

RA 5 14699

DOCKETED
USNRC

November 21, 2007 (4:29pm)

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Lawrence G. McDade, Chair
Dr. Richard E. Wardwell
Dr. Kaye D. Lathrop

In the Matter of) Docket Nos. 50-247-LR and 50-286-LR
)
ENTERGY NUCLEAR OPERATIONS, INC.) ASLBP No. 07-858-03-LR-BD01
)
(Indian Point Nuclear Generating Units 2 and 3)) November 21, 2007
_____)

**MOTION OF ENTERGY NUCLEAR OPERATIONS, INC. TO STRIKE
PETITIONS TO INTERVENE BY
FRIENDS UNITED FOR SUSTAINABLE ENERGY, USA, INC.**

INTRODUCTION

In accordance with 10 C.F.R. §§ 2.1204 and 2.323, Entergy Nuclear Operations, Inc. (Entergy or Applicant), in the above-captioned matter, hereby moves to strike the Request for Hearing and Petition for Leave to Intervene ("Petition"), filed on or about September 21, 2007 ("Petition 1"), the revised Request for Hearing and Petition for Leave to Intervene, filed on or about October 3, 2007 ("Petition 2"), and the second revised Request for Hearing and Petition for Leave to Intervene, filed on or about November 9, 2007 ("Petition 3"), by Friends United for Sustainable Energy, USA (FUSE). The several Petitions respond to the U.S. Nuclear Regulatory Commission (NRC or Commission) Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing ("Notice"), published in the *Federal Register* on August 1, 2007 (72 Fed. Reg. 42,134), in regard to Entergy's application to renew operating licenses for the Indian Point Energy Center (IPEC) Units 2 and 3.

TEMPLATE = SEU-041

SEU-02

As discussed below, FUSE has repeatedly flouted the Commission's Rules of Practice as well as explicit directions by the presiding Atomic Safety and Licensing Board regarding, among other things, service of its Petitions. FUSE also has filed multiple iterations of its Petitions causing confusion in the record and significantly disadvantaging Entergy in attempting to provide a meaningful response. Accordingly, FUSE's Petitions should be stricken.

BACKGROUND

In response to the Notice, FUSE, on September 21, 2007, filed Petition 1. FUSE submitted that document, over 170 pages in length, to the Commission and the NRC Staff. Despite explicit instructions in the *Federal Register* notice,¹ however, FUSE did not serve Entergy. Counsel for the NRC Staff provided a courtesy copy of Petition 1 to Entergy. Because FUSE failed to include in its submission the many attachments and enclosures identified in Petition 1, FUSE refiled its petition on October 3, 2007, which included some – but not all – of the previously-omitted attachments and enclosures (Petition 2). FUSE again, however, did not serve Entergy. The Office of the Secretary provided a courtesy copy of Petition 2 to Entergy.

An apparently-complete version of Petition 2 – now exceeding many hundreds of pages in length – was provided to Counsel for the NRC Staff on or about October 25, 2007, some three weeks after the initial submission of Petition 2. FUSE stated that Petition 2 superseded Petition 1.² This submission included a certificate of service; yet even that certificate did not comply with 10 C.F.R. §§ 2.302(b) and 2.305. Specifically, the certificate of service which was dated

¹ As stated in the Notice, "A copy of the request for hearing or petition for leave to intervene should also be sent to the Assistant General Counsel, Entergy Nuclear Operations, Inc., 440 Hamilton Avenue, White Plains, NY 10601." Notice, 72 Fed. Reg. at 42,135.

² See e-mail from Sherwin E. Turk, NRC, to Susan H. Shapiro, FUSE, dated October 11, 2007, which appends an e-mail from Ms. Shapiro confirming FUSE's intention that Petition 2 supersedes Petition 1. The foregoing, as well as the letter referenced in footnote 3, *infra*, were forwarded to the Office of the Secretary and, in turn, to the Board and other petitioners in this matter by e-mail from Emile Julian to E. Roy Hawken on October 17, 2007.

