

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 RESPONSE IN OPPOSITION TO CITIZENS' PETITION TO REQUIRE
SUPPLEMENTATION OF THE SAFETY EVALUATION REPORT FOR OYSTER CREEK

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March 2, 2009

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the Staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby responds to "Petition by [Citizens¹] to Require Supplementation of the Safety Evaluation Report for Oyster Creek Nuclear Power Plant ("Citizens' Petition") dated February 19, 2009. For the reasons set forth herein, Citizens' Petition should be denied.

BACKGROUND

On July 22, 2005, pursuant to 10 C.F.R. Part 54, AmerGen Energy Company, LLC, ("Applicant" or "AmerGen")² submitted to the U.S. Nuclear Regulatory Commission ("NRC") an application for license renewal of Operating License No. DPR-16 ("License") for the Oyster Creek Nuclear Generating Station ("Oyster Creek").³ On September 24

¹ "Citizens" comprise Nuclear Information and Resource Service ("NIRS"), 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.

² As of January 8, 2009, the Oyster Creek license was transferred from AmerGen Entergy Company, LLC, to Exelon Generating Company, LLC. For consistency, the applicant will be referred to as AmerGen throughout the response.

³ Letter from C. N. Swenson, AmerGen, to NRC (July 22, 2005) (Agencywide Documents and (continued. . .)

and 25, 2007, the Atomic Safety and Licensing Board ("Board") held an evidentiary hearing on the only remaining contention in the proceeding, Citizens' contention concerning the drywell shell.⁴ On December 18, 2007, the Board issued an initial decision resolving the drywell contention in AmerGen's favor. *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-07-17, 66 NRC 327, 372 (2007) ("LBP-07-17" or "Decision"). On January 14, 2008, Citizens appealed the Board's decision in LBP-07-17.⁵ That appeal is still pending before the Commission.⁶

On February 2, 2009, Petitioners filed Motion by [Citizens] to Reopen the Record and to Postpone Final Disposition of the Licensing Decision ("Motion to Reopen").⁷

(. . .continued)

Access Management System ("ADAMS") Accession No. ML052080172).

⁴ As admitted by the Board, the Contention read:

[I]n light of the uncertain corrosive environment and correlative uncertain corrosion rate in the sandbed 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).

⁵ Citizens' Petition for Review of LBP-07-17 and Interlocutory Decisions in the Oyster Creek Proceeding (Jan. 14, 2008).

⁶ On May 28, 2008, the Commission ordered additional briefs from the parties on a single specified issue regarding the planned three dimensional finite element structural analysis of the drywell shell. See *AmerGen Entergy Co. LLC*, (Oyster Creek Nuclear Generation Station), CLI-08-10, 67 NRC 357, 359 (2008). Subsequently, the Commission ordered an advisory opinion from the Board on the issue specified in CLI-08-10. See Commission Order (Aug. 21, 2008) (unpublished). The Board issued its advisory opinion on October 29, 2008. See Memorandum (Addressing the Issue Referred by the Commission Regarding the Adequacy of AmerGen's Proposed 3-D Finite Element Structural Analysis Studies) (Oct. 29, 2008) (unpublished).

⁷ Previously, on January 23, 2009, Citizens filed "Commission Notification" ("Citizens' Notification") in which Citizens argued that the Inspection Report demonstrated that Oyster Creek's drywell aging management program ("AMP") and piping AMP are inadequate and thus, the decision in LBP-07-17 is invalid. See, e.g., Citizens' Notification at 2 and 8.

Therein Citizens argued that the Commission must reopen the record of the proceeding and stay final disposition of Oyster Creek's license renewal application based upon the results of the fall 2008 inspections at Oyster Creek, as documented in Commission notifications dated November 6⁸ and 17,⁹ 2008, and the Staff's PNO¹⁰ and Inspection Report.¹¹ Citizens asserted that the fall 2008 inspection results demonstrated that AmerGen's aging management program ("AMP") for the drywell shell is inadequate and its AMP for certain plant piping *may* be inadequate. See Motion to Reopen at 1-2. On February 11 and 12, 2009, AmerGen and the Staff filed responses opposing Citizens' Motion to Reopen.¹²

⁸ Notification of Information in the Matter of Oyster Creek Nuclear Generating Station License Renewal Application (Nov. 6, 2008) ("Staff Notification"); Commission Notification (Nov. 6, 2008) ("AmerGen Notification").

