RAS 11192

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
E. Roy Hawkens, Chair
Dr. Paul B. Abramson
Dr. Anthony J. Baratta

In the Matter of:	February 17, 2006
AmerGen Energy Company, LLC	Docket No. 50-219
(License Renewal for Oyster Creek Nuclear Generating Station)	

AMERGEN'S ANSWER TO PETITIONERS' MOTION FOR LEAVE TO ADD CONTENTIONS OR SUPPLEMENT THE BASIS OF THE CURRENT CONTENTION

I. INTRODUCTION

On February 7, 2006, Petitioners in the above-captioned proceeding[1] submitted to the Atomic Safety and Licensing Board ("Board") a "Motion for Leave to Add Contentions or Supplement the Basis of the Current Contention" ("Motion"). Petitioners' Motion apparently was triggered by a January 31, 2006, public conference call hosted by the NRC Staff, the subject of which was proposed Interim Staff Guidance ("ISG") regarding the generic consideration of drywell shell corrosion in Mark I containments. Petitioners erroneously characterize the discussions regarding the proposed ISG as

1 Petitioners are Nuclear Information and Resource Service ("NIRS"), Jersey Shore Nuclear Watch, Inc. ("JSNW"), Grandmothers, Mothers and More for Energy Safety ("GRAMMIES"), New Jersey Public Interest Research Group ("NJPIRG"), New Jersey Sierra Club ("NJ Sierra Club"), and New Jersey Environmental Federation ("NJEF").

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constituting new material facts relevant to their pending contention. This simply is not the case. As discussed below, Petitioners' Motion: (1) constitutes an unauthorized pleading that, contrary to Commission rules, continues to reargue points previously made by Petitioners; (2) fails to provide sufficient substantive grounds for admission of Petitioners' previously-filed contention on the drywell shell; and (3) fails to meet the standards for the admission of new, late-filed contentions. For these reasons, Petitioners' Motion should be denied. In addition, AmerGen respectfully requests that the Board not allow Petitioners' late pleading to interfere with its timely ruling on Petitioners' Petition to Intervene.

II. PETITIONERS HAVE FAILED TO ADEQUATELY JUSTIFY ADMISSION OF THEIR ORIGINAL CONTENTION

A. Petitioners' Request To Supplement The Basis For Their Current Contention Constitutes An Unauthorized Pleading And Should Be Rejected

Petitioners have requested that the allegedly new information upon which they base their Motion "be added to the basis originally submitted for the initial contention." Motion at 10. In their original Petition to Intervene, Petitioners submitted one contention relating to potential corrosion and integrity of the Oyster Creek Nuclear Generating Station ("OCNGS") drywell shell. *See* Request for Hearing and Petition to Intervene (Nov. 14, 2004). AmerGen and the NRC Staff submitted Answers to the Petition, and Petitioners filed a Reply in accordance with 10 C.F.R. § 2.309(h)(1) and (2). *See* AmerGen's Answer Opposing NIRs, *et al.* Request for Hearing and Petition to Intervene (Dec. 12, 2005); NRC Staff Answer to Request for Hearing and Petition to Intervene (Dec. 14, 2005).

In response to arguments improperly presented for the first time in Petitioners' Reply, AmerGen next filed a Motion to Strike (*see* AmerGen Motion to Strike (Dec. 29, 2005)) and Petitioners responded (*see* Petitioners' Opposition to AmerGen Motion to Strike (Jan. 13, 2006)). All of these pleadings addressed the admissibility of the drywell contention. The Board then set a schedule to rule on Petitioners' standing and their sole contention before the end of this month. *See* Memorandum (Feb. 2, 2006).

In a last-ditch effort to shore-up an inadmissible contention, Petitioners once again are improperly seeking to bend the rules and add arguments contrary to NRC regulations. Specifically, under 10 C.F.R. § 2.309(f)(2), "[c]ontentions must be based on documents or other information available at the time the petition is to be filed." In addition, under 10 C.F.R. § 2.309(h)(3), other than a Petitioner's Reply, "[n]o other written answers or replies will be entertained." Thus, Petitioners' current request to supplement the basis for their original contention at this late stage (and on the brink of an imminent Board decision on admissibility), constitutes an unauthorized pleading.

