁷ submitted by Citizens in support of their reopening effort did Dr. Hopenfeld state that his concerns about Oyster Creek’s metal fatigue calculations (original or confirmatory) raise a significant safety issue. Neither of Dr. Hopenfeld’s declarations explain how a CUFen exceeding 1.0 relates to the risk of breakage of the RR nozzle. The Staff’s expert, John R. Fair, explained in his affidavit that risk assessments demonstrate that under-

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significance of the use of the simplified method, there has been extensive attention on the public record to the simplified method from the Staff’s ongoing review of the Wolf Creek license renewal application, in which the Staff, long before Dr. Hopenfeld, identified potential concerns about the simplified method, and the extensive record of the Vermont Yankee license renewal proceeding. Moreover, notwithstanding such purported general public interest, the Board in the Pilgrim license renewal proceeding denied a motion to submit a new contention on metal fatigue issues and refused to consider the issue *sua sponte* pursuant to 2.340(a). See Memorandum and Order (Ruling on Pilgrim Watch Motions on Cumulative Usage Factors) (July 1, 2008) (unpublished).

¹⁷ Declaration of Dr. Joram Hopenfeld (Apr. 15, 2008) (“First Hopenfeld Declaration”); Second Declaration of Dr. Joram Hopenfeld (May 23, 2008) (“Second Hopenfeld Declaration”).

prediction of CUFs is not a significant safety issue because even if the CUF exceeds 1.0, the likely consequence is a small crack that would be detected and repaired. See LPB-08-12, 67 NRC at__ (slip op. at 21); Fair Affidavit at ¶¶ 7, 9. Citizens nowhere attempt to dispute the technical accuracy of Mr. Fair's conclusions, and so fail to controvert his assertion that the issue raised is not a significant safety issue.

In his dissenting opinion, Judge Baratta opined that Citizens had identified a significant safety issue based on additional arguments of his own.¹⁸ These arguments, however, are not a persuasive rationale for reopening and should not be allowed to substitute in providing Citizens needed expert support. Judge Baratta argues that Citizens have raised a significant safety issue because allowing the CUFen to exceed 1.0 violates the Commission's "Defense-in-Depth" principles. LBP-08-12, 67 NRC ____ (slip op. at 10) (J. Baratta, dissenting). This argument, however, is not persuasive. Whether couched in defense-in-depth terms or otherwise, the fact remains that the issue Citizens are raising is not a significant safety issue. While the Staff is not suggesting that the CUFen of Oyster Creek's recirculation nozzle actually exceeds 1.0, the Fair Affidavit demonstrates that the principle of defense in depth would not be violated even if the CUFen *did* exceed 1.0, because risk assessments demonstrate that the increase in the core damage frequency ("CDF") resulting from a CUF as high as 4.75 is negligible. See Fair Affidavit at ¶¶8. Mr. Fair explained: "The negligible CDF results, in part, from the low probability that a small fatigue crack would grow through the thick nozzle to a size that would challenge plant safety systems, even though there is a relatively high

¹⁸ The Staff notes that the burden is on the party moving to reopen, not the Board reviewing the motion, to provide expert support explaining the safety significance of the issue raised. Furthermore, parties are precluded from raising new facts and arguments on appeal. See, e.g., *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 344 (1999); *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-813, 22 NRC 59, 82-83 (1985).

probability of initiating a fatigue crack at a CUF of 4.75.” *Id.* Thus, the probability of a fatigue failure of the recirculation nozzle leading to a large-break loss of coolant accident is negligible even if the CUFen exceeds 1.0. *Id.* ¶¶ 6-8. Given this lack of safety significance, the issue does not legitimately raise defense-in-depth concerns or otherwise suggest lack of adherence to Commission policy.

Consequently, Citizens have failed to explain why their proposed new contention (that AmerGen’s original metal fatigue analysis of the RR nozzles is not conservative and thus a conservative analysis is needed) raises a significant safety issue. Therefore, Citizens’ claim that the Board erred by ignoring the evidence discussed above lacks merit.

C. The Board Properly Found that Citizens’ Proposed Contention Would Not Materially Alter the Outcome of the Proceeding

Citizens argue that the Board erred in finding that their proposed new contention was not likely to materially alter the outcome of the proceeding. In so doing, Citizens argue that “the Board misapplied the summary judgment standard of proof applicable to motions to reopen” and “ignor[ed] conflicting evidence.” Appeal at 3. This argument overlooks the Commission’s regulatory requirements for reopening.

