

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Dale E. Klein, Chairman  
Gregory B. Jaczko  
Peter B. Lyons  
Kristine L. Svinicki

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In the Matter of )

AMERGEN ENERGY COMPANY, LLC )

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

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) Docket No. 50-219-LR  
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**CLI-08-28**

**MEMORANDUM AND ORDER**

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 (collectively, Citizens) have petitioned for Commission review<sup>1</sup> of a Memorandum and Order of the Atomic Safety and Licensing Board, LBP-08-12.<sup>2</sup> In its decision, the Board denied Citizens' most recent challenge to the application for renewal of the operating

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<sup>1</sup> *Citizens' Petition for Review of LBP-08-12* (Aug. 1, 2008) (Petition).

<sup>2</sup> *AmerGen Energy Co. LLC* (License Renewal for Oyster Creek Nuclear Generating Station), LBP-08-12, 68 NRC \_\_\_\_, slip op. (July 24, 2008).

license of AmerGen Energy Company, LLC (AmerGen) for its Oyster Creek Nuclear Generating Station (Oyster Creek) — Citizens' motion to reopen the record and to add a new contention.<sup>3</sup> AmerGen<sup>4</sup> and the NRC Staff<sup>5</sup> filed answers opposing the petition for review. Citizens replied to AmerGen's and the Staff's filings.<sup>6</sup>

We deny the petition for review.

## I. BACKGROUND

### A. Citizens' Motion to Reopen

Today's decision addresses matters separate from those included in the contested proceeding associated with AmerGen's license renewal application, to which

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<sup>3</sup> *Motion by 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 to Reopen the Record and for Leave to File a New Contention, and Petition to Add a New Contention* (Apr. 18, 2008) (Motion to Reopen), with *Declaration of Dr. Joram Hopenfeld* (Apr. 15, 2008) (First Hopenfeld Declaration). AmerGen and the Staff opposed this motion: *AmerGen's Answer Opposing Citizens' Motion to Reopen Record and Petition to Add a New Contention* (Apr. 28, 2008); *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). See also *Reply by 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 to AmerGen's Opposition to [its] Petition to Add a New Contention* (May 5, 2008) (Motion to Reopen Reply I). *Reply by 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 to the NRC Staff's Opposition to [its] Motion to Reopen* (May 6, 2008) (Motion to Reopen Reply II).

<sup>4</sup> *AmerGen's Answer Opposing Citizens' Petition for Review of LBP-08-12* (Aug. 11, 2008) (AmerGen Answer).

<sup>5</sup> *NRC Staff's Answer in Opposition to Citizens' Petition for Review of LBP-08-12* (Aug. 11, 2008) (Staff Answer).

<sup>6</sup> *Citizens' Consolidated Reply Regarding Petition for Review of LBP-08-12* (Aug. 18, 2008) (Citizens' Reply).

Citizens is a party in connection with its drywell liner contention.<sup>7</sup> The subject of today's decision is the Board's denial of a Motion to Reopen filed by Citizens subsequent to the NRC Staff's issuance of a Draft Regulatory Issue Summary (Draft RIS).<sup>8</sup> The Draft RIS, addressed to all operating power reactor licensees, informed licensees that the use of a simplified "Green's function" analysis for calculating cumulative usage factors related to metal fatigue could be non-conservative if not correctly applied.<sup>9</sup> The Draft RIS also indicated that the Staff had asked recent license renewal applicants that used this simplified analysis to perform confirmatory analyses to show that their analyses produced sufficiently conservative results.<sup>10</sup> As part of its Motion to Reopen, Citizens sought admission of the following new contention:

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

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<sup>7</sup> See e.g., LBP-07-17, 66 NRC 327 (2007). A decision on Citizens' petition for review of LBP-07-17 has not been issued. Today's decision is limited to Citizens' petition for review of LBP-08-12.

<sup>8</sup> See Draft NRC Regulatory Issue Summary 2008-xx, "Fatigue Analysis of Nuclear Power Plant Components" (Apr. 11, 2008), published in *Proposed Generic Communication; Fatigue Analysis of Nuclear Power Plant Components*, 73 Fed. Reg. 24,094 (May 1, 2008).

<sup>9</sup> The Green's function issue first arose in a different license renewal proceeding. (*Entergy Nuclear Vermont Yankee, LLC, & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), Docket No. 50-271-LR). See also LBP-08-12, slip op. at 2-5, 68 NRC at \_\_\_\_.

<sup>10</sup> See e.g., *Request for Additional Information Concerning Metal Fatigue and its Impact on the Review of the Oyster Creek Nuclear Generating Station, License Renewal Application (TAC No. MD7624)* (Apr. 29, 2008) (RAI), available at ADAMS Accession No. ML081080077. AmerGen answered the RAI in its *Response to NRC Request for Additional Information on Metal Fatigue Analysis Related to Oyster Creek Generating Station License Renewal Application* (May 1, 2008) (RAI Response) (ML061240217).

allowable metal fatigue limits during any extended period of reactor operation.<sup>11</sup>

To support its Motion to Reopen,<sup>12</sup> Citizens attached a declaration by its expert<sup>13</sup> and cited the NRC Staff's notification to the Commission of the Staff's intention to ask for a confirmatory analysis from AmerGen,<sup>14</sup> the Draft RIS, an email from the Staff's counsel,<sup>15</sup> two Advisory Committee on Reactor Safeguards (ACRS) meeting transcripts,<sup>16</sup> and AmerGen's response to the Staff request for additional information.<sup>17</sup>

Citizens also filed a motion to supplement, together with a second declaration by Citizens' expert,<sup>18</sup> in connection with its response to a Board order asking the parties to discuss AmerGen's RAI Response.<sup>19</sup> In its Motion to Supplement, Citizens argued that

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<sup>11</sup> LBP-08-12, slip op. at 4.

<sup>12</sup> See Motion to Reopen at 2-4.

<sup>13</sup> First Hopenfeld Declaration.

