

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

August 27, 2007 (3:40pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Before Administrative Judges:

E. Roy Hawkens, Chair

Dr. Paul B. Abramson

Dr. Anthony J. Baratta

_____)	
In the Matter of:)	August 27, 2007
)	
AmerGen Energy Company, LLC)	
)	Docket No. 50-219
(License Renewal for Oyster Creek Nuclear)	
Generating Station))	
)	
_____)	

**AMERGEN'S MOTION IN LIMINE REGARDING
PORTIONS OF CITIZENS' REBUTTAL**

I. INTRODUCTION

In accordance with 10 C.F.R. §§ 2.1204, 2.323 and 2.337, and the Atomic Safety and Licensing Board's ("Board") Orders of April 19, 2006,¹ and April 17, 2007,² AmerGen Energy Company, LLC ("AmerGen") hereby moves to exclude from consideration portions of: (1) "Citizens"³ Rebuttal Regarding Relicensing of Oyster Creek Nuclear Generating Station" (August 17, 2007) ("Citizens' Rebuttal"); (2) "Pre-Filed Rebuttal Written Testimony of Dr. Rudolf H. Hausler Regarding Citizens' Drywell Contention" ("Testimony"); and (3) Citizens' Exhibits 39 and 40 (both of which are memoranda from Dr. Hausler, dated August 16, 2007).

¹ Memorandum and Order (Prehearing Conference Call Summary, Initial Scheduling Order, and Administrative Directives) (unpublished).

² Memorandum and Order (Prehearing Conference Call Summary, Case Management Directives, and Final Scheduling Order) (unpublished) ("April 17 Order").

³ "Citizens" are: Nuclear Information and Resource Service; Jersey Shore Nuclear Watch, Inc.; Grandmothers, Mothers and More for Energy Safety; New Jersey Public Interest Research Group; New Jersey Sierra Club; and New Jersey Environmental Federation.

The Board must exclude, or, in the alternative, accord no weight to⁴ the specified portions of these documents because: (1) Citizens impermissibly challenge the Oyster Creek Nuclear Generating Station (“OCNGS”) current licensing basis (“CLB”); (2) Citizens impermissibly present arguments based on the assumption that AmerGen will violate its regulatory commitments; (3) Citizens’ Exhibit 39 does not respond to the direct testimony of the other parties; (4) Citizens present a variety of other arguments that are outside the scope of this proceeding; and (5) Citizens present arguments with no evidentiary basis that are, therefore, unreliable.⁵

II. LEGAL STANDARDS

Section II.A of AmerGen’s Motion in Limine to Exclude Portions of Citizens’ Initial Written Submission⁶ provides the legal standards generally applicable to the admissibility of evidence and motions in limine in NRC proceedings. In sum, 10 C.F.R. § 2.337(a) states that, “[o]nly relevant, material, and reliable evidence . . . will be admitted” Based on this standard, Boards have excluded testimony and exhibits on issues that are outside the scope of the admitted contention or the proceeding.⁷ Further, this Board has limited rebuttal to those issues that respond to the direct testimony of other parties,⁸ and in its ruling on motions in limine

⁴ Memorandum and Order (Ruling on Motions in Limine and Motion for Clarification) at 2 (Aug. 9, 2007) (unpublished) (“Aug. 9 Order”). The Board has determined that it will “refrain from actually expunging . . . irrelevant material” and will instead “accord it no weight.” Aug. 9 Order at 2. However, AmerGen’s position remains that inadmissible evidence cannot be admitted into evidence at the hearing. As a result, and in order to ensure that all of AmerGen’s rights are fully preserved, AmerGen objects to the admission of these materials here, and expects to express its objection to the admission of these materials at the hearing. Given the Board’s prior ruling, however, this Motion states hereafter that the inadmissible material must be accorded “no weight.”

⁵ Counsel for AmerGen has consulted with Citizens’ and NRC Staff counsel regarding this Motion in accordance with 10 C.F.R. § 2.323(b). Citizens’ counsel does not concur with this Motion. NRC Staff counsel indicated that the Staff would respond as appropriate after review of the Motion.

⁶ July 27, 2007.

⁷ See, e.g., *Louisiana Energy Services, L.P.* (National Enrichment Facility), Licensing Board Memorandum and Order (Ruling on In Limine Motions and Providing Administrative Directives) (Jan. 21, 2005) (unpublished).

