February 24, 2010

Ms. Marcia M. Waldron, Clerk
United States Court of Appeals
for the Third Circuit
21400 United States Courthouse
601 Market St.
Philadelphia, PA 19106-1790

Attn: Christina M. Koperna, Case Manager

Re: New Jersey Environmental Federation, *et al.* v. United States Nuclear Regulatory Commission, *et al.*, No. 09-2567

Dear Ms. Waldron,

Per instructions from your office, enclosed please find a single copy of Federal Respondents' Brief filed on behalf of respondents United States Nuclear Regulatory Commission and United States of America in the captioned matter. Other parties have been served by mail and electronically.

Pursuant to Fed. R. App. P. 30(c)(2)(B), ten copies of our final brief will be filed within 14 days after the deferred Appendix has been served and filed.

Very truly yours,

/s/

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No. 09-2567

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NEW JERSEY ENVIRONMENTAL FEDERATION, *et al.*,
*Petitioners,*
v.
UNITED STATES NUCLEAR REGULATORY COMMISSION and
THE UNITED STATES OF AMERICA,
*Federal Respondents,*

and

EXELON GENERATION CO., LLC,
*Intervenor-Respondent.*

On Petition for Review of Orders by the
United States Nuclear Regulatory Commission

# BRIEF FOR FEDERAL RESPONDENTS


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## *JURISDICTIONAL STATEMENT*

Citizens' petition[1] for review challenges three decisions of the Nuclear Regulatory Commission (NRC) – NRC's final decision (April 1, 2009), after a hearing, rejecting Citizens' arguments against a 20-year license renewal for the Oyster Creek Generating Station; NRC's decision (November 6, 2008), denying Citizens' motion to reopen the renewal hearing to consider a new contention; and NRC's decision (October 6, 2008), denying a request by Citizens and others to suspend license renewal proceedings for Oyster Creek and three other nuclear power plants pending a "comprehensive overhaul" of NRC's license renewal process.

Under the Hobbs Act, this Court has subject matter jurisdiction to review NRC's final decision and interlocutory decisions underlying it. *See* 28 U.S.C. § 2342; *New Jersey v. NRC*, 526 F.3d 98, 102 (3d Cir. 2008). But, as we argue below (Argument V), NRC's refusal to suspend proceedings involves a discretionary matter of agency management not subject to judicial review. *See* 5 U.S.C. § 701(a)(2). The petition for review was filed within sixty days of NRC's final decision. *See* 28 U.S.C. § 2344.

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[1] We follow petitioners' nomenclature for themselves (Citizens) and the applicant AmerGen Energy Company, LLC or Exelon Generation Co., LLC (AmerGen or Exelon). *See* Pet.Br.1 n.1; R.581at1 n.1.

## *STATEMENT OF THE ISSUES*

1. Whether NRC abused its discretion in rejecting Citizens' late contentions that did not meet NRC pleading requirements for timeliness, where the late contentions were based on information publicly available to Citizens when they submitted their original contention.

2. Whether NRC abused its discretion in declining to reopen a closed hearing, where NRC, employing technical expertise, found that Citizens' new contention did not raise a significant safety issue and that reopening the hearing was unlikely to lead to a materially different result.

3. Whether Citizens may seek judicial review of how NRC Staff performs its customary license application review and makes related non-hearing findings, including Commission supervision thereof.

4. Whether NRC abused its discretion in referring ongoing safety matters to its regulatory Staff for post-hearing oversight, where these matters were not part of Citizens' adjudicated contention and NRC had otherwise made all safety findings requisite to issuing the renewed license?

5. Whether this Court has jurisdiction to review NRC's implementation of recommendations by NRC's Inspector General for improving NRC Staff license application review and, if so, whether NRC abused its discretion in implementing those recommendations?

## *STATEMENT OF THE CASE*

Under 42 U.S.C. § 2133(c), a commercial nuclear power plant may be licensed for a term not to exceed 40 years. A license may be renewed upon expiration. *Id.* Requirements and standards for license renewal are contained in 10 C.F.R. Part 54. Under these regulations, NRC focuses on the "potential detrimental effects of aging that are not routinely addressed by ongoing regulatory programs." *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant), CLI-01-17, 54 NRC 3, 7 (2001); *see also* 56 Fed. Reg. 64943, 64946 (Dec. 13, 1991).

Because NRC license renewal focuses strictly on plant aging effects (along with environmental effects not at issue here), contested proceedings like the one here are limited to a review of the plant structures and components that will require "an aging management review for the period of extended operation and the plant's systems, structures and components that are subject to an evaluation of time-limited aging analyses." *Duke Energy Corp.* (McGuire Nuclear Station), CLI-01-20, 54 NRC 211, 212 (2001). Thus, license renewal proceedings are limited in scope and "not intended to duplicate the Commission's ongoing review of operating reactors." *Turkey Point*, 54 NRC at 3. Rather, license renewal applicants must "demonstrate how their [aging management] programs will be effective in managing the

effects of aging during the proposed period of extended operation." *Turkey Point*, 54 NRC at 8. NRC then decides whether "there is reasonable assurance that the activities authorized by the renewed license will continue to be conducted in accordance with the CLB [Current Licensing Basis]" (R.437at14-15). *See* 10 C.F.R. § 54.29.

Under 42 U.S.C. § 2239(a), NRC offers an opportunity for hearing on a license renewal application. Here, Citizens were granted a hearing on their sole admitted contention – which called on AmerGen, the Oyster Creek licensee, to prove by a preponderance of the evidence that its ultrasonic testing program "is adequate to manage the aging effects of corrosion in the sand bed region of Oyster Creek's drywell shell so the intended functions of the shell (*i.e.*, structural integrity and pressure containment) will be maintained during the renewal period consistent with the current licensing basis" (R.437at14).

After an evidentiary hearing, NRC's hearing tribunal, the Atomic Safety and Licensing Board, issued a decision finding no merit to this contention (R.437at56-57). The Commission rejected Citizens' petition for appellate review, except to direct enhanced NRC Staff oversight of AmerGen's compliance with (then proposed) License Condition 7 to perform a three-dimensional (3-D) finite element structural analysis of the

drywell shell – a matter not in contention and not part of the hearing (R.581at33).

The Commission discussed the Board's fact findings and procedural rulings extensively (R.581at33-68), and found them "reasonable" (R.581at4). In this final decision, as well as earlier interlocutory decisions, the Commission found that Citizens had not shown good cause for filing new contentions late, that Citizens' efforts to reopen the hearing were unpersuasive because they raised no significant safety question, and that an NRC Inspector General report on improving NRC Staff's license renewal reviews did not require suspending ongoing license renewal proceedings (R.581; 546; 540).

Citizens' petition for review in this Court ensued. This case marks the second time the Oyster Creek license renewal proceeding has reached this court.[2] *See New Jersey Dep't of Envtl. Prot. v. NRC,* 561 F.3d 132, 133 (3d Cir. 2009).

[2] Citizens' claim that the Oyster Creek license renewal hearing stands alone (Pet.Br.26) is misleading. The Vermont Yankee and Pilgrim nuclear plants also have had licensing renewal hearings, and one is expected to start soon for the Indian Point plant.

## *STATEMENT OF THE FACTS*

### A. Citizens are granted intervention on a single contention.

AmerGen (now Exelon) is the owner and licensed operator of the Oyster Creek Nuclear Generating Station. In 2005, AmerGen applied for a 20-year renewal of its operating license, then due to expire on April 9, 2009. "Citizens" consist of six organizations that jointly sought a hearing in the renewal proceeding (R.36at1). Citizens proposed only one contention, which the Board admitted for hearing. It alleged that the renewal application was deficient because AmerGen's aging management program did not include "periodic UT [ultrasonic testing] measurements" in the sand bed region of the drywell liner (R.36at25-44).[3]

The Board initially found this contention mooted by AmerGen's subsequent commitment to perform such UT measurements (R.83at8), but allowed Citizens to amend its contention (R83at8-9), which (as amended) the Board admitted for hearing:

> [I]n light of the uncertain corrosive environment and the correlative uncertain corrosion rate in the sand bed region of the drywell shell, AmerGen's proposed [UT monitoring] plan . . . is insufficient to maintain an adequate margin of safety. [R.99at36].

[3] A portion of the exterior shell was originally constructed with a bed of sand to support the shell as it transitions from being embedded in concrete on both sides to being embedded only on the interior (R.437at3).

The Board ruled that six other proposed new contentions, which it characterized as "discrete challenges" to AmerGen's UT monitoring of the drywell shell (R.99at9), were inadmissible, untimely, or both. The Board found these other contentions untimely because the information supporting them was publicly available to Citizens when they formulated their original contention (R.99at9-36; R.437at10 n.14).

On appeal to the Commission, Citizens maintained that AmerGen's new expansion of UT monitoring into the license renewal period rendered their contentions timely, as any earlier challenge to a non-existent program would have been speculative. The Commission agreed with the Board, however, that while AmerGen had recently committed to undertake UT monitoring during the renewal period, the technical facets of the UT monitoring program belatedly challenged by Citizens already existed when Citizens submitted its original contention. In other words, the Commission held that Citizens had originally filed a contention challenging just one aspect of the UT monitoring program when it could and should have challenged any and all aspects it thought deficient (R.581at49-51).

### B. The Board finds no merit to the admitted contention and rejects other contentions as too late or not warranting reopening.

At the hearing on Citizens' sole admitted contention , the Board received direct, rebuttal, and surrebuttal written testimony from 15 AmerGen witnesses, five NRC Staff witnesses and one Citizens witness, along with numerous exhibits, plus live testimony resulting from the Board's clarifying questions (R437at11-13). After reviewing the record, the Board ruled that "AmerGen has demonstrated by a preponderance of the evidence" that the acceptance criteria [for drywell shell thickness in the sand bed region[4]] will be satisfied throughout the renewal period" (R.437at56).

The Board made three key fact findings to support its ruling. First, the external wall of the drywell shell "will not experience significant corrosion" because AmerGen's corrective and mitigating actions, coupled with its aging management program, reasonably assure that water will not leak into the region and, even if leakage occurred, it would not penetrate the three-layer epoxy coating. Nor will the internal wall of the drywell shell in the sand bed region experience significant corrosion, given its non-corrosive

[4] These "acceptance criteria" are derived from the reactor manufacturer's engineering analysis in compliance with standards of the American Society of Mechanical Engineers ("ASME") Boiler and Pressure Vessel Code. They address the relevant stresses that could potentially cause the shell to buckle or lose pressure. The Board addressed the development and application of these acceptance criteria extensively (R.437at18-22).

environment and absence of any measurable corrosion to date (R.437at56-57). Second, even if corrosion occurred, AmerGen's "plan to take UT measurements every 4 years, coupled with the other commitments in its aging management program," sufficiently assures that the acceptance criteria will not be exceeded (R.437at57). And third, calculation of the available margin above the acceptance criteria is based on the most heavily corroded area in which sand that had retained moisture has now been removed. Any future leakage will therefore drain to less corroded areas where the remaining available margin is about 300% greater than in the regions of heavier corrosion (R.437at57).

While joining in the decision, Judge Baratta thought there was "a lack of knowledge about the actual thickness of the drywell shell," and that the Board should impose "an additional requirement" upon the 3-D analysis to be performed by AmerGen before the period of extended operation (R.437Baratta6). Judge Baratta observed that proposed License Condition 7 – *not* a part of the admitted contention and *not* a part of the hearing – required AmerGen to perform "a 3-dimensional (3-D) finite element analysis of the drywell shell" prior to the license renewal period, using modern methods to better quantify the available margin above minimum buckling criteria required by Code. He suggested that AmerGen be required perform,

in conjunction with the 3-D analysis of the drywell shell, "a series of sensitivity analyses" and model the drywell thickness between measured locations more realistically than was possible at the time of the GE analysis in 1990 (R.437Baratta5-6; *see also* R.437at51 n.55).

