

June 5, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
AMERGEN ENERGY COMPANY, LLC) Docket No. 50-219-LR
)
(Oyster Creek Nuclear Generating Station))

NRC STAFF'S ANSWER TO CITIZENS' MOTION
TO SUPPLEMENT THE BASIS OF THEIR CONTENTION

INTRODUCTION

Pursuant to § 2.323(c), the Staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby responds to "Citizens' Response to Board Order and Motion to Supplement the Basis of Their Contention" (May 27, 2008) ("Motion to Supplement"). As explained below, Citizens' Motion to Supplement should be denied.

BACKGROUND

On April 18, 2008 Citizens filed a motion to "Reopen the Record and for Leave to File a New Contention, and Petition for Leave to File a New Contention, and Petition to Add a New Contention" ("Motion to Reopen"). The Staff and AmerGen responded on April 28, 2008.¹ On May 5, 2008, Citizens filed a reply to AmerGen in which they limited their new proposed contention to the assertion: "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 operation." Reply by [Citizens] to AmerGen's Opposition to Their

¹ See AmerGen's Answer Opposing Citizens' Motion to Reopen the Record and Add a New Contention (Apr. 28, 2008); NRC Staff's Response in Opposition to Citizens' Motion to Reopen and Add a New contention (Apr. 28, 2008).

Petition to Add a New Contention (May 5, 2008) (“May 5 Reply”).² Also on May 5, 2008, counsel for AmerGen sent a letter to the Chairman of the Commission enclosing AmerGen’s May 1, 2008 response to the NRC Staff’s request for additional information (“RAI”) concerning the reactor recirculation outlet nozzle fatigue analysis. See Letter from Alex S. Polonsky, Counsel for AmerGen, to Dale E. Klein, Chairman of the U.S. Nuclear Regulatory Commission (May 5, 2008) (“RAI response”).³ On May 9, 2008, the Commission referred the matter regarding whether to reopen the record to this Board for appropriate action. On May 21, 2008, this Board issued an order directing the parties to submit an affidavit accompanied by a pleading explaining the impact, if any, of the RAI response on Citizens’ Motion. See Order (Directing Parties to Submit Explanatory Pleadings and Affidavits) (Unpublished) (“May 21 Order”) at 2. On May 27, 2008, Citizens filed a response to the Board’s May 21 and added the instant Motion to Supplement the basis of their proposed new contention. Therein Citizens

² Citizens previously contended:

(1) The predictions of metal fatigue for at least 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 the allowable metal fatigue limits during any extended period of reactor operation. (2) In addition, similar confirmatory analyses must be carried out for other structures for which the nonconservative analysis was used. (3) Finally, the current stress-based metal fatigue monitoring program at Oyster Creek is inadequate because it relies upon nonconservative analysis techniques.

Motion by [Citizens] to Reopen the Record and for Leave to File a New Contention, and Petition to Add a New Contention (Apr. 18, 2008) (“April 18 Motion”) at 12 (numbers added). However, following AmerGen’s and the Staff’s response to their April 18 Motion, Citizens withdrew parts 2 and 3 of their proposed contention. See Citizens’ Reply to AmerGen’s Opposition to Citizens’ Motion for Leave to File a Reply, and Citizens’ Reply (Apr. 28, 2008) at 3.

³ It should be noted that contrary to Citizens’ assertion, AmerGen’s RAI response was not an unsworn submission. See, e.g., Motion to Supplement at 5. Rather, as the RAI response clearly states, it was submitted to the Staff under penalty of perjury per 28 USC 1746. This satisfies the Commission’s oath or affirmation requirement. See Regulatory Issue Summary 2001-018, Requirements for Oath or Affirmation (Aug. 22, 2001).

assert that AmerGen's RAI response "confirms" that their proposed new contention raises a significant safety issue and provides additional bases for their contention.