⁸ April 17 Order at 5-6.

following direct testimony, this Board has determined that it “will accord no weight” to evidence that is “irrelevant or otherwise inadmissible.”⁹

III. INADMISSIBLE PORTIONS OF CITIZENS’ REBUTTAL

A. Citizens Once Again Impermissibly Challenge the OCNGS CLB

Section II of Citizens’ Rebuttal is simply an attempt to relitigate Citizens’ previously-rejected acceptance criteria contentions. Section II’s title states that it is responding to Board Question 12(e). That question requested a discussion of whether “[b]ecause Oyster Creek’s [CLB] is based on the GE methodology . . . consideration of a different modeling or elementization would constitute, under NRC regulations, a challenge to the CLB.”¹⁰ In Section II of Citizens’ Rebuttal, however, they again offer their own interpretation of and opinions about what the appropriate acceptance criteria should be in the OCNGS CLB, including various arguments that the buckling criteria are not *currently* part of the CLB.¹¹ But the Board’s question and previous rulings in this proceeding preclude an argument that the buckling acceptance criteria are not part of the CLB.¹²

⁹ Aug. 9 Order at 2.

¹⁰ *Id.* at 11-12 (emphasis added).

¹¹ *E.g.* Citizens’ Rebuttal at 6 (“Thus, Citizens assert that the NRC did not grant a license amendment based on the GE modeling. The license therefore requires the licensee to show that the shell meets the ASME code requirements.”); *id.* at 8 (“Citizens have found no evidence that the GE tray model or any specific local area acceptance criteria form part of the CLB.”).

¹² Memorandum and Order (Denying Citizens’ Motion for Leave to Add a Contention and Motion to Add a Contention) (Apr. 10, 2007) (unpublished) (“April 10 Order”) (rejecting as non-timely a challenge to the GE modeling underlying the acceptance criteria); *AmerGen Energy Company, LLC* (Oyster Creek Nuclear Generating Station), LBP-06-22, 64 N.R.C. 229, 237-40 (2006) (“LBP-06-22”) (also rejecting as non-timely a challenge to the GE modeling underlying the acceptance criteria); *see also* April 10 Order at 3 n.6; Memorandum and Order (Denying AmerGen’s Motion for Summary Disposition) at 2 n.4 (June 19, 2007) (unpublished) (“June 19 Order”) (reiterating the inadmissibility of any challenge to “AmerGen’s modeling for deriving acceptance criteria”); Aug. 9 Order at 6 (“Citizens may not challenge the derivation of the acceptance criteria, or how the criteria are applied in the current licensing term.”). In addition to the impermissible arguments in Section II, Citizens also continue to use the incorrect acceptance criteria throughout their rebuttal. *See, e.g.*, Citizens’ Rebuttal at 14 (“of the criteria used the most justifiable is to limit areas that are less than 0.736 inches thick to be both smaller than 12 inches by 12 inches and thicker than 0.636 inches on average.”); Hausler Rebuttal Testimony at 3 (A6). To the extent Citizens continue to argue that OCNGS’ calculation-

For these reasons, essentially all of Section II of Citizens' Rebuttal must be accorded no weight.

B. Citizens May Not Submit Arguments Based on a Presumption that AmerGen Will Violate Its Commitments

Citizens argue that water from the reactor cavity could reach the external sand bed region during those *forced* outages when the reactor cavity is filled with water.¹³ Their argument is based, in part, on the allegation that AmerGen will not apply a strippable coating to the reactor cavity prior to filling the reactor cavity with water for forced outages.¹⁴ AmerGen has a commitment docketed with the NRC to use strippable coating during any outage—refueling or forced—when the reactor cavity will be filled with water.¹⁵ Citizens' argument, therefore, necessarily implies that AmerGen will violate its commitment.

The Commission has held that, "in the absence of evidence to the contrary, the NRC does not presume that a licensee will violate agency regulations wherever the opportunity arises."¹⁶ In *PFS*, the Commission refused to "assume" that "unexpected" conditions would "induce PFS to ignore its [commitments] to train and employ a sufficient number of firefighters."¹⁷ Similarly,

specific values for its UT thickness evaluations are established "acceptance criteria" under the CLB, their arguments on this point must be accorded no weight.

¹³ Citizens' Rebuttal at 23.

¹⁴ Hausler Rebuttal Testimony at 9 (A20) (Thus, Citizens allege that "water could flow onto the exterior of the drywell shell in the sandbed region if a forced outage occurred that required the reactor cavity to be flooded without having the leakage mitigation measures applied.").

¹⁵ Applicant's Exh. 10, Encl. at 2 of 13; AmerGen Direct Testimony, Part 1, A.27.

¹⁶ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-9, 53 N.R.C. 232, 235 (2001) ("*PFS*"); see also *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 N.R.C. 193, 207 (2000) ("[T]his agency has declined to assume that licensees will contravene our regulations.").

¹⁷ *PFS*, 53 N.R.C. at 235.

Citizens may not argue that the Board should assume that unexpected conditions will induce AmerGen to violate its commitment to apply a strippable coating to the reactor cavity liner.¹⁸

Thus, the Board must accord no weight to Citizens' arguments that are based on the assumption that AmerGen will violate its Primary Containment Inspection Program commitments.