Citizens sought Commission review of the Board ruling, but, before acting on Citizens' petition, the Commission asked for additional briefing on Judge Baratta's comment (R.497) and ultimately referred the issue to the Board for resolution (R.523). The Board sent the Commission an Advisory Memorandum, joined by Judge Baratta, stating that, subject to Board suggestions, "AmerGen's approach in developing the 3-D model is tailored toward obtaining a conservative best estimate of the margin" of thickness in the drywell liner (R.543at16), and that the "sensitivity studies planned by AmerGen should likely provide a bounding of the uncertainties" suggested by Judge Baratta (R543at16). Again, AmerGen's performance of these studies, not part of Citizens' admitted contention, was to be monitored by NRC Staff outside the hearing as part of the Staff's customary licensee oversight responsibilities (R.581at65-68).

With the record complete, the Commission found the Board's fact findings rejecting Citizens' UT contention, now reinforced by the Advisory Memorandum, "reasonable" and declined to disturb them (R.581at4).

The Commission also declined to upset a Board decision not to admit for hearing "corrosion monitoring" contentions that Citizens filed late. Pointing out that NRC "contention admissibility and timeliness rules require a high level of discipline and preparation by petitioners" (R.581at48), the Commission agreed with the Board that Citizens should have filed their new contentions much earlier because they were based on long-available information (R.581at48-54). Similarly, the Commission declined to "second guess" the Board's view that Citizens' new contentions lacked the support and fact basis called for in NRC pleading rules (R.581at56).

The Commission also discussed information outside the hearing record on the drywell obtained during a recent outage (R.581at23) and related NRC Staff inspection (R.581at26). The Staff's Inspection Report confirmed AmerGen's implementation of its license renewal commitments and provided additional details on the Staff's observations (R.581at28).[5] The Commission clarified that its review on this question fell under its supervisory rather than adjudicatory capacity, and was intended to assure

[5] While the report showed some indications of moisture, the Staff stated, *inter alia*, that it observed "no identified significant conditions affecting the drywell shell structural integrity" (R.581at26); that detected blistering of the shell from moisture "had a minimal impact on the drywell steel shell"; and that "the projected shell corrosion rate remains very small, as confirmed by NRC [S]taff review of [ultrasonic testing] data" (R.581at27).

that NRC Staff addressed Judge Baratta's concerns about the actual state of the drywell liner by "enhancing its review of Exelon's compliance with proposed License Condition 7" (R.581at67). The Commission stated that proposed License Condition 7 "is consistent with achieving Judge Baratta's objective: enhancing the NRC's 'understanding of the drywell shell state' by performing 'a conservative best estimate analysis of the actual drywell shell'" (R.581at65).

The Commission rejected Citizens' motion to reopen the hearing based on the Inspection Report (R.581at70-85). The Commission found that the Report's observation of some moisture was not of "safety significance" warranting a reopened hearing under NRC reopening standards, *see* 10 C.F.R. § 2.326, and did not undercut the Board's safety findings (R.581at82). Commissioner (now Chairman) Jaczko dissented on the Inspection Report issue. He would have admitted the Report into the record, but not reopened the hearing. Instead, he would have directed a fresh inspection in 2010 as a condition of renewing Oyster Creek's license (R.581Jaczko7).

### C. The Commission denies Citizens' request to reopen the record and admit its new metal fatigue contention.

While the Commission was reviewing the Board's decision, Citizens sought an entirely distinct reopening of the hearing record to add a new

contention unrelated to the drywell shell (R.546at3-4; R.517at4). The new contention involved NRC's issuance of a draft "Regulatory Issue Summary" to reactor licensees informing them "that the use of a simplified 'Green's function' analysis for calculating cumulative usage factors [CUF] related to metal fatigue could be non-conservative if not correctly applied" (R.546at3).

Citizens' proposed new contention stated as follows:

> 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 establish whether these nozzles could exceed allowable metal fatigue limits during any extended period of reactor operation. [R.546at4]

NRC hearing regulations require that a motion to reopen must be timely, address "a significant safety or environmental issue," and demonstrate that "a materially different result would be . . . likely had the newly proffered material been considered initially." (R.546at12). *See* 10 C.F.R. § 2.326.

The Board majority, exercising its technical expertise, determined that AmerGen, as directed by NRC Staff, had "recalculate[d] the recirculation nozzle CUF to confirm that the original calculation was adequately conservative" (R.517at12), and that Citizens had "provide[d] no factual evidence or expert testimony showing that the analysis used at Oyster Creek employing the Green's function was improperly performed so as to result in a deficient, non-conservative CUF for the recirculation nozzle" (R.517at13).

Thus, the Board held that Citizens had failed to raise a "significant safety issue" – the second prong of NRC's reopening criteria (R.517at15).

Further, Board held that Citizens had not met the third prong for reopening, which, for a proposed new contention, required Citizens to show "a likelihood that their contention would be resolved in their favor such that AmerGen's renewal application would be denied or conditioned" (R.517at19). Here, the Board held: "The fact that the results from AmerGen's original CUF analysis and its confirmatory analysis both comport with the ASME Code requirement is consistent with our conclusion that, on this record, Citizens fail to demonstrate that consideration of their newly proffered contention would likely cause a materially different outcome in this proceeding" (R.517at20).

One Board member (Judge Baratta) disagreed. He believed that NRC Staff findings and AmerGen's admissions sufficed to justify reopening (R.517Baratta6).

Citizens again appealed. The Commission found, as had the Board majority, that Citizens had not satisfied the second and third prongs of these requirements (R.546at12-28). It rejected Citizens' claim that the second prong – a "significant safety issue" – could be "satisfied by a 'mere showing' that possible violation of regulatory safety standards could occur,"

because such a standard was devoid of "specific factual or technical" support (R.546at16). The Commission further stated it would not overturn the Board's assessment of the competing expert affidavits because a complaint that the Board "improperly weighed the evidence" did not prove factual or legal error (R.546at24).

As to the third prong, the Commission rejected Citizens' claim that NRC's "summary disposition standard" for admitted contentions (akin to Fed. R. Civ. P. 56) should have applied to its reopening motion. The Commission held that applying a summary disposition standard to motions to reopen would "shift[] the burden – deliberately heavy and deliberately placed on the party seeking reopening – from parties advocating reopening to parties opposed to it," which is "the exact opposite of what the rule requires" (R.546at22).

### D. The Commission denies Citizens' petition to suspend the proceeding to overhaul Staff license review procedures.

While the Commission was considering Citizens' challenge to the Board's merits decision, Citizens and other groups requested the Commission to suspend the Oyster Creek and three other relicensing proceedings pending a "comprehensive overhaul" of NRC's review of license renewal applications. They based this request principally on an audit

report issued by NRC's Office of the Inspector General (OIG) regarding the effectiveness of NRC Staff's license renewal reviews (R.540at2).

The OIG report did not criticize the adequacy of NRC Staff license renewal reviews from a safety perspective. Rather, as the Commission stated, "the OIG Report found that the Staff should improve the transparency of its report writing so that a reader can more easily understand what materials the reviewers evaluated and how they reached their conclusions" (R.540at8). The OIG report made eight recommendations for improving documentation and transparency, seven of which NRC Staff formally agreed to implement (R.540at8-10). In these circumstances, the Commission found no justification for the "drastic" relief Citizens sought (R.540at29-30).

The Commission also observed that "NRC has not, and will not, litigate claims about the adequacy of the Staff's safety review in licensing adjudications" because "[i]t is the applicant, not the Staff, that has the burden of proof in litigation" (R.540at18). Thus, the Commission held, Citizens' "complete overhaul" request did not relate to an admissible contention, rendering it outside the scope of the license renewal hearing (R.540at18).

## *SUMMARY OF THE ARGUMENT*

The proceeding below produced a prodigious record on well-defined and well-understood technical issues on which the Commission has focused enormous Board, Staff, licensee and third-party resources. While Citizens might disagree with the precise way the Commission has chosen to assess the potential for future corrosion in the Oyster Creek drywell liner, they neither dispute issuance of the renewed license, nor challenge the Commission's informed technical judgments.[6] Rather, Citizens simply argue that the Commission erred procedurally in denying their motions to file late contentions and to reopen the hearing, and in directing NRC Staff to oversee AmerGen's fulfillment of License Condition 7 as opposed to holding further hearings.

These procedural claims lack merit. Timely conduct of proceedings is a significant NRC objective, and the courts have upheld NRC's insistence upon compliance with its strict standards for admitting late contentions and for reopening hearings. The Commission has established these standards to make sure that NRC does not devote scarce and costly hearing resources to

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[6] "Petitioners do not now contest the legality of the Commission's chosen approach to resolving the drywell structural issue at this stage because the Staff review of these issues is now complete and did not reveal any major new issues with regard to the structural integrity of the containment system." Pet.Br.54.

untimely, insubstantial or immaterial contentions. Here, Citizens' late contentions were based on information long available to the public and thus were properly rejected as untimely. As for Citizens' request to reopen the record, it fell far short of meeting their burden to show that new information has safety significance and would have produced a materially different result in the proceeding if considered.

The Commission delegated no aspect of Citizens' adjudicatory contention or any requisite safety finding by the Board to NRC Staff for post-hearing review. The Staff customarily reviews each application, including all safety issues and compliance with license conditions, whether or not a hearing occurs. The Staff's non-hearing findings of "reasonable assurance" of public health and safety required for license renewal do not further require, as Citizens apparently believe, the Commission's post-hearing stamp of approval. This includes any Staff post-hearing reviews. If the rule were otherwise, Exelon's UT monitoring results in 2010 and beyond would provide a practically inexhaustible source for new contentions, and license renewal proceedings would never draw to a close.

Finally, Citizens claim that an Inspector General report on improving NRC's license renewal process, chiefly through better record-keeping, required NRC to stop the Oyster Creek proceeding in its tracks. The

argument is insubstantial. An agency's supervision of its own staff is quintessentially committed to the agency's discretion and is not subject to judicial review. In any event, it was reasonable here for NRC to continue license renewal proceedings that were near completion, while at the same time implementing recommended paperwork improvements.

## *STANDARD OF REVIEW*

Judicial review of NRC decisions is narrow and deferential. NRC licensing decisions may not be overturned unless "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). *See New Jersey Dep't of Envtl. Prot v. NRC,* 561 F.3d 132, 136-37 (3d Cir. 2009); *Limerick Ecology Action, Inc. v. NRC,* 869 F.2d 719, 728 (3d Cir.1989); *Duke Power Co. v. NRC,* 770 F.2d 386, 389-90 (4th Cir. 1985). "This general posture of deference" is particularly applicable "in the context of licensing decisions, where statutory directives are scant and the AEA explicitly delegates broad authority to the agency to promulgate rules and regulations." *Massachusetts v. United States,* 522 F.3d 115, 126-27 (1st Cir. 2008).

Indeed, "the Commission's licensing decisions are generally entitled to the highest judicial deference because of the unusually broad authority that Congress delegated to the agency under the Atomic Energy Act."

*Massachusetts v. NRC,* 924 F.2d 311, 324 (D.C. Cir. 1991). As this Court has noted, "deference to questions implicating agency expertise" is due when NRC is employing its expertise. *New Jersey Dep't of Envtl. Prot. v. NRC,* 561 F.3d at 137.

This Court recognized years ago that "NRC is charged with the responsibility of protecting the common defense and security as well as the public health and safety . . . and it would subvert this design were we to invalidate the challenged NRC action when it appears to be consonant with statutory dictates and not an unreasonable exercise of its discretion." *In re Three Mile Island Alert, Inc.,* 771 F.2d 720, 728 (3d Cir. 1985). Judicial deference is particularly in order when NRC has made technical or scientific findings on safety and the environment, areas that lie at the core of the agency's mission. *See Baltimore Gas & Elec. Co. v. NRDC, Inc.,* 462 U.S. 87, 103 (1983). *Accord New York v. NRC,* 589 F.3d 551, 555 (2d Cir. 2009); *Kelley v. Selin,* 42 F.3d 1501, 1511 (6th Cir. 1995); *Three Mile Island Alert,* 771 F.2d at 737.

