

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 12/13/07

ATOMIC SAFETY AND LICENSING BOARD

SERVED 12/13/07

Before Administrative Judges:

Lawrence G. McDade, Chairman
Dr. Kaye D. Lathrop
Dr. Richard E. Wardwell

In the Matter of

ENTERGY NUCLEAR OPERATIONS, INC.

(Indian Point Nuclear Generating
Units 2 and 3)

Docket Nos. 50-247-LR and 50-286-LR

ASLBP No. 07-858-03-LR-BD01

December 13, 2007

ORDER

(Barring Sherwood Martinelli From Further Participation In This Proceeding)

On December 4, 2007, the Board received via electronic mail a copy of a letter that was sent by Mr. Sherwood Martinelli, the representative of Friends United for Sustainable Energy (FUSE), in response to the Board's Censure Order that was dated December 3, 2007.¹ That letter was titled "Response to Censure Apology to Board, and Other Matters."²

Whatever it may have been, Mr. Martinelli's letter was not an acceptable apology, and it did not comply with the Board's Censure Order in several respects.³

¹ Licensing Board Order (Censure of Sherwood Martinelli) (Dec. 3, 2007) [hereinafter "Censure Order"]. The Censure Order was confirmed by the Commission on December 12, 2007. Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), CLI-07-28, __ NRC __ (Dec. 12, 2007).

² Letter from Sherwood Martinelli, Response to Censure -- Apology to Board, and Other Matters (Dec. 3, 2007) [hereinafter "Martinelli Letter"].

³ We note that in his "apology letter" Mr. Martinelli did not certify that he had read and would comply with the Licensing Board Orders that were expressly enumerated by the Board in our Censure Order of December 3, 2007, and which are available on the NRC's Electronic Hearing Docket and ADAMS. See Censure Order at 3. Instead, Mr. Martinelli stated that he has read "all orders of the board that I have been given a copy of" We are thus left to guess which, if any, Orders of the Board he includes in that group.

Apparently, however, Mr. Martinelli did not include the following Orders, which were

In his “apology” Mr. Martinelli characterized the Censure Order as an “order attempting to limit my freedom of speech.”⁴ He also said that the Board was taking “exception to my speaking my honest heart felt opinion and beliefs”⁵ Later in his “apology” Mr. Martinelli stated that: “I freely admit that I gave no thought to the fact that certain thin skinned or puritan people might take offense” and, having referenced George Carlin’s 12 dirty words monologue,

identified in our Censure Order, as orders with which he would comply. These Orders instructed the participants in this litigation regarding the proper content of a Proof of Service: Licensing Board Order (Administrative Matters and Directing Parties Attention to Requirements for Proper Service) at 2 (Oct. 29, 2007); Licensing Board Order (Authorizing FUSE to Submit a Section 2.335 Petition) at 3 (Nov. 21, 2007); Licensing Board Order (Denying an Extension of Time Within Which To File Requests For Hearing) at 3 (Nov. 27, 2007); Licensing Board Order (Granting an Extension of Time To Clearwater Within Which To File Requests For Hearing) at 3 (Nov. 27, 2007); Licensing Board Order (Denying Entergy’s Motion to Strike But Sua Sponte Striking FUSE’s Multiple Requests For Hearing) at 3 (Nov. 28, 2007); Licensing Board Order (Denying an Extension of Time Within Which To File Requests For Hearing) at 2 (Nov. 28, 2007); Licensing Board Order (Granting An Extension Of Time Within Which To File Requests For Hearing) at 4 (Nov. 29, 2007).

The Certificate of Service attached to Mr. Martinelli’s letter ignored the provisions of 10 C.F.R. Part 2, as were explained in detail in the Board’s Orders cited above. The Proof of Service attached to Mr. Martinelli’s letter does not indicate to whom it was sent. Instead it merely states that it was sent “to all parties.” As repeatedly explained by this Board in earlier orders, the parties at this point in this proceeding are the NRC Staff [10 C.F.R. § 2.302(b)] and Entergy [10 C.F.R. § 2.309(a)]. In addition, however, several other entities, including FUSE, have petitioned to become parties to this proceeding. The Censure Order was very specific as to whom Mr. Martinelli need send copies of his apology and it was not limited to just the parties [the NRC Staff and Entergy]. Given the deficiency in his Proof of Service, there is nothing in the record of this proceeding which demonstrates that Mr. Martinelli complied with the service aspect of the Censure Order.