<sup>14</sup> Motion to Reopen at 2, citing Samson S. Lee, Acting Director, Division of License Renewal, Office of Nuclear Reactor Regulation, *Notification of Information in the Matter of Oyster Creek Nuclear Generating Station License Renewal Application* (Apr. 3, 2008), (Staff Notification) (ML080930335).

<sup>15</sup> Motion to Reopen at 2, citing Email from Mary Baty, Esq. to Richard Webster, Esq. (Apr. 7, 2008).

<sup>16</sup> Motion to Reopen at 3, citing Transcript of 54<sup>th</sup> ACRS Meeting at 8-10, 10-11 (Feb. 7, 2008), (ML080500208); Transcript of 550<sup>th</sup> ACRS Meeting at 119-21 (Mar. 6, 2008) (ML080740427).

<sup>17</sup> Motion to Reopen at 3, citing RAI Response at Table 4.3.4-1.

<sup>18</sup> *Citizens' Response to Board Order and Motion to Supplement the Basis of [its] Contention* (May 27, 2008) (Motion to Supplement), with *Second Declaration of Dr. Joram Hopenfeld* (May 23, 2008) (Second Hopenfeld Declaration).

<sup>19</sup> Order (Directing Parties to Submit Explanatory Pleadings and Affidavits) (May 21, 2008) (unpublished). In this order, the Board directed the parties to respond to

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AmerGen's RAI Response showed that the original metal fatigue calculation was not conservative.<sup>20</sup>

## **B. Technical Background**

Fatigue, in this context, may be defined as the weakening of a material due to cyclic loading. Components, such as the recirculation outlet nozzle at Oyster Creek, may experience repeated cyclic loading in the course of plant operation. In particular, transients like the significant temperature changes associated with events such as plant startup and shutdown induce stresses on components. If the number of load cycles or transients is excessive, fatigue failure — that is, fracture or significant reduction in strength — of components may occur. For a material (e.g., stainless steel), there is a characteristic number of cycles that the material can withstand at a particular applied stress level before fatigue failure occurs.

The “cumulative usage factor” quantifies the fatigue that a particular metal component experiences during plant operation. The cumulative usage factor is the ratio of the number of load cycles a component has experienced to the number of cycles the component can withstand before it fails. For example, a cumulative usage factor of 0.1 for a component indicates that the component has experienced one-tenth of the number of load cycles it can withstand before failure occurs.

Our regulations, in 10 C.F.R. Part 50, do not directly mention fatigue of metal components, but 10 C.F.R. § 50.55a(c)(1) requires components like the recirculation

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AmerGen's RAI Response by filing affidavits of experts and pleadings explaining the effect of this response on Citizens' Motion to Reopen.

<sup>20</sup> Motion to Supplement at 8-10.

outlet nozzle, which is part of the reactor coolant pressure boundary, to meet the requirements for Class 1 components in Section III of the American Society of Mechanical Engineers (ASME) Boiler and Pressure Vessel Code (ASME Code). The ASME Code provides a methodology for calculating the cumulative usage factors for nuclear power plant components, and specifies a design limit of 1.0 for the cumulative usage factor of a given component.<sup>21</sup> To demonstrate compliance with the ASME Code in connection with issuance of an initial operating license, an applicant would have performed a predictive fatigue analysis with a projected number of transients for the licensing period.<sup>22</sup>

In the license renewal context, our regulations, at 10 C.F.R. §§ 54.33 and 54.35, require that the regulations established under 10 C.F.R. Part 50, including compliance with the ASME Code, be followed during the period of extended operation. This means that the cumulative usage factor for a component should not exceed 1.0, even including additional cyclic loading that may occur during the period of extended operation. For the recirculation outlet nozzle at Oyster Creek, AmerGen demonstrated compliance with the fatigue requirements of the ASME Code as part of its time-limited aging analyses (TLAAs), as defined in 10 C.F.R. § 54.3(a).<sup>23</sup> 10 C.F.R. § 54.21(c)(1), which lists the

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<sup>21</sup> ASME Code, Section III, Division 1, Subsection NB-3222.4.

<sup>22</sup> See *License Renewal Application, Oyster Creek Generating Station, Docket No. 50-219, Facility Operating License No. DPR-16*, at 4-24 (July 22, 2005) (ML052080185).

<sup>23</sup> In 10 C.F.R. § 54.3(a), TLAAs are defined as licensee (plant-specific) calculations and analyses that:

- (1) Involve systems, structures, and components within the scope of license renewal, as delineated in § 54.4(a);

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technical information that must be contained in a license renewal application, requires license renewal applicants to include an evaluation of TLAAAs that demonstrates at least one of the following:

- (i) The analyses remain valid for the period of extended operation;
- (ii) The analyses have been projected to the end of the period of extended period of operation; or
- (iii) The effects of aging on the intended function(s) will be adequately managed for the period of extended operation.<sup>24</sup>

The NRC's Standard Review Plan (SRP) provides guidance to the Staff for the evaluation of license renewal applications,<sup>25</sup> with SRP Section 4.3 focusing on the review of the applicant's metal fatigue analysis. For applicants choosing to demonstrate

- (2) Consider the effects of aging;
- (3) Involve time-limited assumptions defined by the current operating term, for example, 40 years;
- (4) Were determined to be relevant by the licensee in making a safety determination;
- (5) Involve conclusions or provide the basis for conclusions related to the capability of the system, structure, and component to perform its intended functions, as delineated in § 54.4(b); and
- (6) Are contained or incorporated by reference in the [current licensing basis].

<sup>24</sup> AmerGen demonstrates compliance with the ASME Code by projecting the fatigue analysis for the nozzle through the extended operating period, which is acceptable under 10 C.F.R. § 54.21(c)(1)(ii), but also commits to an aging management program that would satisfy the requirements of 10 C.F.R. § 54.21(c)(1)(iii). See NUREG-1875, Vol. 2, *Safety Evaluation Report Related to the License Renewal of Oyster Creek Generating Station*, Section 4.3.4.4 (Final SER) (ML071310246).