⁹ Updated Commission Notification (Nov. 17, 2008) ("AmerGen's Updated Notification").

¹⁰ Preliminary Notification: Results of Implementation of Oyster Creek License Renewal Commitments Related to the Drywell Containment (Nov. 17, 2008) (ADAMS Accession No. ML083220240) ("Staff's PNO").

¹¹ Oyster Creek Generating Station-NRC License Renewal Follow-up Inspection Report 05000219/2008007 (Jan. 21, 2009) (ADAMS Accession No. ML090210106) ("Inspection Report").

¹² [AmerGen's] Answer to Citizens Motion to Reopen the Record and Postpone Final Disposition of the Licensing Decision (Feb. 11, 2009); NRC Staff's Response in Opposition to Citizens' Motion to Reopen the Record and Postpone Final Disposition of the Licensing Decision (Feb. 12, 2009).

On February 19, 2009, Citizens filed the instant Petition as a “general motion.”¹³ Petition at 4. Citizens asserts that the Staff’s Safety Evaluation Report (“SER”) on Oyster Creek’s license renewal application¹⁴ is inadequate and, therefore, the Commission must order the Staff to supplement the SER. Citizens’ Petition at 13-17. As in prior petitions by Citizens, *see supra* note 13, Citizens asserts that its Petition does not request rulemaking under 10 C.F.R. § 2.802 or enforcement under § 2.206. Citizens’ Petition at 3.

DISCUSSION

Citizens repeats arguments it has made before that are not material to the proceeding and that do not demonstrate that the SER is inadequate. In addition, Citizens’ requested relief is unsupported in fact or law as previously explained by the Commission in response to a previous Citizens’ petition.

I. Citizens’ Petition is Duplicative of Prior Motion to Reopen

Citizens admits that its Petition is not different than the Motion to Reopen.

Citizens’ Petition at 6. Citizens states that “the essential differences are that this Petition

¹³ Citizens has filed two other petitions with the Commission in the course of this proceeding. See 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) (“Suspension Petition”); 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) (“Supplemental Suspension Petition”). Both of these petitions were denied by the Commission in *AmerGen Energy Co. LLC* (Oyster Creek Nuclear Generating Station) et al., CLI-08-23, 68 NRC __ (slip op.) (Oct. 6, 2008). Like the instant Petition, these prior petitions asserted that the Staff’s license renewal safety evaluation reports were insufficient and requested that the Commission overhaul the license renewal process and order the Staff to re-do its reviews.

¹⁴ Safety Evaluation Report Related to the License Renewal of Oyster Creek Generating Station (“SER”) – NUREG-1875, Vol. 1 (ADAMS Accession No. ML071290023), Vol. 2 (ADAMS Accession No. ML071310246).

requests different relief and is not part of Citizens' appeal of LBP-07-17." *Id.* Citizens' assertion is unpersuasive.

Citizens identifies issues but only relies on two to assert that the SER is inadequate. Citizens' five "essential elements"¹⁵ are (1) visual inspections failed to identify coating degradation in 2006, (2) water is entering the sandbed region from multiple sources, (3) water caused corrosion blisters in at least Bay 11, (4) using poly bottles to detect water was unreliable, and (5) the one-time inspection of piping showed measurable thinning. Citizens' Petition at 12-13. These are the same five elements Citizens' asserted in Citizens' Motion to Reopen. In that previous Motion, Citizens' stated that (1) "[v]isual [i]nspections [h]ave [r]epeatedly [f]ailed [t]o [f]ind [o]ngoing [c]orrosion,"¹⁶ (2) "[w]ater [f]rom [m]ultiple [s]ources is [p]robably [e]ntering [t]he [s]andbed [r]egion,"¹⁷ (3) "blisters would not form in the absence of water,"¹⁸ (4) "monitoring the [sandbed] drains is ineffective because water can be dripping into the sandbed and even pond on the floor without any water being observed in the drains,"¹⁹ and (5) "[a]ging [m]anagement [f]or [t]he [p]iping [m]ay [b]e [i]nadequate."²⁰ Thus, the single difference between the instant Citizens' Petition and Citizens Motion to Reopen is the relief requested. Citizens' Motion to Reopen requested that the Commission reopen the record because the Board relied improperly on these five issues. Alternatively, Citizens' Petition requests the

¹⁵ Citizens' list of five essential elements from the Inspection Report reflects Citizens' interpretation of the Inspection Report and does not correspond to any specific findings in the Inspection Report.