We have repeatedly stated that participants in this litigation “must not be left uncertain as to whom . . . pleadings have been provided.” See Licensing Board Order (Administrative Matters and Directing Parties Attention to Requirements for Proper Service) at 2 (Oct. 29, 2007). Mr. Martinelli, however, either cannot, or will not, follow even the most simple of directions.

⁴ Martinelli Letter at 2. We note that the pages numbers used in the citation of Mr. Martinelli’s letter have been assigned by the Board because, contrary to our direction in earlier Orders, he once again did not number the pages of his submission.

⁵ In which the Board noted that his language: “[T]he board decided to be a bunch of pro industry pricks . . .” used in the context of commenting on an earlier Order of this Board, was “grossly inappropriate” when “addressed to the presiding judges in the course of an adjudicative proceeding.” Censure Order at 2.

he suggested that the Board may be able to prevent him from “stepping over the lines of their [the Board’s] subjective version of propriety” if “perhaps the board could put forth . . . a list of words or passages they will not allow in documents presented for their consideration?”⁶ Mr. Martinelli then suggested that his reference to the Board as “as a bunch of pro industry pricks” was not vulgar because, after all, the dictionary defined a prick as “a pointed instrument or weapon” before defining it as a vulgar synonym for a “penis” or a vulgar synonym for “a spiteful or contemptible man often having some authority.”⁷

The Board declines Mr. Martinelli’s request to provide him with a list of prohibited words, and rejects his suggestion that the use of the phrase “pro industry pricks” in his earlier communication was not an unacceptable breach of decorum in an adjudicative proceeding. 10 C.F.R. § 2.314(a) gives participants in litigation before the Board sufficient warning of what is expected of them by way of decorum. Accordingly, we decline Mr. Martinelli’s invitation to elaborate on this definition or excuse his earlier breach, and find that his “apology” – which was objectively more insulting than his initial transgression – is inadequate.

As noted in our Censure Order on this matter, “parties and their representatives in proceedings subject to [Subpart 2] are expected to conduct themselves with honor, dignity, and decorum as they should before a court of law.”⁸ Based on his “Apology Letter” Mr. Martinelli either cannot understand that simple direction, or he is unwilling to comply with it. Either way, in our judgement, it would be impossible for the Board to meet its responsibility “to control the prehearing and hearing process . . . maintain order” and “conduct a fair and impartial hearing

⁶ Martinelli letter at 2.

⁷ Id.

⁸ 10 C.F.R. § 2.314(a).

according to the law”⁹ without holding all participants to the level of courtesy and decorum required by the Commission’s Regulations. In order to achieve this, we cannot allow further participation in this proceeding by Mr. Martinelli.

Therefore, we are directing all participants in this litigation that, unless and until a further Order is issued by this Board, or by the Commission rescinding this Order, they need not respond to any filing submitted by Mr. Martinelli. In addition, the Board advises Mr. Martinelli that further pleadings in this proceeding submitted by him on his own behalf, or submitted by him on behalf of any organization, will not be considered by the Board.

Barring Mr. Martinelli from further participation in this proceeding does not, per se, strike the petition filed by FUSE on November 30, 2007. However, it does leave the group without a designated representative. In regards to their recent filing, the Board notes that FUSE did not comply with the Board’s Order of November 28, 2007, requiring them to correct several deficiencies with their initial petitions that were struck for noncompliance with the NRC Rules of Practice set out at 10 C.F.R. Part 2.¹⁰ Furthermore, there were instances where the first person pronouns were used to reflect Mr. Martinelli’s actions and several paragraphs within the numbered contentions that have new headings, but are unrelated to the topic at hand. Lastly, editorial language, in places, does not meet the standard of decorum required by 10 C.F.R. § 2.314(a).