<sup>25</sup> NUREG-1800, Rev. 1, *Standard Review Plan for Review of License Renewal Applications for Nuclear Power Plants* (SRP) (Sept. 2005) (ML052770566).

compliance with 10 C.F.R. § 54.21(c)(1)(ii), the SRP directs the Staff to apply the following criterion:

The [cumulative usage factor] calculations have been reevaluated based on an increased number of assumed transients to bound the period of extended operation. The resulting [cumulative usage factor] remains less than or equal to unity [1.0] for the period of extended operation.<sup>26</sup>

In addition to the regulatory requirement that the cumulative usage factor not exceed 1.0, the Staff guidance suggests that the cumulative usage factor be adjusted to account for the fact that the fatigue life of components in an operational environment (e.g., exposure to reactor coolant) may be less than predicted by the ASME Code, where fatigue life was measured in a controlled laboratory setting.<sup>27</sup> The SRP presents an acceptable methodology for calculating the environmentally-adjusted cumulative usage factor.

To calculate the cumulative usage factor for a component, it is necessary to know the number of load cycles a component has experienced and the stress acting on the component during each cycle. These will be compared to the “allowed” number of load cycles a component can withstand before fatigue fracture occurs to determine the cumulative usage factor. The ASME Code contains fatigue design curves for various materials that specify the allowed number of cycles at any applied stress.<sup>28</sup> The number of load cycles is relatively easy to tabulate, as the licensee keeps records of events that

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<sup>26</sup> SRP Section 4.3.2.1.1.2.

<sup>27</sup> See generally the Staff recommendation for the closure of GSI-190 [Generic Safety Issue – 190 Fatigue Evaluation of Metal Components for 60-Year Plant Life], contained in *Memorandum from Ashok Thadani to William Travers* (Dec. 26, 1999) (ML003673136).

<sup>28</sup> ASME Code, Section III, Division 1, Mandatory Appendix I, Figures I-9.1 to I.9-6.



cause transients (e.g., startup, shutdown, and unplanned shutdown (scram)).

Determining the stress acting on the component is somewhat more complicated and may require detailed knowledge of material properties, component design, and the temperature profile of the transient, among other parameters. The stresses acting on a component are generally calculated by finite element modeling (computer modeling of the stress profile of a material).

Detailed fatigue analysis following the methodology of ASME Code Section III requires consideration of six stress inputs for a component: three normal (direct) stresses, and three shear stresses. Fatigue analysis using these six stresses is potentially time and resource intensive. In some instances, license renewal applicants have taken a simplified approach, using only one stress as the stress input (the maximum difference between the normal stresses) rather than six, and using the “Green’s function” to estimate the stress response of a component during transients. AmerGen used this approach in its license renewal application for Oyster Creek for the recirculation output nozzle. In the course of its review of the Vermont Yankee Power Station license renewal application, the Staff found that while there is no inherent problem with using the Green’s function, the simplified methodology, particularly the consideration of only one stress instead of six, could provide non-conservative results.<sup>29</sup> In other words, the simplified methodology may underestimate the stress acting on the component and, in turn, the cumulative usage factor.

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<sup>29</sup> See NUREG-1907, Vol. 2, *Safety Evaluation Report Related to the License Renewal of Vermont Yankee Nuclear Power Station*, at 4-40 (May 2008) (ML081430109).

Use of the Green's function, with a simplified stress input, for fatigue analysis may result in either conservative or non-conservative results, depending on the assumptions used and the engineering judgment of the analyst. The conservatism of the analysis therefore is evaluated on a case-by-case basis. Because of the potential for non-conservative results, the Staff issued a generic communication, the Draft RIS, and, in the case of Oyster Creek, issued an RAI, requesting a confirmatory fatigue analysis using the ASME Code methodology with all six stress inputs, which Citizens refers to in its Motion to Reopen.

As summarized in the Draft RIS:

The Green's function approach involves performing a detailed stress analysis of a component to calculate its response to a step change in temperature. This detailed analysis is used to establish an influence function, which is subsequently used to calculate the stresses caused by the actual plant temperature transients. This methodology has been used to perform fatigue calculations and as input for on-line fatigue monitoring programs. *The Green's function methodology is not in question.* The concern involves a simplified input for applying the Green's function in which only one value of stress is used for the evaluation of the actual plant transients. . . . Simplification of the analysis to consider only one value of the stress may provide acceptable results for some applications; however, it also requires a great deal of judgment by the analyst to ensure that the simplification still provides a conservative result.

The [S]taff has requested that recent license renewal applicants that have used this simplified Green's function methodology perform confirmatory analyses to demonstrate that the simplified Green's function analyses provide acceptable results. The confirmatory analyses retain all six stress components.<sup>30</sup>

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<sup>30</sup> Draft RIS, 73 Fed. Reg. at 24,095 (emphasis added).

AmerGen responded to the Staff's Draft RIS and the RAI, providing the results of its confirmatory analysis.<sup>31</sup> The Staff subsequently issued and served its supplemental safety evaluation report relating, in part, to AmerGen's confirmatory analysis.<sup>32</sup>

### **C. Board Decision**

In a split decision, the Board found that Citizens' Motion to Reopen failed to satisfy the regulatory requirements for reopening the record.<sup>33</sup> Judge Baratta, dissenting,<sup>34</sup> would have granted the motion, and he would have "reframe[d] the contention to promote efficiency and simplicity."<sup>35</sup> We agree that Citizens' Motion to Reopen failed to satisfy our regulatory requirements for reopening the record and deny the petition for review.

The Board majority also found that Citizens' Motion to Supplement the basis of its contention, which the Board treated as a separate motion to reopen, failed to satisfy the requirements for reopening the record.<sup>36</sup> Judge Baratta disagreed with the majority on this point as well. He viewed the Motion to Supplement as an addendum to the motion to reopen rather than as a separate motion to reopen,<sup>37</sup> and therefore

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<sup>31</sup> RAI Response.

