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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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)	)	
	)	

CITIZENS' CONSOLIDATED REPLY REGARDING PETITION FOR REVIEW OF LBP-08-12

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TEMPLATE = SECY-037

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I. INTRODUCTION

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") hereby reply to the Answers of the NRC Staff and AmerGen Energy Co. LLC ("AmerGen") regarding the appeal of Atomic Safety and Licensing Board ("ASLB" or "Board") Initial Decision LBP-08-12.[1]

II. KEY ISSUES IN THIS PROCEEDING

Because of the page limit, Citizens confine this reply the following issues: i) the need to apply the rules fairly, reasonably and in accordance with statutory requirements; ii) the appropriateness of the summary judgment standard for deciding motions to reopen; and iii) whether Citizens are raising an issue that is safety significant. For all other issues, Citizens rely upon their initial briefing.

A. The Rules Must Be Applied Fairly, Reasonably And In Accordance With Statutory Standards

All parties agree that Commission proceedings are governed by the cardinal rule of fairness and that the Atomic Energy Act ("AEA") provides Citizens with the right to hearing on all issues that are material to reclicensing, subject to reasonable procedural restrictions. *See* AmerGen Ans. at 23-24; NRC Staff Ans. at 19-21. The court in *Union of Concerned Scientists v. NRC*, 920 F.2d 50 (D.C. Cir. 1990) ("UCS II") confirmed that the NRC may not prevent all parties from ever raising in a hearing an issue that is material to a licensing decision. *Id.* at 54. Although the UCS II decision found that the rules on late-filed contentions did not violate the AEA on its face, it did recognize that the NRC's procedural rules could be applied to prevent all parties from ever raising a material issue. *Id.* at 56. It then stated that in such a case, the aggrieved party could bring an as-applied challenge to the validity of the rules.[2] *Id.*

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[1] Memorandum and Order (Denying Citizens' Motion to Reopen the Record and to Add a New Contention), *In the Matter Of AmerGen Energy Co, LLC* (License Renewal for Oyster Creek Nuclear Generating Station), LBP-08-12 (July 24, 2008) (the "Decision").

[2] The NRC Staff also imply that *Three Mile Island Alert v. NRC*, 771 F.2d 720 (3rd Cir. 1985) suggests that the Board properly denied Citizens' motion to reopen. NRC Ans. at 21. In fact, one of the

The metal fatigue issue is material to relicensing. Illustrating this, similar issues with allegedly inadequate fatigue calculations have been admitted as contentions in the proceedings for Vermont Yankee and Indian Point. Although, the majority found that this issue was not safety significant, Judge Baratta recognized that majority's approach makes it "virtually impossible to ever reopen a proceeding no matter how safety significant an issue raised in a contention might be." Decision, Dissent of Judge Baratta at 13. Because the issue is material, the majority has done precisely what the UCS II court recognized is not permitted by the AEA; it has prevented all parties from ever raising a material issue through the application of NRC's procedural rules. For this reason alone, the decision must be reviewed and reversed.

Moreover, the majority's application of the rules was manifestly unfair. Instead of addressing the fairness point directly, AmerGen erroneously suggests that the Commission has imposed burdens on Citizens akin to a summary judgment proceeding, while imposing no corresponding burden upon AmerGen and the Staff. AmerGen Ans. at 11. This assertion is directly contradicted by case law, *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 524 (1973), and is a straightforward attempt to make the rules burdensome for Citizens alone. This would be manifestly unfair and is, of course, not what the Commission has actually done. Similarly, AmerGen erroneously argues that the doctrine that allows a delay in motion to reopen proceedings for some limited discovery when the opposing party relies upon evidence that is unavailable to the movant is not part of NRC proceedings. AmerGen Ans. at 20-21. In fact, as the Appeal Board recognized long ago, this exception to the general rule is applicable to motions to reopen as well as to motions for summary disposition. *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 524 (1973). Even if this were not the case, fairness requires that that when a party opposes reopening a proceeding by citing to a critical piece of new evidence, that party should not be

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core pre-requisites to the holding in that case was that "petitioners were afforded a fair opportunity to offer both argument and evidence on all of the relevant issues." 771 F.2d at 730-31. Thus, that case also confirms that Citizens must be granted a fair opportunity to litigate the metal fatigue issue.

permitted to avoid providing the new evidence to the movant. This would allow movant to determine if the assertions of the opposing party are correct and if any facts remain in dispute. This procedure is not only fair, it also serves to cut down on the issues to be adjudicated.

Moreover, AmerGen erroneously states that Citizens "do not have the right to 'fully litigate' the issues they raise." AmerGen Ans. at 22. This statement directly contradicts the AEA and the rule of fundamental fairness, and is also against the public interest.[3] Here, the only reason that Citizens had to move to reopen is because AmerGen failed to adequately disclose its calculation methods in the License Renewal Application ("LRA"). It would therefore be manifestly unjust to curtail Citizens' right to litigate the issues arising from AmerGen's omission, because that would punish Citizens, who are not at fault, and benefit AmerGen, the very party that made the omission. If anything, this circumstance should be a reason to impose additional burdens upon AmerGen or reduce the burdens on Citizens.

