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USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
OFFICE OF THE SECRETARY
BEFORE THE COMMISSION

November 6, 2008 (8:30am)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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

CITIZENS' ANSWER TO NRC STAFF MOTION TO RESPOND TO CITIZENS' OCTOBER 14, 2008 LETTER

I. INTRODUCTION

While 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") have no objection to allowing the NRC Staff to respond to Citizens' October 14, 2008 letter, they hereby request an opportunity to reply to the Staff's answer if that answer contains any new information about how the metal fatigue analyses at issue were conducted. In addition, Citizens object to the NRC Staff's gratuitous and wholly erroneous allegations about the appropriateness of considering the contents of the letter and its attachment in this proceeding. In fact, both the law of the case and the cardinal rule of fairness require the Commission to consider the information in the letter. Moreover, the NRC Staff are judicially estopped from asserting such a position because they previously urged the Atomic Safety and Licensing Board (the "Board") to dismiss Citizens' contention based upon information that was submitted to the Commission by AmerGen in the form of a very similar letter.

These disputes illustrate a fundamental flaw in the Part 2 rules. If an application is found to be deficient based on information that emerges after the hearing record has closed, the public is forced to meet a very high burden to obtain a hearing on the issue, but has no means to obtain full information

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about the deficiency. Here, AmerGen and the NRC Staff have worked together to exploit this flaw in the procedures by preventing Citizens from obtaining a copy of the metal fatigue analyses. Citizens are therefore forced to litigate this issue at a major informational disadvantage and are occasionally presented with snippets of new information about how the analyses were carried out. To avoid claims about timeliness, Citizens are forced to react these snippets as they become available, but the Part 2 rules do not provide a ready route for such action. To solve a similar conundrum, AmerGen took a self-help route when it submitted new information to the Commission by letter. NRC Staff made no objection to that approach, but now, after Citizens took a similar approach, the NRC Staff objects.

One licensing board judge has noted that the Part 2 rules, if applied poorly, could become the equivalent of a shell game with the usual street corner outcome: the citizens lose out. Heeding the complaints of the NRC Staff about Citizens letter would make an already flawed proceeding hopelessly unfair and would leave Citizens without the ability to respond to new information about the way the metal fatigue analyses were carried out. Such an outcome is highly undesirable, because the Commission should be fully informed about unresolved disputes between technical experts prior to making its decisions. The Staff's approach is not only inconsistent, it is grossly unfair, and it would unreasonably abridge Citizens' right to request a hearing on issues that are material to relicensing pursuant to the Atomic Energy Act ("AEA").

II. FACTUAL BACKGROUND

Citizens have been trying to obtain a copy of the metal fatigue analyses for some time. First, AmerGen refused to provide a copy of the analyses to Citizens. E-mail from A. Polonsky to R. Webster, dated May 22, 2008. Then, the Board refused to order AmerGen to provide Citizens with a copy. Board Memorandum and Order, LBP-08-12 (July 24, 2008) slip op. at 25 n. 23. Finally, in response to a Freedom of Information Act ("FOIA") request, NRC Staff advised Citizens that the analyses had been reviewed at Exelon's office and were therefore not available through FOIA. NRC Response to FOIA Request 2008-0283, dated August 13, 2008. As a result, Citizens have been placed in the anomalous

position that they are forced to litigate about the adequacy of analyses that they have not been able to review. Citizens have therefore been forced to rely on public documents that discuss the analyses, including NRC requests for additional information, affidavits provided in the hearing, and summaries of the analyses. Those summaries show that both the original analysis, upon which AmerGen and the Staff continue to rely, and the confirmatory analysis, contain non-conservative unjustified assumptions.