<sup>32</sup> *Safety Evaluation Report Related to the License Renewal of Oyster Creek Nuclear Generating Station, Supplement 1* (Sept. 2008) (SER Supplement) (ML080230078).

<sup>33</sup> LBP-08-12, slip op. at 22.

<sup>34</sup> *Dissent of Judge Baratta*, attached to LBP-08-12 (Dissent), see 68 NRC at \_\_\_\_, following slip op. p. 27, separately numbered.

<sup>35</sup> Dissent at 1 n.1.

<sup>36</sup> LBP-08-12, slip op. at 26.

<sup>37</sup> Dissent at 6 n.4.

permissible. We need not decide how best to characterize the Motion to Supplement, because, as we indicate below, the arguments in the motion and statements in the accompanying affidavit do not show a safety issue warranting further inquiry.

## II. LEGAL FRAMEWORK

Our regulations, in 10 C.F.R. § 2.341(b)(4), provide that we may grant a petition for review at our discretion, “giving due weight to the existence of a substantial question with respect to the following considerations”:

- (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) A substantial and important question of law, policy, or discretion has been raised;
- (iv) The conduct of the proceeding involved a prejudicial procedural error; or
- (v) Any other consideration which the Commission may deem to be in the public interest.

Motions to reopen are governed by 10 C.F.R. § 2.326, which provides:

- (a) A motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied:
  - (1) The motion must be timely. However, an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented;
  - (2) The motion must address a significant safety or environmental issue; and
  - (3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.
- (b) The motion must be accompanied by affidavits that set forth the factual and/or technical bases for the movant’s claim that the

criteria of paragraph (a) of this section have been satisfied. Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. Evidence contained in affidavits must meet the admissibility standards of this subpart. Each of the criteria must be separately addressed, with a specific explanation of why it has been met. When multiple allegations are involved, the movant must identify with particularity each issue it seeks to litigate and specify the factual and/or technical bases which it believes support the claim that this issue meets the criteria in paragraph (a) of this section.

. . .

- (d) A motion to reopen which relates to a contention not previously in controversy among the parties must also satisfy the requirements for nontimely contentions in § 2.309(c).

As subsection (d) makes clear, where a motion to reopen proposes a contention not previously part of the proceeding, the requirements for late-filed contentions set out in 10 C.F.R. § 2.309(c) must also be satisfied.

“[A] party seeking to reopen a closed record to raise a new matter faces an elevated burden to lay a proper foundation for its claim. Commission practice holds that the standard for admitting a new contention after the record is closed is higher than for an ordinary late-filed contention.”<sup>38</sup> “New information is not enough . . . to reopen a closed hearing record at the last minute; the information must be significant and plausible enough to require reasonable minds to inquire further.”<sup>39</sup> “The burden of

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<sup>38</sup> *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 (2005), citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 554-55 (1978). “Obviously, ‘there would be little hope’ of completing administrative proceedings if each newly arising allegation required an agency to reopen its hearings.” *Private Fuel Storage*, 61 NRC at 350 n.18.

<sup>39</sup> *Private Fuel Storage*, 61 NRC at 350.

satisfying the reopening requirements is a heavy one,”<sup>40</sup> and “proponents of a reopening motion bear the burden of meeting all of [these] requirements.”<sup>41</sup>

### III. DISCUSSION

In its petition for review, Citizens argues that the Board erred in declining to reopen this license renewal proceeding to admit its new contention. Citizens makes four arguments, none of which persuades us that the Board made errors requiring that we grant the petition for review. First, Citizens argues that its metal fatigue cumulative usage factor contention addressed a significant safety issue (10 C.F.R. § 2.326(a)(2)), and that the Board majority, in finding that it did not, applied the wrong legal standard and ignored evidence supporting the view that the issue was safety significant.

Second, Citizens argues that admitting its contention would have had a material effect on the outcome of the proceeding (10 C.F.R. § 2.326(a)(3)). In making this point, Citizens argues that the correct standard for reopening is the summary disposition standard; that the conservatism of AmerGen’s analysis is in dispute; that the Board majority relied on the wrong evidence; and that the Board majority erred in finding that the contention was moot. Alternatively, Citizens argues, additional discovery should have been permitted.

Third, Citizens argues that when the Board asked for pleadings responding to AmerGen’s RAI Response, the Board “created procedural prejudice by allowing

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<sup>40</sup> *Louisiana Power & Light Co.* (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5 (1986).

<sup>41</sup> *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-10, 32 NRC 218, 221 (1990).

AmerGen and the Staff to make additional factual arguments about the deficiency of the proposed contention to which Citizens did not get a chance to reply, because the Board asked for simultaneous briefing from all the parties.”<sup>42</sup>

Finally, Citizens argues that imposing stringent requirements for reopening the record and disallowing discovery “eviscerates Citizens['] right to a hearing under the [Atomic Energy Act]. . . . [According to Citizens], [e]ither the majority’s interpretation of the rules is incorrect or the rules themselves are deficient.”<sup>43</sup>

We discuss these four points in turn.<sup>44</sup>

**A. 10 C.F.R. § 2.326(a)(2) — “Significant Safety Issue”**

The Board majority found that Citizens’ Motion to Reopen failed to show that its new contention raised a significant safety issue. In the majority’s view, Citizens failed to provide the factual evidence or expert testimony required by 10 C.F.R. § 2.326(b), and this failure was fatal to its effort to present a significant safety issue. In its petition for review, Citizens points to a number of asserted failings in the Board’s decision.

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<sup>42</sup> Petition at 16.

<sup>43</sup> *Id.* at 20.

<sup>44</sup> We note that the Board majority did not find the Motion to Reopen untimely, so whether the motion satisfied the timeliness requirements of 10 C.F.R. § 2.326(a)(1) is not at issue now. Judge Baratta devotes a fair amount of discussion to the timeliness of Citizens’ motion to reopen. Dissent at 2-5. As Judge Baratta points out, a decision on the timeliness of the motion to reopen was “not necessary to the [m]ajority” since the majority found that the motion to reopen failed our reopening rule’s “significant safety issue” and “materially different result” requirements (10 C.F.R. § 2.326(a)(2)-(a)(3)). Dissent at 2. Because we agree with the majority’s assessment regarding whether the motion to reopen satisfied sections 2.326(a)(2) and (3), we need not address the timeliness question.