The Motion is nothing but a thinly veiled attempt by Petitioners to obtain a third bite at the apple. This should not be permitted by the Board. AmerGen respectfully requests that the Board expeditiously reject that portion of the Motion that seeks to "supplement" the basis for Petitioners' original contention and, in accordance with its published schedule, issue a decision on the admissibility of all previously-filed contentions.

B. The Alleged "New" Information Does Not Provide An Adequate Basis For Admission Of Petitioners' Original Contention

Petitioners' Motion is based upon the recent availability of certain alleged "critical new information." Motion at 1. Petitioners exclusively rely on a January 31,

2006, public conference call hosted by members of the NRC Staff, as well as documents provided by the Staff in support of the conference call. *See* Petitioners' Exhibit B (PowerPoint slides prepared by the NRC Staff). The purpose of the conference call was to discuss the possible issuance of a draft ISG related to the aging management of drywell shell corrosion in all reactors with Mark I-type containments. *See id.* slide 1.

Petitioners' Motion is rife with a number of mischaracterizations of the information presented in advance of the conference call as well as during the call itself. There are numerous reasons why these mischaracterizations do not present a "genuine dispute . . . on a material issue of law or fact" (10 C.F.R. § 2.309(f)(1)(vi)) and, therefore, do not provide any additional basis for admitting Petitioners' original contention.[2]

First, Petitioners' allege that the NRC Staff has "*concluded* that corrosion of the Mark 1 reactor drywell liner is a major safety-related issue that has not received sufficient attention to date." Motion at 3 (emphasis added). This is a blatant mischaracterizion of the NRC Staff's position, as the Staff has not yet rendered any conclusions on the issue. The conference call was an informal discussion between the NRC Staff and the Nuclear Energy Institute ("NEI") on possible, future changes to a non-binding generic guidance document. The purpose of the conference call was to provide an informal opportunity for the Staff to discuss the possible issuance of an ISG on monitoring and management of Mark I drywell shell corrosion.

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[2] Petitioners have selectively cited the applicable standards for admission of a contention. While they note that a contention must be "material to the findings the N.R.C. must make" (see Motion at 6, citing 10 C.F.R. § 2.309(f)(1)(iv)), they ignore the additional requirement that there be a "genuine dispute ... on a material issue of law or fact." *See* 10 C.F.R. § 2.309(f)(1)(vi). The failure to identify any new information specific to, or affecting, OCNGS demonstrates that no such genuine dispute has been raised.

The Staff has not yet decided whether to issue the ISG, let alone reached definitive conclusions regarding its substantive content and recommendations for industry. In fact, a second public meeting to discuss the proposed ISG is scheduled to take place at the NRC on February 28. *See* ADAMS Accession No. ML060450728. If the Staff goes forward with the ISG, it will first publish the ISG in draft for public review and comment before it is finalized. Even if the ISG is finalized, it will then represent only interim guidance and recommendations for industry—eventually to be included in a future revision of the Generic Aging Lessons Learned ("GALL") report, which itself, is a non-binding Staff guidance document. Thus, Petitioners' references to these preliminary discussions, in tandem with their failure to tie those deliberations to any actual noncompliance with 10 C.F.R. Part 54 at OCNGS, further underscores the defectiveness in their original proposed contention.

