

November 19, 2008 (3:02pm)

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSIONOFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

## ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

E. Roy Hawken, Chair

Dr. Paul B. Abramson

Dr. Anthony J. Baratta

In the Matter of:

November 19, 2008

AmerGen Energy Company, LLC

Docket No. 50-219

(License Renewal for Oyster Creek Nuclear  
Generating Station)AMERGEN'S ANSWER OPPOSING CITIZENS' MOTION FOR CLARIFICATION

On November 10, 2008, Citizens'<sup>1</sup> filed a Motion for Clarification of Certain Findings of Fact and Other Appropriate Relief ("Motion"). The Motion alleges that the Atomic Safety and Licensing Board's ("Board") "findings of fact regarding the comparison of the internal and external [sand bed region ultrasonic thickness] measurements"<sup>2</sup> are "not supported by the citations given in the Board's Answer."<sup>3</sup> Citizens request that the Board "either clarify where in

<sup>1</sup> Citizens are 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.

<sup>2</sup> Motion at 1.

<sup>3</sup> *Id.* at 4 (citing Licensing Board Memorandum (Addressing The Issue Referred By The Commission Regarding The Adequacy Of AmerGen's Proposed 3-D Finite Element Structural Analysis Studies) at 9 (Oct. 29, 2008) (unpublished) ("Memorandum")). In doing so, Citizens, *yet again*, mischaracterize the purpose of the three dimensional finite element structural analysis. The purpose of this analysis is *not* "to determine whether the drywell shell at [Oyster Creek,] meets or will continue to meet the requirements of the Current Licensing Basis ('CLB') with reasonable assurance." Motion at 1; *see also* "Citizens' Supplemental Brief Regarding Commission Questions on Structural Analysis and Board Follow Up Questions" (Oct. 1, 2008) at 1 (describing the purpose using similar language). Instead, it is to "*better quantify the margin that exists above the [ASME] Code required minimum for buckling.*" *AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), CLI-08-10, 67 NRC 357, 358 (May 28, 2008) (emphasis added).

the record the comparisons referred to are found, or modify the language of the memorandum.”<sup>4</sup>

In the alternative, Citizens demand that, “if the Board decides that the analysis it thought had been done has actually not been done, it should add a recommendation that AmerGen should to [sic] carry out” this type of analysis.<sup>5</sup> In accordance with 10 C.F.R. § 2.323(c), AmerGen Energy Co., LLC (“AmerGen”) hereby opposes Citizens’ Motion.

First, Citizens are wrong about the nature of the Board’s Memorandum. The Memorandum is in the nature of an advisory opinion.<sup>6</sup> Citizens, however, repeatedly mischaracterize the information in the Board’s Memorandum as “findings of fact.”<sup>7</sup> The Board’s Memorandum is not an Order and does not present any “findings of fact.” Instead, it provides the Board’s response to the narrow issue that the Commission referred to it on August 21, 2008,<sup>8</sup> and does so based upon information that was already in the evidentiary record.<sup>9</sup>

Second, the record of this proceeding has been closed for over one year.<sup>10</sup> To address the narrow issue that the Commission referred to it,<sup>11</sup> the Board asked for oral argument from counsel, with the clear understanding that counsels’ statements were not testimony.<sup>12</sup> The Board cited AmerGen’s counsel’s statements at oral argument regarding AmerGen’s use of external

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<sup>4</sup> Motion at 4.

<sup>5</sup> *Id.*

<sup>6</sup> See Memorandum at 2 n.2 (noting that resolution of technical issues surrounding AmerGen’s 3-D analysis is not essential to the NRC granting a renewed license); *id.*, *Separate Advisory Opinion* of Judge Abramson (emphasis added).

<sup>7</sup> See Motion, *passim*.

<sup>8</sup> Commission Order at 2 (Aug. 21, 2008) (unpublished) (“August 21 Order”).

<sup>9</sup> See Memorandum at 1-2.

<sup>10</sup> *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-07-17, 66 NRC 327, 338 (2007) (“LBP-07-17”).

<sup>11</sup> August 21 Order at 2 (“referr[ing]” to the Board the question of whether AmerGen’s structural analysis commitment matches or bounds the sensitivity analysis that Judge Baratta discussed in his Additional Statement accompanying LBP-07-17); see also Memorandum at 1.

<sup>12</sup> See Licensing Board Memorandum and Order at 3 (Sept. 10, 2008) (unpublished) (“In addressing these topics, counsel should keep in mind that this is an oral argument, not an evidentiary hearing.”).

data for the limited purpose of confirming that internal adjacent bay data were representative of the measured shell thickness in certain bays.<sup>13</sup>

Finally, those statements *are* supported by the record. Citizens' counsel objected during oral argument that this information was not in the record.<sup>14</sup> On rebuttal, AmerGen's counsel responded to that objection and cited the exact sentence *from Citizens' own Exhibit 46* that forms the evidentiary basis for the statement.<sup>15</sup> The Board's decision to cite counsel's statement during direct argument, rather than to his rebuttal argument or the underlying evidence that has been in the record for over a year, is irrelevant. *Citizens' Exhibit 46* provides sufficient evidentiary support for the statement in the Board's Memorandum.

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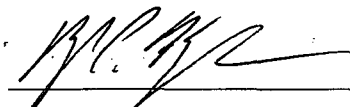
<sup>13</sup> See Memorandum at 9.

<sup>14</sup> Tr. at 977-78 (Webster).

<sup>15</sup> *Id.* at 1025-26 (Polonsky) (*quoting* Citizens' Exh. 46 at OCLR 29744 ("External point measurements were used in a limited way to confirm the basis for an engineering judgment, assuming a normal[] statistical distribution, regarding an appropriate thickness to use in the re-analysis.")); *see also* AmerGen's Supplemental Brief Following Oral Argument at 7 n.33 (Oct. 1, 2008) (citing the same).

Therefore, no change or clarification to the Board's Memorandum is necessary, and Citizens' Motion should be denied in its entirety.

Respectfully submitted,



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Dated in Washington, D.C.  
this 19th day of November 2008

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**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD**

**Before Administrative Judges:**

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of AmerGen's "AMERGEN'S ANSWER OPPOSING CITIZENS' MOTION FOR CLARIFICATION" were served this day upon the persons listed below, by e-mail and first class mail.

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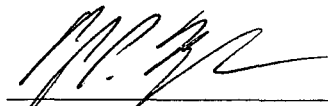
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