¹⁶ Citizens Motion to Reopen at 3.

¹⁷ *Id.* at 4.

¹⁸ *Id.* at 5.

¹⁹ Citizens Motion to Reopen at 13.

²⁰ *Id.* at 8.

Commission effectively reopen the record and order the Staff to supplement the SER with these allegedly new facts.²¹

More importantly, these issues are not new. The Board fully addressed these issues in LBP-07-17. The Board rejected the view that (1) “visual inspections may not reliably detect the early stages of coating failure,”²² (2) water from sources other than “the refueling cavity liner” enters the sandbed region,²³ (3) blisters demonstrate imminent epoxy coating failure,²⁴ and (4) monitoring of the sandbed drains is unreliable.²⁵ Moreover, if these assertions were adequately addressed by the Board, it is unnecessary to supplement the SER to document their rejection.

As explained in the Staff’s Answer, Citizens misunderstands the scope of the AmerGen’s aging management program for plant piping, which includes, but is not limited to, the One-Time Inspection program. Staff’s Answer at 15-16. Citizens suggests that AmerGen is not being required to perform any additional actions for the two locations noted in the Inspection Report as failing to meet the acceptance criteria. AmerGen has committed to taking corrective action as Citizens noted. Citizens’ Petition at 16. AmerGen also made additional commitments to continue the current flow accelerated corrosion program, SER at A-8, Commitment 11, and to periodically monitor the effects of

²¹ As explained more fully below in Section III, the adequacy of the Staff’s review and the SER are not material to license proceedings. The Commission has explained to Citizens that its issues must be with the license renewal application and not the Staff review. *See AmerGen e al.*, CLI-08-23, 68 NRC ___ (slip op. at 18).

²² Decision at 360-61.

²³ *Id.* at 352.

²⁴ *Id.* at 363.

²⁵ *See id.* at 354.

aging on “systems in the scope of license renewal ... and are not covered by other existing periodic monitoring programs.” SER at A-47, Commitment 41.

Citizens’ Petition is simply duplicative of its filings to the Board and Commission and its arguments, pleadings, and testimony during these proceedings over the past three years. Despite Citizens’ assertions to the contrary, Citizens’ Petition is simply a supplement of Citizens’ Motion to Reopen re-captioned as a petition. Thus, Citizens’ Petition should be denied.

II. Citizens Fails to Show the Inadequacy of the SER

Citizens states that “the SER must be updated.” Citizens’ Petition at 12 (capitalization altered). Citizens bases this assertion on its unfounded belief that (1) the Inspection Report “contradicts a number of the Staff’s expectations when the Oyster Creek SER was written,” (2) the Inspection Report “requires the proposed AMP for managing corrosion of the drywell shell to be enhanced,” and (3) “the one-time piping inspection produced an unexpected result.” Citizens’ Petition at 12-13. Citizens’ Petition abandons half of the issues identified in Citizens’ Motion to Reopen as being material to this proceeding.²⁶

Citizens specifically asserts that the SER is inadequate because it incorrectly assumed that (1) “visual inspections would reliably detect [epoxy] coating failure,” (2) “the proposed method of detecting water in the drywell would be reliable,” and (3) “the one-time inspection of certain piping would find no measurable degradation.” Citizens’

²⁶ In Citizens’ Motion to Reopen, Citizens bases included that the Inspection Report invalidated the following conclusions: (1) “water could only be ... present in the [drywell] sandbed region for 30 days every two years,” (2) “the only ... source of water was the refueling cavity and any water that penetrated the drywell would evaporate rapidly”, (3) the view that “visual inspections are adequate to detect the onset of corrosion,” (4) flow accelerated corrosion AMP may be inadequate, (5) the identification of “three new corrosion blisters” shows that water is present during operation, and (6) there are “many other leaks at the plant.” Citizens’ Motion to reopen at 2 and 12.