In order to successfully move to reopen the record of a proceeding, the movant must demonstrate that the motion is (1) timely; (2) raises a significant safety issue; and (3) *demonstrates that a materially different result would be likely if the newly proffered evidence were considered.* 10 C.F.R. § 2.326 (a)(1)-(3) (emphasis added). In addition, if the motion to reopen seeks to litigate an issue that was not previously in controversy, the movant must demonstrate that it satisfies the requirements of 2.309(c) and 2.309(f). 10 C.F.R. § 2.326(d).

In a motion to reopen, the burden is on the moving party to demonstrate that it has satisfied each of the criteria in § 2.326(a)(1)-(3) via affidavits from individuals with

knowledge or expertise in the appropriate discipline. 10 C.F.R. § 2.326(b). These affidavits must present evidence meeting the requirements of § 2.337¹⁹ and must separately address each of the criteria for reopening and explain why each has been met. *Id.* In their appeal, Citizens urge that “Boards should use the summary disposition standard to determine whether the pre-requisite showing to reopen the record has been made.” Appeal at 9. Citizens thus claim that their evidence need only be sufficient to withstand a motion for summary disposition, and that the party *opposing* reopening should bear the burden of proving that a materially different outcome is *unlikely*. See Appeal at 9-10 (citing *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC, 520, 523 (1973); *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 (2005) (“PFS”)).

Citizens’ argument is flawed for two reasons. First, as noted above, to apply a summary disposition-type standard to a motion to reopen would shift the burden from the party moving to reopen the record to the party opposing reopening. Such a shift would be contrary to both the regulation (§ 2.326) and Commission case law, which clearly put the burden of satisfying all of the requirements for reopening the record on the moving party. See *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-85-7, 21 NRC 1104, 1106 (1985); *Pacific Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-756, 18 NRC 1340, 1344 (1983) (quoting *Kansas Gas & Elec. Co.* (Wolf Creek Power Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978)).

Second, the cases cited by Citizens do not support the proposition that Boards should apply a summary disposition-type standard in lieu of the Commission’s regulatory

¹⁹ Section 2.337 provides that only relevant, material, and reliable evidence may be admitted. Evidence that is irrelevant, unduly repetitive, or unreliable must be excluded.

requirement that a materially different result must be shown to be likely in order for the record to be reopened to admit a late-filed contention. Rather, a summary disposition standard applies in the reopening context only to require dismissal of a new contention where no genuine dispute of material fact actually exists. See *Vermont Yankee*, ALAB-138, 6 AEC at 523 (stating that once the Board resolves the questions of timeliness and significant safety issue in the moving party's favor, the Board considers whether it needs additional evidence to resolve the issue because, even if an issue is timely raised and involves a significant safety issue, no reopening of the evidentiary hearing is necessary if there is "no genuine unresolved issue of fact"). Moreover, as stated in *PFS*, CLI-05-12, 61 NRC at 350, "Commission practice holds that the standard for admitting new contentions after the record is closed is higher than for ordinary late-filed contentions," (citing *Vermont Yankee*, ALAB-138, 6 AEC at 523). See also *Private Fuel Storage, LLC*, (Independent Spent Fuel Storage Installation), LBP-05-5, 61 NRC 108, 116 (2005) *aff'd* CLI-05-12, 61 NRC 354 (2005) (stating that *Vermont Yankee*, ALAB-138, lays out a test "for admissibility of contentions on new subjects that arise after the evidentiary record has been closed"). Because contentions filed after the record has closed must clear a higher threshold than contentions filed while the record is still open, *PFS*, CLI-05-12, 61 NRC at 350, there is nothing surprising about a contention being admitted in *Vermont Yankee* prior to the closing of the record in that proceeding while a similar contention filed in the instant proceeding well after the record had closed was not admitted. Thus, contrary to Citizens' assertions, the Board did not err in putting the burden on Citizens to show that their new contention raised a significant safety issue and could materially affect the outcome of this proceeding.

Even if a summary disposition-type standard were applied to Citizens' proposed new contention, Citizens' effort to reopen the record would still fail. Citizens cannot escape the requirement of 10 C.F.R. 2.326(b), which requires that support of a motion to

reopen be in the form of affidavits given by competent individuals with knowledge of the facts or experts in the appropriate discipline, containing evidence that meets the requirements of § 2.337 and specifically addressing and explaining each of the reopening criteria.²⁰ Second, as Citizens have noted, “bare assertions are insufficient to oppose a motion for summary disposition” and “expert opinions must be sufficiently grounded upon a factual basis.” Appeal at 12 (citing AmerGen Motion for Summary Disposition of Citizens’ Drywell Contention (Mar. 30, 2007) at 5-6); *Advanced Medical Sys. Inc.*, CLI-93-22, 38 NRC 98, 102 (1993); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-04, 61 NRC 71, 80-81 (2005). The declarations of Dr. Hopenfeld submitted by Citizens in support of their effort to reopen the record of this proceeding contain speculation without a grounded factual basis and fail to controvert the affidavits submitted by AmerGen and the Staff.

