

August 30, 2007 (4:30pm)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSIONOFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

E. Roy Hawken, Chair

Dr. Paul B. Abramson

Dr. Anthony J. Baratta

In the Matter of:

August 30, 2007

AmerGen Energy Company, LLC

Docket No. 50-219

(License Renewal for Oyster Creek Nuclear
Generating Station)**AMERGEN'S ANSWER OPPOSING
CITIZENS' MOTION TO CROSS-EXAMINE PETER TAMBURRO****I. INTRODUCTION**

In accordance with 10 C.F.R. §§ 2.1204 and 2.323, 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 strongly opposes Citizens'³ Motion to Cross-Examine Peter Tamburro ("Citizens' Motion").⁴ For the reasons set forth below, the Board should deny Citizens' Motion in its entirety. Citizens have fabricated a meritless rationale for cross-examination and have utterly failed to overcome the strong presumption against cross-examination in Subpart L

¹ Memorandum and Order (Prehearing Conference Call Summary, Initial Scheduling Order, and Administrative Directives) (unpublished).

² Memorandum and Order (Prehearing Conference Call Summary, Case Management Directives, and Final Scheduling Order) (unpublished) ("April 17 Order").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

⁴ Aug. 24, 2007.

proceedings. Citizens' Motion ignores clear evidence proffered by AmerGen and effectively alleges misconduct by AmerGen and its employees without any basis.

II. LEGAL STANDARDS

The Board has ruled that this hearing will be conducted according to the informal adjudicatory procedures of Subpart L.⁵ Under Subpart L, the Board conducts the examination of the parties' witnesses, based in part on confidential questions submitted by the parties prior to the hearing.⁶ Cross-examination by the parties is not permitted, with one narrow exception:

The presiding officer shall allow cross-examination by the parties *only* if the presiding officer determines that cross-examination by the parties is *necessary* to ensure the development of an adequate record for decision.⁷

Under the new Part 2 rules, the bar for permitting cross-examination in Subpart L hearings is very high, allowing cross-examination:

only in the *rare* circumstance where the presiding officer finds in the course of the hearing 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.⁸

This Board has previously expressed its view that it did not expect to permit cross-examination in this proceeding. In the April 11, 2007 conference call relating to the final scheduling order, Judge Abramson admonished the parties that requesting cross-examination

⁵ Memorandum and Order (Denying Citizens' Motion to Apply Subpart G Procedures) (unpublished) (June 5, 2006) ("June 5 Order").

⁶ 10 C.F.R. § 2.1207(a)(3).

⁷ 10 C.F.R. § 2.1204(b)(3) (emphasis added).

⁸ 69 Fed. Reg. 2196 (Jan. 14, 2004) (to be codified at 10 C.F.R. § 2.1204(b)(3)) (emphasis added). This is because "cross-examination conducted by the 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." *Id.* at 2195. Rather, questioning by the Board is the "better approach for assuring the expeditious, controlled and deliberate development of an adequate record for decision" in informal hearings. *Id.* at 2196.

would be “an exercise in futility” and Judge Hawkens informed Citizens that the Board “views [10 C.F.R. § 2.1204(b)(3)] as setting a high hurdle for a party to engage in cross examination.”⁹

III. CITIZENS HAVE FAILED TO DEMONSTRATE THAT CROSS-EXAMINATION OF MR. TAMBURRO IS NECESSARY

Citizens’ Motion provides absolutely no justification for the Board to overrule the strong presumption against cross-examination in Subpart L hearings.¹⁰ Specifically: (1) the Board is perfectly capable of eliciting the testimony that Citizens request in order to ensure the development of an adequate record; (2) Citizens’ arguments about AmerGen’s witness panels have no basis; (3) Citizens have not demonstrated that cross-examination of Mr. Tamburro will contribute to the record; and (4) Citizens have identified no actual inconsistencies in Mr. Tamburro’s testimony.

A. The Board is Perfectly Capable of Eliciting Testimony to Ensure the Development of an Adequate Record

Contrary to Citizens’ Motion, the Board is perfectly capable of developing an adequate record on the issues Citizens raise without the assistance of cross-examination by Citizens. Under Subpart L, the Commission has recognized that the Board is better suited to effectively develop the record than the parties. Thus, the Board “should have sole authority and responsibility to conduct the examination of witnesses, after considering suggested questions for

⁹ See Tr. of Conference Call at 64 (April 11, 2007). One Licensing Board has recently interpreted Section 2.1204(b)(3) to require a “case-by-case determination” to assess whether cross-examination is necessary to develop an adequate record. *Entergy Nuclear Vermont Yankee, L.L.C.* (Vermont Yankee Nuclear Power Station), LBP-04-31, 60 NRC 686, 709 n.29 (2004). The Board’s ruling was limited to a determination that Section 2.1204(b)(3) was consistent with Vermont’s right, as a state, to cross-examination under 42 U.S.C. § 2021(1). *Id.* at 711. Furthermore, the First Circuit has ruled that the presumption is that all interrogation of witnesses will be undertaken by the hearing officer, not the litigants,” and that as a result, the “party seeking to cross-examine bears the burden of showing that cross-examination is in fact *necessary*.” *Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338, 351 (2004) (emphasis added).