Citizens argues the Board majority set the “significance” bar too high. According to Citizens, the requirement that a motion to reopen must address a significant safety issue is satisfied by a “mere showing” that a possible violation of regulatory safety standards could occur. Such a demonstration would not require specific factual or technical information that shows that the purportedly non-conservative cumulative usage factor calculation for the Oyster Creek recirculation outlet nozzle will result in a significant safety issue. Citizens’ “mere showing” standard is a novel interpretation that misapprehends the plain language of the rule. Section 2.326(b) requires motions to reopen to be accompanied by affidavits of qualified experts presenting the factual and/or technical bases for the claim that there is a significant safety issue, together with evidence that satisfies our admissibility standards. A “mere showing” of a possible violation is not enough. And Citizens did not provide even that.

According to Citizens, AmerGen’s calculations with respect to the recirculation output nozzle used non-conservative assumptions and a non-conservative methodology. Citizens argues that because the predicted environmentally corrected cumulative usage factor was at or close to the allowable limit of 1.0 under the simplified, non-conservative assumptions, a reanalysis that complied with the ASME Code would likely predict that the allowed limit of 1.0 would be exceeded during any extended period of operation,<sup>45</sup> which “would lead to violation of the requirement for an adequate [time limited aging analysis], 10 C.F.R. § 54.21(c)(1)(ii), [so] the increase would be safety significant.”<sup>46</sup> To

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<sup>45</sup> First Hopenfeld Declaration at ¶ 9.

<sup>46</sup> Petition at 5.



support this, Citizens relied on the Staff's April 3, 2008, notification<sup>47</sup> and on information from the *Vermont Yankee* proceeding, which, as the Board majority points out, Citizens failed to link to the site-specific characteristics of the Oyster Creek plant. The cited regulation, 10 C.F.R. § 54.21(c)(1)(ii), specifies technical information that must be included in a license renewal application, namely a list of time-limited aging analyses, together with a demonstration that the "analyses have been projected to the end of the period of extended operation."<sup>48</sup> Citizens provided no evidence to support its argument that AmerGen's calculations were based on non-conservative assumptions or methodologies, or to support its premise that a change to a more conservative analytical methodology would push the cumulative usage factor over 1.0.

Citizens' expert complains that AmerGen's revised, ASME Code-based analysis omitted the cladding on the recirculation nozzle, which had been included in the first, Green's function-based analysis. Citizens' expert believed that, were the cladding accounted for under the revised analysis, the cumulative usage factor likely would have exceeded 1.0. Citizens argued, therefore, that AmerGen should have shown a plant-

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<sup>47</sup> Staff Notification. We agree with the Board majority that Citizens' reliance on an NRC Staff document to satisfy the 10 C.F.R. § 2.326(b) affidavit requirement is tenuous. See LBP-08-12, slip op. at 11 n.10. But, like the majority, we need not decide that issue to resolve the petition for review.

<sup>48</sup> See 10 C.F.R. § 54.21(c)(1)(ii); § 54.21(c)(1) is reproduced in full above (Section I.B). Citizens did not point explicitly to 10 C.F.R. § 54.21(c)(1)(ii) as the "violated" regulation until its petition for review. Citizens' Motion to Reopen did not directly reference 10 C.F.R. § 54.21(c), though its expert briefly mentioned § 54.21(c)(iii) (First Hopenfeld Declaration at ¶ 10). There was also a brief mention of § 54.21(c)(ii) in Citizens' Motion to Supplement at 9.

specific basis for omitting the cladding in its revised analysis.<sup>49</sup> Similarly, Judge Baratta argues that the omission of the cladding in the reanalysis had safety significance.<sup>50</sup>

We disagree. Omitting the cladding when performing ASME Code-based cumulative usage factor calculations is expressly allowed under both the ASME Code and under implementing NRC guidance.<sup>51</sup> An applicant is not required to provide a plant-specific justification for excluding cladding for this component. Citizens has provided no evidence that the recirculation outlet nozzle at Oyster Creek is an exception to the rule permitting exclusion of the cladding for fatigue calculations. Citizens has not

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<sup>49</sup> Petition at 6, citing Second Hopenfeld Declaration at ¶¶ 9-11. Similarly, Dr. Hopenfeld bases his assertion that the reanalysis does not show that the original analysis was sufficiently conservative on his view that the assumptions incorporated in the reanalysis, particularly relating to the omission of the cladding on the recirculation output nozzle, were not justified. Second Hopenfeld Declaration at ¶ 9.

<sup>50</sup> Dissent at 13-14.

<sup>51</sup> See ASME Code, Section III, Subsection NB, Subarticle NB-3122.3 (“[W]hen the cladding is of the integrally bonded type and the nominal thickness of the cladding is 10% or less of the total thickness of the component, the presence of the cladding may be neglected.”); NUREG/CR-6260: Application of NUREG/CR-5999 Interim Fatigue Curves to Selected Nuclear Power Plant Components, p. 4-2 (Feb. 1995) (ML031480219) (“For the ASME Code fatigue curves, the fatigue usage for the base metal under the cladding is less than for the cladding for comparable stress intensity levels because the fatigue life for stainless steel is several times greater than for carbon/low-alloy steel... Thus, for ASME Code analyses, it is reasonable to neglect fatigue of the cladding and compute the [cumulative usage factor] of the base metal.”). See also Staff Responses to Public Comments on Draft Regulatory Guide DG-1144 (proposed new Regulatory Guide 1.207), “Guidelines for Evaluating Fatigue Analyses Incorporating the Life Reduction of Metal Components Due to the Effects of the Light-Water Reactor Environment for New Reactors,” and Draft NUREG/CR-6909, “Effect of LWR Coolant Environments on the Fatigue Life of Reactor Materials (Draft Report for Comment),” Item 6, p. 5 (ML070510687) (“The ASME Code allows the designer to neglect the presence of the cladding if its thickness is less than 10% of the total thickness of the component, as stated in paragraph NB-3122 of the ASME Code. The designer should assume that the environmental effects apply to the underlying carbon steel material for those cases in which the cladding is neglected.”).

pointed to operating experience at Oyster Creek (or relevant operating experience at any other plant) that calls into question the justification for this exclusion. Finally, Citizens has provided only speculation that the Green's function analysis, which *did* include the nozzle cladding, was non-conservative.