The First Hopenfeld Declaration speculated that because Vermont Yankee apparently underestimated the CUFen for its feedwater nozzle by 40% using the simplified method of analysis, Oyster Creek’s CUFen calculation for its RR nozzles *might* not be conservative. See First Hopenfeld Declaration at ¶¶ 7, 9. Nowhere in his First Declaration did Dr. Hopenfeld state that the possibility that the CUFen for Oyster Creek’s reactor recirculation nozzle exceeded 1.0 constituted a significant safety issue, much less explain the safety significance of a CUFen exceeding 1.0. When the results of Oyster Creek’s confirmatory analysis showed that Oyster Creek appeared to have overestimated the CUFen of the RR nozzle using the simplified method, see RAI Response, counsel for Citizens argued that the confirmatory analysis did not comply with

²⁰ See also LBP-08-12, 67 NRC ___ (slip op. at n.10) (explaining that in light of the 1986 amendments to the regulation governing reopening, it is clear that a movant seeking to reopen the record must provide affidavits setting forth the factual and/or technical basis for its claim and cannot rely on information that Staff has found “self-evident”).

the ASME Code. Citizens' Motion to Supplement at 9. The Second Hopenfeld Declaration did not, however, support that assertion. Instead Dr. Hopenfeld opined that some of AmerGen's assumptions *may not* be justified and therefore *he could not* conclude that AmerGen's confirmatory analysis was conservative. See Second Hopenfeld Declaration at ¶¶7-11. Like the First Hopenfeld Declaration, the Second Hopenfeld Declaration does not affirmatively state that a significant safety issue had arisen. Neither of those declarations controverts either the evidence presented by the Staff that the safety significance of use of the simplified method is low²¹ or AmerGen's assertions that its confirmatory analysis was performed in accordance with the ASME Code and that the ASME Code allows the analyst to "neglect" the cladding inside the nozzle.²² In the absence of evidence that the ASME Code procedure is flawed because it allows users to "neglect" cladding, or that AmerGen's confirmatory analysis (contrary to statements made under penalty of perjury) did not in fact comply with the ASME Code, Citizens' assertions that AmerGen's analysis did not comply with Code and that it is not conservative because it did not consider the cladding are baseless speculation and do not controvert AmerGen's and the Staff's evidence.

Thus, even applying a summary disposition-type standard, Citizens failed to dispute the evidence presented by AmerGen and the Staff that *potential* under-prediction of the RR nozzle CUFen is *not* a significant safety issue and that consideration of their new contention is *not* likely to materially alter the outcome of this proceeding.

²¹ See Fair Affidavit at ¶¶7, 9(explaining that the Staff studied the effects of environmentally assisted fatigue and performed risk assessments and determined that environmentally assisted fatigue was not a significant safety concern). Mr. Fair's affidavit explained that a CUF greater than 1.0 does not mean failure. *Id.* at ¶7-8. Even if the CUF is 4.75 times the limit, there is only a negligible increase in the core damage frequency. *Id.* at ¶ 8.

²² See AmerGen's RAI Response; Affidavit of Gary L. Stevens dated May 27, 2008 (attached to AmerGen's Response to May 21 Board Order).

Consequently, the Board's conclusion that consideration of their proposed contention does not raise a significant safety issue and would not likely alter the outcome of the proceeding was correct.

D. The Board's Conclusion that Citizens' Proposed New Contention Was Moot Was Not Erroneous

Citizens' assertion that the Board erred in finding Citizens' proposed new contention to be moot is unfounded. As the Board recognized in its decision, "the plain language of Citizens' . . . contention reveals that it is a contention of omission alleging that AmerGen should perform a confirmatory analysis." LBP-08-12, 67 NRC ____ (slip op. at 16 n.14). Commission case law holds that where contentions allege the "omission of particular information or an issue from an application, and the information is later supplied by the applicant. . . . the contention is moot." *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 383 (2002). Here, Citizens' contention alleged that the original fatigue analysis for the recirculation nozzles was not conservative and that, therefore, "[a] confirmatory analysis using a conservative method is required." Citizens' Motion to Reopen at 12. The results of such a confirmatory analysis were submitted to NRC as a docketed response to the Staff's April 29, 2008 RAI. See RAI Response. In the RAI Response and in the Stevens Affidavit (attached to AmerGen's Response to May 21 Order) AmerGen stated that it had performed an analysis in accordance with the ASME Code and that this analysis confirmed that the original analysis was conservative and acceptable. RAI Response at 2; Stevens Affidavit at ¶¶9-10.²³ Citizens have made no