After the metal fatigue contention was fully briefed to the Commission, AmerGen submitted a letter to the Commission attaching a summary of the confirmatory analysis. Letter from Polonsky to Klein, dated May 5, 2008 *available at* ML081290455. The attachment to the letter asserted that the confirmatory analysis showed “that the results of the original analysis are conservative and remain acceptable.” *Id.*, Enclosure at 4. In response to a request from the Board for briefing on this issue, Citizens alleged that because AmerGen had failed to make a formal motion to have the summary of the confirmatory analysis considered, the Board should not allow AmerGen to gain any advantage from it.¹ Citizens also showed that the summary tacitly acknowledged that elements of the original analysis were non-conservative. In contrast, the NRC Staff expressed no concern about way that AmerGen submitted the summary and alleged that the summary rendered Citizens’ contention moot. NRC Staff Explanatory Pleading and Affidavit, dated May 27, 2008 at 4. Over a dissent from Judge Baratta, the majority of the Board found *inter alia* that the contention was moot on July 24, 2008. NRC Staff Motion for Leave to Respond (“Motion”) at 2. The Board also found that Citizens position that the information attached to AmerGen’s letter should be ignored because it was not properly submitted to the Commission was without merit. Board Memorandum and Order, LBP-08-12 (July 24, 2008) slip op. at 16 n. 13

On September 19, 2008, after this appeal was fully briefed, Staff issued a supplementary Safety Evaluation Report (“SER Supplement”). Motion at 3. When Citizens’ expert Dr. Hopenfeld reviewed the SER supplement, he found it contained previously undisclosed information about how the confirmatory analysis was conducted, which was that the “maximum transient temperatures” were apparently used to

¹ This would not have shielded the Commission from the information contained in AmerGen’s letter, because AmerGen had already submitted the information to the NRC Staff.

determine the environmental correction factor. SER Supplement at 4-3. Dr. Hopenfeld therefore supplied comments to Citizens stating that this procedure would have led to a large underestimate of the environmental correction factor, because using the maximum temperature would lead to considering the minimum amount of dissolved oxygen in the water. Comments of Dr. Hopenfeld (attached to Letter from Webster to Klien, dated October 14, 2008) at 2. Citizens were therefore placed in an analogous position to AmerGen in that they had information that might bear on the issue being litigated, but the issue was fully briefed and the record was closed. Citizens therefore adopted AmerGen's approach and submitted the information from Dr. Hopenfeld as an attachment to a letter, which was served on all the parties.

III. STAFF FAILED TO CONSULT CITIZENS ON WHETHER THE LETTER SHOULD BE CONSIDERED

Prior to filing their motion, NRC Staff consulted with Citizens regarding their desire to respond to Dr. Hopenfeld's comments. Citizens advised the Staff that they had no objection to such a response. Unfortunately, instead of merely requesting the chance to respond, in the Motion the NRC Staff also alleged that the Commission should ignore Dr. Hopenfeld's comments. Motion at 1. Staff failed to meet their obligations under the rules to consult on the latter issue. *See* 10 C.F.R. § 2.323(b). For this reason alone, the Commission should reject Staff's request that the Commission ignore the expert comments attached to Citizens' letter.

IV. LAW OF THE CASE REQUIRES THE COMMISSION TO CONSIDER DR. HOPENFELD'S COMMENTS

Once the opportunity to file a motion for reconsideration has run, the Board's rulings become the law of the case and may not subsequently be challenged successfully. *Georgia Power Company, et al.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-16, 39 NRC 257, 259 (1994). Here, the licensing board decided to allow the information that AmerGen submitted by letter into the proceeding. Board Memorandum and Order, LBP-08-12 (July 24, 2008) slip op. at 16 n. 13. Thus, the law of the case is that where additional information becomes available that bears on an issue that has been fully briefed, a party may submit that information by letter for the consideration of the Commission or the licensing board.

V. THE CARDINAL RULE OF FAIRNESS REQUIRES THE COMMISSION TO CONSIDER DR. HOPENFELD'S COMMENTS

As the NRC practice guide states, the cardinal rule of fairness in pre-hearing matters requires that both parties have a full and fair opportunity to be heard:

Prior to entertaining any suggestion that a contention not be admitted, the proponent of the contention must be given some chance to be heard in response. The petitioners cannot be required to have anticipated in the contentions themselves the possible arguments their opponents might raise as grounds for denying admission of those proffered contentions. *Houston Lighting & Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 525 (1979); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 83 n. 17 (1996); *rev'd in part on other grounds*, CLI-96-7, 43 NRC 235.

Although the Rules of Practice do not explicitly provide for the filing of either objections to contentions or motions to dismiss them, each presiding board must fashion a fair procedure for dealing with such objections to contentions as are filed. The cardinal rule of fairness is that each side must be heard. *Allens Creek, supra*, 10 NRC at 524.