¹⁰ Citizens appear to be under some misconception about the applicable Part 2 regulations, incorrectly citing to a non-existent 10 C.F.R. § 2.310(b)(3): “Thus, Citizens are moving to cross-examine AmerGen’s expert, Peter Tamburro under 10 C.F.R. § 2.310(b)(3) in this case.” Citizens’ Motion at 2. No such provision exists. In fact, § 2.310 addresses selection of hearing procedures, which the Board has already resolved to be Subpart L. June 5 Order.

witnesses posed by the parties.”¹¹ The Board brings “substantial experience and expertise to each contested matter.”¹² Indeed, “its three judges must be active inquisitors of the factual, technical, and scientific evidence relevant to resolving contested issues.”¹³ This Board in particular (composed of one legal judge, one technical judge, and one judge with legal and technical expertise) is more than capable of asking probing questions to resolve any perceived inconsistencies or lack of clarity.

Citizens have made only the barest attempt to justify the extraordinary relief that they request. Apart from pointing out various alleged inconsistencies in Mr. Tamburro’s statements (which we address in Section D below), the only bases for their request are that: (1) the witness “panel” format will prevent the Board from probing any perceived inconsistencies; and (2) other AmerGen witnesses will prevent Mr. Tamburro from testifying truthfully.¹⁴ We address each of these assertions below.

B. Citizens’ Arguments About AmerGen’s Witness Panels Have No Basis

Citizens argue that “in the absence of this motion [for cross examination] being granted, Citizens’ questions for Mr. Tamburro would be divided among three panels.”¹⁵ Citizens believe that as a result “it will be impossible to make him explain the inconsistencies.”¹⁶

Citizens ignore the fact that the Board has broad discretion in conducting the hearing. There is no regulation that requires the Board to question the witnesses in panels, or that restricts the Board’s ability to pose specific questions to specific individuals. The Board is simply not

¹¹ 69 Fed. Reg. at 2196.

¹² *Vermont Yankee*, 60 NRC at 697.

¹³ *Id.*, citing 69 Fed. Reg. at 2188.

¹⁴ Citizens’ Motion at 2, 7.

¹⁵ *Id.* at 7.

¹⁶ *Id.* at 2.

circumscribed by AmerGen's chosen panel format in how it wishes to conduct its questioning. It is free to question Mr. Tamburro on any aspect of his testimony at *any* stage of the hearing. Citizens' allegations in this regard utterly fail to support their request to cross-examine Mr. Tamburro.

Citizens' next claim (that "other witnesses on the panels may seek to prevent Mr. Tamburro from fully expressing his views") is equally unfounded.¹⁷ Citizens specifically implicate Mr. Gallagher, an Exelon Vice President. Citizens' argument amounts to an unwarranted and offensive accusation against the character of Mr. Tamburro and Mr. Gallagher, both of whom will be testifying under oath.¹⁸ Furthermore, as noted above, if the Board wishes to elicit testimony on a particular issue or question specifically from Mr. Tamburro, it is free to do so. Mr. Gallagher has neither the ability to circumscribe the Board's inquiries, nor the intent to influence Mr. Tamburro's sworn testimony.

Accordingly, Citizens' allegation that Mr. Tamburro's presence as a witness on the panels prevents the Board from questioning him effectively is utterly without merit.

C. Citizens Have Not Demonstrated that their Cross-Examination of Mr. Tamburro Would Contribute to the Record

1. Citizens' Admit that Their Proposed Cross-Examination Plan Is Inadequate

Citizens argue that Mr. Tamburro's previous testimony and authored documents "do not allow Citizens to offer to the Board a full and complete cross-examination plan that the Board could reasonably be expected to follow."¹⁹ 10 C.F.R. §2.1204(b) requires a party requesting the

¹⁷ *Id.* at 7.

¹⁸ The text of Citizens' Motion reveals that their argument is pure speculation: "Mr. Tamburro *may* feel obliged to follow Mr. Gallagher's lead in responding to certain questions." Motion at 7 (emphasis added). AmerGen would also like to note that witnesses appear in panels frequently in NRC proceedings and that there is no basis for presuming that a management witness will unduly influence another witness' testimony.