September 19, 2007 – approximately five weeks prior to submission of complete Petition 2 – was not signed and did not include Entergy on the service list. FUSE, on or about October 26, 2007, forwarded a copy of Petition 2 to Entergy but still without a proper certificate of service.

Petition 2, among other petitions, was transmitted by the Commission's Office of the Secretary to the Chief Judge of the Atomic Safety and Licensing Board Panel for appointment of an Atomic Safety and Licensing Board, on October 12, 2007; this Board was constituted on October 18, 2007. Thereafter, in light of some uncertainty with respect to the date by which responses to petitions were due and the service irregularities brought to the Commission's attention by Entergy,³ the Board, by Order dated October 29, 2007, clarified that responses to all timely petitions for leave to intervene are due by January 11, 2008, regardless of when the petitions are filed. Moreover, as especially relevant here, the Board admonished all parties of their ironclad obligations regarding proper service of documents in this proceeding. Licensing Board Memorandum and Order (Administrative Matters and Directing Parties Attention to Requirements for Proper Service) (Oct. 29, 2007) (unpublished) ("Memorandum and Order").

Without offering any substantive reason, FUSE, on or about November 9, 2007, filed with the Commission yet a third version of its petition (Petition 3), again without proper service on Entergy. Entergy, again, had to obtain a courtesy copy from NRC Staff Counsel. Based upon a preliminary examination, however, Petition 3, in contrast to Petitions 1 and 2, does not include any attachments and, indeed, seems to make no reference to any attachments or enclosures. Further, unlike prior versions which are signed or co-signed by Ms. Susan H. Shapiro, Petition 3 is signed solely by Mr. Sherwood Martinelli, as FUSE's representative.⁴

³ See letter from Kathryn M. Sutton and Paul M. Bessette to Annette Vietti-Cook, dated October 11, 2007.

⁴ By letter dated November 21, 2007, addressed to NRC Chairman Klein and the Chairman of this Board, Ms. Shapiro advised that she had resigned from FUSE and withdrawn as its counsel.

Most significantly, however, FUSE did not state whether Petition 3 supersedes Petition 2, or in what substantive respects it differs from Petition 2. Further, as noted previously, Petition 3 does not include a certificate of service. Mr. Martinelli, in his cover letter, simply states that:

[s]hould it be necessary that copies of this document needed to be served on other parties, please provide a list of those parties, with an email address for same, and we will be more than happy to oblige in sending them an electronic copy of same, assuming they can show they have been granted standing at the time of this filing. It is quite certain, that any other parties will be capable of down loading a copy of this filing from ADAMS in the very near future.

Cover letter from Sherwood Martinelli to NRC Chairman Klein, dated November 7, 2007.

Clearly, the above statement by Mr. Martinelli does not satisfy the Commission's service requirements in Sections 2.302(b) and 2.305.

Finally, FUSE, on or about October 23, 2007, filed a Formal Request for the GEIS to be Exempted As a Requirement of Part 10 CFR 51.6, thereby Requiring Entergy to Address All Category 1 and Category 2 Issues in the EIS, with the Chairman of the NRC. This document like all of the other FUSE filings, was not properly served on Entergy.⁵

DISCUSSION

I. The Petitions

As set forth by the Board in its Memorandum and Order, "[w]ith regard to proper filing and service, we note that '[a]ll documents offered for filing must be accompanied by proof of service' 10 C.F.R. § 2.302(b). We also note that the Commission's regulations provide that '[i]f a request for hearing or petition to intervene is filed in response to any notice of hearing or opportunity for hearing, the applicant/licensee shall be deemed to be a party.' 10 C.F.R. § 2.309(a). Further, we note that '[w]hen a party has appeared by attorney, service must be made

⁵ As directed by the Board in its November 21, 2007 Order (Authorizing FUSE to Submit a Section 2.335 Petition), that matter will be addressed separately.

upon the attorney of record.’ 10 C.F.R. § 2.305(b).” Memorandum and Order at 1-2. The Board further urged all persons who might wish to participate in this proceeding “to read the Commission’s Rules of Practice, 10 C.F.R. Part 2. . . . Failure by any party to comply with the Rules works an injustice on the other parties to the proceeding. Accordingly, failure to comply with the Rules can well result in a litigant being dismissed from this proceeding.”⁶ *Id.* at 2-3 (Emphasis added).