Citizens argues that the Board erred when it discounted the relevance of a newspaper article that Citizens presented as evidence to support its contention. The article included a statement attributed to an NRC spokesperson to the effect that breakage of a recirculation outlet nozzle could have severe consequences.<sup>52</sup> Quite apart from evidentiary shortcomings presented by a newspaper article, we agree with the Board majority that the nexus between the purportedly non-conservative cumulative usage factor analysis and a "significant safety issue" is lacking. As the majority correctly noted, "[b]inding case law establishes that a movant who seeks to reopen the record does *not* show the existence of a significant safety issue merely by showing that a plant component 'perform[s] safety functions and thus ha[s] safety significance.'"<sup>53</sup>

Citizens faults the Board majority for disregarding what Citizens characterizes as "additional evidence" presented by Judge Baratta.<sup>54</sup> Even if we agreed that an affidavit

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<sup>52</sup> See LBP-08-12, 68 NRC \_\_\_, slip op. at 14, citing Motion to Reopen at 7-8 (quoting Todd Bates, NRC Wants Nuclear Plant's Water Nozzles Rechecked, Asbury Park Press, Apr. 7, 2008).

<sup>53</sup> LBP-08-12, slip op. at 13-14, citing *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 & 2), CLI-90-06, 31 NRC 483, 487 (1990) (emphasis and alterations in original).

<sup>54</sup> Petition at 7. Citizens also faults the Board majority for disregarding the "broader safety significance of the [non-conservative calculation] issue" which is "also relevant to safety [at] at least seven other reactors." Petition at 7-8. The scope of this proceeding, however, is limited to the license renewal application for the Oyster Creek facility.

of another party (here the NRC Staff) could appropriately function as Citizens' supporting affidavit,<sup>55</sup> clearly a dissenting judicial opinion cannot substitute for the movant's affidavit required to be submitted with that motion to reopen, and thus cannot be considered to be "additional evidence." Moreover, we disagree that, even if true, an environmentally adjusted cumulative usage factor greater than 1.0 violates our "defense-in-depth" principle. The safety risk is negligible:

While the Staff is not suggesting that the [environmentally adjusted cumulative usage factor] of Oyster Creek's recirculation nozzle actually exceeds 1.0 . . . the principle of defense[-]in[-]depth would not be violated even if [it] did exceed 1.0, because risk assessments demonstrate that the increase in the core damage frequency . . . resulting from a [cumulative usage factor] as high as 4.75 is negligible.<sup>56</sup>

**B. 10 C.F.R. § 2.326(a)(3) — "Materially Different Result"**

The Board majority found that not only did Citizens' motion to reopen fail to present a significant safety issue, but it "also fail[ed] to show a likelihood that

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<sup>55</sup> Dissent at 6. To support his view that a document prepared by another party such as the Staff can substitute for the affidavit required under 10 C.F.R. § 2.326(b), Judge Baratta cites to a single case that antedates codification of the current rule in 1986. *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358, 364 (1973). In our view, Judge Baratta's reading of that case is too broad; the case also is distinguishable since here, unlike in the *Vermont Yankee* case, the documents do not, "on their face," raise "serious safety concerns" — a prerequisite according to the *Vermont Yankee* Appeal Board for bypassing the accompanying affidavit requirement. *Id.* at 364. In *Vermont Yankee*, the Staff itself stated relatively early on, in its proposed findings, that resolution of the issues (which related to the applicant's quality assurance program) must be resolved prior to issuance of the license (*Id.* at 360), and the Appeal Board, in discussing the serious nature of its concerns, noted that there was "no record evidence that a satisfactory [quality assurance] program even exist[ed]" (*Id.* at 362). In contrast, here the Staff simply asked for a confirmatory analysis (RAI, 4.3.4-1) and explicitly stated that the original analysis was not in question (Draft RIS, 73 Fed. Reg. at 24,095).

<sup>56</sup> Staff Answer at 10, referring to Fair Affidavit at ¶ 8.

consideration of their new contention would result in the denial or conditioning of AmerGen's license renewal application."<sup>57</sup> Citizens argues that, in reaching this conclusion, the Board erred by misapplying the standard of proof applicable to motions to reopen.<sup>58</sup> According to Citizens, the appropriate standard for determining whether a motion to reopen should be granted is the summary disposition standard, which places the burden of proof on the moving party and requires the evidence to be considered in the light most favorable to the party opposing summary disposition. Citizens would have us reverse the burden, requiring opponents to its motion to reopen to demonstrate the absence of a genuine issue of material fact, while construing the evidence presented in the light most favorable to Citizens. This reading of our rules is incorrect.

"The interpretation of a regulation, like the interpretation of a statute, begins 'with the language and structure of the provision itself . . . [and] the entirety of the provision must be given effect.'"<sup>59</sup> The standards governing motions to reopen appear in 10 C.F.R. § 2.326. Motions for summary disposition are governed by an entirely separate rule, 10 C.F.R. § 2.710. By advocating a summary disposition standard, Citizens would effectively excise the reopening and "nontimely filing" standards<sup>60</sup> and replace them with a reformulated section 2.710, stripped of its own timeliness requirements and applied to a post-decisional context for which it was not intended.

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<sup>57</sup> LBP-08-12, slip op. at 19.

<sup>58</sup> Petition at 3.