⁹ 10 C.F.R. § 2.319.

¹⁰ See Licensing Board Order (Striking FUSE’s Multiple Requests For Hearing) at 2 (Nov. 28, 2007) in which the Board instructed FUSE that if they chose to submit an additional petition that “the Request for Hearing and Petition to Intervene must be clearly labeled as the Superseding Request for Hearing and Petition for Leave to Intervene, with each page numbered, and all exhibits attached thereto with an index listing all of the exhibits.” FUSE did not comply with any of these simple requirements and instead submitted more than 400 unnumbered pages, with no exhibit index.

Any of these derelictions would constitute sufficient grounds to dismiss FUSE's petition at this time. Accordingly the Board strikes FUSE's November 30, 2007 petition. However, in fairness to the membership of that organization, which to date has had woefully inadequate representation in this proceeding, the Board will allow FUSE another opportunity to participate in this proceeding. Accordingly, if FUSE wishes to be considered for participation in this hearing, the Board will allow it a reasonable period within which to designate a new representative, file an Superceding Request for Hearing and Petition for Leave to Intervene, to correct the noted deficiencies, and clarify the organization and content of their hearing request.

Accordingly, in order to be considered for intervener status in this proceeding FUSE will complete the following actions in a revised Superceding Request for Hearing and Petition for Leave to Intervene and submit it to this Board¹¹ no later than December 24, 2007: 1) clearly label the revised petition as the "Superceding Request for Hearing and Petition to Intervene," with each page numbered, and an index listing all of the attached exhibits; 2) modify the petition to reflect the new representation (e.g. changing, as needed, the first person pronouns) and to delete or correct language not meeting common standard of practice and decorum; 3) verify that all proffered contentions are numbered sequentially; and 4) certify that the numbered contentions are the only ones to be considered by the parties and the Board.¹²

¹¹ Accompanied by an adequate Proof of Service. See Licensing Board Order (Administrative Matters and Directing Parties Attention to Requirements for Proper Service) (Oct. 29, 2007).

¹² In granting FUSE yet another opportunity to submit an acceptable Superceding Request for Hearing and Petition to Intervene, we expressly advise FUSE that this is not a license to add additional contentions, to substantively amend contentions previously filed, or to develop additional bases in support of those previously submitted contentions. Rather, it is only an opportunity to make clerical and administrative corrections to the Request for Hearing and Petition to Intervene that was filed on November 30, 2007, so that FUSE's Petition will be in a form that is acceptable to the Board, and the procedure will be fair to the other participants in this litigation.

Any failure by FUSE to meet all of these specific requirements will result in the rejection of the Superceding Request for Hearing and Petition to Intervene.

Pursuant to 10 C.F.R. § 2.314(c)(3), an appeal of this Order may be filed with the Commission within ten (10) days after issuance, that is on or before December 24, 2007.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD¹³

/RA/

Lawrence G. McDade, Chairman
ADMINISTRATIVE JUDGE

Rockville, MD
December 13, 2007

¹³ Copies of this Order were sent this date by Internet e-mail to: (1) Sherwood Martinelli as representative for FUSE; (2) Counsel for the NRC Staff; (3) Counsel for Entergy; (4) Manna Jo Green, the representative for Clearwater; (5) Counsel for WestCan, CAN, RCCA, PHASE and the Sierra Club - Atlantic Chapter; (6) Nancy Burton as the representative of CRORIP; (7) Counsel for Westchester County; (8) Counsel for the State of New York; (9) Counsel for the State of Connecticut; (10) Counsel for the Town of Cortlandt; and (11) Counsel for Riverkeeper, Inc.

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Units 2 and 3))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER (BARRING SHERWOOD MARTINELLI FROM FURTHER PARTICIPATION IN THIS PROCEEDING) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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[Original signed by Nancy Greathead]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 13th day of December 2007