The Commission itself, in its November 16, 2007 Order granting additional time to FUSE, reiterated the significance of this matter and potential ramifications of disregarding NRC regulations. Order at 1-2 (Nov. 16 2007) (unpublished).⁷ “Finally,” the Commission stated, “we remind FUSE that our Rules require it to serve copies of its pleadings on all parties to the proceeding, including the NRC Staff and the licensee (Entergy), and to include a Certificate of Service with each pleading. *See* 10 C.F.R. § 2.302(b); §§ 2.305(b) and (f). We note that the Licensing Board has already commented on FUSE’s previous failure to follow these rules, and we remind FUSE that there are potential repercussions in failing to follow the pleading requirements, including the possibility that pleadings not served on all parties and pleadings not accompanied by a Certificate of Service may be stricken.” *Id.*

⁶ It is reasonable to have expected that Ms. Shapiro, as an attorney, would have been mindful of these very elemental requirements without the need for reminder by the Board.

⁷ The date initially set for the close of the period for submission of requests for hearing and petitions for leave to intervene, October 1, 2007, was extended by the Commission to November 30, 2007. Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Nos. DPR-26 and DPR-14 for an Additional 20-year Period: Extension of Time for Filing of Requests for Hearing or Petitions to Intervene in the License Renewal Proceeding, 72 Fed. Reg. 55,834 (Oct. 1, 2007). FUSE’s subsequent request for additional time was granted by the Commission on November 16, 2007, the Commission affording FUSE until December 10, 2007, for the submission of a supplement to its petition for leave to intervene. Although the Commission’s action effectively renders the matter moot, it warrants mention that FUSE’s multiple requests for an extension of time – one filed by both Ms. Shapiro and Mr. Martinelli, the other solely by Mr. Martinelli, one served only on the Chairman of the NRC, the other on the Chairman of the NRC and the Chairman of this Board, both dated November 7, 2007 – represent further examples of FUSE’s disjointed participation in this matter.

The Commission's Rules of Practice in 10 C.F.R. Part 2, and the Board's Memorandum and Order in this proceeding couldn't be more clear in regard to the obligations of all participants to ensure and document proper service, yet FUSE has repeatedly, but inexplicably disregarded them.

FUSE's conduct and procedural missteps have yet another, more substantive effect, however. While FUSE's earlier statement that Petition 2 superseded Petition 1 allowed the parties to focus their responses on the substance of one submittal, this is no longer possible, given the submission of Petition 3. FUSE has not indicated why Petition 3 was filed or what its current intention is in regard to Petition 2.

At this point, the Board and parties are left to decide that for themselves, a burden of some magnitude given the sheer size of and variations between the various petitions. The answer to that question will clearly have a profound impact on how the parties respond to the petitions, and on how the Board, in turn, will decide whether FUSE has otherwise met its burden with respect to admission as a party. That answer must be provided by FUSE itself. The Board has made clear that "Parties should not – and will not – be left to assume which is the operative pleading. Accordingly, any amended pleading must be labeled as such and clearly dated so as to be readily distinguishable from earlier, superceded pleading." Memorandum and Order at 2.

The burden to submit a petition for leave to intervene which satisfies the Commission's requirements in 10 C.F.R. § 2.309, is on the petitioner. *See Metropolitan Edison Company* (Three Mile Island Unit 1), CLI-83-25, 18 NRC 727, 731 (1983); *also* 10 C.F.R. § 2.325. Also, a party bears the burden that a licensing board, and, for that matter, other parties, might misapprehend a party's position because of inadequacies in their pleadings and failure to follow Commission requirements. *See Sacramento Municipal Utility District* (Rancho Seco Nuclear

Generating Station), CLI-93-3, 37 NRC 135, 143 n.17 (Board could not be faulted for not addressing as contentions portions of a party's petition addressing standing that were not labeled as contentions.)