Petition at 13-16. The issues identified by Citizens do not establish that the SER is inadequate.

Citizens states that “the Staff closed this open item [AMP for the drywell shell] based upon a commitment to visually inspect the coating all (sic) 10 drywell Bays prior to any period of extended operation” Citizens’ Petition at 13. Citizens fails to identify that this item was closed based on a commitment to visually inspect the coating of all 10 drywell bays and conduct ultrasonic testing (“UT”) of the drywell shell. SER at 4-45 to 4-47 and A-27 Commitment 27. The Inspection Report confirms that corrosion of the drywell shell is adequately controlled.²⁷ Citizens also fails to note that visual inspections detected the one broken blister and the three unbroken blisters. Inspection Report at 10-11.

Citizens states that the “Staff’s finding of reasonable assurance that water intrusion will be systemically evaluated has proved incorrect and must be revisited.” Citizens’ Petition at 15. Citizens apparently bases this conclusion on AmerGen’s identification of some de-lamination of the strippable coating, AmerGen’s evaluation of the potential for water to enter the sandbed bays, AmerGen’s entry into the sandbed bays, and AmerGen’s repair of the leak and clean-up of the bays. See, e.g., Inspection Report at 4. AmerGen’s actions and its commitments demonstrate that leaks into the sandbed bays have been and will be systemically evaluated and corrected.

Citizens’ also argues that “the one-time inspection has now shown that opposite of what was intended by the SER” Citizens’ Petition at 16. This is simply incorrect. The one-time inspection program operated as intended and identified components as

²⁷ The Inspection Report stated that “UT dynamic scan thickness measurements under the four blisters, from inside the drywell, confirmed the drywell shell had no significant degradation as a result of the corrosion.” Inspection Report at 11.

potentially needing to be included in the AMP under Commitment 41. This information was in Oyster Creek's 2005 license renewal application, and Citizens has not filed a late contention on this issue. Citizens' concern is irrelevant and untimely.

As none of the issues Citizens identifies can demonstrate that the SER is inadequate, Citizens' Petition should be denied.

III. Citizens' Petition Constitutes a Challenge to the Adequacy of the Staff's Review and, Therefore, Raises Issues that are Outside the Scope of this Proceeding

Citizens argues that the Commission should consider its petition because the Commission cannot issue a license until all material safety findings have been made and the issue raised in its petition, i.e., the adequacy of the Staff's SER, is material to the Oyster Creek license renewal proceeding. See Citizens' Petition at 5. Citizens argues that because the adequacy of the Staff's review, including its SER, is material, this proceeding must be expanded to allow Citizens an opportunity to challenge the SER. See Citizens' Petition at 5-6. Citizens argues that although it cannot challenge the adequacy of the Staff's review before the Board, the Commission's decision on Citizens' prior petitions (*AmerGen et. al*, CLI-08-23, 68 NRC __) was "designed to indicate" that Citizens can "raise issues regarding NRC Staff performance" before the Commission. *Id.* As explained below, Citizens' arguments are incorrect and unsupported.

A. The Adequacy of the Staff's Review Cannot Be Challenged in this Proceeding

Citizens' assertions that it may challenge the adequacy of the Staff's review before the Commission are unfounded. The Commission has clearly stated that the adequacy of the Staff's review, including the adequacy of the SER, is not the proper focus of licensing proceedings. In promulgating the 2004 revision to the Commission's rules of practice, the Commission stated that consistent with longstanding NRC case law, the "adequacy of the applicant's license application, not the NRC staff's safety evaluation, is the safety issue in any licensing proceeding." Changes to Adjudicatory Process, Final

Rule, 69 Fed. Reg. 2,182, 2,202 (Jan. 14, 2004) (citing Commission case law). The Commission reaffirmed this principle in ruling on Citizens' prior petitions. The Commission stated: "The purpose of licensing proceedings is to allow interested persons the right to challenge the sufficiency of the application. The NRC has not, and will not, litigate claims about the adequacy of the Staff's safety review in licensing adjudications." *AmerGen et al.*, CLI-08-23, 68 NRC ____ (slip op. at 18) (noting that Citizens' petitions were based "upon the fundamentally flawed premise" that it has a right to challenge the adequacy of the Staff's reviews). Consequently, Citizens' assertion that it can challenge the adequacy of the Staff's review before the Commission is unsupported and Citizens' Petition should be denied.

