January 4, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
ENTERGY NUCLEAR OPERATIONS, INC.	)	Docket Nos. 50-247/286-LR
	)	
(Indian Point Nuclear Generating Units 2 and 3)	)	

NRC STAFF'S MOTION TO STRIKE THE
"SUPERCEDING REQUEST FOR HEARING AND PETITION TO INTERVENE"
FILED BY FRIENDS UNITED FOR SUSTAINABLE ENERGY, USA (FUSE)

Pursuant to 10 C.F.R. §§ 2.323(a) and 2.1204(a), the Staff of the U.S. Nuclear Regulatory Commission ("NRC Staff") hereby moves to strike and dismiss the "Superceding Request for Hearing and Petition to Intervene" ("Superceding Petition"), filed on December 24, 2007, by Friends United for Sustainable Energy, USA ("FUSE"). As more fully set forth below, in support of this request the Staff states (a) that FUSE has failed to complete service of its Superceding Petition and exhibits on the Staff, and (b) that the Certificate of Service attached to FUSE's Superceding Petition, attesting to service on the Staff, appears to be misleading or inaccurate.[1]

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[1] The Staff has made a sincere effort to comply with the requirements in 10 C.F.R. § 2.323(b). As discussed *infra*, at 3-5, the undersigned Counsel contacted Mr. John LeKay, FUSE's designated representative, in an effort to resolve the service issues raised in this Motion. However, in light of the fact that FUSE has failed to comply with the Commission's requirements governing the filing and service of documents, and FUSE's Certificate of Service is misleading or incorrect, the Staff has concluded that these issues concerning FUSE's filings can not be resolved -- even if FUSE now provides proper service of its documents. *See* discussion *infra* at n.14. In addition, inasmuch as FUSE appears to be unable or unwilling to provide paper copies of its filings, despite the requirement that it provide such copies, this issue can not be resolved by the Staff. *See* E-mail message from Sherwood Martinelli, a/k/a RoycePenstinger@aol.com to the service list, transmitted December 27, 2007 at 4:30 PM; and E-mail (continued. . .)

A. FUSE Has Failed to Complete Service of Its Petition and Exhibits on the NRC Staff.

1. In its Order of December 13, 2007, the Atomic Safety and Licensing Board barred Mr. Sherwood Martinelli from further participation in this proceeding, due to his failure to comply with the Licensing Board's prior Censure Order of December 3, 2007. The Licensing Board observed that this action left FUSE without a designated representative, that its petition to intervene of November 30, 2007, did not fully comply with the Board's "Order (Striking FUSE's Multiple Requests for Hearing)," at 2 (Nov. 28, 2007), and that the petition required other revisions. Order of December 13, 2007, at 4. Noting that sufficient grounds then existed to wholly dismiss FUSE's petition, the Board struck that petition, but nonetheless afforded FUSE an opportunity to designate a new representative in place of Mr. Martinelli and to file, no later than December 24, 2007, a petition that corrects the noted deficiencies. *Id.,* at 5.

2. In an E-mail transmission sent on December 24, 2007, FUSE filed its Superceding Petition, along with an index of contentions, an index of exhibits, a "Certificate of Service," and five "Notice of Appearances" (marked as Exhibits 76-80). The Notices of Appearance named five FUSE members and directors as its representatives in this proceeding in place of Mr. Martinelli. FUSE further designated one individual, John LeKay, as its lead

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message from "Sherwood Martinelli <fuse_usa@yahoo.com>" to Sherwin Turk, with copies to service list, transmitted January 1, 2008, at 12:37 PM. Counsel for the Staff contacted Entergy's attorneys, who stated that they do not oppose the instant Motion; further, they advised that they were served with a paper copy of FUSE's Superceding Petition and a CD ROM disc containing the Exhibits, but did not receive a paper copy of the Exhibits.

representative, and provided FUSE's telephone number, address, and E-mail address (fuse_usa@yahoo.com) as his contact information. *See* Notice of Appearance, at 1, 2.[2]

3. FUSE did not file or serve its exhibits by E-mail, other than Exhibits 76-80. Rather, FUSE stated that the other exhibits are "contained on CD ROM being mailed under separate cover." E-mail message from fuseusadocket@aol.com, transmitted on December 24, 2007, at 6:33 PM.