Here, FUSE has repeatedly disregarded the Commission's Rules of Practice and the very explicit directions of this Board regarding service of documents, as cited above. In doing so, moreover, it has created an incoherent record in terms of the various petitions it has filed, in effect shifting a very considerable and costly burden to the Applicant and others to divine which version remains viable and what it consists of and relies upon in support of its admission. While FUSE's blatant and repeated disregard with respect to the foregoing warrants outright rejection of its petitions and its dismissal from this proceeding, its conduct, not to mention fundamental fairness to the Applicant, at a minimum, calls for summarily striking all of the FUSE Petitions currently before the Board.

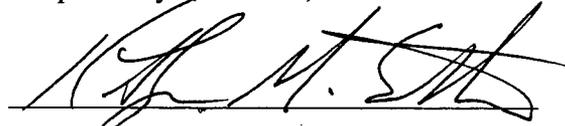
Although FUSE's conduct justifies this action without affording FUSE a further opportunity to comply with NRC requirements, the Applicant would not object to a Board Order striking the pending petitions, without prejudice to filing a new, self-contained petition, complying in all respects with the Commission's Rules of Practice, by the December 10, 2007 deadline that now exists for FUSE. Failure to do so by December 10, 2007, however, warrants a finding by the Board that FUSE is in default and would justify outright denial of FUSE's petitions in this proceeding. *See* 10 C.F.R. § 2.320.

CONCLUSION

FUSE has repeatedly and inexplicably failed to comply with very clear Commission Rules of Practice and with the explicit direction of this Board in regard to service of its various petitions for leave to intervene. As a result, FUSE has tangled the record in this proceeding with

ambiguous petitions of considerable size. This has resulted in an unacceptable and costly burden on Entergy in its attempt to meaningfully respond as a party in this proceeding. Such conduct – and its effects – must be corrected now before this matter proceeds any further or becomes further convoluted by Petitioner. For these reasons, Entergy moves to strike all of FUSE’s petitions for leave to intervene proffered to date.

Respectfully submitted,



Kathryn M. Sutton, Esq.

Paul M. Bessette, Esq.

Martin J. O’Neill, Esq.

MORGAN, LEWIS & BOCKIUS, LLP

1111 Pennsylvania Avenue, N.W.

Washington, DC 20004

Phone: (202) 739-5738

E-mail: ksutton@morganlewis.com

E-mail: pbessette@morganlewis.com

E-mail: martin.o'neill@morganlewis.com

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

Before Administrative Judges:
Lawrence G. McDade, Chair
Dr. Richard E. Wardwell
Dr. Kaye D. Lathrop

In the Matter of)	Docket Nos. 50-247-LR and 50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.)	ASLBP No. 07-858-03-LR-BD01
(Indian Point Nuclear Generating Units 2 and 3))	November 21, 2007

NOTICE OF APPEARANCE OF PAUL M. BESSETTE

The undersigned, being an attorney at law in good standing admitted to practice before the courts of the District of Columbia, hereby enters his appearance in the above-captioned matter as counsel on behalf of Entergy Nuclear Operations, Inc.

Respectfully submitted,



Paul M. Bessette
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Ave., N.W.
Washington, DC 20004
Tel: (202) 739-5796
Fax: (202) 739-3001
pbessette@morganlewis.com

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

Before Administrative Judges:
Lawrence G. McDade, Chair
Dr. Richard E. Wardwell
Dr. Kaye D. Lathrop

In the Matter of)	Docket Nos. 50-247-LR and 50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.)	ASLBP No. 07-858-03-LR-BD01
(Indian Point Nuclear Generating Units 2 and 3))	November 21, 2007

NOTICE OF APPEARANCE OF KATHRYN M. SUTTON

The undersigned, being an attorney at law in good standing admitted to practice before the courts of the District of Columbia, hereby enters her appearance in the above-captioned matter as counsel on behalf of Entergy Nuclear Operations, Inc.