Second, Petitioners fail to provide any new information *specific* to OCNGS and fail to show how the generic matters addressed in the conference call affect the OCNGS License Renewal Application ("Application"). Petitioners' characterizations of the NRC Staff slides and subsequent conference call with NEI relate to the *generic* issue of Mark I drywell shell corrosion and the Staff's proposal for a *generic* response to that issue. There is nothing in Petitioners' Motion that addresses the significance of these generic deliberations to the Application. For example, Petitioners have made no effort to point out whether, or to what degree, AmerGen has relied on the GALL to meet aging

management requirements, or to demonstrate whether AmerGen has, in fact, performed root cause analyses to evaluate the causes of potential leaks and resulting corrosion.[3]

Furthermore, many of Petitioners' assumptions and conclusions are simply in error and thus fail to raise a genuine dispute of material fact or law. For instance, Petitioners' statement that the Staff has concluded that Mark I drywell shell corrosion "has not received sufficient attention to date" (Motion at 3), ignores the fact that the NRC Staff has paid significant attention to this issue. Specifically, it issued a Generic Letter on this issue in 1987 and Information Notices in 1986 and 1991. *See* Generic Letter 87-05; Information Notice 86-99 and Supplement 1 (attached as Petitioners' Exhibits 1 and 2). Even though the Staff is now considering whether the industry as a whole should pay additional attention to the potential for Mark I drywell corrosion for purposes of license renewal, such consideration, in and of itself, does not create a new genuine dispute of material law or fact specific to the Application.[4]

Next, Petitioners state that one of the members of the NRC Staff made an oral statement that the GALL report "does not provide sufficient guidance for detecting and monitoring potential corrosion . . . particularly in inaccessible areas." Motion at 3. Such oral statements by individual NRC Staff members do not create a genuine dispute of material law or fact.

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[3] Petitioner's unsupported conclusion that there is a current "corrosion problem" at OCNGS is also wrong. Drywell corrosion obviously is an issue that has been the subject of extensive time, attention, and resources over the years at OCNGS. For purposes of license renewal, AmerGen has identified appropriate Aging Management Programs to address the issue for the period of extended operation. But there is no current corrosion problem at OCNGS, and there is nothing in the proposed ISG to support Petitioners' conclusion.

[4] Petitioners' new argument is based on possible future generic safety guidance and anticipated NRC safety review. An admissible contention, however, must be based on the Application and not on the NRC's safety review of that application. *See* 10 C.F.R. § 2.309(f)(1)(vi).

Petitioners also state that the Staff is proposing "a number of modifications to GALL, highlighting the need to carefully evaluate both the corrosion itself and potential sources of water, including cracks in the concrete containment and the refueling seal at the top of the drywell liner," Motion at 3; *id* at 2 ("AmerGen has failed to carry out an adequate root cause analysis for the corrosion problem"); *see also* Dr. Hausler's Memorandum ("[a]ccording to the NRC no root cause analysis of the sources of this water has been carried out").[5] The record is clear, however, that AmerGen has carefully evaluated not only the potential for corrosion of the drywell shell itself, but also potential sources of water. For example, the License Renewal Application states:

> To validate UT measurements and characterize the form of damage *and its cause* (i.e., due to the presence of contaminants, microbiological species, or both) core samples of the drywell shell were obtained at seven locations. The core samples validated the UT measurements and confirmed that the corrosion of the drywell is due to the presence of oxygenated wet sand and exacerbated by the presence of chloride and sulfate in the sand bed region.

Application at 3.5-19 (emphasis added). Similarly, Petitioners' own Exhibit 2 to its original Petition (NRC Information Notice 86-99, Supplement) recognized:

> The licensee has taken action to investigate, identify, and correct leak paths into the drywell gap and plans to take more action to survey the leakage and prevent it. . . . For the refueling cavity, *all* potential leakage pathways have been thoroughly checked and *liner cracks* were sealed with adhesive stainless steel tape before a strippable coating is applied. Since the *refueling cavity* is flooded only during refueling, no leakage concerns exist at other times. At the end of the outage, the refueling cavity is drained, and the tape and *strippable coating* are removed. The licensee found leaks related to the equipment pool and stopped them with liner weld repairs. The equipment pool also will be protected with a strippable coating during flooded periods of operation.

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[5] Dr. Hausler provides no basis for this misinformed belief. *See id.* at 3 ("to date I *understand* that no root cause analysis has been carried out") (emphasis added).