Citizens claim that, in rejecting their late contentions and motion to reopen, NRC gave too little weight to their expert affidavits. But, when "specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original

matter, a court might find contrary views more persuasive." *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989). More broadly, this Court does "not require the agency to reopen its proceedings except upon a clear showing of abuse of discretion or of extraordinary circumstances." *Three Mile Island Alert*, 771 F.2d at 728.

## *ARGUMENT*

### I. The NRC acted well within its discretion in declining to admit for hearing Citizens' late contentions.

#### A. Citizens' new, late contentions expanding the scope of their original contention were untimely.

Citizens originally submitted but a single contention, alleging that AmerGen must "conduct an adequate number of confirmatory UT measurements" at all levels of the drywell liner to determine its actual thickness and monitor projected corrosion (R.36at25). When Citizens were given the opportunity to amend their contention months later – the original contention had become moot when AmerGen agreed to conduct UT testing during the license renewal period – they then proposed *seven* new contentions (R.99at1-2, 9). As Citizens acknowledge (Pet.Br.29), their amended contention amounted to "seven discrete challenges" to the renewal application (R.99at9), each requiring separate examination under NRC contention-admissibility rules.

Because Citizens submitted these new or amended contentions seven months after the November 14, 2005 deadline noticed at 70 Fed. Reg. 54585 (Sept. 15, 2005), they had to comply with NRC's "late-filing" standards:

> (i) The information upon which the amended or new contention is based was not previously available;
>
> (ii) The information upon which the amended or new contention is based is materially different than information previously available; and;
>
> (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information. [10 C.F.R. § 2.309(f)(2); R.99at6].[7]

Of the seven new contentions, the Board admitted for hearing only one, relating to the frequency of AmerGen's scheduled UT monitoring of the drywell shell (R.99at14-20). That contention, which the Board found timely because it was based on AmerGen's recently announced UT schedule, was essentially a reframing of the previously admitted contention (R.99at2). The Board held that the *other* six challenges to the licensee's UT monitoring of the drywell liner were untimely because Citizens had access to sufficient information to have formulated those additional contentions with its original

[7] Citizens did not meet the late contention criteria under § 2.309(f)(2), so its untimely filings had to address the separate balancing test in 10 C.F.R. § 2.309(c)(1), to demonstrate, *inter alia,* good cause for its lateness. Citizens ignored the Board's repeated admonitions that its late filings must satisfy these criteria, and the Board therefore treated Citizens' failure to address them here as a waiver (R.99at6-7 n.7).

submission.

Record evidence of this available information, as the Board recounted, amply supports the Board's untimeliness determination (R.99at10-36). Hence, the Board's rulings were perfectly logical and not, as Citizens claim, "internally inconsistent." Pet.Br.29. On appeal, Citizens challenges the Board's denial of only two of its seven late contentions – contentions on "acceptance criteria" and "spatial scope."

Citizens' fanciful but misleading *Alice in Wonderland* ("White Queen") caricature suggests that it was "impossible" for Citizens to submit a valid contention of any kind on UT monitoring until the licensee announced its new UT testing plan. Pet.Br.30. But the clue revealing Citizens' flawed argument lies in their statement that, until then, the licensee "did not propose any *additional* UT monitoring of the drywell shell" for the license renewal period (Pet.Br.29; emphasis added).

Referring to *additional* monitoring acknowledges that AmerGen's UT monitoring program was already in place. Thus, Citizens illogically claims that it had no information sufficient to challenge *any* aspect of drywell liner integrity until AmerGen increased the *frequency* of UT monitoring in 2006. In fact, though, the record shows that AmerGen had identified drywell liner corrosion – and had used UT to measure liner corrosion – since 1986

(R.36at27). As Citizens demonstrated in its own intervention petition (R.1at4-6), which they timely filed in 2005, exhaustive, publicly available research on this corrosion had been extensively documented by NRC from 1986 through 2004 (R.36at27-31). Citizens' original contention demanding frequent UT measurements shows that available data enabled them, had they so chosen, to challenge *all* aspects of AmerGen's plan – not just UT frequency – "to address the corrosion problem" so as to assure that the liner "maintained an adequate safety margin and was not experiencing further corrosion" (R.437at6-7).

In particular, Citizens argues that they could not formulate their contention on thickness "acceptance criteria" until AmerGen announced in 2006 its plans to increase UT monitoring. But as the Board found, information on thickness acceptance criteria was "by no means new" in April 2006 when AmerGen announced its plans for additional monitoring, "nor was it previously unavailable" (R.99at12). Citizens' own pleadings, the Board observed, "demonstrate that the analyses in effect at Oyster Creek for deriving the acceptance criteria have long been publicly available" (R.99at13). In their petition to intervene, Citizens themselves referred to "as designed," "minimum required" and "critical minimum required" liner

thickness (R.99at12), proving their awareness of the acceptance criteria.[8] Thus, the record justifies the Board's reasonable ruling that if Citizens "wished to challenge the methodology used to determine this acceptance criterion for the sand bed region [of the drywell], [they] had an obligation – once [they] became aware of that criterion – to obtain the information necessary to advance such a challenge" (R.99at12). The Commission reasonably declined to overturn the Board's finding of untimeliness (R.581at49). And so should this Court.

Likewise, Citizens could have timely raised its contention challenging the "spatial scope" of AmerGen's UT monitoring program (*i.e.*, the various points at which UT measurements would be taken). That contention claimed that AmerGen missed known degraded areas and insufficiently monitored for new thin areas of the liner (R.99at28-30). However, AmerGen's 2005 commitment to perform thickness measurements in the sand bed region of the drywell stated that those measurements "will be taken from inside the drywell *at locations tested in the 1990s such that the new measurements can be compared with earlier test results*" (R.99at29; emphasis in original).

[8] Also, AmerGen's docketed renewal application "clearly states that its aging management program for the drywell shell" will comply with ASME Code requirements for "minimum required shell thickness" (R.99at13). Citizens' intervention petition exhibits "make repeated specific references" to "use of the ASME Code for establishing the acceptance criteria for the drywell shell" (R.99at13).

Citizens already knew "of the locations within the drywell liner that were tested during the 1990s" because exhibits to their intervention petition "explicitly discuss" AmerGen's UT measurement locations during 1992 and 1994, and its December 1995 commitment to take thickness measurements at the same locations (R.99at29). Other Citizens exhibits made "precisely" clear where those earlier UT measurements were taken, and Citizens knew from AmerGen's publicly available December 2005 commitment that it intended to take additional measurements at the same locations (R.99at29).[9]

Hence, as the Board found, "the appropriate time for a challenge by Citizens to the spatial scope of AmerGen's UT measurements was promptly after AmerGen had docketed its December [2005] commitment" (R.99at30). The Commission agreed (R.581at50). As with Citizens' "acceptance criteria" contention, their contention challenging UT "spatial scope" has nothing to do with UT *frequency* – the only aspect of the monitoring that changed after the deadline for submitting contentions had passed.

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[9] Hence, no basis in the Board's findings exists for Citizens' averment that, because of the supposedly limited spatial scope of UT measurements, "it is possible" that the shell fails one of the acceptance criteria. Pet.Br.8. Actually, the Board found that the document upon which Citizens relied for this assertion was unreliable and the expert who prepared it lacked structural engineering experience (R.437at22 n.22, 27 n.30). In fact, over 100 UT measurements were taken from the drywell shell exterior during the 1992 and 2006 outages (R.437at26).

Citizens speculate that earlier submission of its late UT contentions would have been rejected. Pet.Br.32. But the Board's decision to admit for hearing Citizens' original UT frequency contention disproves Citizens' speculation. Citizens could and should have challenged the absence of such a UT monitoring program by identifying *every* aspect – not just frequency – it thought essential to the program. When Citizens did so only belatedly, the Board (and Commission) properly rejected their contentions as too late.

In its appellate decision, the Commission observed that NRC contention-admissibility and timeliness requirements for new or amended contentions were made deliberately "stringent" (R.581at 31) – to make sure that NRC hearings are orderly and focused:

> [O]ur contention admissibility and timeliness rules require a high level of discipline and preparation by petitioners, who must examine the publicly available material and set forth their claims and the support for their claims at the outset. *There simply would be no end to NRC licensing proceedings* if petitioners could disregard our timeliness requirements and add new contentions at their convenience during the course of a proceeding based on information that could have formed the basis for a timely contention at the outset of the proceeding. Our expanding adjudicatory docket *makes it critically important* that parties comply with our pleading requirements and the Board enforce those requirements. [R.581at48-49; footnotes and internal quotation marks omitted; emphasis added]

Here, NRC certainly acted well within its discretion by not allowing Citizens to expand its UT claims – which originally focused on UT monitoring

frequency only – to include a variety of other grievances that Citizens should have advanced earlier.

### B. Citizens' late contentions on monitoring corrosion in the embedded region and lower portion of the sand bed region were untimely and not properly supported.

Well into the proceeding, Citizens raised two additional new, late-filed contentions challenging AmerGen's enhanced corrosion monitoring program. One of these new contentions alleged that more extensive monitoring for corrosion of the drywell liner was required in the region embedded in concrete, and the other alleged that the scope of exterior liner measurements was insufficient to detect possible interior corrosion. In this Court, Citizens challenge NRC's rejection of these contentions. Pet.Br.34.

#### 1. Finding Citizens' late contentions untimely was not an abuse of discretion.

Citizens complain that the Board found their contentions untimely by applying a new policy that enhancements to existing programs cannot constitute "new information" justifying a late contention, and that the Commission endorsed this policy. Pet.Br.34. Actually, NRC's timeliness rationale was multifaceted and went far deeper than Citizens suggest.

First, the Board observed that Citizens had already proposed an earlier contention likewise challenging AmerGen's monitoring program for the embedded portion of the drywell (R.125at7). The Board had rejected the

earlier contention on timeliness grounds, noting that a 2005 NRC Staff report had already "addresse[d] potential corrosion of inaccessible areas of the drywell [shell] that are 'embedded' in concrete" (R.125at7; *see* R.46at3-5, 13). The Board applied the same reasoning, and reached the same result, when considering Citizens' fresh version of their already-rejected contention (R.125at7-8 & n.8).[10]

Second, the Board ruled that AmerGen's enhanced monitoring (*see* Pet.Br.33) "is not the kind of new information that will support admission of a new contention" because, as a matter of logic, if the *enhanced* monitoring were insufficient, then AmerGen's *unenhanced* monitoring was *a fortiori*

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[10] AmerGen's earlier trench excavation confirms that the potential for corrosion in the concrete embedded portion of the drywell interior was well understood long ago. AmerGen had excavated trenches on the interior of the drywell below the concrete floor in 1986 "to allow UT measurements to be taken to characterize the vertical extent of corrosion in the lower sand bed region of the shell," and AmerGen took "numerous" measurements there in 1986 and 1988. AmerGen's renewal application committed to take additional measurements, which AmerGen did in 2006 after excavating filler material from the trenches (R.125at2-4).

Hence, contrary to Citizens' view (Pet.Br.33), the discovery of water in one excavated trench did *not* provide new information on the need for a monitoring program (R.125at9-10), which was already in place, because NRC and AmerGen had long since recognized the potential for liner corrosion in inaccessible areas of the drywell embedded in concrete. That is precisely why trenches were dug below the concrete floor – to allow UT monitoring (R.125at2, 8 n.9). The record thus disproves Citizens' claim that "the UT monitoring program for the embedded region was completely *new*." Pet.Br.36 (emphasis in original).

inadequate and Citizens were obliged to challenge it in their original Petition to Intervene (R.125at8). This was the same reason why the Board had denied an earlier Citizens' contention on monitoring the sand bed region for epoxy coating integrity and moisture (R.125at8, *citing* R.99at23).