C. Citizens' Exhibit 39 Does Not Respond to the Direct Testimony of AmerGen or the NRC Staff

Citizens' Exhibit 39 fails to meet the following Board requirement for rebuttal testimony:

written responses and rebuttal testimony with supporting affidavits *directed to the initial statements and testimony of other participants* . . . providing a "road map" that identifies the legal and factual weaknesses in an opponent's position, identifies rebuttal witnesses and evidence, and *specifies the precise purpose* of rebuttal witnesses and evidence.¹⁹

Further, "[b]eing in the nature of rebuttal, the response is not to advance any new affirmative claims or arguments that reasonably should have been, but were not, included in the party's previously-filed initial written statement."²⁰

Specifically, Exhibit 39 is a 24-page memorandum from Dr. Hausler titled, "Further Discussion of the Nature of the Corroded Surfaces and the Residual Wall Thickness of the Oyster Creek Dry Well" that fails to meet these basic standards. It is nothing more than an essay in which Dr. Hausler rehashes his opinions on a variety of topics, with almost no specific references to the direct testimony of the other parties. Buried in this extensive memorandum are only three citations to the NRC Staff's Initial Statement of Position and a single specific citation

¹⁸ Nor may Citizens argue that the decision not to use strippable coating in the 1994 and 1996 refueling outages provides evidence that AmerGen will disregard its commitments. At that time, there was no docketed commitment to use these specific mitigation measures.

¹⁹ April 17 Order, at 5 (emphasis added).

²⁰ *Id.* at 6.

to AmerGen's direct testimony. This lack of specificity makes it nearly impossible to determine whether individual statements are intended to rebut evidence, what evidence they rebut, or if they impermissibly offer new arguments. Thus, Exhibit 39 utterly fails to provide a focused rebuttal of the arguments of other parties, and instead amounts to a de facto second attempt at direct testimony.

For these reasons, the Board must accord no weight to Citizens' Exhibit 39.

D. Citizens' Argument that the Epoxy Coating Does Not Cover Inaccessible Areas of the Sand Bed Region is Impermissible

Citizens argue that "AmerGen has failed to establish that the epoxy coating was applied to all of the drywell shell in the sand bed region."²¹ Allegedly, this is because AmerGen's "[i]nternal documents . . . indicate that areas of the shell in the sand bed region were not coated with epoxy because they are inaccessible."²² Thus, Citizens appear to allege that there could be ongoing corrosion in uncoated areas of the drywell shell that are not being monitored under AmerGen's existing UT monitoring program or Protective Coating Monitoring and Maintenance Program ("PCMMP"). There is no UT *frequency* that would resolve Citizens' concern.

This argument is yet another attempt by Citizens to challenge the spatial scope of AmerGen's UT monitoring program and AmerGen's PCMMP.²³ The Board has excluded both of these issues from the admitted contention,²⁴ so this material must be accorded no weight.

²¹ Citizens' Rebuttal at 21; *see also id.* at 18-19.

²² Hausler Rebuttal Testimony at 10 (A21).

²³ *See, e.g.*, Supplement to Petition to Add a New Contention at 7 (June 25, 2006) ("the monitoring for moisture and coating integrity is inadequate . . . the scope of the UT monitoring is insufficient to systematically identify and sufficiently test all the degraded areas").

²⁴ LBP-06-22, 64 N.R.C. at 249-51 (rejecting Citizens' challenge to the "spatial scope of AmerGen's UT monitoring program" as "nontimely"); *id.* at 245 (rejecting Citizens' challenge to "AmerGen's monitoring program for epoxy coating integrity" as "nontimely"); *see also* Aug. 9 Order at 6 ("arguments challenging the spatial scope of UT are not litigable in this proceeding").

E. Citizen's Use of Extreme Value Statistics Is Impermissible

Citizens' Rebuttal and Testimony include detailed use of "extreme value statistics,"²⁵ which Dr. Hausler defines as an "alternative approach" that "was developed in order to predict damage from extreme weather conditions."²⁶ Citizens use this technique to speculate about the thickness of the drywell shell in areas where measurements are not taken,²⁷ going far beyond the scope of what the Board has allowed—namely criticism of the "manner in which AmerGen has applied its statistical analysis" and "organizing and displaying AmerGen's data through the use of contour plots."²⁸ Accordingly, the discussion and use of extreme value statistics must be accorded no weight.²⁹

F. Citizens' Argument That There Is "Likely" To Be A Spot Thinner Than 0.49" Is Impermissible

Citizens argue that there is "uncertainty that the thinnest spot on the drywell was actually measured."³⁰ Moreover, Citizens state: "Dr. Hausler shows that if 40 measurements had been taken in Bay 13, extreme value statistics show that it is likely that a point thinner than 0.49 inches . . . would have been observed."³¹ In other words, Dr. Hausler speculates that if UT measurements were taken at additional locations, then a violation of the 0.490" pressure criterion would be identified. There is no UT *frequency* that would resolve Citizens' concern. These

²⁵ See, e.g., Citizens' Rebuttal at 18; Hausler Rebuttal Testimony at 7-8 (A17); Citizens' Exh. 38 at 7-8.