²³ The Staff notes that both the RAI response and the affidavit were accompanied by statements attesting, under penalty of perjury, that the information contained therein was true and correct. Therefore, Citizen's assertions that the Board relied on "unsworn bare assertions," Appeal at 15, has no merit.

showing that the Board should not have considered these documents as evidence in deciding whether to reopen the record.

In support of their claim, Citizens argue that the Board “ignored” the statements by Citizens’ expert (Dr. Hopenfeld), and Judge Baratta in his dissent, that the analysis was made “less conservative than the original analysis by neglecting the nozzle cladding, without providing any plant-specific justification.” *Id.* Citizens also assert that the contention cannot be moot because “the issue of whether the confirmatory analysis was conservative remains in dispute.” *Id.* These arguments are meritless. As discussed in Section II.C., *supra*, Citizens have failed to provide anything other than speculation in support of their argument that neglecting the nozzle cladding made the confirmatory analysis less conservative. Citizens have also not provided evidence that AmerGen did not comply with the ASME Code or that the ASME Code is flawed. In contrast, AmerGen has specifically stated that “the nozzle cladding was neglected for the fatigue calculation, *as permitted in NB-3122.3 of Section III of the ASME Code.*”²⁴ RAI Response at 3 of 7(emphasis added); Stevens Affidavit at ¶ 10. Judge Baratta’s dissent, though it does attempt to provide a technical explanation for his concerns regarding AmerGen’s “neglecting” of the nozzle cladding, does not specifically address the key issue of whether the RR nozzles meet the ASME Code conditions that permit the cladding to be neglected. Rather, Judge Baratta provides only a generic discussion of the potential significance of nozzle cladding in the context of fatigue calculations that

²⁴ Subsection NB-3122.3 of Section III of the ASME Code reads: “In satisfying NB-3222.2 and NB-3222.4, the presence of the cladding shall be considered with respect to both the thermal analysis and the stress analysis. The stresses in both materials shall be limited to the values specified in NB-3222.2 and NB-3222.4. However, when the cladding is of the integrally bonded type and the nominal thickness of the cladding is 10% or less of the total thickness of the component, the presence of the cladding may be neglected.”

does not address the applicable ASME Code provisions.²⁵ Therefore, because Citizens have provided no support for their view that the confirmatory analysis is not conservative, they failed to meet their burden of filing an admissible contention for which reopening is warranted. Further, the issue raised by Judge Baratta is not properly within the scope of the proposed new contention, as Citizens failed to support it. Accordingly, the Board properly decided that the contention is moot.

E. The Board Did Not Err in Denying Citizens' Request for Discovery to Support Their Motion to Reopen

Citizens' assertion that they should have been granted discovery in order to support their motion to reopen lacks merit. Commission case law precludes a litigant from obtaining discovery to assist it in framing motions to reopen and add contentions. *See Baltimore Gas and Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 351 (1998) (noting the Commission's longstanding precedent that intervenors are not entitled to engage in discovery to assist in framing contentions and the Commission's determination that this does not violate intervenors' due process rights); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-85-7, 21 NRC 1104, 1106 (1985) (precluding movant from engaging in discovery to support a motion to reopen). Also, as stated above, reopening a closed record is a difficult task by design, and so Citizens' claim that accomplishing this goal is difficult without discovery does not signal unfairness; it simply reflects the reality of the Commission's rules on record reopening.²⁶ Thus, to honor Citizens' request for discovery would be contrary to

²⁵ The Staff also notes that Judge Baratta's discussion does not reference any expert affidavits or other documents to support his views on the significance of cladding in fatigue calculations.

²⁶ In several instances Citizens appear to challenge the Commission's reopening standard, suggesting that there should be an exception for them from the clear language of (continued. . .)

well established Commission precedent.