On appeal to this Court, Citizens take issue with what they call a "newly minted policy" that "enhancements to existing programs cannot constitute new information upon which new contentions can be based." Pet.Br.34. But that is not what the Board held. The Board held that an applicant's improvements to public health and safety "could not *ordinarily* be viewed as conferring petitioners with an *automatic* opportunity to advance a new contention" (R.99at23; emphasis added). The Board's point – which the Commission endorsed (R.581at51-52) – is one of simple logic: if AmerGen's monitoring program is insufficient after enhancement, it must have been insufficient beforehand, too.

Policy aside, the Board's timeliness rulings rest on a showing in the record that the information upon which Citizens based their new contentions was long known to them, and that it was incumbent upon them to challenge the adequacy of AmerGen's monitoring before enhancements prompted them to take notice of supposed inadequacies.

Finally, Citizens cite the Commission's final decision (Pet.Br.36 n.28)

to allege that "the mere possibility" of water infiltration in the drywell interior would have rendered the contention premature if submitted earlier (*id.* at 36). But the passage from the Commission decision that Citizens cite was not discussing Citizens' untimeliness; rather, it addressed Citizens' failure to provide supporting factual information (R.581at54-56) so as to "meet our strict contention admissibility standards" (R.581at56).

**2. Citizens' late contentions failed to raise a material dispute.**

Citizens also find fault with the Board and Commission's additional rationale that Citizens' late "corrosion monitoring" contentions failed to raise an issue of material dispute. Citizens claim that the Board impermissibly "looked into the disputed facts" (Pet.Br.36) in violation of the Ninth Circuit decision in *Sierra Club v. NRC,* 862 F.2d 222, 228 (9th Cir. 1988). But that case preceded major NRC rule revisions in 1989 and 2004 that imposed greater responsibility upon intervenors to show the factual bases for proposed contentions.[11] These changes are codified at 10 C.F.R. §

[11] This extensive rulemaking culminated in significant changes to "raise the threshold" for admitting contentions by requiring the proponent "to supply information showing the existence of a genuine dispute with the applicant on an issue of law or fact" with references to the specific portions of the application which are disputed, and "supported by a concise statement of the alleged facts or expert opinion, together with specific sources and documents of which the petitioner is aware." 54 Fed. Reg. 33168 (Aug. 11, 1989).

2.309(f)(1). *See* 69 Fed.Reg. 2182, 2239-40 (Jan. 14, 2004). As Citizens acknowledge, NRC's "strict standards" for contention admissibility require intervenors to do "far more than is required" for federal court pleadings. Pet.Br.21-22.

NRC rules requiring specificity and materiality for admitting contentions defeat Citizens' argument that the NRC must follow the notice pleading or "motion to dismiss" standard, employed by courts to "construe[] the facts in favor of [the pleader]." Pet.Br.36-37. The "motion to dismiss" standard urged by Citizens "ignores [NRC's] very explicit rules on contention admissibility" (R.581at 54). It is scarcely imposition of a "writ" system (Pet.Br.22) to insist that participants in agency hearings steeped in highly sophisticated technical analyses bring to the table specific, fact-based claims and sufficient scientific or engineering expertise to litigate those claims meaningfully.

In this Court, Citizens do not say which facts the Board improperly determined, but claim that the Commission's ignored the "Board's correct finding that Petitioners showed . . . such corrosion at other plants." Pet.Br.37. Actually, though, like the Commission, the Board ruled that "interior corrosion in drywell shells at other facilities . . . does *not* support a conclusion that Oyster Creek has experienced such corrosion"

(R.125at17)(emphasis added). The Board also pointed to an authoritative NRC Staff report to refute the sufficiency of Citizens' "surface rust" and "loss-of-wall-thickness" allegations (Pet.Br.37).[12] Moreover, the Board and Commission found the contentions insufficient for still other reasons, not acknowledged in Citizens' appellate brief. These record reasons (R.125at18-19; R.581at56) independently support NRC's rejection of Citizens' contentions.

To place NRC's rulings in perspective, we note that the robust record upon which the Board and Commission based their decisions denying Citizens' late contentions (as well denying reopening, discussed below) is heavily fact-laden with contrasting scientific and technical data from competing sources, each asserting expertise. In this situation, this Court is

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[12] The Staff's Safety Evaluation Report stated that visual examinations under ASME Code standards "have not identified recordable corrosion at the junction of the bottom concrete floor and the steel shell or any other location inside the drywell." Further, "minor surface rust . . . noted in some areas . . . is limited to isolated areas and does not impact the intended function of the drywell" (R.125at17).

Citizens' "Catch-22" argument (Pet.Br.37-38) misapprehends why NRC requires specificity and a genuine dispute of material fact in pleading contentions. If an intervenor alleges that some plant system, structure, or component subject to potential detrimental effects of aging is inadequately addressed by the plant's aging management program, the intervenor must show *why*. Otherwise, the number of contentions that could be crafted to monitor speculative problems would be limited only by the pleader's creativity.

required to defer to NRC's judgment:

> These are technical and scientific studies. Courts should be particularly reluctant to second-guess agency choices involving scientific disputes that are in the agency's province of expertise. Deference is desirable. Particularly when we consider a purely factual question within the area of competence of an administrative agency created by Congress, and when resolution of that question depends on engineering and scientific considerations, we recognize the relevant agency's technical expertise and experience, and defer to its analysis unless it is without substantial basis in fact.

*New York v. NRC*, 589 F.3d at 555 (citations and quotation marks omitted).

For this very reason, this Court recognizes that review of NRC licensing decisions is deferential. *New Jersey Dep't of Envtl. Prot.*, 561 F.3d at 137. Whether a party has raised an authentically new and substantial issue "is a matter for the NRC to determine in the first instance and is reviewed deferentially." *Union of Concerned Scientists v. NRC,* 920 F.2d 50, 55 (D.C. Cir. 1990). NRC is entitled to rely on its own expertise in making such judgments. *See Three Mile Island Alert*, 771 F.2d at 732. On the record here, NRC's decisions that Citizens' late contentions did not warrant agency hearings were "permissible products of reasoned analysis." *Id.* at 738.

## II. The NRC acted well within its discretion in denying Citizens' motion to reopen the hearing record to admit a new contention on metal fatigue.

In 2008, several years into Oyster Creek's license renewal proceeding, Citizens pointed to a recent draft NRC Staff notice on metal fatigue and asked the Commission to reopen the hearing record on that basis. But their legal and factual arguments for reopening were unsound under NRC reopening rules, as the Commission reasonably held.

### A. Section 189 of the AEA did not bar application of NRC reopening standards to Citizens' metal fatigue contention.

Relying on Section 189a of the Atomic Energy Act, 42 U.S.C. § 2239(a), which provides for a hearing opportunity in NRC licensing cases, Citizens first argue that "the Commission cannot apply the standards for reopening the record to a new contention that raises a new material issue, as opposed to new evidence about an issue that has already been heard." Pet.Br.41. But because this novel assertion "was never presented to the Commission," *Nat'l Whistleblower Ctr. v. NRC,* 208 F.3d 256, 265 (D.C. 2000), Citizens have "waived this argument." *Frank v. Colt Indus., Inc.*, 910 F.2d 90, 100 (3d Cir. 1990).[13]

[13] Below, Citizens merely argued that Section 189a prohibits NRC from excluding from hearings a specific issue it agrees to be material to licensing (R.518at19-21), not (as Citizens now argue) that "the stringency of the

Citizens' supporting authorities are, in any event, inapposite. In *Deukmejian v. NRC,* 751 F.2d 1287 (D.C. Cir.1984), *vac. on other grounds,* 760 F.2d 1320 (D.C. Cir. 1985), the court held that NRC's grant of a low-power license extension constitutes a license amendment, which triggers a hearing opportunity. Hence, the court held, intervenors were entitled to a hearing on their construction quality assurance issue, which NRC could not avoid by relegating intervenors to tougher reopening criteria in a separate, full-power license proceeding. *Id.* at 1316. The court found that the opportunity to seek reopening in the *full power* licensing case was not "an adequate substitute" for the hearing guaranteed intervenors under Section 189a by the amendment extending the *low power* license. *Id.* Here, however, unlike *Deukmejian*, the Commission did not first deny Citizens a hearing in one proceeding and then relegate them to a reopening procedure in a different proceeding.

Moreover, *Deukmejian* did not disallow NRC's use of reopening standards just because an issue is "material" and "unlitigated," as Citizens suggest. Pet.Br.41. If that were so, NRC's reopening standards would be nullified – most reopening issues, like the one here, are by definition "unlitigated." Indeed, in *Deukmejian* itself, the court agreed that denial of

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reopening standards mean[s] that they cannot be applied to new material contentions that deal with unlitigated issues." Pet.Br.41.

the request to reopen a different issue in the operating license hearing "was proper in light of the Commission's high standards for reopening."[14] 751 F.2d at 1316.

This Court, too, has not hesitated to approve NRC decisions against reopening under the agency's usual standards, so long as the decisions are reasonable, notwithstanding the "unlitigated" nature of the reopening issue. *See Three Mile Island Alert*, 771 F.2d at 732-38.

### B. Citizens did not satisfy NRC's criteria for reopening the closed record to consider its metal fatigue contention.

#### 1. NRC's reopening standards create a "deliberately heavy" burden of proof to show safety significance and the likelihood of a materially different result.

The Commission acted well within its discretion in denying Citizens' motion to reopen the record to consider its metal fatigue contention. NRC will not reopen a closed hearing record unless the three criteria of 10 C.F.R. § 2.326(a)(1)-(3) are met, and the motion is "accompanied by affidavits that set forth the factual and/or technical bases" for meeting these criteria. 10 C.F.R. § 2.326(b). For technical claims, the affidavits must come from

[14] The other cases cited by Citizens merely stand for the unremarkable proposition that "NRC may not eliminate from the licensing proceedings consideration of evidence that is relevant to material licensing issues, such as issues raised by emergency preparedness exercises," *Massachusetts. v. NRC,* 924 F.2d 311, 333 (D.C. Cir. 1991); *Union of Concerned Scientists v. NRC,* 735 F.2d 1437, 1438 (D.C. Cir. 1984), and do not discuss reopening standards as an alleged curtailment of hearing rights.

"experts in the disciplines appropriate to the issues raised" and must meet evidence admissibility standards. *Id.*

Reopening a closed hearing record before any federal agency is serious business – so serious that denials of motions to reopen that are unsupported by new information are not judicially reviewable. *See ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 284 (1987); *Beehive Tel. Co., Inc. v. FCC,* 180 F.3d 314, 317-18 (D.C. Cir. 1999). Accordingly, the NRC places a "deliberately heavy" burden on the party seeking reopening to meet its legal and technical criteria (R.546at22). *See generally* R.546at12-14; R.581at71-72.

NRC reopening standards have been approved by this and other courts of appeals for decades. *See Three Mile Island Alert,* 771 F.2d at 732. *Accord, Ohio v. NRC,* 814 F.2d 258, 262 (6th Cir. 1987); *Oystershell Alliance v. NRC,* 800 F.2d 1201, 1207 (D.C. Cir. 1986). Restrictions on reopening are necessary to maintain the integrity of the NRC's hearing process.

In any agency hearing, it is not unusual for information to develop afterwards that arguably bears on the tried issues. It does not follow, however, that this new information necessarily warrants reopening the closed record. "The unfettered ability to file a late contention may

significantly undermine the efficiency of a proceeding *even if the contention is based on newly discovered information.*" *Massachusetts v. NRC,* 924 F.2d 311, 334 (D.C. Cir. 1991) (emphasis added).