Petitioners' Exhibit 2, at 2 (NRC Information Notice 86-99, Supplement (Feb. 14, 1991)) (emphasis added). Thus, the Staff's generic concerns do not create a genuine material issue specific to the Application, nor have the Petitioners provided anything new about potential sources of water at OCNGS relevant to this proceeding.

Petitioners next cite a statement made by an NRC Staff member that "some license applicants have failed to include the refueling seal in the scope of their license renewal." Motion at 3. This statement demonstrates the generic nature of the proposed ISG, and undermines Petitioners' argument that this purported new information is specific to the Application. There is no regulatory requirement that the refueling seal be included in the scope of license renewal. Consistent with regulatory requirements, the Application discusses the scoping of the refueling seal (*see* Application at Section 2.4.2), and Petitioners had the opportunity to challenge this part of the Application in their initial Petition. They failed to do so in a timely manner, and are prohibited from doing so now.

Petitioners next quote the following language that the Staff is proposing to include in the ISG:

> The source of water has been shown to be the seal between the refueling cavity and the drywell. GALL Report recommends root cause analysis and further evaluation, when potential for corrosion is indicated in the inaccessible areas of the drywell.

Motion at 4. As noted above, AmerGen already has clearly recognized and addressed the potential for water leakage in the Application. Furthermore, also as noted above, consistent with the potential GALL recommendations discussed to date, AmerGen already has performed extensive root cause analyses that cover the "inaccessible" areas of the drywell.

Petitioners next cite another oral statement made by an NRC Staff member during the call, that ultrasonic testing ("UT") would be required in inaccessible areas where there is a potential for corrosion. *Id.* at 4. Even if Petitioners have accurately quoted this Staff member, an oral statement by a single NRC Staff member in informal discussions during a conference call does not provide significant new information that creates a genuine dispute of material law or fact relating to the OCNGS drywell shell. Furthermore, there is no genuine issue here because AmerGen already is performing UT in these inaccessible areas. *See* AmerGen's Answer at 24; Application at 3.5-18 and 4-55.

Petitioners have also erroneously stated that AmerGen and the NRC Staff "argued that the original contention should be limited to corrosion in the sand bed region." Motion at 10. AmerGen and the NRC Staff said nothing of the sort, and Petitioners' sloppy mischaracterization does not alter that fact. As is clearly reflected in both AmerGen and the Staff's prior pleadings, AmerGen and the Staff argued that Petitioners' original contention related to the sand bed *and* upper regions of the drywell shell, and was inadmissible as to both regions. *See* AmerGen's Answer at 23-31; NRC Staff's Answer at 14-17.

Petitioners also allege that the January 31 conference call and accompanying slides buttress their argument regarding the lower, embedded portions of the drywell shell. Motion at 10. To reach that erroneous conclusion, however, Petitioners must—and do—incorrectly equate the Staff's discussion in the conference call of "inaccessible" areas with the "embedded" portion of the drywell shell. *Id.*

Petitioners' own Exhibit B makes it clear that Petitioners have completely misconstrued the Staff's proposal. In discussing the scope of *existing* language in the GALL Report, the Staff states that "For inaccessible areas of the drywell . . . [the GALL] Report only addresses embedded steel containment shell or liner." Petitioners' Exhibit B, slide 6. This is a clear acknowledgement that the GALL Report already addresses the embedded portions of the drywell shell.[6] Since the GALL Report already addressed this area of the drywell shell, Petitioners argument that this is new information fails.[7]

The Staff does go on to define those aspects of the GALL Report that it *may* decide to modify in the future:

> The GALL Report does not provide sufficient guidance when the drywell shell area is surrounded by concrete structure *and the distance between the shell and the surrounding concrete is too small for performing visual examination (VT).*

Petitioners' Exhibit B, slide 6 (emphasis added). The Staff also states that: "For inaccessible areas, where shell surface is embedded in sand, *or separated from concrete by moisture barrier or insulation* . . . [s]uch areas need further evaluation that includes root cause analysis." *Id.*, slide 11 (emphasis added).