B. Adequacy of the Staff's Review Is Not Material

Citizens asserts that the adequacy of the Staff's review, including the adequacy of the SER, is material to the licensing decision. Citizens' Petition at 5. Citizens asserts that it has a right to a hearing on all material issues, including "material issues involving supervision of the Staff," based on the D.C. Circuit's decision in *Union of Concerned Scientists v. NRC*, 735 F.2d 1437 (D.C. Cir. 1984). Citizens' reliance on *Union of Concerned Scientists* is misplaced. In *Union of Concerned Scientists*, the Court recognized that the hearing rights accorded by § 189 of the Atomic Energy Act ("AEA") are not without limitation, and the Commission has broad discretion to decide which matters are relevant to its licensing decision. *Union of Concerned Scientists*, 735 F.2d. at 1446; Nuclear Power Plant License Renewal, Final Rule, 56 Fed. Reg. 64943 64,960 (Dec. 13, 1991) (stating that courts have repeatedly noted the broad discretion the AEA gives the NRC with respect to structuring regulatory proceedings); See also *AmerGen Energy Co. LLC*, (License Renewal For Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC ____ (slip. op at 27) (Nov. 6, 2008) (addressing a prior arguments by Citizens that *Union of Concerned Scientists* and traditional notions of due process require

full consideration of its concerns). The Commission determined that the adequacy of the Staff's review is not material to the licensing decision. See *AmerGen et al.*, CLI-08-23, 68 NRC ___ (slip op. at 18) ("NRC has not, and will not, litigate claims about the adequacy of the Staff's safety review in licensing adjudications."); 69 Fed. Reg. at 2202 ("the adequacy of the applicant's license application, not the NRC staff's safety evaluation, is the safety issue in any licensing proceeding.").

In addition, in ruling on Citizens' prior petitions, the Commission reiterated that in NRC proceedings, the burden of proof is on the applicant, not the Staff, and the Commission's contention pleading rules require a showing of a genuine dispute with the application or licensee on a material issue of law or fact. *AmerGen et. al.*, CLI08-23, 68 NRC ___ (slip op. at 18). The Commission further stated that Citizens and its fellow petitioners have had "ample opportunity" to present contentions. *Id.* Since the Commission's decision in CLI-08-23, Citizens has again challenged the adequacy of AmerGen's application by filing its recent Motion to Reopen on February 2, 2009 pursuant to 10 C.F.R. § 2.326.

Because the adequacy of the Staff's review, including the adequacy of the Staff's SER, is not material to and not within the scope of this proceeding, Citizens' Petition should be denied.

IV. The Staff is Not Required to Supplement the SER

Citizens' Petition fails to identify any legal or regulatory authority requiring that the Staff supplement the SER based upon the results of the Inspection Report. Citizens' Petition is not supported by the AEA, precedent, NRC regulations, Staff guidance, or the anecdotal references to past SER supplements proffered by Citizens.

A. The AEA and Commission Regulations Do Not Support Citizens' Request for Supplementation of the SER

Citizens' argument that the legally required findings must be made in the SER is incorrect. The findings required by the AEA and the NRC's regulations are made by the licensing authority (i.e. the Director of the Office of Nuclear Reactor Regulation) in issuing the license, not in the SER. See, e.g., Wolf Creek Generating Station, Unit 1, Renewed Facility Operating License (Nov. 20, 2008) (ADAMS Accession No. ML082820469). Moreover, neither the AEA, the plain language of the Commission regulations nor the statements of consideration for the regulations, suggest that the finding required by 10 C.F.R. § 54.29 to issue a renewed license must also be documented in the SER. Rather, the basis for the required finding must be in the application.