¹⁹ Citizens' Motion at 7.

right to cross-examine to submit a cross-examination plan describing “the issue or issues on which cross-examination will be conducted,” the “objective to be achieved by cross-examination,” and the “proposed line of questions that may logically lead to achieving the objective of the cross-examination.” Although AmerGen is not permitted to review Citizens’ cross-examination plan at this stage of the proceeding, Citizens’ admission that they cannot offer the Board a full and complete cross-examination plan makes it difficult to conclude that Citizens’ cross-examination will contribute to “the development of an adequate record.”²⁰

2. Citizens Admit that their Motion Amounts to a Fishing Expedition

Citizens express their “wish to examine Mr. Tamburro about his concerns relating to *other* items, *including* the correction applied to the 1992 external data, and how to decide whether Bays with more than one area that is thinner than 0.736 inches are acceptable.”²¹ This cursory, non-inclusive text suggests that Citizens’ “plan” to cross-examine Mr. Tamburro amounts, at least in part, to an open-ended fishing expedition.

D. Citizens Have Identified No Actual Inconsistencies in Mr. Tamburro’s Testimony

Finally, in support of their Motion, Citizens allege that “Peter Tamburro’s Documents and Testimony Are Inconsistent With Each Other,”²² and that AmerGen’s Exhibit 16 (the “24 Calc”), “authored by Mr. Tamburro ... is unclear and at times misleading.”²³ These arguments rest fundamentally on either a failure to read the evidence AmerGen has submitted, or if Citizens

²⁰ 10 C.F.R. §2.1204(b)(3). Furthermore, to the extent that Citizens have failed to meet the requirement to submit a full cross-examination plan, in accordance with Section 2.1204(b), their Motion should be denied on that basis alone.

²¹ Citizens’ Motion at 6 (emphasis added).

²² *Id.* at 3.

²³ *Id.* at 5.

have read AmerGen's evidence, on a deliberate decision to ignore that evidence.²⁴ The following subsections specifically address each of the three alleged "inconsisten[cies]" in Mr. Tamburro's documents and testimony, and demonstrate that Citizens' argument is based on their continued insistence that the local buckling criterion *should be* 0.636" square, rather than the 0.536" tray that is part of the OCNGS CLB. It is one thing to disagree with AmerGen on this point. It is quite another to allege false testimony, accuse AmerGen personnel of improprieties, and seek extraordinary relief on that basis. Citizens' Motion, in our view, constitutes an abuse of motion practice.

1. Citizens Ignore AmerGen's Pre-Filed Direct Testimony

Citizens allege that Mr. Tamburro "used 0.636 inches as the correct local area acceptance criterion"²⁵ in Applicant's Exhibit 16, and then "[d]irectly contradicting his evaluation . . . swore that the local area acceptance criterion includes a one square foot area that must be greater than 0.536 inches."²⁶ Thus, Citizens argue that Mr. Tamburro used the 0.636 criterion to derive a margin of 0.022 inches in the 24 Calc,²⁷ and then in his affidavit for summary disposition (Citizens' Exhibit 6), "stated that 'Citizens' assertion that the margin above the acceptance criteria is as low as 0.026 inches, therefore, is not supported by the data."²⁸

²⁴ With this in mind, Citizens' disregard of evidence makes their attempt to impugn Mr. Tamburro's character particularly egregious. This is not the first time that Citizens' counsel has acted in a way that raises serious questions regarding his compliance with counsel's "manifest and iron-clad obligation of candor." *Public Service Co. of Oklahoma* (Black Fox Station, Units 1 & 2), ALAB-505, 8 N.R.C. 527, 532 (1978). In Citizens' Motion for Leave to Add a Contention and Motion to Add a Contention (Feb. 6, 2007), Citizens used the same tactic of ignoring obvious and available evidence that directly addressed their allegations. See AmerGen's Answer Opposing Citizens' February 6, 2007 Motion for Leave to Add a Contention and Motion to Add a Contention (March 5, 2007) at 6 n.4.

²⁵ Citizens' Motion at 5.

²⁶ *Id.*

²⁷ *Id.* at 4.

²⁸ *Id.* at 5.

AmerGen's Pre-Filed Direct Testimony and Exhibit 16 fully explain these alleged contradictions. The testimony clearly explains that the 0.636" value in the 24 Calc. was a calculation-specific value.²⁹ And the 24 Calc. itself states: "For this calculation *only* [0.636"]", which is more conservative, is to be used as acceptance criteria [sic]."³⁰ This calculation-specific value is "more conservative than the acceptance criteri[on] that [is] part of the Current Licensing Basis."³¹ "Using more conservative values in specific calculations is akin to operating a plant using an administrative limit, which . . . assures compliance with the actual acceptance criteria."³² Thus Citizens have either failed to review AmerGen's Pre-Filed Testimony and Exhibit 16, or they are ignoring them.³³

2. Mr. Tamburro's Alleged Disregard of His Own Concerns

Citizens' next argument is that Mr. Tamburro "[e]xpressed [c]oncerns" about the original 24 Calc. that he "[s]ubsequently [d]isregarded."³⁴ Allegedly, "subsequent revisions" to the 24 Calc. "took the route of using more stringent acceptance criteria rather than justifying the 9.5% reduction in buckling strength," but Mr. Tamburro's testimony did not.³⁵

First, Citizens' allegation, in substance, appears to reflect a desire to cross-examine Mr. Tamburro about the adequacy and derivation of the local buckling acceptance criteria under the

²⁹ AmerGen Dir. Part 2, at A.18-19.