The Staff is generically referring to the area *above* the lower embedded portions; namely the sandbed and upper regions of Mark I drywell shells. The sandbed region at OCNGS, however, is accessible for VT because the sand has been removed. *See*

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[6] *See also*, Petitioners' Exhibit B slide 7, Columns 3 and 7, which makes clear that the GALL Report already addresses "embedded shell and sand pocket regions" and "embedded containment steel shell or liner."

[7] AmerGen demonstrated that Petitioners' Reply Brief, for the first time, raised concerns regarding the lower, embedded portion of the drywell shell. *See* AmerGen Motion to Strike (Dec. 29, 2005). Petitioners' Motion is another attempt to resurrect the same argument.

AmerGen Answer at 21; Application at 3.5-20 (2000 and 2004 visual inspections of sandbed region). Thus, at OCNGS, the only area that would be subject to the ISG is the upper region of the drywell where insulation and the small annular space prevent visual inspections. Of course, this is the region of the drywell for which AmerGen is performing UT measurements. *See* Application at 3.5-21. Thus, the January 31 conference call had nothing to do with the lower, embedded portions of the OCNGS drywell shell, and thus cannot serve as a basis for admission of a contention that extends to that portion of the drywell shell.

For all these reasons, Petitioners have failed to demonstrate—yet again—that there is a genuine dispute of material law or fact. Accordingly, their drywell contention remains inadmissible, and Petitioners unauthorized request to admit it should be denied.

III. PETITIONERS HAVE FAILED TO PROVIDE AN ADEQUATE BASIS FOR ADMISSION OF THEIR NEW CONTENTIONS

Petitioners argue alternatively that the Board should admit two new contentions also related to drywell shell corrosion. In order to admit new contentions, the Board must find that Petitioners have satisfied the general requirements for admissibility contained in 10 C.F.R. § 2.309(f)(1), and the late-filing requirements in 10 C.F.R. §§ 2.309(c) and (f)(2). The Petitioners have done neither.

A. Petitioners' First Proposed New Contention

Petitioners' first new contention alleges that AmerGen's:

> monitoring regime for the inaccessible areas of the drywell liner is inadequate, and must at least include ongoing regular, direct measurements of thickness at all areas where corrosion could have occurred . . . and clear acceptance criteria for the measurements.

Motion at 11.

Petitioners provide the following three general bases for this new contention: "the new information presented by N.R.C. on January 31, 2006, a new memorandum from Dr. R.H. Hausler[8] . . . and all the information previously submitted to support the initial contention." *Id.* (emphasis added). As discussed above, inaccessible areas at OCNGS, as defined by the NRC, would be limited to the upper region of the drywell shell, and would exclude the sandbed region and the underlying region that is embedded in concrete.

1. Petitioners' Have Failed to Satisfy the General Admissibility Standards in 10 C.F.R. 2.309(f)(1)

Petitioners were obligated to make a "minimal showing that material facts are in dispute, indicating that a further inquiry is appropriate." Motion at 7 (citing *Georgia Inst. of Tech.*, CLI-95-12, 42 NRC 111, 118 (1995). As an explanation of the basis for this first new contention, Petitioners state that the NRC has "now concluded that, where corrosion is a possibility, ultrasonic [] testing of the drywell liner in inaccessible areas is required." *Id.* at 11.

As discussed above, Petitioners' interpretation of the proposed ISG is simply wrong. The NRC Staff has "concluded" nothing. Petitioners' reference to a single oral statement by a single NRC Staff member hardly constitutes a Staff "conclusion" that UT in inaccessible areas is required. This misinterpretation of the facts fails to meet the Commission's standards for an admissible contention.