This Board has not yet ruled on Citizens' Motion to Reopen. Thus, the issues of whether Citizens have met their burden of satisfying all the requirements of 10 C.F.R. § 2.326 and whether Citizens' proposed new contention calling for a "confirmatory analysis using a conservative method" to determine whether the reactor recirculation outlet nozzles could exceed allowable metal fatigue limits during any extended period of operation is admissible (i.e. whether Citizens proposed new contention satisfies the requirements of 10 C.F.R. §§ 2.309(c), (f)(1) & (f)(2))⁴ have not yet been resolved and the record remains closed.

DISCUSSION

The Staff has briefed the requirements for admission of contentions numerous times in this proceeding and, most recently, in NRC Staff Response in Opposition to Citizens' Motion to Reopen the Record and for Leave to File and Add a New Contention (Apr. 28, 2008) ("April 28 Response") at 18-19. The Staff has also briefed the requirements for motions to reopen, including the requirements for admission of contentions after the record has been closed. See April 28 Response at 4-6; 14-16; NRC Staff's Response in Opposition to Citizens' Motion for Leave to Reply to NRC Staff's Opposition to Citizens' Motion to Reopen (May 15, 2008) at 4-6.

As part of their Motion to Supplement, Citizens assert that AmerGen's RAI response "confirms" that their proposed new contention raises a significant safety issue and provides additional bases for their contention. Motion to Supplement at 9. Citizens assert that AmerGen's confirmatory analysis (which showed a lower environmentally adjusted cumulative

⁴ The Staff again notes that Citizens are explicitly required by § 2.326(d) to demonstrate that their proposed new contention(s) satisfy the requirements of § 2.309(c).

usage factor (“CUFen”) is not conservative, an “appropriately conservative analysis would show that the CUFen would be greater than allowable by the [current licensing basis] at some point during any period of extended operation” (*Id.* at 9-10) and, therefore, “problems with the metal fatigue calculations raise significant safety issues, because, if they go uncorrected, a violation of the CLB could occur and the regulations regarding TLAA would be violated” (*Id.* at 10). This is Citizens’ third attempt⁵ to demonstrate a significant safety issue, and, once again, Citizens have failed.

Section 2.326(b), governing motions to reopen, requires expert affidavits for purposes of demonstrating a significant safety issue. Section 2.309(f)(1)(v), one of the provisions governing admissibility of contentions, requires that contentions be supported by a concise statement of facts and/or expert opinion. Citizens’ assertions are not supported by fact or expert opinion. Counsel for Citizens argues that Oyster Creek’s current licensing basis (“CLB”) is that the CUFen should be less than 1.0. See Motion to Supplement at 9 (citing the NUREG1875 Safety Evaluation Related to the License Renewal of Oyster Creek Generating Station (Apr. 2007) at 3-170 to 3-172 (“SER”) and the Oyster Creek License Renewal Application at 4-45 to [sic] 4-36 (“LRA”). However, neither the SER nor the LRA are part of Oyster Creek’s CLB⁶ and neither

⁵ The first attempt was in Citizens’ April 18 Motion. The second was in their May 5 Reply.

⁶ CLB is defined in 10 C.F.R. § 54.3. The CLB is defined as:

[T]he set of NRC requirements applicable to a specific plant and a licensee’s written commitments ensuring compliance with and operation within the applicable NRC requirements and the plant-specific design basis (including all modifications and additions to such commitments over the life of the license) that are docketed and in effect. The CLB includes the NRC regulations contained in 10 CFR Parts 2, 19, 20, 21, 26, 30, 40, 50, 51, 54, 55, 70, 72, 73, 100 and appendices thereto; orders; license conditions; exemptions; and technical specifications. It also includes the plant-specific design-basis information defined in 10 CFR 50.2 as documented in the most recent final safety analysis report
(continued. . .)