III. Citizens' Allegations of Unfairness Are Unfounded

In their appeal, Citizens allege they were prejudiced by the Board's consideration of AmerGen's RAI Response and the Board's failure to strike pleadings filed by the Staff and AmerGen in response to the Board's May 21, 2008 Order requesting affidavits from competent individuals explaining the significance of AmerGen's RAI response and legal briefs explaining the impact, if any, on Citizens' proposed new contention. See Appeal at 16-17; May 21, 2008 Order at 2. Citizens' allegations of procedural prejudice are baseless. Commission case law on motions to reopen is clear that parties opposing the motion may submit contravening evidence and the Board may consider all of the evidence submitted by all parties without reopening the record. See *PFS*, CLI-05-12, 61 NRC at 350 (stating that the Board correctly considered both the intervenor's new allegation and the applicant's contrary evidence). In addition, 10 C.F.R. § 2.337(b)(1) allows Boards to take official notice of agency records, provided the parties are offered an opportunity to controvert the document.

Through its May 21, 2008 Order, the Board provided the parties, including Citizens, an opportunity to respond to AmerGen's RAI Response, thus satisfying the requirements of § 2.337(b)(1). Thus, there was nothing "fundamentally unfair" about the Board's approach.

(. . .continued)

§ 2.326 because, they assert, their proposed new contention is timely filed. See, e.g., Appeal at 18. However, § 2.335(a) prohibits challenges to the Commission's regulations in any adjudicatory proceeding subject to Part 2 unless a party to the proceeding requests and receives, pursuant to § 2.335(b), a waiver of § 2.335(a) on the basis of special circumstances with respect to the subject matter of the particular proceeding such that the rule, regulation, or subsection thereof does not serve the purposes for which it was adopted. Citizens have not requested such a waiver.

Citizens, though, claim that this single briefing opportunity was insufficient, and that they should have additionally been given an opportunity to respond to the Staff's and AmerGen's briefs. Yet, Citizens made clear in their Motion to Strike that the purpose of such responsive briefing would have been to make use of information they were seeking to obtain through discovery.²⁷ As explained above, there is no right to discovery to aid in formulating motions to reopen and add new contentions. Accordingly, a request for additional briefing that would be *based on* information obtained via non-existent discovery lacks any legal foundation, and the Board was right to reject it. In sum, there was nothing unfair about the Board's decision to consider AmerGen's RAI Response after allowing all parties the opportunity to respond to it.

IV. There Has Been No Violation of Due Process or the Atomic Energy Act

Citizens argue that the Atomic Energy Act ("AEA") guarantees their right to a hearing on any issue that is material to a licensing decision and that the issue identified by their proposed contention is material to the licensing decision. Citizens' interpretation is overly broad and unsupported. While § 189(a) of AEA has been interpreted to "prohibit[] the NRC from preventing all parties from ever raising in a hearing on a licensing decision a specific issue it agrees is material to that decision," it has not been interpreted to require the Commission to entertain contentions on all material issues at *any* stage in a licensing proceeding.²⁸ *Union of Concerned Scientists v. U.S. Nuclear Regulatory Comm'n.*, 920 F.2d 50, 54-55 (D.C. Cir. 1990).

Furthermore, in the rulemaking proceeding which codified the reopening standard, the Commission stated that the purpose of the rule was to ensure that once

²⁷ See Citizens' Motion to Strike at 6-7.

²⁸ Such as where the record has closed and a petitioner fails to satisfy the requirements for opening to admit a late-file contention.

the record closes, “finality will attach to the hearing process. Otherwise it would be doubtful whether a proceeding could ever be completed.” 51 Fed. Reg. at 19,539. This proposition is supported by the observation of the Third Circuit Court of Appeals in a decision upholding the Commission’s denial of a motion to reopen the record of the Three Mile Island restart proceeding: “at some point . . . proceedings must terminate in outcomes.” *Three Mile Island Alert v. U.S. NRC*, 771 F.2d 720, 740 (3d Cir. 1985). Thus, requiring Citizens to satisfy the clear requirements of § 2.326 in order to reopen a record that has been closed for nearly a year is not a violation of the AEA or due process. Citizens’ attempts to demonstrate that they have satisfied a much lower threshold (i.e. “materiality”) are therefore to no avail.

CONCLUSION

The Board’s decision in LBP-08-12 was consistent with the applicable facts and law. Furthermore, for the reasons set forth above, Citizens’ Petition for Commission Review of LBP-08-12 should be denied.

Respectfully submitted,

/RA/

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/RA/

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Dated at Rockville, Maryland
this 11th day of August 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER IN OPPOSITION TO CITIZENS' PETITION FOR REVIEW OF LBP-08-12" 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 11th day of August, 2008.

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