There also is nothing "material" about preliminary discussions regarding possible future changes to a non-binding guidance document. Materiality presumes that the

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[8] A petitioner's own Memorandum cannot be the basis for a contention. It can only support the basis. *See* 10 C.F.R. § 2.309(f)(1)(v). A petitioner could otherwise generate new bases at its

(footnote continued)

outcome of the proceeding can be affected by the new information. *See* 10 C.F.R. § 2.309(f)(1)(iv); *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 2), LBP-03-12, 58 NRC 75, 92 (2003) *aff'd* CLI-03-14, 58 NRC 207 (2003) *recon. denied*, CLI-03-18, 58 NRC 433 (2003). The January 31 conference call was the first of perhaps many calls and meetings to discuss an NRC Staff proposal. The next meeting, for example, will be on February 28. This proposal may never be converted into an ISG and, even if it ultimately is, the ISG—as with all guidance—would not be binding on a license renewal applicant. AmerGen fails to see how such a speculative, tenuous and ultimately non-binding document could satisfy the Commission's standards for "materiality."

The Staff's preliminary discussions also are not material because the proposed ISG raises, at best, a generic safety issue. The NRC has a longstanding practice of *not* addressing generic safety issues in individual licensing proceedings. *See Long Island Lighting Company* (Shoreham Nuclear Power Station), ALAB-99, 6 AEC 53, 55 (1973) ("the introduction of essentially generic issues, not unique to any given reactor, would be inappropriate in an individual reactor licensing proceeding"); *see e.g. Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 86 (1985); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179 (1998)).

The second basis for Petitioners' first new contention is their reliance on Dr. Hausler. Specifically, "Dr. Hausler points particularly to the interface between the concrete at the bottom of the liner and the steel liner as an area where corrosion is *likely*

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whim, creating "new" information to justify an otherwise late-filed contention.

to be occurring ...." Motion at 11 (emphasis added). Petitioners also rely on Dr. Hausler for the notion that "removal of the sand *probably* shifted the location where the highest rate of corrosion is occurring to the embedded area of the liner below the concrete floor." *Id.* (emphasis added). These unsupported, speculative statements wander far afield from the purported underlying "new information" raised in the Staff's January 31 conference call. As discussed above, the sole focus of the proposed ISG is inaccessible areas of the drywell shell. These areas are defined by the NRC in the very slides that Petitioners attach as Exhibit B which, when applied to OCNGS, exclude the sandbed region and the underlying portion of the drywell shell that is embedded in concrete. Dr. Hausler misses this point.

In summary, none of Petitioners' bases provides adequate justification for the first new late-filed contention.

2. Petitioners Have Failed to Satisfy the Late Filing Requirements of 10 C.F.R. 2.309(c)

This new contention also should be dismissed because Petitioners made no effort to meet the requirements of Section 2.309(c). Petitioners argue that because they have filed a timely petition, they may add safety-related contentions if they meet the requirements of 10 C.F.R. § 2.309(f)(2). Motion at 7-8. Asserting that their new contentions are timely under Section 2.309(f)(2), Petitioners argue that they need not address the requirements for non-timely filings in 10 C.F.R. § 2.309(c). Motion at 8. Petitioners rely solely on a Licensing Board decision for support. *See* Motion at 8 (citing *Entergy Nuclear Vermont Yankee, L.L.C.* (Vermont Yankee Nuclear Power Station), LBP-05-32, 2005 NRC LEXIS 207 (Dec. 2, 2005)).

They are mistaken. In *Vermont Yankee*, a Licensing Board granted standing to petitioner New England Coalition ("NEC") and admitted several contentions challenging Entergy's extended power uprate application. 2005 NRC LEXIS 207, at *1. The Board then granted Entergy's motion to dismiss one contention because it was mooted by a new engineering report. LBP-05-24, 62 NRC 429, 434 (2005). The Board, however, provided NEC with twenty days to challenge the adequacy of the engineering report. *Id.* at 433.

In its timely Motion requesting leave to file a new contention, NEC addressed the substance of Sections 2.309(f)(2) *and* 2.309(c). *See* NEC Request for Leave to File a New Contention (Sept. 21, 2005) (ML052700382). Finding the new contention timely under Section 2.309(f)(2), the Board thought it "contradictory" to consider the late-filing requirements of Section 2.309(c). 2005 NRC LEXIS 207 at *15-16. The Board nonetheless analyzed the contention against the standards in Section 2.309(c) and ruled that the contention met the "requirements of 10 CFR § 2.309(c), (f)(1), and (f)(2)." *Id.* at *15-16, 27. Thus, while the Board noted an apparent inconsistency between the requirements of Section 2.309(c) and (f)(2), it analyzed the contention using both provisions.