**2. NRC rules anticipate a merits-based analysis to determine whether new information meets reopening criteria.**

Citizens argued below that the Board should have reopened the record to admit a new contention asserting that AmerGen's calculation of metal fatigue for the recirculation nozzles at Oyster Creek is not conservative, and that a confirmatory analysis is required (R.517at4). As elsewhere, Citizens complain that the Commission's analysis of the new information they presented to reopen constitutes a premature adjudication of the issues. Pet.Br.45. This is but a reiteration of Citizens' argument that NRC hearing rules must follow federal pleading practice.

What NRC's reopening rule in 10 C.F.R. § 2.326(a)(1)-(3) anticipates – a substantive determination of "safety significance" and potential for "a materially different result" – cannot be achieved in a vacuum. All relevant technical data must be analyzed, including analysis of expert affidavits that meet evidentiary standards. Just a glimpse of the Commission's technical discussion explains why elevated pleading and evidentiary thresholds are appropriate when evaluating highly sophisticated, technical issues such as

recirculation nozzle outlet compliance with ASME Code Section III for Class 1 components (R.546at5-11).[15] Here, the Commission appropriately employed its own expertise (and its Staff's) – an approach this Court has endorsed for reopening decisions – to determine that Citizens' metal fatigue claim lacked sufficient safety significance to require litigating the issue at a restarted NRC hearing.[16] *See Three Mile Island Alert*, 771 F.2d at 732. In such cases, NRC has broad discretion to call upon expertise from extra-record sources. *Id.*

As they did below, Citizens argue that merely showing a *possible* breach of Code requirements suffices to justify reopening. Pet.Br.44-47. The Commission aptly observed, however, that Citizens' "mere showing" standard is "a novel interpretation that misapprehends the plain language of the [reopening] rule" and "would not require specific factual or technical

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[15] For example, Citizens' citation to R.546at18 (Pet.Br.45) involves an extended analysis of whether cladding on the recirculation nozzle must be included in analyzing the nozzle's cumulative use factor (CUF). For technical reasons the Commission explained exhaustively, both ASME Code and NRC guidance expressly allow omitting cladding (R.546at18 n.51).

[16] Although petitioners have not met NRC requirements for reopening, they may still present any safety concerns about the drywell shell or other license renewal issues by invoking the citizen's petition process in 10 C.F.R. § 2.206. *See, e.g., Connecticut Coalition Against Millstone 3 v. NRC,* 2004 WL 2603567, *3 (2d Cir. 2004); *Riverkeeper, Inc. v. Collins*, 359 F.3d 156, 158 (2d Cir. 2004).

information that shows that the purportedly non-conservative cumulative usage factor calculation for the Oyster Creek recirculation outlet nozzle will result in a significant safety issue" (R.546at16).

In fact, as the Commission found, Citizens did not even make a "'mere showing' of a possible violation" (R.546at16). They baldly alleged that AmerGen's calculations of the cumulative usage factor employed non-conservative assumptions and methodologies, but provided no supporting evidence (R.546at17). Citizens argue that non-conservative calculations at other plants supported their claim, but below, they offered information on the Vermont Yankee plant only, which Citizens "failed to link to the site-specific characteristics" (*i.e.*, design and components) of Oyster Creek (R.546at17; R.517at13).

Citizens contend that the Commission impermissibly considered a Staff affidavit refuting their safety claims. Pet.Br.45. But NRC regulations explicitly require expert affidavits that support reopening with factual and technical data meeting evidentiary standards, 10 C.F.R. § 2.326(b), and Citizens did provide an affidavit. The Commission must be free to consider "contrary evidence in determining whether there was a real issue at stake warranting a reopened hearing" (R.517at10, *quoting Private Fuel Storage, L.L.C.*, CLI-05-12, 61 NRC 345, 350 (2005)). *See Three Mile Island Alert,*

771 F.3d at 732.

Citizens' claim that an NRC public relations spokesman admitted the safety significance of their new contention is both unfounded and irrelevant. Pet.Br.38, 46. The spokesman did not address Citizens' contention; he merely commented that severe consequences could result if the nozzle broke (R.546at19). That truism, however, applies to all safety components.[17] A party seeking to reopen must show more than that a component has safety significance because it performs safety functions (R.546at19). The truism that loss of a safety component could have severe consequences, delivered by a non-expert public relations spokesman, did not support reopening.

Finally, the NRC did not err in denying discovery on Citizens' proposed reopening contention. *See* Pet.Br.43-44. NRC's long-established practice disallows any discovery preceding admission of related contentions (R.546at25 n.73). Further, NRC did not try to "stymie" Citizens' access to

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[17] The Board dissent repeated this error, discussing the safety significance of the nozzle as distinct from cumulative use factors (CUF) calculations (R.517Barrata7). This, too, merely restates the safety significance of the component without questioning the conservatism of AmerGen's CUF.

Elsewhere, Citizens claim that calculations upon which NRC relied were not "fully conservative." Pet.Br.39. Logically, a calculation is "fully" conservative only when further conservatism is impossible, which produces a risk of zero. But "zero risk" or "risk free" licensing is not required by the Act or NRC regulations. *E.g., Riverkeeper, Inc. v. Collins,* 359 F.3d 156, 168 (2d Cir. 2004).

documents. Pet.Br.44. NRC maintains and makes public at its website and under the Freedom of Information Act a vast array of documents relating to licensing. But licensees maintain at their power reactors sites and offices an extraordinary volume of documents also relevant to plant licensing, and NRC cannot possibly warehouse all these documents. Therefore, NRC frequently reviews some documents at licensees' plants and offices.

## III. The Commission made all requisite findings for issuing the renewed license for Oyster Creek.

### A. The Board exercised delegated authority to make all requisite findings regarding the actual thickness of the drywell liner.

Citizens claim that the Commission made only a "conditional" finding that the UT program for the Oyster Creek drywell provides reasonable assurance of safety during the license renewal period. Pet.Br.53. This is incorrect. Simply put, the Commission has delegated authority to the Board under 10 C.F.R. § 2.340(a) to make findings on contested issues, subject to Commission review.[18] That is precisely how this case proceeded at NRC.

The hearing below was limited to a single admitted contention

[18] In offering a hearing on the Oyster Creek renewal application, NRC explicitly recited the safety findings that must be made and stated that any contention submitted with a hearing request with respect to the application would be decided by the Commission "or a presiding officer designated by the Commission." 70 Fed. Reg. 54585 (Sept. 15, 2005).

challenging the sufficiency of AmerGen's proposed UT monitoring plan for the drywell (R.437at10; R.99at36). After the hearing, the Board exhaustively reviewed the evidence, upholding the sufficiency of the UT monitoring plan on the merits, and concluded that AmerGen had met its burden of proof by a preponderance of the evidence (R.437at56). The Board summarized its fact-finding in two pages of conclusions:

- "[W]e conclude that AmerGen has demonstrated by a preponderance of the evidence that the acceptance criteria, which currently are satisfied, will also be satisfied at the beginning of the renewal period" (R.437at56).
- "We further conclude that AmerGen has demonstrated by a preponderance of the evidence that the acceptance criteria will be satisfied throughout the renewal period, because there is no likelihood that the sand bed region of the drywell shell will experience significant corrosion during that period" (R.437at56). [19]

[19] The Board concluded that the external wall of the drywell shell "will not experience significant corrosion" because AmerGen's "corrective and mitigative actions," coupled with its aging management program commitments, provide reasonable assurance that water will not leak into that region and, even if it did, would not penetrate the "robust, three-layer epoxy coating." The Board also concluded that the internal wall of the shell in the sand bed region would not experience significant corrosion "given its non-corrosive environment and the absence of any measurable corrosion in the past" (R.437at56-57).

- "Finally, even if we assumed – contrary to our express findings – that the sand bed region would experience measurable corrosion during the renewal period, we conclude that AmerGen has demonstrated by a preponderance of the evidence that its plan to take UT measurements every four years, coupled with the other commitments in its aging management program, is sufficient to ensure the bounding available margin of .064 inch[20] is not violated" (R.437at57).[21]

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[20] The Board explained that its calculation of available margin is conservative because (1) measurable corrosion to date "does not begin to approach the available margin of .064 inch"; (2) the available margin is calculated from a single point in the "most heavily corroded area" of the drywell sand bed region; and (3) the sand that was the source of retained moisture in that region has been removed, "thus increasing our confidence that the frequency of AmerGen's UT measurements will be adequate" (R.437at57).

[21] Judge Baratta wrote an Additional Statement indicating that in his view AmerGen should perform, as part of AmerGen's licensing commitment to perform a 3-D finite element analysis of the shell before the renewal period (R.437Barrata5), "a series of sensitivity analyses, at least one of which includes the use of an extrapolation scheme to determine the thicknesses between the measured locations" (R.437Barrata6). Judge Baratta did not "dissent" from the Board's decision, as Citizens mistakenly claim (Pet.Br.39) – in fact, he explicitly concurred (R.437Barattal). In any event, AmerGen's 3-D analysis commitment was not a part of Citizens' contention, and Judge Baratta did not state that his recommendation was necessary to decide Citizens' contention.

The Commission found these conclusions "reasonable" and declined to disturb them (R.581at4), explicitly endorsing the Board's "reasonable assurance" conclusion disposing of the only admitted contention (R.581at65), and stating that "the Board's fundamental conclusion in LBP-07-17, authorizing issuance of the renewed license, stands on its own" (R.581at65 n.271). The Commission also recited AmerGen's enhanced license commitment to perform an additional 3-D finite element analysis, which would achieve Judge Baratta's objective of enhancing the NRC's "understanding of the drywell shell state" (R.437Baratta5) by performing "a conservative best estimate analysis of the actual drywell shell." (R.581at65). Exelon (formerly AmerGen) did perform the analysis (R.581at67 n.277).

The Commission clarified, however, that "a complete review of Exelon's compliance with the license condition is *not* a precondition for granting the license renewal application and is *separate and apart* from the resolution of the contention at issue in Citizens' Petition" because "review and enforcement of license conditions is a normal part of the Staff's oversight function rather than an adjudicatory matter" (R.581at67-68; emphasis in original).

Accordingly, Citizens err in claiming that NRC did not make sufficient or definitive findings of safety with regard to their admitted

contention. Pet.Br.47-53. The Board made all requisite findings with clarity (*see* 10 C.F.R. § 2.340(a)), and the Commission fully explained why it decided against further discretionary review of those findings. *See* 10 C.F.R. § 2.341(a)(2). Thus, contrary to Citizens' claims, NRC discharged its fact-finding responsibilities for Oyster Creek license renewal with great care and precision.

### B. NRC Staff made all safety findings requisite to licensing for uncontested issues.

Petitioners argue that the Commission failed to make definitive safety findings regarding the Oyster Creek drywell shell because the Commission referred so-called "unresolved safety issues" to its Staff, without adequate oversight by the Commission (Pet.Br.47-61). Here, too, Citizens misapprehend the licensing process.

In issuing a reactor operating license under 10 C.F.R. Part 50 or a renewed operating license under Part 54, NRC Staff, not the Commissioners acting collegially as the Commission,[22] makes *all* safety findings requisite to

[22] In Management Directive 9.27, Ch. 123-03, the Commission delegated to Staff – the Director of Nuclear Reactor Regulation – authority to issue and amend reactor licenses. This Court may judicially notice this directive. *See* http://adamspublic.nrc.gov/FNOpenClient/FnSearchPage.aspx?Library=PU_ADAMS^PBNTAD01&Op=Search (ML041400069). This authority includes renewed licenses in uncontested proceedings (ML021560479). As noted, this delegation is expressly contemplated by 10 C.F.R. § 2.340(i)(1). Thus, once the Commission has disposed of all pending hearing matters, the

issuing the license *except* those pertaining to contentions in contested hearings. *Compare* 10 C.F.R. § 2.340(a) (responsibilities of Board to decide hearing contentions) *with* 10 C.F.R. § 2.340(i)(1) (Staff issuance of license once Director has made "all findings necessary for the issuance of . . . the license, not within the scope of the . . . decision of the presiding officer").