<sup>59</sup> *U.S. Dept. of Energy* (High-Level Waste Repository), CLI-06-5, 63 NRC 143, 154 (2006), quoting *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 288, *review denied*, CLI-88-11, 28 NRC 603 (1988).

<sup>60</sup> See 10 C.F.R. § 2.326 (reopening); 10 C.F.R. § 2.309(c)(1) (nontimely filing).

Most significantly, Citizens' interpretation shifts the burden — deliberately heavy and deliberately placed on the party seeking reopening — from parties advocating reopening to parties opposed to it. This is the exact opposite of what the rule requires. Under 10 C.F.R. § 2.326, it is not AmerGen's (or the Staff's) burden to defeat the motion to reopen. Instead, it is *Citizens'* burden, through its motion to reopen and in its accompanying affidavit (the First Hopenfeld Declaration), to demonstrate that the motion should be granted. Bare assertions and speculation, such as Citizens' expert's speculation that “[i]t is . . . likely that an analysis that complies with the ASME Code would predict that the [cumulative usage factor] would become greater than one during the proposed period of extended operation,”<sup>61</sup> and that “the environmental factors in the [license renewal application] and the [request for additional information] are probably non-conservative,”<sup>62</sup> do not supply the requisite support. Moreover, regardless of how Citizens' Motion to Supplement (accompanied by the Second Hopenfeld Declaration) is characterized, as the Board majority correctly recognized, even in this second filing Citizens' expert's assertions remain speculative and continue to lack the technical details and analysis required to support reopening the proceeding.<sup>63</sup>

The arguments Citizens makes to us in its petition for review do not remedy the deficiencies of its motion to reopen. Nor do Citizens' arguments demonstrate that the Board majority erred. Section 2.326(b) requires motions to reopen to be accompanied

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<sup>61</sup> First Hopenfeld Declaration at ¶ 9 (emphasis added).

<sup>62</sup> First Hopenfeld Declaration at ¶ 11 (emphasis added).

<sup>63</sup> In this connection, we note that in his admittedly limited analysis, Citizens' expert identified no specific deficiencies in AmerGen's RAI Response.

by supporting affidavits of experts, and the Board majority properly found Citizens' Motion to Reopen lacking in this respect. In its petition for review, Citizens asserts that "there are unresolved issues of fact regarding whether a materially different result would be likely."<sup>64</sup> For support, Citizens relies on Judge Baratta's disagreement with the majority, citing heavily to his dissent — almost as though the dissent were an affidavit and Judge Baratta were Citizens' expert — and faulting the majority for "carr[ying] out no technical analysis at all."<sup>65</sup> As we stated above, Judge Baratta's dissenting opinion cannot substitute for the affidavit required to be submitted to the Board, with a motion to reopen, in the first instance. And the Board is not required to augment a deficient motion to reopen by performing supplementary technical analysis. In fact, "a Board is to decide the motion to reopen on the information before it and has no authority to engage in discovery in order to supplement the pleadings before it. Simply put, the burden of satisfying the reopening requirements is on the movant. . . ."<sup>66</sup>

Citizens goes on to accuse the Board majority of ignoring "critical evidence" and citing "irrelevant evidence" demonstrating a dispute as to the conservatism of the analyses.<sup>67</sup> For example, Citizens argues that it "provided expert testimony stating that to be certain that an analysis was conservative, each assumption should be justified by

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<sup>64</sup> Petition at 11.

<sup>65</sup> *Id.*

<sup>66</sup> *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-915, 29 NRC 427, 433 (1989), quoting *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 & 2), CLI-86-7, 23 NRC 233, 235-36 (1986), *aff'd sub nom. Ohio v. NRC*, 814 F.2d 258 (6<sup>th</sup> Cir. 1987), and citing *Louisiana Power & Light Co.* (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1 (1986).

<sup>67</sup> *Id.* at 11-14.

the actual conditions.”<sup>68</sup> Citizens argues that it also provided testimony that “AmerGen . . . failed to show that its second analysis, [which] omitted the effect of the cladding on the nozzle, was conservative,” and that Judge Baratta agreed with Citizens’ expert that this cladding issue mattered to the conservatism of the cumulative usage factor analysis.<sup>69</sup> According to Citizens, “AmerGen cannot successfully defeat the motion to reopen using the unsupported assertion of its expert that the confirmatory analysis conforms to the ASME code.”<sup>70</sup> Because the conservatism of the confirmatory analysis was in dispute, Citizens argues, dismissal of its motion to reopen was erroneous.

These arguments fundamentally dispute the Board’s assessment of the testimony Citizens provided in support of its contention. We are generally disinclined to upset fact-driven Licensing Board determinations, particularly “where the affidavits or submissions of experts must be weighed.”<sup>71</sup> We find unpersuasive Citizens’ arguments for Commission reconsideration of the Board’s findings regarding Dr. Hopenfeld’s expert testimony. Citizens has identified no clear Board factual or legal error requiring further Commission consideration on appellate review, but merely complains that the Board improperly weighed the evidence, essentially restating its objections to AmerGen’s

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<sup>68</sup> Petition at 11, citing Dissent at 13, in turn citing the Second Hopenfeld Declaration.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 13.

<sup>71</sup> *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-00-12, 52 NRC 1, 3 (2000), quoting *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-99-22, 50 NRC 3, 6 (1999).



confirmatory analysis.<sup>72</sup> Without more, we are disinclined to second guess the Board's assessment of Citizens' affidavits.

Citizens argues in the alternative that we should allow discovery so that Citizens can flesh out support for its proposed contention. This request is contrary to our rules and long-standing precedent barring discovery in connection with the preparation of proposed contentions.<sup>73</sup> Moreover, Citizens' expert could, in our view, have provided an analysis based on the technical information provided in the RAI Response, particularly the data included in Attachments 1 and 2 to the response.<sup>74</sup>

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<sup>72</sup> To the extent that Citizens argues that the Board majority erred in finding its proposed "contention of omission" moot, it is simply incorrect. The contention, as proffered on April 18, demanded that AmerGen perform a confirmatory analysis using a conservative methodology. AmerGen later performed a confirmatory analysis, using the ASME Code method called for in our regulations. Thus, the contention of omission, as originally proffered, was indeed rendered moot by AmerGen's submission to the NRC of its confirmatory analysis, and the Board majority did not err in making that determination. *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 383 (2002); *see also Entergy Nuclear Vermont Yankee L.L.C. and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-05-24, 62 NRC 429, 431 (2005).