The circumstances of this proceeding are readily distinguishable from the facts in *Vermont Yankee*. First, in that case, the Board *invited* NEC to submit a new contention and determined ahead of time that its contention would be timely if filed within 20 days. 62 NRC at 433. That is not the case here. Second, unlike NEC, Petitioners did not even address the substance of Section 2.309(c). This Board, therefore, cannot analyze whether those factors have been met.

Finally, in *Vermont Yankee*, the Board had already granted NEC standing and admitted several of NEC's contentions. 2005 NRC LEXIS 207, at *1. Here, the Board has not yet ruled on Petitioners' standing or admitted its contention. Petitioners do not mention these procedural differences when they argue that *Vermont Yankee* is relevant authority.

3. Petitioners Have Failed to Satisfy the Late Filing Requirements of 10 C.F.R.,2.309(f)(2)

Even if the Board were to venture further in its analysis, it would find that Petitioners' attempt to meet the requirements of Section 2.309(f)(2) is deficient. This provision permits the Board to grant leave to file new or amended contentions (i) based on information "not previously available;" (ii) based on information "materially different than information previously available;" and (iii) if the "amended or new contention has been submitted in a timely fashion based on the availability of subsequent information."

First, there is absolutely nothing new about the NRC's concern for drywell shell corrosion of Mark I-type containments. Petitioners themselves devote more than 10 pages of their initial Petition to Intervene towards recounting the history of the drywell shell corrosion issue at Oyster Creek. Petitioners' Exhibits filed along with that initial Petition included NRC Information Notices and other NRC correspondence related to the issue. *See* Petitioners' Exhibits 1 through 4. The January 31 telephone call involved generic information that presents no new information relative to this historical issue as it pertains to OCNGS.

Nor is this information materially different than information previously available. As discussed above, the draft ISG upon which Petitioners rely is limited to that portion of the drywell shell where there is a separation between the drywell shell and the concrete

and there is a moisture barrier or insulation in the intervening space. At OCNGS, this is the upper region of the drywell shell that was clearly encompassed by Petitioners' original contention. It is also the area where AmerGen is already performing UT. Thus, the "new" information proffered by Petitioners hardly constitutes information that is "materially different" than that previously available.

Petitioners go on to discuss Dr. Hausler's views regarding the lower, embedded portions of the drywell shell. Motion at 11-12. Since the Staff conference call did not relate to this subject, there is no reason Dr. Hausler could not have expressed those views earlier – particularly since it is Petitioners' position that its original contention encompassed the lower, embedded portions of the drywell shell. In addition, to the extent that Petitioners are also relying on information "previously submitted," they of course are not relying on "previously unavailable" information.

Finally, Petitioners seem to believe that if their initial contention is dismissed, they can simply file another contention arguing some or all of the same issues contained in the rejected contention. They are mistaken. The Commission's policy on adjudications is focused on efficient and meaningful, rather than wasteful and redundant, proceedings. *See* Final Rule; Changes to Adjudicatory Process, 69 Fed. Reg. 2182 (2004).

For all these reasons, Petitioners' request for admission of this first new contention should be denied.

B. Petitioners' Second Proposed New Contention

Petitioners' second new contention alleges that:

> AmerGen must conduct a root cause analysis of the corrosion problem and implement a verifiable program to eliminate leakage of water onto the drywell liner.

Motion at 13. As bases, Petitioners again rely not only on the information from the January 31 conference call, but also on Dr. Hausler's new memorandum and other information "previously submitted." *Id.* at 14.