³⁰ AmerGen Exhibit 16, at 12 (emphasis added).

³¹ AmerGen Dir. Part 2, at A.6.

³² *Id.* at A.20.

³³ In either case, the Board should consider sanctions against Citizens' counsel. AmerGen takes Citizens' attempt to smear its employee and witness seriously, regardless of whether Citizens' Motion rests upon Citizens' lack of diligence or intentional disregard of evidence.

³⁴ Citizens' Motion at 6.

³⁵ *Id.*

ASME code, a topic that is outside the scope of this proceeding.³⁶ Second, even if Citizens' intended cross-examination was limited only to the application of the local buckling criterion,³⁷ then, as explained in Section 1, above, their alleged "inconsistencies" are fully explained in Amergen's Direct Testimony. Thus, it is entirely unclear how Citizens' ignorance of AmerGen's testimony, willful or otherwise, demonstrates that cross-examination by Citizens will help develop an adequate record.

3. Alleged Violations of the Acceptance Criteria

Finally, Citizens allege that AmerGen's Exhibit 16 (the 24 Calc, Rev. 2) "shows that the acceptance criteria are probably being violated," and that "the data presentation" is "unclear and at times misleading."³⁸ Thus, "the Board would find it difficult to ask probing questions about this document"³⁹

The first part of Citizens' allegation reiterates their previous arguments that the drywell shell allegedly does not *currently* meet the acceptance criteria. This is yet another impermissible challenge to the application of the acceptance criteria in the current licensing term.⁴⁰ Because this topic is outside the scope of the hearing, it also is clearly not an appropriate topic for cross-examination.

The second part of Citizens' allegation is based on Citizens' *counsel's* failure to understand Rev. 2 of the 24 Calc. From the description in Citizens' Motion, it appears that

³⁶ Licensing Board Memorandum and Order (Ruling on Motions in Limine and Motion for Clarification) at 6 (Aug. 9, 2007) (unpublished) ("Aug. 9 Order"); AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), LBP-06-22, 64 N.R.C. 229, 240 (2006); Licensing Board Memorandum and Order (Denying Citizens' Motion for Leave to Add a Contention and Motion to Add a Contention) at 6 (Apr. 10, 2007) (unpublished).

³⁷ See Aug. 9 Order at 6 (permitting Citizens to "argue that AmerGen has failed to apply the acceptance criteria in a consistent manner").

³⁸ Citizens' Motion at 6.

³⁹ *Id.* at 7.

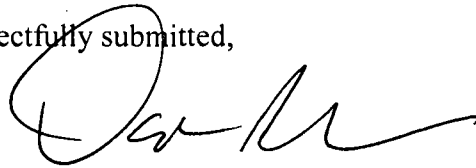
⁴⁰ See Aug. 9 Order at 6 ("Citizens may not challenge . . . how the criteria are applied in the current term.").

Citizens' counsel chose to review Rev. 2 of the 24 Calc, *without expert technical assistance*, and then had difficulty understanding the document.⁴¹ The failure of Citizens' counsel to comprehend a document provides no basis for the Board to permit him to cross-examine Mr. Tamburro on that document. Moreover, if he cannot understand the document, then how could he possibly cross-examine Mr. Tamburro in a coherent manner? Finally, Citizens' counsel has been given ample opportunity to develop questions and submit them to the Board, and to submit rebuttal and surrebuttal testimony addressing any alleged deficiencies in AmerGen's evidence. Thus, Citizens have utterly failed to show why the Board should grant them the extraordinary opportunity to cross-examine Mr. Tamburro.

IV. CONCLUSION

For the reasons set for above, Citizens' Motion should be denied in its entirety, and the Board should consider sanctions against Citizens' counsel.

Respectfully submitted,



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Dated in Washington, D.C.
this 30th day of August 2007.

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⁴¹ Citizens' Motion at 6 ("*[C]ounsel for Citizens' has spent considerable time....*") (emphasis added).

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)

) August 30, 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 Answer Opposing Citizens' Motion to Cross-Examine Peter Tamburro" were served this day upon the persons listed below, by e-mail and first class mail, unless otherwise noted.

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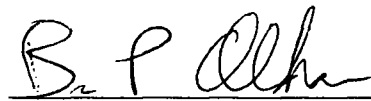
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