Thus, the "final" or "definitive" safety findings that Citizens demand for Oyster Creek (Pet.Br.47-53) have been made by the Staff for all *uncontested* issues. These findings are recited in the license issued on April 8, 2009.[23] For findings on *contested* issues, however, the Board's findings control (R437at56-58). They constitute the requisite – and "definitive" – NRC findings on contested issues (R.581at 65 n.271). *See* 10 C.F.R. §§ 2.340(a), 2.341(a)(2), 2.344. Once the Board has resolved all hearing contentions, and the Commission has completed any appellate review, "the decision as to all other matters which need to be considered prior to the issuance of the requested license *is the responsibility of the staff and it alone.*" *Public Serv. Co. of New Hampshire* (Seabrook Station), ALAB-

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proceeding is no longer contested. *See* 10 C.F.R. § 2.4.

[23] NRC Staff issued the renewed license for Oyster Creek after the Commission had declined review in CLI-09-07 and after Staff had made all requisite findings. The 250-page license includes all such requisite findings as well as license terms and conditions. *See* ML052720204. Notice of issuance was published at 74 Fed. Reg. 18000 (April 20, 2009).

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854, 24 N.R.C. 783, 791 (1986) (emphasis added).

Here, the Commission "decline[d] to disturb" the Board's findings (R.581at4, 65), and accepted review *only* to provide "clarification and direction to the Staff" (R.581at65) in its "review and enforcement of [Exelon's] license conditions [as] a normal part of the Staff's oversight function rather than an adjudicatory matter" (R.581at67-68). The Commission explicitly stated that Exelon's compliance with proposed License Condition 7 (Exelon's performance of 3-D finite element analysis of the drywell shell) was *not* a precondition for granting license renewal and was separate and apart from resolution of Citizens' contention (R.581at67). Hence, "all appropriate safety findings" (Pet.Br.48) were made for Oyster Creek, either by the Board for contested issues or by the Staff for uncontested issues.

## IV. Citizens' arguments regarding the relationship between the Commission and its Staff do not pertain to admitted contentions and are otherwise without merit.

Citizens offer a mishmash of complaints about the relative role of the Commission and its Staff in license renewal. Citizens' arguments on this score are, frankly, difficult to follow. Below we explain why Citizens' various grievances, as we understand them, are not well-taken.

### A. Intervenors may not contest in hearings the performance of the Staff's review of license applications or the Commission's supervision of the Staff's review.

Citizens argue that the Commission illegally referred unresolved safety issues to NRC Staff and disregarded problems with the Staff's review. Pet.Br.47. Peppered throughout these arguments is the implicit assumption that this Court may review the interaction between the Commission and its Staff. As we noted above, these claims reflect great confusion over the dual but very distinct roles of the Commission as the agency's final adjudicatory decisionmaker, granting discretionary review in NRC adjudications under 10 C.F.R. § 2.341, and as the agency head, supervising its regulatory Staff in the ordinary performance of Staff duties.

Thus, while Commission supervision of its Staff is integral to NRC's licensing of nuclear power plants, this supervision is not grist for the hearing mill in contested cases like Oyster Creek.

In contested cases, intervenors may not raise contentions regarding Staff performance of its review of a license application inasmuch as it is the adequacy of the application, not Staff actions, that must pass muster. NRC rules for license renewal, in particular, are not an invitation for intervenor challenges to the adequacy of Staff review of aging management issues. As the Commission ruled below in denying Citizens' request to stay the Oyster

Creek proceeding (to await an "overhaul" of Staff review procedures):

> The purpose and scope of a licensing proceeding 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. . . .
>
> It is the applicant, not the Staff, that has the burden of proof in litigation. Our contention pleading rules emphasize that the petitioner must show that a "genuine dispute exists *with the applicant/licensee* on a material issue of law and fact. [R.540at 18 (emphasis in original)]

This principle is bedrock NRC law.[24] On appeal, Citizens have not sought review of the Commission's stay-of-proceedings denial (R.540at2-3), which embodies this principle. In fact, Citizens mention this ruling only obliquely. Pet.Br.52.

Citizens' discussion of mandatory uncontested hearings for "early site permits" for new reactors (Pet.Br.50-52) has no relevance to the adjudication of admitted contentions in contested license renewal cases. Early site permits are a component of new-reactor construction permits, a form of

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[24] In adopting changes to its hearing rules, the Commission reiterated that "NRC staff has the independent authority, indeed the responsibility, to review all safety matters," whether or not a hearing occurs. 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004). "The adequacy of the applicant's license application, not the NRC staff's safety evaluation is the safety issue in any licensing proceeding, and under longstanding decisions of the agency, contentions on the adequacy of the [Safety Evaluation Report] are not cognizable in a proceeding." *Id. See Curators of the Univ. of Missouri*, CLI-95-1, 41 NRC 71, 121 (1995).

licensing where hearings are mandated by law, whether or not issues are contested. *See Exelon Generation Co.* (Early Site Permit for Clinton ESP Site), CLI-05-17, 62 NRC 5, 27-28, 34-43 (2005). In license renewal cases, by contrast, no hearings on uncontested issues are mandated. Because *Clinton* and other "early site permit" proceedings are inapposite, these cases provide no support for Citizens' assertion that the Commission is required to review "the Staff's definitive findings of safety on the *uncontested issues*." Pet.Br.52 (emphasis added).

### B. The Commission did not "condition" its safety findings upon further NRC Staff review.

Citizens argue that the Commission failed to make definitive safety findings because it "condition[ed]" its "reasonable assurance" findings upon further NRC Staff review. Pet.Br.53. For reasons discussed in Section III.B, this meritless claim contradicts the Commission's express determinations, first, that all requisite contested safety findings were made by the Board, which the Commission declined to disturb (R.581at4, 65 & n.271), and second, that its direction to the NRC Staff to enhance Exelon's compliance with License Condition 7 was not a "precondition for granting the license renewal application" or resolving Citizens' contention, but rather "a normal part of the Staff's oversight function" (R.581at67).

The Commission did not rule, as Citizens claim, that enhanced NRC

Staff review was intended "to ensure" that the drywell shell "was safe." Pet.Br.54. Safety was already assured by the Board's findings (R.437at56-57) and the Commission's acceptance of those findings. Further, the Commission's directing its Staff to "enhanc[e] its review of Exelon's compliance" with proposed License Condition 7 was anything but a tacit admission that the Staff had not been diligent, as Citizens suggest (Pet.Br.54).[25] It was instead an expression of confidence that the Staff would use its "expertise and engineering judgment to scrutinize carefully Exelon's compliance" (R.581at68).

This approach conforms to longstanding NRC law and practice that, where appropriate, the NRC hearing adjudicator "may refer minor safety matters not pertinent to its basic findings to the NRC staff for post-hearing resolution." *Massachusetts v. NRC,* 924 F.2d 311, 331 (D.C. Cir. 1991). In *Georgia Power Co.* (Vogtle Electric Generating Plant), CLI-92-03, 35 NRC 63, 67 (1992), for example, the Commission dismissed an appeal of a Board decision, but asked NRC Staff "to give further consideration to certain

[25] License Condition 7, like any other reactor license condition, was issued with the (renewed) license. It is therefore incongruous to argue that the Commission "did not require the Staff's review of compliance with condition 7 to be complete prior to the issuance of the license." Pet.Br.54. License Condition 7 required *performance* of the 3-D analysis before the extended period of operation – and Exelon submitted the 3-D report on January 22, 2009 (R.554) – *not* that NRC Staff complete its analysis of the *results* by that time.

matters that appear related . . . to [intervenor's] expressed concerns," noting that "[w]here . . . an adjudication is terminated, we may still refer safety matters of potential concern to the staff for review."

This includes oversight of licensee compliance with licensing conditions, even if (not the case here) those conditions were imposed by an adjudicatory board. *See Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-80-12, 11 NRC 514, 517 (1980). Such referral does not interfere with an intervenor's statutory hearing rights so long as the Board has made the requisite findings on contested issues for issuing the license. *See Consol. Edison Co.* (Indian Point Station), CLI-74-23, 7 AEC 947, 951 (1974). That is exactly what happened here: the Commission directed the Staff to oversee a non-hearing issue, but in no way impinged upon the ability or responsibility of the Board to make the findings requisite to issuance of the license.

### C. The Commission's referral of post-hearing Inspection Report issues to NRC Staff was not error.

Citizens allege that the Commission's post-hearing referral to the Staff of issues arising from an Inspection Report dated January 21, 2009 – well after the record of the hearing closed – was error. Citizens claim that the Report shows that Exelon did not have "aging of the drywell under control prior to licensing" (Pet.Br.59), but do not explain how this post-

hearing report is part of the record, and further, how it pertains to their sole hearing contention – concerning the frequency of UT monitoring.

Hearings are not the exclusive mechanism by which NRC acts to provide reasonable assurance that the licensed facility "will provide adequate protection to the health and safety of the public." *See* 42 U.S.C. § 2232(a). It is precisely the function of NRC Staff to assure, beyond the hearing process, "safe operation of nuclear power plants." *Union of Concerned Scientists v. NRC,* 735 F.2d at 1447.[26] By necessity, the Commission must interact frequently with its Staff – even when the Staff is a party to a licensing hearing – in exercising its "supervisory agency-oversight responsibility" rather than its adjudicatory role. *See, e.g., Tennessee Valley Auth.* (Bellefonte Nuclear Plant), 2010 WL 87743, CLI-10-06, *4 (Jan. 7, 2010).

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[26] *See, e.g., Northern States Power Co.* (Prairie Island Nuclear Generating Plant), LBP-08-26, 68 NRC 905, 942 (2008) (NRC Staff and Applicant will ensure that new inspection requirements are changed if necessary because "Board lacks the authority – much less the ability – to require Applicant clairvoyantly to predict the future inspection requirements and to describe their future implementation"); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station), LBP-05-16, 62 NRC 56, 74 (2005) (not the Board's role "to superintend the manner in which the NRC Staff discharges its regulatory review functions"); *CFC Logistics, Inc.*, LBP-03-20, 58 NRC 311, 337 n.1 (2003) (Board's adjudicatory function "operates independently of the NRC Staff's regulatory function").

Indeed, not long ago, in circumstances similar to the current case, the Board cited the long-recognized rule that Staff performs responsibilities "outside the hearing process," and requested the Commission, "*independent of this adjudication,*" to direct further Staff review of a safety issue beyond the intervenor's litigated contentions. *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-05-12, 61 NRC 319, 330 (2005)(emphasis in original).

The Commission was likewise prompted to act in its supervisory role here when its "emphasis on the Staff's close scrutiny of Exelon's compliance with its drywell liner inspection and evaluation commitments" was "intensified" by Staff notifications and its recent (January 2009) Inspection Report (R.581at68). The Commission observed that "these notifications and inspection report are not part of the evidentiary record – and consequently our comments here are not adjudicatory in nature" (R.581at68).

As the Staff's supervisor, however, the Commission found the Staff's assessment of its inspection findings – the minor blistering and rust stain had a "very low safety significance" – to be "reasonable," and reiterated its expectation that Staff's monitoring would, as always, be "thorough and complete" (R.581at68 & n.280). This was not an unlawful delegation of the

Commission's adjudicatory duties to NRC Staff – the duties were not adjudicatory – but a prudent step to assure the Staff monitors ongoing license compliance.