<sup>73</sup> Discovery is not available until after a request for hearing or petition to intervene has been granted. *See* 10 C.F.R. § 2.336. *See Consumers Energy Co., Nuclear Management Co., LLC, Entergy Nuclear Palisades, LLC, and Entergy Nuclear Operations, Inc.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 416 (2007) ("We have long precluded petitioners from using discovery as a device to uncover additional information supporting the admissibility of contentions.") *See also Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 351 (1998); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), CLI-85-7, 21 NRC 1104, 1106 (1985) ("The movant is not entitled to engage in discovery in order to support a motion to reopen.").

<sup>74</sup> On October 14, 2008, Citizens sent a letter to Chairman Klein, with an attachment prepared by Dr. Hopenfeld, in an apparent attempt to bolster the technical underpinnings of its cumulative usage factor contention. Citizens provided no procedural justification for this submission, and we do not consider it to be part of the record before us. Nonetheless, even though couched as a response to the Staff's SER Supplement, it is

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### C. Other Claims

Citizens argues that the Board created procedural prejudice when it requested simultaneous briefs from the parties to explain the effect of AmerGen's RAI Response. Citizens argues that because both AmerGen and the Staff purportedly made additional factual arguments in their briefs, which the Board used in denying the proposed contention, Citizens should have been permitted to file a reply brief. Citizens reiterates its basic complaint regarding discovery, but, in reviewing Citizens' filings before the Board,<sup>75</sup> we see no attempt on the part of Citizens' expert to interpret the data that was provided in AmerGen's RAI response, to demonstrate, specifically, why that information was not sufficient to form the basis for a new contention, or to indicate what a reply brief, had one been permitted, would have contained or how such a reply brief could have altered the outcome of the proceeding.<sup>76</sup> In fact, while Citizens filed a motion to strike

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clear that the arguments Dr. Hopensfeld makes in the attachment to the letter are in actuality based upon information, like AmerGen's RAI Response, available several months ago. In our view, Citizens' letter simply confirms that Citizens' expert could have made a more complete argument based on the RAI Response — *without discovery* of AmerGen's confirmatory analysis. See *Letter to Chairman Klein, Re: In the Matter of AmerGen Energy Co., LLC (License Renewal for Oyster Creek Nuclear Generating Station) Docket No. 50-219-LR* (Oct. 14, 2008), served via email by Citizens' counsel. The Staff responded to Citizens' letter, see *NRC Staff's Motion for Leave to Reply to Citizens' October 14, 2008 Letter and Comments to the Chairman* (Oct. 27, 2008).

<sup>75</sup> See e.g., Motion to Reopen, First Hopensfeld Declaration, Motion to Reopen Reply I, Motion to Reply II, Motion to Supplement, Second Hopensfeld Declaration, *Citizens' Motion to Strike and for Other Appropriate Relief* (June 5, 2008).

<sup>76</sup> Cf. *Owner-Operator Independent Drivers Ass'n., Inc. v. Federal Motor Carrier Safety Administration*, 494 F.3d 188, 203 (D.C. Cir. 2007) ("To show that error was prejudicial, a [petitioner] must indicate with reasonable specificity what portions of the documents it objects to and how it might have responded if given the opportunity. . . Moreover, a petitioner must show that on remand [it] can mount a credible challenge . . . and [was]

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portions of the other parties' responses to the Board's request for additional briefing, it did not file a motion seeking leave to file a reply brief, and provided no justification for a reply brief. We see no "compelling circumstances" justifying a reply brief — indeed, the parties could reasonably anticipate the argument that Citizens' contention was moot simply based on the Board's request for an explanation of the significance of the RAI Response.

Citizens argues that it was entitled to a hearing on its proposed contention because section 189(a) of the Atomic Energy Act (AEA)<sup>77</sup> guarantees a right to a hearing on any issue that is material to licensing and because traditional notions of due process require full consideration of Citizens' concerns. According to Citizens, the Board's overly stringent interpretation of our reopening rules violated the AEA; alternatively, Citizens argues, our rules are deficient because they violate the AEA.<sup>78</sup> But the AEA's guarantee of a hearing on material issues is not without limitation. "[S]ection 189(a)'s hearing requirement does not unduly limit the Commission's wide discretion to structure its licensing hearings in the interests of speed and efficiency."<sup>79</sup> The hearing right provided in Section 189(a) is not automatic — our rules appropriately

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thus prejudiced by the absence of an opportunity to do so before the agency." (internal quotation marks and citations omitted, other alterations in original)).

<sup>77</sup> 42 U.S.C. § 2239(a).

<sup>78</sup> See 10 C.F.R. § 2.335. Generic challenges to our rules are barred in adjudicatory proceedings.

<sup>79</sup> *Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1448 (D.C.Cir. 1984) (*UCS I*).

require the identification of specific factual support to justify reopening.<sup>80</sup> Here, Citizens failed to articulate a claim with the specificity required under our rules. We find no deficiency in the Board majority's application of our reopening rules, our contention admissibility rules, or our discovery rules.

#### IV. CONCLUSION

For the reasons stated above, the petition for review is *denied*.

IT IS SO ORDERED.

For the Commission

**(NRC SEAL)**

**/RA/**

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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 6<sup>th</sup> day of November, 2008

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<sup>80</sup> See *UCS I* at 1448, citing *BPI v. AEC*, 502 F.2d 424, 428 (D.C.Cir. 1974) (“[Section 189(a)] does not confer the automatic right of intervention upon anyone. Under its procedural regulations it is not unreasonable for the Commission to require that the prospective intervenor first specify the basis for his request for a hearing.”).