The AEA authorizes the Commission to issue licenses for commercial nuclear power plants and to establish requirements for license applications as it "may deem necessary in order to find that utilization or production of special nuclear material will be in accord with the common defense and security and will provide for adequate protection to the health and safety of the public." AEA § 182 (42 USC 2232). The Commission promulgated 10 C.F.R. Part 54 to establish the requirements that applicants for renewed operating licensees must meet. See, e.g., Nuclear Power Plant License Renewal, Final Rule, 60 Fed. Reg. 22,461 (May 8, 1995). With respect to aging management, license renewal applicants are required to *demonstrate* that the effects of aging will be adequately managed so that intended functions will be maintained consistent with the current licensing basis during the period of extended operation. See 10 C.F.R. § 54.21(a)(ii)(3). The finding that is made in order to renew an operating license with respect to aging management is: "Actions have been identified and have been or will be taken with respect to managing the effects of aging during the period of extended operation such that there is reasonable assurance that the activities authorized by the

renewed license will continue to be conducted in accordance with the current licensing basis, as defined in 10 CFR § 54.3.” See 10 C.F.R. § 54.29 (a)(1). See also *AmerGen et al.* CLI-08-23, 68 NRC ___ (slip op. at 7). Accordingly, Citizens’ Petition to supplement Staff’s SER should be denied.

B. Prior Precedent Does Not Support Citizens’ Position that Supplementation of the SER Is Required

Citizens asserts that NRC case law supports its request for SER supplementation. The case law does not support Citizens’ assertion. In *Curators of the University of Missouri*, the Commission rejected an intervenor’s request that the Staff prepare a safety evaluation documenting the basis for its approval of amendments to materials licenses. CLI-95-1, 41 NRC 71, 122 (1995) (hereinafter “*Curators*”). In so doing, the Commission indicated that the reasons for requiring the Staff to document its conclusions “decrease in importance as the record develops, and [are] ultimately completely superseded by the Presiding Officer’s (and, later, [the Commission’s]) findings of fact and conclusions of law.” *Id.* While *Curators* involved an amendment to a materials license, not a license renewal application, where, as here, the record is extensive and the Board has made detailed findings of fact and conclusions of law, *Curators* undermines Citizens’ assertion that supplementation is either necessary or required.

The cases cited by Citizens also fail to support its request. In each case²⁸ the Board and the Commission distinguished between contested and uncontested issues:

an operating license may not issue unless and until this agency makes the [necessary] findings . . . -including the ultimate finding that such issuance ‘will not

²⁸ See Peititon at 8. (citing *Exelon Energy Co. LLC* (Early Site Permit for Clinton ESP Site) et al., CLI-05-17, 62 NRC 5, 35, 2005); *Commonwealth Edison Co.* (Byron Nuclear Power Station Units 1 & 2), ALAB-678, 15 NRC 1400, 1420 n.35 (1982); *South Carolina Elec. & Gas Co.* (Virgil C. Summer Nuclear Station, Unit1), ALAB-642, 13 NRC 881, 895-896 (1981). In these cases, the Commission was required by the AEA to conduct a hearing. The Commission is not required by the AEA to conduct a hearing on license renewal applications. See 56 Fed. Reg. 64,960-64,961.

be inimical to . . . the health and safety of the public.’ As to those aspects of reactor operation not considered in an adjudicatory proceeding (if one is conducted), it is the staff's duty to insure the existence of an adequate basis for each of the [necessary] determinations.

Commonwealth Edison Co. (Byron Nuclear Power Station Units 1 & 2), ALAB-678, 15 NRC 1400, 1420 n.36 (1982) (citing *South Carolina Elec. & Gas Co.* (Virgil C. Summer Nuclear Station, Unit1), ALAB-642, 13 NRC 881, 895-896 (1981)). None of these cases supports Citizens’ request because the issues raised in Citizens’ Petition (i.e. the adequacy of the AmerGen’s AMP for the drywell shell) are *contested* and these cases do not stand for the proposition that the Staff must document the basis for its required findings in the safety evaluation report. In any event, these findings are further made by the licensing authority in issuing the license. Thus, Citizens’ Petition should be denied.