1. Petitioners' Have Failed to Satisfy the Standards in 10 C.F.R. 2.309(f)(1)

Petitioners have failed to raise a genuine dispute of material fact or law. As an explanation of the basis for this second new contention, Petitioners state that the NRC Staff "have recommended that root cause analysis of corrosion problems in accessible areas be carried out in addition to aging management programs." *Id.* Dr. Hausler also states that "[a]ccording to the NRC no root cause analysis of the sources of this water has been carried out" and "to date I understand that no root cause analysis has been carried out." Hausler Memorandum at 3. As discussed above, all that the NRC Staff has recommended at this time is further public discussion on the proposed ISG. Even if a root cause analysis were *required*, this basis does not raise a genuine dispute of material fact or law because root cause analyses have already been performed with regard to historic drywell corrosion issues at Oyster Creek. See discussion above at page 11. The fact that Petitioners and Dr. Hausler mischaracterize the Staff's proposal and overlook the discussion of previously conducted root cause analyses does not raise a genuine dispute.

The second basis for Petitioners' contention is their reliance on Dr. Hausler. Motion at 14. Petitioners vaguely state that the Staff's "recommendation is heartedly seconded by Dr. Hausler" and that "Dr. Hausler adds that because direct testing *might miss* some areas of corrosion, a verifiable program to prevent water reaching the drywell liner must supplement the requirement for direct monitoring and root cause analysis." *Id.* (emphasis added). Dr. Hausler's statements are nothing more than speculation,

unsupported by any analysis. Such speculation does not support the admissibility of a contention. *See, e.g., Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358-9 (2001). In addition, as discussed above, the NRC Staff is not yet taking any course of action other than to continue to meet to discuss a proposed ISG. Finally, Dr. Hausler and Petitioners ignore one of their very own exhibits which explains the program already in place to prevent the leakage of water on to the drywell shell. *See* Petitioners' Exhibit 2, at 2.

In summary, Petitioners' mischaracterization of the January 31 conference call, and Dr. Hausler's unsupported statements are inadequate to support an admissible contention.

2. Petitioners Have Failed to Satisfy the Late Filing Requirements of 10 C.F.R. 2.309(c) and (f)(2)

Finally, this new contention should be dismissed because, as discussed above, Petitioners made no effort to address the requirements of Section 2.309(c). Petitioners' attempt to meet the requirements of Section 2.309(f)(2) is equally deficient. AmerGen's response to this contention is the same as the response provided above in Section III.A.3. For the reasons discussed above, neither Dr. Hausler's memorandum nor previously-submitted information constitutes new information that was "not previously available." 10 C.F.R. § 2.309(f)(2). As for Petitioners' allegations based upon the January 31 conference call, again as discussed above, AmerGen has already undertaken the very root cause analyses that Petitioners are now requesting. Moreover, AmerGen already has in place "a verifiable program to prevent water reaching the drywell liner." Motion at 14; *see* Petitioners' Exhibit 2, at 2.

Thus, Petitioners have presented no new information that is materially different

than that previously available. As a result, their request for admission of this new contention should be denied as well.

IV. CONCLUSION

Petitioners' latest attempt to amend their sole contention is unauthorized and fails to identify a genuine dispute of material fact or law. Petitioners' argument in the alternative, to proffer two new late-filed contentions, also has no substantive merit and lacks legal foundation. Because the new contentions lack an adequate basis and fail to meet the late-filing requirements of 10 C.F.R. §§ 2.309(c) and (f)(2), they should be dismissed by the Board.

Respectfully submitted,

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Dated in Washington, D.C.
this 17th day of February 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
E. Roy Hawkens, Chair
Dr. Paul B. Abramson
Dr. Anthony J. Baratta

In the Matter of:	)	February 17, 2006
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 Answer To Petitioners' Motion For Leave To Add Contentions or Supplement the Basis of the Current Contention were served this day upon the persons listed below, by E-mail and first class mail, unless otherwise noted.

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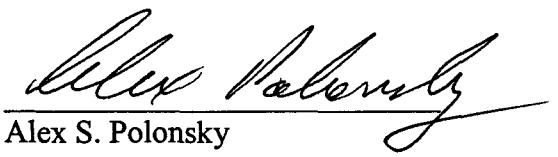

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