document states on the cited pages that Oyster Creek's CLB is that the CUFen (as opposed to *non*-environmentally the cumulative usage factor ("CUF")) should be less than 1.0. Citizens' assertions are not supported by expert opinion because nowhere in his Second Declaration does Dr. Joram Hopenfeld state that his concerns about Oyster Creek's metal fatigue calculations (original or confirmatory) raise a significant safety issue, that a violation of Oyster Creek's CLB could occur, or that the ASME code requires a CUFen of 1.0.⁷ Instead Dr. Hopenfeld speculates that *if* AmerGen's decision to neglect the nozzle cladding in the confirmatory calculation of the CUF is not justified, the CUFen would likely exceed 1.0. Second Declaration of Dr. Joram Hopenfeld at ¶9 ("Second Hopenfeld Declaration"). In addition, the Second Hopenfeld Declaration provides no support for Citizens' assertion that AmerGen's confirmatory analysis did not comply with the ASME code or made unjustified assumptions. See Motion to Supplement at 9. Instead Dr. Hopenfeld opines that some of AmerGen's assumptions *may* not be justified and therefore *he* cannot conclude that AmerGen's confirmatory analysis is conservative. See Second Hopenfeld Declaration at ¶¶7-11. Moreover, Dr. Hopenfeld's Second Declaration does not affirmatively state that a significant safety issue

(. . .continued)

(FSAR) as required by 10 CFR 50.71; and the licensee's commitments remaining in effect that were made in docketed licensing correspondence such as licensee responses to NRC bulletins, generic letters, and enforcement actions, as well as licensee commitments documented in NRC safety evaluations or licensee event reports.

10 C.F.R. § 54.3

⁷ Likewise, Dr. Hopenfeld's previously declaration does not support these assertions. See Declaration of Dr. Joram Hopenfeld (Apr. 15, 2008). See *also* NRC Staff's Response in Opposition to Citizens' Motion to Reopen the Record and For Leave to File and Add a New Contention (Apr. 28, 2008) at 6-7 (discussing Dr. Hopenfeld's April 15, 2008 declaration and noting that the declaration merely alleges that AmerGen's metal fatigue analysis may not be conservative and does not address safety significance).

has arisen. Rather, Citizens' counsel opines without any reference or citation that a significant safety issue has been established by an alleged violation of the CLB regarding the CUFen. See Motion to Supplement at 9-10. Thus, Citizens have again failed to demonstrate a significant safety issue, and their supplemental basis for their new proposed contention is not supported by facts or expert opinion and is therefore inadmissible.

In addition to asserting that AmerGen's RAI response "confirms" that their proposed new contention raises a significant safety issue, Citizens assert that AmerGen may not rely on its confirmatory analysis to demonstrate that Citizens have not raised a significant safety issue. Motion to Supplement at 10. Citizens have apparently forgotten that *they* have the burden of showing a significant safety issue for purposes of reopening the record, and *they* have the burden of demonstrating that they have raised an admissible new contention. See April 28 Response at 4-6.

Finally, Citizens assert that the RAI response provides additional bases for their proposed new contention. Specifically, Citizens assert that the RAI response demonstrates that original analysis is not conservative and, because AmerGen is still relying on the original analysis, AmerGen should be required to show that the original analysis *is* conservative. See Motion to Supplement at 9-10. Citizens argue, therefore, that they have raised a material dispute with the licensee. See *Id.* at 9. This assertion is flawed.

One of the showings Citizens must make to supplement or add to their proposed new contention is that the issue raised by their contention is material to the findings the Staff must make to support the action. 10 C.F.R. § 2.309(f)(1)(iv). There is no requirement that AmerGen demonstrate or that the Staff find that the analysis AmerGen relies upon is more or less conservative than any other analysis. Therefore, even if the Board finds that Citizens have satisfied the requirements of § 2.326 and their proposed new contention, as stated in their

Motion to Reopen and May 5 Reply, is admissible, the issue of whether AmerGen's original analysis is conservative is not material and is inadmissible.

CONCLUSION

For the reasons set forth above, Citizens' Motion to Supplement should be denied.

Respectfully submitted,

/RA/

Mary C. Baty
Counsel for NRC Staff

Dated at Rockville, Maryland
this 5th day of June 2008

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER TO CITIZENS' MOTION TO SUPPLEMENT THE BASIS OF THEIR CONTENTION" in the above-captioned proceeding have been served on the following by electronic mail with copies by deposit in the NRC's internal mail system or, as indicated by an asterisk, by electronic mail, with copies by U.S. mail, first class, this 5th day of June 2008.

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