

August 30, 2007

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 ANSWER IN OPPOSITION TO
CITIZENS' MOTION TO CROSS-EXAMINE PETER TAMBURRO

INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.1204 and 2.323, and "Memorandum and Order (Prehearing Conference Call Summary, Case Management Directives, and Final Scheduling Order)" (April 17, 2007) (unpublished) ("April 17 Order"), at 7, the staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby answers Citizens'¹ "Motion to Cross-Examine Peter Tamburro and for an Extension of Time Regarding NRC's Errata" (August 14, 2007) ("Motion").² For the reasons set forth below, the Staff opposes Citizens' Motion.

DISCUSSION

Citizens request to use a Subpart G procedure—cross-examination by the parties³—because they presume and assert in conclusory fashion that the Board's examination of Mr. Tamburro would not produce an adequate record for decision. See Motion at 2. Citizens' request should be rejected.

¹ The six organizations--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--are collectively referred to as "Citizens."

² Because the Board has ruled on Citizens' request for extension of time, this response only addresses the request for cross-examination. See Order (Ruling on Citizens Motion for an Extension of Time) (August 28, 2007) (unpublished).

³ See 10 C.F.R. § 2.711 (authorizing cross-examination by the parties in Subpart G proceedings).

This is a 10 C.F.R. Part 2, Subpart L proceeding. See Memorandum and Order (Denying NIRS's Motion to Apply Subpart G Procedures) (June 5, 2006) (unpublished) ("June 5, 2006 Order"). Pursuant to 10 C.F.R. § 2.1204(b)(3), the presiding officer in a Subpart L proceeding may authorize cross-examination by the parties if he or she determines that cross-examination "is necessary to ensure development of an adequate record for decision." Citizens, however, have not shown that the Board's examination, which will include questions proposed by Citizens and other parties to the proceeding, will not ensure an adequate record for decision on Citizens' admitted contention (*i.e.*, whether the frequency of AmerGen's UT monitoring is sufficient to maintain an adequate safety margin). See LBP-06-22, 64 NRC 229, 240 (2006). Moreover, Citizens' Motion incorrectly assumes that a Board composed of experienced legal and technical members is incapable of developing an adequate record through their own questioning of the witnesses and some questions proposed by the parties.

In 2004, the Commission revised its Rules of Practice for adjudications to "make the NRC's hearing process more effective and efficient." Changes to the Adjudicatory Process, 69 Fed. Reg. 2182 (Jan. 14, 2004). To that end, the Commission revised its rules to provide for the use of informal Subpart L procedures for hearings involving nuclear power reactor license renewals, unless the presiding officer, by order, finds that resolution of the contention or contested matter necessitates resolution of (1) issues of material fact relating to the occurrence of a past activity, where the credibility of an eyewitness may reasonably be expected to be at issues, and/or (2) issues of motive or intent of the party or eyewitness material to the resolution of the contested matter. See 10 C.F.R. § 2.310(d). See *also* 69 Fed. Reg. at 2205. The Board has found that Subpart G procedures are not necessary (*i.e.*, the requirements of 10 C.F.R. § 2.310(d) were not met) in this proceeding. See June 5, 2006 Order.

In a Subpart L proceeding, cross-examination by a party is available only if the presiding officer determines that such cross-examination is "necessary to ensure the development of an

adequate record for decision.” 10 C.F.R. § 2.1204(b)(3). The Commission decided to limit cross-examination conducted by parties because cross-examination by parties “often is not the most effective means for ensuring that all relevant and material information with respect to a contested issue is efficiently developed for the record of the proceeding.” 69 Fed. Reg. at 2195. The Commission further stated that the presiding officer should permit cross-examination in informal proceedings “only in the rare circumstance where the presiding officer finds . . . that his or her questioning of witnesses will not produce an adequate record for decision, and that cross-examination by the parties is the only reasonable action to ensure the development of an adequate record.” *Id.* at 2196.⁴

Citizens have not shown that this is one of those rare instances where the Board's questions will be inadequate and cross-examination by Citizens is necessary to develop an adequate record. In accordance with Subpart L procedures, Citizens have had the opportunity, through their initial and rebuttal presentations and the direct and rebuttal testimony of their own expert, to highlight inconsistencies between Mr. Tamburro's testimony and his documents, as well as “misleading” or “opaque” presentations of data by AmerGen. See Motion at 6-7. See *also* Citizens' Initial Statement Regarding Relicensing of Oyster Creek Nuclear Generating Station (July 20, 2007);⁵ Citizens' Rebuttal Regarding Relicensing of Oyster Creek Nuclear