C. Staff Guidance Does Not Support Citizens’ Request For Supplementation

The Staff guidance referenced by Citizen’s Petition is out of date and does not demonstrate that the Staff must update the SER to include the results of the fall 2008 inspection, which was conducted in accordance with Inspection Procedure 71003 “Post-Approval Inspection for License Renewal.” Citizens references NRR Office Letter No. 805²⁹ (ADAMS Accession No. ML003670278) for the proposition that the license renewal review process includes technical review of the application and on-site inspections and that the Staff’s SER must document the results of those activities. Citizens’ Petition at 9-10. Citizens asserts that because the license renewal application review process

²⁹ It should be noted that NRR Office Letter No. 805 was superseded by RNLW-100 in 2003 (ADAMS Accession No. ML032200334). Moreover, NRR Office Letter No. 805 predates development of both the GALL Report (NUREG-1801 Generic Aging Lessons Learned (GALL) Report, Rev. 0 (July 2001)) and the standard review plan for license renewal applications (NUREG-1800 Standard Review Plan for Review of License Renewal Applications Rev. 0 (July 2001)) which were prepared in response to Commission instructions. See Staff Requirements-SECY-99-148–Credit for Existing Programs for License Renewal (Aug. 27, 1999) (ADAMS Accession No. ML003751930). All of these documents are silent on supplementation of SERs.

includes on-site inspections, Staff guidance requires that the fall 2008 inspection should be documented in the Staff's SER. NRR Office Letter 805, which is merely guidance (and is superseded at that), is silent on the matter of supplementing SERs based upon the results of post-license renewal inspection. Current guidance is similarly silent.³⁰ Citizens fails to recognize that the Staff has already completed inspections related to review of the license renewal application described in Inspection Manual Chapter 2516 "Policy and Guidance for License Renewal Inspection Programs" and Inspection Procedure 71002. See Inspection Report 05000219/20006007 (Staff Exhibit 5 ADAMS Accession No. ML072850953). The inspection conducted last fall and documented in the Inspection Report, which forms the basis of Citizens' Petition, was conducted in accordance with Inspection Manual Chapter 2515 "Light-Water Reactor Inspection Program -- Operations Phase" and Inspection Procedure 71003 "Post-Approval Site Inspection For License Renewal." Thus, Citizens has failed to identify Staff guidance supporting its assertion that the SER must be supplemented.

D. Anecdotal Information of Past Supplements Does Not Support Request for Supplementation

Citizens asserts that the Staff has a "longstanding practice of issuing SER supplements when new issues arise regarding aging management of in-scope components." Citizens' Petition at 10. However, in support of their claim of a longstanding practice, Citizens provides only three examples. This is hardly significant given that the Staff has already approved twenty-seven license renewal applications for

³⁰ Current guidance for Staff review of license renewal application is contained in NUREG-1800 Standard Review Plan for Review of License Renewal Applications for Nuclear Power Plants Rev. 1 (Sept. 2005).

over fifty individual reactors.³¹ Moreover, the three examples Citizens relies on are not relevant here.

Citizens' first example was the Staff's September 2008 supplement to the SER on Oyster Creek's license renewal application. Citizens' Petition at 10. On April 3, 2008, the Staff notified the Commission that Oyster Creek's license renewal application used a simplified method to calculate cumulative usage factors (CUF) for one type of nozzle that may not be conservative. See Memorandum from Samson S. Lee, NRR, to the Commission Re: Notification of Information in the Matter of Oyster Creek Nuclear Generating Station License Renewal Application (April 3, 2008) (ADAMS Accession No. ML080930335). The Staff then requested that AmerGen perform a confirmatory calculation and documented the results of its review of AmerGen's response in the September 2008 SER supplement. See Safety Evaluation Report Related to the License Renewal of Oyster Creek Nuclear Generating Station, Supplement 1 (Sept. 2008) (ADAMS Accession No. ML080230078) ("Oyster Creek Supplemental SER"). The fact that the Staff used a supplement to the SER to document its resolution of a concern with AmerGen's license renewal application does not demonstrate that the Staff must now repeat the results of the fall 2008 Inspection Report in a supplement to the SER when the Staff has documented the results in the Inspection Report, on which Citizens relies.