Citizens argue that the Inspection Report "contradicted three critical findings made by the Board" and "undermined the Board's ultimate finding that the aging management program . . . for the drywell shell to which Exelon has committed would provide reasonable assurance of adequate protection during any extended period of operation." Pet.Br.55-56. But that Report is outside the record. Citizens tried to reopen the record to include it, and to convene a hearing on it, but the Commission found that Citizens did not meet NRC's stringent criteria for reopening (R.581at70-85). Because the Report is *not* part of the evidentiary record, Citizens' claims of its importance are unavailing in this lawsuit.[27]

Citizens were free to seek judicial review of the Commission's refusal to reopen the hearing for new contentions related to the Inspection Report (R.581at70-85), as they have sought review for the denial of reopening to consider a new metal fatigue contention (Pet.Br.38-47). But nowhere in

[27] In considering whether an agency action was arbitrary and capricious, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Town of Winthrop v. FAA*, 535 F.3d 1, 14 (lst Cir. 2008), *quoting Camp v. Pitts,* 411 U.S. 138, 142 (1973).

their opening appellate brief do Citizens unambiguously challenge NRC's denial of reopening regarding the Inspection Report, much less demonstrate that the Commission acted arbitrarily in finding that Citizens' motion to reopen failed to raise a significant safety or environmental issue – the second of the three-prong test for reopening (R.581at73-77).

Citizens cite liberally from Commissioner Jaczko's partial dissent (Pet.Br.56-61), but he actually *supported* the majority in denying Citizens' request for Commission review and their motion to reopen (R.581Jaczko1). His suggestion that the Commission add the Inspection Report to the record, and establish a new condition based on it, rested on the Commission's *sua sponte* powers rather than a perceived gap in the hearing record. Indeed, his reliance on *sua sponte* authority fairly implies concurrence with the majority that reopening criteria were not met.

Insofar as Citizens emphasize inconsistencies between Inspection Report findings and hearing evidence (Pet.Br.56; *compare* R.581at81-82 *with* R.581 Jaczko3-6), such inconsistencies were not significant to safety. The Commission majority found no safety risk:

> Our primary consideration in [deciding against reopening or admitting the Inspection Report *sua sponte*] is whether Commissioner Jaczko's proposed change to Commitment 27 is premised on a safety risk. It is not. The dissent maintains simply that the Inspection Report introduces enough uncertainty about the sufficiency and implementation of Exelon's

> commitments to warrant that the Commission, on its own motion and notwithstanding the safety findings by the Board and the NRC Staff, revise the license condition. We do not find Commissioner's Jaczko's rationale compelling. [R.581at81-82].[28]

Elaborating on the sufficiency of the Board's safety findings and Citizens' failure to satisfy reopening criteria, the Commission majority stated that "the dissent's proposal would undermine our licensing and regulatory process by disregarding much of our Licensing Board's careful review of the drywell shell corrosion issue, by elevating the significance of the Inspection Report (which, after all, found no significant safety issue), and by ignoring our long-established standards for reopening closed adjudicatory records" (R.581at81).

At bottom, neither Commissioner Jaczko nor the Commission majority supported reopening and they agreed that Staff actions overseeing AmerGen's fulfillment of licensing commitments would best address the Inspection Report results. They simply differed on whether one of Exelon's license commitments should be modified.

Finally, Citizens argue that the Inspection Report shows "unresolved issues," which rendered the Board's findings "flawed." Pet.Br.57-58. But

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[28] Commissioner Jaczko would have modified Exelon's existing commitment by adding an inspection to the next refueling outage in 2010 (R.581Jaczkoat1, 7). He did not endorse reopening, further hearings, modification of Board findings, or denial of license renewal.

"flawless" is not an NRC licensing standard under the AEA any more than a judicial standard of review. In any event, Citizens' assertion is contrary to the record. The Commission reasonably found that, even if the Board had applied Citizens' "enormously conservative" calculation of drywell shell corrosion, UT measurements under the approved program "still would be adequate" (R.581at82). That fact, coupled with the myriad of related follow-up activities, "reinforces our confidence that at bottom, the performance deficiencies noted in the Inspection Report do not present significant safety risks and would not have altered the Board's ruling" (R.581at82). And, as noted above, Citizens do not actually challenge NRC's decision not to reopen the record based on the Inspection Report.

### V. The NRC Inspector General's Report on improving transparency in the license renewal process provides no basis for relief.

The Commission denied petitions filed by several public interest groups, including Citizens, in four NRC license renewal proceedings, including Oyster Creek. These petitions asked NRC to "suspend these proceedings until it has conducted a 'comprehensive overhaul' of the manner in which the NRC Staff reviews license renewal applications" (R.540at2). They based their request principally on an audit report by NRC's Office of the Inspector General (OIG) regarding the effectiveness of

the agency's license renewal safety reviews (R.540at2).

Before this Court, Citizens do not challenge denial of the stay, but claim that the Commission failed to verify its Staff's work so that "its decision to approve the [renewed] license for Oyster Creek violated the AEA and was arbitrary." Pet.Br.61.

Here, Citizens do not explain precisely what they are challenging or what relief they seek. As we discussed above, the Commission did not "approve" Oyster Creek's license renewal as such; the Commission simply left undisturbed the Board's decision denying Citizens' contention (R.581at4) and accepted review solely to clarify one non-hearing issue (R.581at33). At that point, license approval was up to the Staff, as we have already shown.

In any event, for the reasons discussed in Section IV.A above, the manner in which NRC Staff reviews any application is beyond the scope of NRC hearings and judicial review afforded by 42 U.S.C §§ 2239(a) and (b). While the Commission responded to the petition to suspend license renewal proceedings, and painstakingly explained how NRC Staff was implementing seven of eight OIG recommendations to improve its review (R.540at10),[29]

[29] Hence, Citizens err in claiming that the Commission ignored opportunities to improve its Staff's review of renewal applications. Pet.Br.5.

the Commission's exercise of inherent supervisory authority is not reviewable.

"That the courts have statutory jurisdiction over an act of the Executive [under the Hobbs Act] does not automatically imply . . . that the courts always have jurisdiction to review that act for conformity with the APA." *Marine Eng'rs' Beneficial Ass'n v. Mar. Admin.*, 215 F.3d 37, 42 (D.C. Cir. 2000). Here, the congressional intent to preclude judicial review of how NRC conducts Staff review of an application is "fairly discernible in the statutory scheme." *Assoc. of Data Processing Serv. Orgs., Inc. v. Camp,* 397 U.S. 150, 157 (1970). Nothing in the AEA calls for judicial oversight of the Commission's supervision of its staff. The AEA "is hallmarked by the amount of discretion granted the Commission in working to achieve the statute's ends." *Public Serv. Co. of New Hampshire v. NRC,* 582 F.2d 77, 82 (1st Cir. 1978); *accord, Massachusetts v. United States,* 522 F.3d 115, 126-27 (1st Cir. 2008); ("statutory directives are scant"); *Nuclear Info. Res. Serv. v. NRC,* 969 F.2d 1169, 1177 (D.C. Cir. 1992) (*en banc)* (AEA gives NRC "broad regulatory latitude").

Because "no judicially manageable standards are available for judging how and when" the Commission should step in to direct changes in its Staff's processing of license applications, judicial "review is not to be had."

*Heckler v. Chaney*, 470 U.S. 821, 830 (1985). There is "no law to apply" to such matters of agency management. *Id.* at 831. Rather, such oversight is "committed to agency discretion." 5 U.S.C. § 701(a)(2).

Internal audits like the OIG report at issue here are directed solely at NRC senior management and Congress. Audits neither offer nor rely upon any law for a court to apply – they offer no "formal and informal statements of the NRC for a standard of review." *Massachusetts Pub. Interest Research Group, Inc. v. NRC,* 852 F.2d 9, 16 (1st Cir. 1988). Further, "courts are ill-equipped to superintend . . . managerial decisions" like NRC's methods of reviewing its Staff's work. *Frakes v. Pierce,* 700 F.2d 501, 504 (9th Cir. 1983). *Accord, Intercity Transp. Co. v. United States,* 737 F.2d 103, 107 (D.C. Cir. 1984).

Even if reviewable, NRC's handling of the OIG Report was hardly an abuse of discretion. "Given the wide latitude an agency has in designing its own proceedings," NRC's decision on the timing of its license renewal hearings, deciding not to suspend those hearing pending a suggested overhaul of Staff review procedures, is "well within the realm of the agency's discretion." *Nat'l Whistleblower Ctr. v. NRC,* 208 F.3d at 264.

Courts are "obliged to defer to the operating procedures employed by an agency when the governing statute requires only that a 'hearing' be

held." *Union of Concerned Scientists,* 920 F.2d at 54. Conversely, "to prevail on a claim that the NRC is bound to conduct its proceedings in a particular manner, a petitioner must point to a statute specifically mandating that procedure, for absent constitutional constraints or extremely compelling circumstances, courts are never free to impose on the NRC (or any other agency) a procedural requirement not provided for by Congress." *Kelley v. Selin,* 42 F.3d at 1511 (internal quotation marks and citations omitted).

Additionally, NRC's response to the OIG audit demonstrates that the agency is diligently engaged in self-examination and self-improvement. Its improvements to NRC Staff's review of license renewal applications, however, are matters of judgment and informed discretion, subject to oversight by Congress rather than the federal courts. The OIG recommendations for improving the effectiveness of the license renewal review programs accepted by NRC (R.540at10-11) were primarily to "improve the transparency of [NRC staff] report writing so that a reader could more easily understand what materials the reviewers evaluated and how they reached conclusions" (R.540at8). As the Commission "suspension-of-proceedings" decision indicated, the OIG Report did not reflect substantive problems either with NRC's Standard Review Plan for License Renewal or the capability of the Staff to conduct safety reviews

conforming to regulatory standards (R.540at18).

Accordingly, even if reviewable, NRC did not abuse its discretion exercising its managerial authority over its Staff in light of the OIG Report.

## CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Respectfully submitted,


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February 24, 2010

## SPECIAL APPENDIX – NRC REGULATIONS

### 10 C.F.R. § 2.4 Definitions.

As used in this part,

. . . . . .

*Contested proceeding* means—

(1) A proceeding in which there is a controversy between the NRC staff and the applicant for a license or permit concerning the issuance of the license or permit or any of the terms or conditions thereof;

(2) A proceeding in which the NRC is imposing a civil penalty or other enforcement action, and the subject of the civil penalty or enforcement action is an applicant for or holder of a license or permit, or is or was an applicant for a standard design certification under part 52 of this chapter; and

(3) A proceeding in which a petition for leave to intervene in opposition to an application for a license or permit
has been granted or is pending before the Commission.

### 10 C.F.R. § 2.206 Requests for action under this subpart.

(a) Any person may file a request to institute a proceeding pursuant to § 2.202 to modify, suspend, or revoke a license, or for any other action as may be proper. Requests must be addressed to the Executive Director for Operations and must be filed either by hand delivery to the NRC's Offices at 11555 Rockville Pike, Rockville, Maryland; by mail or telegram addressed to the Executive Director for Operations, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; or by electronic submissions, for example, via facsimile, Electronic Information Exchange, e-mail, or CD-ROM. Electronic submissions must be made in a manner that enables the NRC to receive, read, authenticate, distribute, and archive the submission, and process and retrieve it a single page at a time. Detailed guidance on making electronic submissions can be obtained by visiting the NRC's Web site at *http://www.nrc.gov/site-help/e-submittals.html*; by e-mail to *MSHD.Resource@nrc.gov*; or by writing the Office of Information Services, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. The

request must specify the action requested and set forth the facts that constitute the basis for the request. The Executive Director for Operations will refer the request to the Director of the NRC office with responsibility for the subject matter of the request for appropriate action in accordance with paragraph (b) of this section.

(b) Within a reasonable time after a request pursuant to paragraph (a) of this section has been received, the Director of the NRC office with responsibility for the subject matter of the request shall either institute the requested proceeding in accordance with this subpart or shall advise the person who made the request in writing that no proceeding will be instituted in whole or in part, with respect to the request, and the reasons for the decision.

(c)(1) Director's decisions under this section will be filed with the Office of the Secretary. Within twenty-five (25) days after the date of the Director's decision under this section that no proceeding will be instituted or other action taken in whole or in part, the Commission may on its own motion review that decision, in whole or in part, to determine if the Director has abused his discretion. This review power does not limit in any way either the Commission's supervisory power over delegated staff actions or the Commission's power to consult with the staff on a formal or informal basis regarding institution of proceedings under this section.