⁴ Citizens note that the licensing board in the Vermont Yankee extended power uprate proceeding stated that, in accordance with *Citizens' Awareness Network, Inc. v. United States*, 391 F.3d 338 (1st Cir. 2004), “cross-examination under 10 C.F.R. § 2.1204(b)(3) is not restricted to those situations described in 10 C.F.R. § 2.310(d).” See Motion at 2-3 (citing *Entergy Nuclear Vermont Yankee, LLC & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-04-31, 60 NRC 686, 710 (2004)). However, that case does not have precedential effect. See *Sequoyah Fuels Corp.* (Source Material License No. SUB-1010), CLI-95-2, 41 NRC 179, 190 (1995) (stating that licensing board decisions have no precedential effect beyond the immediate proceeding in which they are issued).

⁵ Attached thereto was the “Pre-filed Direct Testimony of Dr. Rudolf H. Hausler” (July 20, 2007), including five attachments and 36 exhibits.

Generating Station (August 17, 2007).⁶ Citizens have submitted proposed questions for the Board to ask Mr. Tamburro. See Letter from Richard Webster, Esq. to Judge E. Roy Hawken, Esq. (August 24, 2007).⁷ Citizens will have another opportunity to propose questions for the Board to ask Mr. Tamburro after the filing of sur-rebuttal testimony. See April 17 Order at 6 n.4. Citizens have not shown that cross-examination of Mr. Tamburro by Citizens is necessary to ensure the development of an adequate record for decision.

The issue in this proceeding is whether the frequency of AmerGen's UT monitoring of the Oyster Creek drywell shell in the sand bed region is sufficient to maintain an adequate safety margin. Citizens claim that they would interrogate Mr. Tamburro in greater detail than the Board regarding analyses of UT inspection data he prepared and inconsistencies between those analyses and his testimony. Citizens have not, however, shown that Citizens' cross-examination of Mr. Tamburro on these matters is necessary to develop an adequate record for decision on the admitted issue in this proceeding. Nor have Citizens shown that the questions that they have presumably proposed to the Board are inadequate to elicit facts and opinions from Mr. Tamburro.

In addition, in "Memorandum and Order (Ruling on Motions in Limine and Motion for Clarification)" (August 9, 2007) (unpublished) at 9-12, and in other rulings in this proceeding,⁸ the Board has demonstrated that it is knowledgeable of the issues in this proceeding and is

⁶ Attached thereto was "Prefiled Rebuttal Written Testimony of Dr. Rudolf H. Hausler Regarding Citizen's Drywell Contention (August 16, 2007) as well as 15 exhibits.

⁷ Because Citizens submitted their proposed questions in accordance with 10 C.F.R. § 2.1207(a)(3), the Staff does not know that Citizens' proposed questions to be directed to Mr. Tamburro. Nevertheless, the Staff presumes that Citizens submitted proposed questions for the Board to ask Mr. Tamburro.

⁸ See e.g., LBP-06-22, 64 NRC at 237-240, 244-255 (ruling on new or amended contentions); Memorandum and Order (Denying Citizens' Motion for Leave to Add a Contention and Motion to Add a Contention) (April 10, 2007) (unpublished); Memorandum and Order (Denying Citizens' Motion for Leave to Add Contentions and Motion to Add Contention) (Feb. 9, 2007) (unpublished).

prepared to ask AmerGen's witnesses probing questions. The Board will not, as Citizens suggest, allow "AmerGen to take advantage of hinderences produced by Mr. Tamburro's opaque presentation of the data." See Motion at 7. Thus, Citizens have not shown that cross-examination of Mr. Tamburro by Citizens is necessary to ensure an adequate record.

CONCLUSION

For the reasons discussed above, Citizens' Motion should be denied.

Respectfully submitted,

/RA/

Mary C. Baty
Counsel for NRC Staff

Dated at Rockville, Maryland
this 30th day of August, 2007

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF ANSWER IN OPPOSITION TO CITIZENS' MOTION TO CROSS-EXAMINE PETER TAMBURRO" 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 30th day of August, 2007.

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