²⁶ Citizens' Exh. 38 at 7-8.

²⁷ Hausler Rebuttal Testimony at 7-8 (A.17).

²⁸ Aug. 9 Order at 4. AmerGen notes that the data can be plotted without the use of extreme value statistics. See, e.g., Applicant's Exh. 28.

²⁹ AmerGen notes that the Board asked about the use of extreme value statistics in Question 10 in the context of how NACE and other organizations treat UT data. AmerGen does not believe Question 10 authorized broad treatment of AmerGen's data using extreme value statistics.

³⁰ Citizens' Rebuttal at 18.

³¹ *Id.*

statements go to the scope, rather than the frequency of UT measurements. As a result, they must be accorded no weight.

G. Citizens Provide No Evidence for Alleged Trough Defects in the “Most Recent Outage”

Citizens state that the trough below the reactor cavity “is still subject to high temperatures that could cause the concrete to deteriorate and the condition of the trough was seen to be far from ideal in the *most recent outage*.”³² Citizens only purported support is their Exhibits 48 and 49. Yet, these exhibits concern the 1996 and 1986 inspections, respectively, so they provide no substantive support for the statement regarding current and future conditions. Accordingly, the statement is unreliable and must be accorded no weight.

H. Citizens Provide No Evidence for a 10 Mils Per Year Interior Corrosion Rate

Citizens state that for the interior drywell surface “it is prudent to allow for a corrosion rate of up to 10 mils per year after new water is introduced onto the interior floor.”³³ This corrosion rate lacks support, as there is no citation to supporting authority and Dr. Hausler does not use this value in any of his memoranda.³⁴ It is, therefore, unreliable and must be accorded no weight.

I. Citizens’ Argument that the Drywell Shell Currently Violates the Acceptance Criteria Is Impermissible

Dr. Hausler argues that “AmerGen’s latest analysis actually demonstrates non-compliance with the local area acceptance criterion.”³⁵ In other words, Dr. Hausler is arguing that the drywell shell does not *currently* meet the acceptance criteria. The Board already has

³² Citizens’ Rebuttal at 20 (emphasis added); *see also* Hausler Rebuttal Testimony at 9 (A20).

³³ Citizens’ Rebuttal at 23.

³⁴ Dr. Hausler merely states that the rate “could be a multiple of 0.002 inches per year,” Citizens’ Exh. 39, at 20.

³⁵ Hausler Rebuttal Testimony at 5 (A13).

ruled that “Citizens may not challenge . . . how the [acceptance] criteria are applied during the current licensing term.”³⁶ Accordingly, this statement must be accorded no weight.

J. Citizens Provide No Support for Dr. Hausler’s Discussion of Galvanic Corrosion

Dr. Hausler states that “[i]t has also been said that the corrosion damage was caused by *galvanic corrosion*” which “is defined as occurring between dissimilar metals.”³⁷ Dr. Hausler provides no support for the second part of this statement, so it must be accorded no weight.

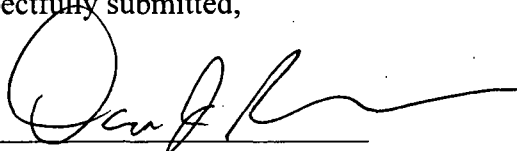
³⁶ Aug. 9 Order at 6.

³⁷ Citizens’ Exh. 39, at 2.

IV. CONCLUSION

For the foregoing reasons, the Board must accord no weight to the portions of Citizens' Rebuttal, Testimony, and Exhibits 39 and 40 identified in this Motion.

Respectfully submitted,



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Dated in Washington, D.C.
this 27th day of August 2007.

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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)

) August 27, 2007

AmerGen Energy Company, LLC)

) Docket No. 50-219

(License Renewal for Oyster Creek Nuclear
Generating Station))
)
)
_____)

CERTIFICATE OF SERVICE

I hereby certify that copies of "AmerGen's Motion in Limine Regarding Portions of Citizens' Rebuttal" were served this day upon the persons listed below, by e-mail and first class mail, unless otherwise noted.

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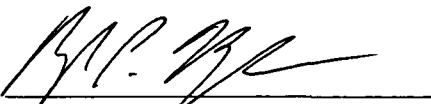
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