(2) No petition or other request for Commission review of a Director's decision under this section will be entertained by the Commission.

(3) The Secretary is authorized to extend the time for Commission review on its own motion of a Director's denial under paragraph (c) of this section.

**10 C.F.R. § 2.309 Hearing requests, petitions to intervene, requirements for standing, and contentions.**

. . . . . .

(c) Nontimely filings. (1) Nontimely requests and/or petitions and contentions will not be entertained absent a determination by the Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on the request and/or petition and contentions that the request and/or petition should be granted and/or the contentions should be admitted based upon a balancing of the following factors to the extent that they apply to the particular nontimely filing:

(i) Good cause, if any, for the failure to file on time;

(ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;

(iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;

(iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;

(v) The availability of other means whereby the requestor's/petitioner's interest will be protected;

(vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;

(vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and

(viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

(2) The requestor/petitioner shall address the factors in paragraphs (c)(1)(i) through (c)(1)(viii) of this section in its nontimely filing.

. . . . .

(f) Contentions. (1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:

(i) Provide a specific statement of the issue of law or fact to be raised or controverted, *provided further*, that the issue of law or fact to be raised in a request for hearing under 10 CFR 52.103(b) must be directed at demonstrating that one or more of the acceptance criteria in the combined license have not been, or will not be met, and that the specific operational consequences of nonconformance would be contrary to providing reasonable assurance of adequate protection of the public health and safety;

(ii) Provide a brief explanation of the basis for the contention;

(iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

(iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;

(v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's
position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific
sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;

. . . . .

(2) Contentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner may amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's documents. Otherwise, contentions may be amended or new contentions filed after the initial filing only with leave of the presiding officer upon a showing that--

(i) The information upon which the amended or new contention is based was not previously available;

(ii) The information upon which the amended or new contention is based is materially different than information previously available; and

(iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

. . . . .

**10 C.F.R. § 2.326 Motions to reopen.**

(a) A motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied:

(1) The motion must be timely. However, an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented;

(2) The motion must address a significant safety or environmental issue; and

(3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

(b) The motion must be accompanied by affidavits that set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) of this section have been satisfied. Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. Evidence contained in affidavits must meet the admissibility standards of this subpart. Each of the criteria must be separately addressed, with a specific explanation of why it has been met. When multiple allegations are involved, the movant must identify with particularity each issue it seeks to litigate and specify the factual and/or technical bases which it believes support the claim that this issue meets the criteria in paragraph (a) of this section.

(c) A motion predicated in whole or in part on the allegations of a confidential informant must identify to the presiding officer the source of the allegations and must request the issuance of an appropriate protective order.

(d) A motion to reopen which relates to a contention not previously in controversy among the parties must also satisfy the requirements for nontimely contentions in § 2.309(c).

**10 C.F.R. § 2.340 Initial decision in certain contested proceedings; immediate effectiveness of initial decisions; issuance of authorizations, permits and licenses.**

(a) *Initial decision—production or utilization facility operating license.* In any initial decision in a contested proceeding on an application for an

operating license (including an amendment to or renewal of an operating license) for a production or utilization facility, the presiding officer shall make findings of fact and conclusions of law on the matters put into controversy by the parties to the proceeding, any matter designated by the Commission to be decided by the presiding officer, and any matter not put into controversy by the parties, but only to the extent that the presiding officer determines that a serious safety, environmental, or common defense and security matter exists, and the Commission approves of an examination of and decision on the matter upon its referral by the presiding officer. Depending on the resolution of those matters, the Commission, the Director, Office of Nuclear Reactor Regulation or Director, Office of New Reactors, as appropriate, after making the requisite findings, will issue, deny or appropriately condition the license.

. . . . .

(i) *Issuance of authorizations, permits, and licenses—production and utilization facilities.* The Commission, the Director of New Reactors, or the Director of Nuclear Reactor Regulation, as appropriate, shall issue a limited work authorization under 10 CFR 50.10, an early site permit under subpart A of part 52 of this chapter, a construction permit or construction authorization under part 50 of this chapter, an operating license under part 50 of this chapter, a combined license under subpart C of part 52 of this chapter, or a manufacturing license under subpart F of part 52 of this chapter within 10 days from the date of issuance of the initial decision:

(1) If the Commission or the appropriate Director has made all findings necessary for issuance of the authorization, permit or license, not within the scope of the initial decision of the presiding officer; and

(2) Notwithstanding the pendency of a petition for reconsideration under § 2.345, a petition for review under § 2.341, or a motion for stay under § 2.342, or the filing of a petition under § 2.206.

**10 C.F.R. § 2.341 Review of decisions and actions of a presiding officer.**

(a)(1) Except for requests for review or appeals under § 2.311 or in a proceeding on the high-level radioactive waste repository (which are governed by § 2.1015), review of decisions and actions of a presiding officer are treated under this section, provided, however, that no party may request a further Commission review of a

Commission determination to allow a period of interim operation under 10 CFR 52.103(c).

(2) Within forty (40) days after the date of a decision or action by a presiding officer, or within forty (40) days after a petition for review of the decision or action has been served under paragraph (b) of this section, whichever is greater, the Commission may review the decision or action on its own motion, unless the Commission, in its discretion, extends the time for its review.

(b)(1) Within fifteen (15) days after service of a full or partial initial decision by a presiding officer, and within fifteen (15) days after service of any other decision or action by a presiding officer with respect to which a petition for review is authorized by this part, a party may file a petition for review with the Commission on the grounds specified in paragraph (b)(4) of this section. Unless otherwise authorized by law, a party to an NRC proceeding must file a petition for Commission review before seeking judicial review of an agency action.

(2) A petition for review under this paragraph may not be longer than twenty-five (25) pages, and must contain the following:

(i) A concise summary of the decision or action of which review is sought;

(ii) A statement (including record citation) where the matters of fact or law raised in the petition for review were previously raised before the presiding officer and, if they were not, why they could not have been raised;

(iii) A concise statement why in the petitioner's view the decision or action is erroneous; and

(iv) A concise statement why Commission review should be exercised.

(3) Any other party to the proceeding may, within ten (10) days after service of a petition for review, file an answer supporting or opposing Commission review. This answer may not be longer than twenty-five (25) pages and should concisely address the matters in paragraph (b)(2) of this section to the extent appropriate. The petitioning party may file a reply brief within five (5) days of service of any answer. This reply brief may not be longer than five (5) pages.

(4) The petition for review may be granted in the discretion of the Commission, giving due weight to the existence of a substantial question with respect to the following considerations:

(i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;

(ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;

(iii) A substantial and important question of law, policy, or discretion has been raised;

(iv) The conduct of the proceeding involved a prejudicial procedural error; or

(v) Any other consideration which the Commission may deem to be in the public interest.

(5) A petition for review will not be granted to the extent that it relies on matters that could have been but were not raised before the presiding officer. A matter raised sua sponte by a presiding officer has been raised before the presiding officer for the purpose of this section.

(6) A petition for review will not be granted as to issues raised before the presiding officer on a pending motion for reconsideration.

(c) (1) If a petition for review is granted, the Commission will issue an order specifying the issues to be reviewed and designating the parties to the review proceeding. The Commission may, in its discretion, decide the matter on the basis of the petition for review or it may specify whether any briefs may be filed.

(2) Unless the Commission orders otherwise, any briefs on review may not exceed thirty (30) pages in length, exclusive of pages containing the table of contents, table of citations, and any addendum containing appropriate exhibits, statutes, or regulations. A brief in excess of ten (10) pages must contain a table of contents with page references and a table of cases (alphabetically arranged), cited statutes, regulations and other authorities, with references to the pages of the brief where they are cited.

(d) Petitions for reconsideration of Commission decisions granting or denying review in whole or in part will not be entertained. A petition for reconsideration of a Commission decision after review may be filed within ten (10) days, but is not necessary for exhaustion of administrative remedies. However, if a petition for reconsideration is filed, the Commission decision is not final until the petition is decided. Any petition for reconsideration will be evaluated against the standard in § 2.323(e).

(e) Neither the filing nor the granting of a petition under this section stays the effect of the decision or action of the presiding officer, unless the Commission orders otherwise.

(f) Interlocutory review. (1) A question certified to the Commission under § 2.319(l), or a ruling referred or issue certified to the Commission under § 2.323(f), will be reviewed if the certification or referral raises significant and novel legal or policy issues, and resolution of the issues would materially advance the orderly disposition of the proceeding.

(2) The Commission may, in its discretion, grant interlocutory review at the request of a party despite the absence of a referral or certification by the presiding officer. A petition and answer to it must be filed within the times and in the form prescribed in paragraph (b) of this section and must be treated in accordance with the general provisions of this section. The petition for interlocutory review will be granted only if the party demonstrates that the issue for which the party seeks interlocutory review:

(i) Threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or

(ii) Affects the basic structure of the proceeding in a pervasive or unusual manner.

**10 C.F.R. § 2.344 Final decision.**

(a) The Commission will ordinarily consider the whole record on review, but may limit the issues to be reviewed to those identified in an order taking review.

(b) The Commission may adopt, modify, or set aside the findings, conclusions and order in the initial decision, and will state the basis of its action. The final decision will be in writing and will include:

(1) A statement of findings and conclusions, with the basis for them on all material issues of fact, law or discretion presented;

(2) All facts officially noticed;

(3) The ruling on each material issue; and

(4) The appropriate ruling, order, or denial of relief, with the effective date.

**10 C.F.R. § 54.29 Standards for issuance of a renewed license.**

A renewed license may be issued by the Commission up to the full term authorized by § 54.31 if the Commission finds that:

(a) Actions have been identified and have been or will be taken with respect to the matters identified in Paragraphs (a)(1) and (a)(2) of this section, such that there is reasonable assurance that the activities authorized by the renewed license will continue to be conducted in accordance with the CLB, and that any changes made to the plant's CLB in order to comply with this paragraph are in accord with the Act and the Commission's regulations. These matters are:

(1) managing the effects of aging during the period of extended operation on the functionality of structures and components that have been identified to require review under § 54.21(a)(1); and

(2) time-limited aging analyses that have been identified to require review under § 54.21(c).

(b) Any applicable requirements of Subpart A of 10 CFR Part 51 have been satisfied.

(c) Any matters raised under § 2.335 have been addressed.

## CERTIFICATIONS

Pursuant to the Federal Rules of Appellate Procedure and the Local Rules of this Court, the undersigned counsel certifies:

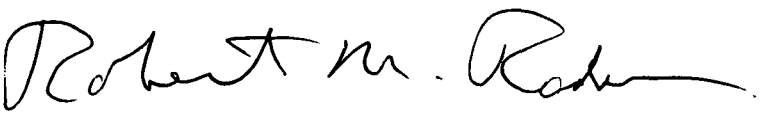
1. I am a member in good standing of the bar of this Court.

2. The foregoing brief of Federal Respondents complies with Fed. R. App. P. 32(a)(7)(B) because this Brief contains 13,981 words, excluding parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii), according to the Microsoft Office Word 2003 software program with which the Brief was prepared.

3. The foregoing Brief complies with Fed. R. App. P 32(a)(5) and Fed. R. App. P. 32(a)(6) because it was prepared in proportionally spaced typeface in 14 point Times Roman font using Microsoft Office Word 2003.

4. The text of the electronically filed brief and hard copies served upon this Court and counsel are the same, as required by Local Rule 31.1.

5. The foregoing Brief was scanned for virus by Symantec Anti-Virus 10.1.6.6010, and no viruses were detected.



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## CERTIFICATE OF SERVICE

I hereby certify that I have on this 24th day of February 2010 served, by direct electronic transmission and the Electronic Filing System, and by overnight service, two copies of Brief for Federal Respondents upon the following:

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