Respectfully submitted,



Kathryn M. Sutton
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Ave., N.W.
Washington, DC 20004
Tel: (202) 739-5738
Fax: (202) 739-3001
ksutton@morganlewis.com

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

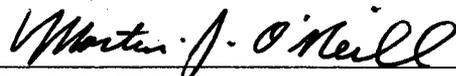
Before Administrative Judges:
Lawrence G. McDade, Chair
Dr. Richard E. Wardwell
Dr. Kaye D. Lathrop

In the Matter of)	Docket Nos. 50-247-LR and 50-286-LR
)	
ENTERGY NUCLEAR OPERATIONS, INC.)	ASLBP No. 07-858-03-LR-BD01
)	
(Indian Point Nuclear Generating Units 2 and 3))	November 21, 2007
)	

NOTICE OF APPEARANCE OF MARTIN J. O'NEILL

The undersigned, being an attorney at law in good standing admitted to practice before the courts of the District of Columbia, hereby enters his appearance in the above-captioned matter as counsel on behalf of Entergy Nuclear Operations, Inc.

Respectfully submitted,



Martin J. O'Neill
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Ave., N.W.
Washington, DC 20004
Tel: (202) 739-5733
Fax: (202) 739-3001
martin.o'neill@morganlewis.com

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

Before Administrative Judges:
Lawrence G. McDade, Chair
Dr. Richard E. Wardwell
Dr. Kaye D. Lathrop

In the Matter of) Docket Nos. 50-247-LR and 50-286-LR
)
ENTERGY NUCLEAR OPERATIONS, INC.) ASLBP No. 07-858-03-LR-BD01
)
(Indian Point Nuclear Generating Units 2 and 3)) November 21, 2007
_____)

CERTIFICATE OF SERVICE

I hereby certify that copies of "MOTION OF ENTERGY NUCLEAR OPERATIONS, INC. TO STRIKE PETITIONS TO INTERVENE BY FRIENDS UNITED FOR SUSTAINABLE ENERGY, USA, INC.; NOTICE OF APPEARANCE OF PAUL M. BESSETTE; NOTICE OF APPEARANCE OF KATHRYN M. SUTTON; NOTICE OF APPEARANCE OF MARTIN J. O'NEILL; and NOTICE OF APPEARANCE OF WILLIAM C. DENNIS" were served this 21st day of November 2007 upon the persons listed below, by first class mail and e-mail as shown below.

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: ocaamail@nrc.gov)

Administrative Judge
Lawrence G. McDade, Chair
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: lgm1@nrc.gov)

Administrative Judge
Richard E. Wardwell
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: rew@nrc.gov)

Administrative Judge
Kaye D. Lathrop
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: kd12@nrc.gov)

Office of the Secretary *
Attn: Docketing and Service
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(E-mail: hearingdocket@nrc.gov)

Susan H. Shapiro, Esq.
21 Perlman Drive
Spring Valley, NY 10077
(E-mail: Palisadesart@aol.com
mbs@ourrocklandoffice.com)

Michael J. Delaney
Vice President – Energy
New York City
Economic Development Corporation
110 William Street
New York, NY 10038
(E-mail: mdelaney@nycedc.com)

Sherwood Martinelli
Friends United for Sustainable Energy USA, Inc.
351 Dykman Street
Peckskill, NY 19566
(E-mail: roycepenstinger@aol.com)

Sherwin E. Turk, Esq.
Lloyd B. Subin, Esq.
Beth N. Mizuno, Esq.
Office of the General Counsel
Mail Stop – O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: set@nrc.gov)
(E-mail: lbs3@nrc.gov)
(E-mail: bnml@nrc.gov)

Arthur J. Kremer, Chairman
New York AREA
347 Fifth Avenue, Suite 508
New York, NY 10016
(E-mail: kremer@area-alliance.org)

Zachary S. Khan
Law Clerk
Atomic Safety and Licensing Board
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: zxk1@nrc.gov)

* Original and 2 copies



Kathryn M. Sutton