Citizens' second example is the Calvert Cliff's SER. Contrary to Citizens' assertion, the Calvert Cliff's SER, NUREG-1705 Safety Evaluation Report Related to the License Renewal of Calvert Cliffs Nuclear Power Plant, Units 1 and 2 (Dec. 1999) was not supplemented. See SECY-00-0010 "Calvert Cliffs Nuclear Power Plant, Units 1 & 2-

³¹ See <http://www.nrc.gov/reactors/operating/licensing/renewal/applications.html> (listing approved applications and number of reactor units).

Renewal of Full-Power Operating License (Jan. 14, 2000) (ADAM Accession No. ML003672584) at 2 (stating the Staff would, *as appropriate*, supplement the SER to reflect a new commitment proposed by the applicant in response to an issue involving electrical cables that emerged after the SER was completed). Thus, the Calvert Cliffs example also fails to support Citizens' claim of a long-standing Staff policy to supplement SERs when new issues regarding in-scope components emerge.

Citizens' third example is the Browns Ferry's SER. The safety evaluation report on Browns Ferry's license renewal application, NUREG-1843-Safety Evaluation Report Related to the License Renewal of the Browns Ferry Nuclear Plant, Units 1, 2, and 3 (dated Jan. 2006, published Apr. 2006) ("NUREG-1843"), was supplemented in April 2006. However, the January 2006 SER specifically indicated that it would be supplemented. NUREG-1843 Supp 1, Section 5 at 5-7. As in the case of the Oyster Creek Supplemental SER, the Browns Ferry SER was supplemented to document the Staff's resolutions of Staff and Advisory Committee on Reactor Safeguards ("ACRS") issues with Browns Ferry's license renewal application, not to include the results of an inspection conducted over a year and half after completion of the SER.

Consequently, Citizens has failed to show that the Staff has a "longstanding" practice of supplementing SERs and failed to provide any legal or regulatory basis for its request that the Commission order the Staff to supplement the SER. Thus, the Commission should deny Citizens' Petition.

V. Supplementation of the SER Is Unnecessary to the Commission's Final Determination

Citizens asserts that unless the Commission orders the Staff to supplement the SER, the Commission will not have an adequate basis to make a final determination on Oyster Creek's license renewal application. Citizens' Petition at 2-3. Citizens' assertion is incorrect.

As explained above, the decision whether to grant Oyster Creek's license renewal application is not based on the adequacy of the Staff's review, but on the adequacy of Oyster Creek's application. *See, e.g., AmerGen et al.*, CLI-08-23, 68 NRC ___ (slip op. at 18); 69 Fed. Reg. 2202. The Commission also observed that "it would be unfair to deny a meritorious application because the Staff's review is found lacking." *Id.* at 26 (citing *Curators*, CLI-95-1, 41 NRC 71, 121 (1995)).

In any event, the Commission's determination does not rest solely on the Staff's SER. Rather, the determination is based upon the entire record, which is quite voluminous, and includes pleadings, testimony, and exhibits submitted by the Staff, Citizens, and the Applicant, as well as the Board's findings of fact and conclusions of law in LBP-07-17.³² The Staff's evaluation of the application, including the SER, is not the only basis for the Commission's decision in contested cases. *See Curators*, CLI-95-1, 41 NRC at 122. Through this contested proceeding, Citizens has had an ample opportunity to challenge the adequacy of AmerGen's application. *See AmerGen et al.*, CLI-08-23, 68 NRC ___ (slip op. at 18). Therefore, Citizens has had an opportunity to offer the information it believes is necessary for the Commission to make a final determination on AmerGen's application. Thus there is simply no basis for Citizens' assertion that the Commission does not have an adequate basis to make a determination on Oyster Creek's application unless the SER is supplemented.

³² As argued in Section I above, Citizens' Petition and Motion to Reopen duplicate arguments addressed by the Board in LBP-07-17.

CONCLUSION

For the reasons set forth above, the Commission should deny Citizens' Petition.

Respectfully submitted,

/RA by Brian G. Harris/

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Mary C. Baty
Counsel for NRC Staff

Dated at Rockville, Maryland
this 2nd day of March 2009

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))	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE IN OPPOSITION TO CITIZENS' PETITION TO REQUIRE SUPPLEMENTATION OF THE SAFETY EVALUATION REPORT FOR OYSTER CREEK" 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 2nd day of March 2009.

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