NRC Staff Practice and Procedure Digest at Pre 89. Contrary to the cardinal rule of fairness, Citizens have been unable to fully litigate this contention because of the information disparities created by AmerGen and the Staff. Furthermore, Citizens could not have filed Dr. Hopfenfeld's comments any earlier because AmerGen and the NRC Staff have concealed the manner in which the metal fatigue analyses were carried out, as far as possible. It would be even more unfair if the Commission allows these dubious tactics to become even more effective by preventing Citizens from responding to information as it becomes available.

VI. THE STAFF ARE JUDICIALLY ESTOPPED FROM ADVOCATING THAT THE COMMISSION SHOULD NOT CONSIDER CITIZENS' LETTER

The NRC Staff's approach to this adjudication has become mired in contradiction. When AmerGen Energy Co. LLC ("AmerGen") submitted new information to the Commission by letter, the NRC Staff did not object. In fact, the Staff used the information to successfully argue that Citizens' contention was moot. Thus, the Staff fully embraced consideration of the information submitted by AmerGen by letter. Having successfully used the information in AmerGen's letter to win a favorable

ruling from the licensing board, Staff are now judicially estopped from taking a contrary, inconsistent position with respect to Citizens' letter. See e.g. *Ryan Operations G.P., v Forrest Paint Co., Inc.*, 81 F.3d 355, 361 (3rd Cir. 1996) (deriving a benefit from a prior position makes application of the doctrine of judicial estoppel "particularly appropriate").

VII. THE STAFF'S APPROACH WOULD MAKE THE PART 2 RULES A SHELL GAME

Judge Farrar has recently noted that the part 2 rules on timing could turn a proceeding "into a shell game, with the usual street-corner outcome: whatever guess the Petitioners make will prove wrong." *Shaw Areva MOX Services (Mixed Oxide Fuel Fabrication Facility)*, LBP-08-10 (June 27, 2008) at 54 (Concurring Opinion of Judge Farrar). He further noted that "ordinarily, of course, a vast disparity exists between the resources of facility proponents and those of facility opponents. Although this does not relieve such opponents of their obligations, in fairness, they ought not be forced to churn and to dissipate their resources needlessly in response to 'Catch-22' situations." *Id.* at 54 n. 15 (citations omitted).

Here, the NRC Staff has tried to use the Part 2 rules to place Citizens in precisely such a Catch-22 situation by concealing how the metal fatigue analyses were conducted and then by trying to prevent Citizens from being able to comment upon the methods used when Staff let slip hints about those methods. The Staff's approach is converting this proceeding from an enquiry into the safety of relicensing the Oyster Creek nuclear power plant into a legal shell game. Staff seem to have forgotten that Congress recognized in the AEA that the safety of the public rests in part upon vigorous citizen participation in the decisions made by the Commission through public hearings. The Commission should therefore deny Staff's attempt to exclude Dr. Hopenfeld's comments from this proceeding and should consider whether Citizens should have the right to obtain the actual metal fatigue analyses to facilitate full and fair adjudication of this contention.

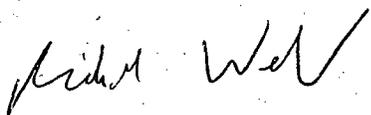
Finally, it may well be that when Staff file their response, yet more facts will emerge about how the analyses were conducted. If this proves to be the case, the Commission should allow Citizens a

chance to reply to the Staff.

VIII. CONCLUSION

For the foregoing reasons, the Commission should consider Dr. Hopenfeld's comments, invite the staff to respond to the comments, and then, if any further facts about how the metal fatigue analyses emerge, allow Citizens to respond to the Staff's filing.

Respectfully submitted,



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Dated: November 5, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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CERTIFICATE OF SERVICE

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

I hereby certify that on November 5, 2008, I caused Citizens' response to NRC Staff's motion regarding Citizens letter of October 14, 2008 to be served via email and U.S. Postal Service (as indicated) on the following:

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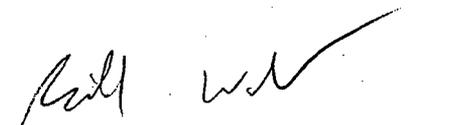
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