Finally, while the NRC may impose reasonable procedural rules to regulate the AEA hearing right, it may not be unreasonable. Like the majority of the Board, AmerGen and the Staff argue that even if Citizens have direct evidence to show that they have raised a significant safety issue, it can only be presented through an expert affidavit. AmerGen Ans at 6; NRC Staff Ans. at 7, 8-9. Citizens used statements by an NRC Staff member to a newspaper,[4] admissions by the Applicant, and the Staff's other findings to support their motion. As Judge Baratta correctly stated "Staff's findings coupled with the Applicant's admissions, as critiqued by Dr. Hopenfeld, are sufficient." Dissent of Judge Baratta at 6. Requiring all supporting evidence to be presented in the form of an expert affidavit would not only be utterly pointless, it would also violate the best evidence rule and the hearsay rule. Instead, it is preferable to present admissions and Staff findings directly, as Citizens have done. Although the rules could be interpreted as requiring all evidence to be submitted by affidavit, the Commission has repeatedly made

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[3] The State of New Jersey has confirmed that the NRC should "permit public review" of the fatigue calculation. Letter from Lipoti to Lee, dated April 17, 2008 *available at* ML081140508.

[4] Contrary to AmerGen's assertions this statement is not hearsay because it is an admission by the NRC Staff, fitting squarely within the hearsay exception provided by Fed. Rules of Evid. 801(d)(2).

exceptions in similar circumstances, because such an interpretation is unreasonable. *E.g. Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358, 364 (1973) (cited in Judge Baratta's dissent at 6-7). Thus, the majority ignored relevant precedent when deciding to ignore the admissions of the Staff and the applicant that supported the contention.

B. The Summary Judgment Standard Is Appropriate

Despite straightforward Commission case law on the subject, AmerGen raises the specter that applying the summary judgment standard to motions to reopen would make reopening less difficult than admitting initial contentions. AmerGen Ans. at 13-14. This is entirely incorrect, because it is well settled that at the initial contention stage, Citizens do not have to present evidence sufficient to survive summary disposition.[5] Thus, using the summary disposition standard would not only maintain an "effective and efficient" hearing process, because contentions resting upon flimsy bases would be eliminated, but would also preserve fundamental fairness and statutory compliance by allowing intervenors a hearing on material disputed issues. Unfortunately, here AmerGen has made this proceeding inefficient by strategically failing to fully state how the fatigue calculations were done at the outset and continuing to conceal the calculations themselves. The Commission should now ensure this proceeding is effective, fair, and compliant with the AEA by admitting the metal fatigue contention. In the alternative, the Commission should order AmerGen to provide Citizens with the metal fatigue analyses and their supporting documentation.

C. Citizens Raised A Significant Safety Issue

Because the regulations are designed to ensure reasonable assurance of adequate protection of public health and safety, by definition, a long term uncorrected violation of the regulations would raise a significant safety issue. Furthermore, it is well settled that the CLB is not at issue in a relicensing proceeding. Thus, Citizens must assume that reasonable assurance of compliance with the CLB provides

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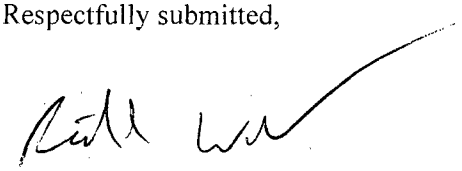
[5] *Georgia Institute of Tech.* (Georgia Tech Research Reactor), CLI-95-12, 42 N.R.C. 111, 118 (1995); Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989).

adequate protection of safety. The logical corollary is that non-compliance with the regulations is prima facie evidence of a significant safety issue.[6] Here Citizens have shown in expert affidavits and through logical argument based on admissions of NRC Staff and AmerGen that the initial TLAA analysis upon which AmerGen is seeking to rely is not conservative, that correction of that analysis to be conservative would likely lead to a violation of the regulations, and that AmerGen has failed to show that its confirmatory analysis is conservative. As Judge Baratta correctly concluded, this is more than sufficient to raise a safety significant issue. Dissent of Judge Baratta at 6-13.

III. CONCLUSION

For the foregoing reasons, the Commission should review the Decision and either reopen the ASLB proceeding for adjudication of the metal fatigue contention, or order AmerGen to provide Citizens with the metal fatigue analyses and their supporting documentation and allow Citizens a reasonable time to submit a timely motion to reopen based upon all the available evidence.

Respectfully submitted,



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Dated: August 18, 2008

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[6] Astonishingly, the NRC Staff state that there is no regulation requiring the CUF_{EN} to remain below 1.0. NRC Ans. at 8. In fact, the Board has previously noted that AmerGen committed to incorporating the requirement for the CUF_{EN} to be less than 1.0 into the CLB, replacing a requirement for the CUF_{EN} to be less than 0.8. Memorandum and Order (Denying New Jersey's Request For Hearing), *In the Matter Of AmerGen Energy Co, LLC* (License Renewal for Oyster Creek Nuclear Generating Station), LBP-06-07 at 17-19, 63 NRC 188 (2006) *aff'd by* 64 NRC 111. The Staff then implies that even a CUF_{EN} exceeding 4.75 would not be significant. NRC Ans. at 10. This amounts to an impermissible collateral attack on the CLB and merely shows that unless the Commission clearly states that evidence regarding a potential violation of the CLB is sufficient to raise a significant safety issue, motions to reopen will face an unreasonably high barrier.

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CERTIFICATE OF SERVICE

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

I hereby certify that on August 18, 2008, I caused Citizens' Consolidated Reply Regarding Petition for Review of LBP-08-12 in the Oyster Creek Proceeding to be served via email and U.S. Postal Service (as indicated) on the following:

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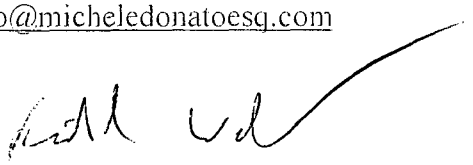
Signed: 

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Dated: August 18, 2008