4. The Certificate of Service attached to FUSE's Superceding Petition states that "a copy of FUSE USA's Superceding Petition . . . by [FUSE Representative] Heather Ellsworth Burns-DeMelo were sent by email, with hard copies to follow via First Class U.S. Mail postage prepaid" to various persons on the Indian Point service list, including Counsel for the NRC Staff. Superceding Petition, at 468. The Certificate of Service was stated to be "signed in accord with 10 CFR 2.304(d)," and was signed by FUSE Lead Representative John LeKay. *Id.* at 471.

5. The NRC Staff, through its Counsel in this proceeding, received FUSE's E-mail transmission of December 24, 2007, containing the Superceding Petition and Exhibits 76-80 thereto. To date, however, the Staff (a) has not received a paper copy of FUSE's Superceding Petition, its Exhibits, or any other related documents, and (b) has not received any of FUSE's other Exhibits, either in electronic format or on paper. In short, some ten days after FUSE was required to file and serve its final petition to intervene, the Staff has still not received effective service of FUSE's Superceding Petition and Exhibits.

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[2] As discussed *infra,* the undersigned attorney recently observed that a telephone number and address were provided for Mr. LeKay in Exhibit 78 to FUSE's Superceding Petition (containing his individual Notice of Appearance), which the Staff received by E-mail along with the Superceding Petition; this telephone number and address differed from the number and address provided for Mr. LeKay in the Notice of Appearance filed as pages 1-2 of the Superceding Petition. *See* discussion *infra* at 5-6.

6. On December 27, 2007, Sherwin Turk, one of the Staff's attorneys in this proceeding, attempted to contact FUSE's newly designated lead representative, John LeKay, to determine whether FUSE had served its Superceding Petition and Exhibits on the Staff. Mr. Turk called the (914) xxx-7458 telephone number listed for Mr. LeKay in the Notice of Appearance provided in the Superceding Petition, at 2. The telephone was answered by Sherwood Martinelli. Upon asking for Mr. LeKay, Mr. Martinelli stated that the telephone number given by FUSE is Mr. Martinelli's home number, and that Mr. LeKay was not there. Further, he stated that "FUSE will be on vacation" and unavailable until after January 8, 2007.

7. Mr. Turk explained that he was calling to determine whether (and if so, how) FUSE had served its Superceding Petition upon the Staff, inasmuch as the Staff had not yet received it. In response, Mr. Martinelli informed Mr. Turk that he was present when FUSE served its Superceding Petition, and that FUSE had not sent a paper copy of the Superceding Petition and Exhibits to the Staff, but sent to the Secretary, via UPS, six paper copies of the Superceding Petition, indexes, and certificate of service, and six copies of a CD ROM disc, with a note requesting that they be distributed to other persons at the NRC. According to Mr. Martinelli, the delivery was scheduled to arrive at the Office of the Secretary by Wednesday (December 26, 2007). Mr. Martinelli further stated that the Exhibits total approximately 20,000 pages, and it would be too expensive for FUSE to provide paper copies of those documents. Mr. Martinelli later advised that he had informed other FUSE members "who are handling the filing against Entergy" of Mr. Turk's call,[3] and he invited Mr. Turk to communicate with FUSE by

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[3] In a telephone conversation initiated by Mr. Turk on January 4, 2008 Mr. LeKay confirmed that Mr. Martinelli had informed him of Mr. Turk's telephone call of December 27, 2007.

E-mail. *See* E-mail message from Mr. Martinelli, a/k/a Royce Penstinger@AOL.com, to the Licensing Board, transmitted on December 27, 2007, at 4:30 PM.

8. On January 2 and 3, 2008, Mr. Turk contacted employees in the Office of the Secretary, Adjudications and Rulemaking Staff, to learn whether that Office had received FUSE's UPS delivery. In response, Counsel for the Staff was informed that "[t]he hearing docket did not receive a hard copy of the attached electronic filing from LeKay/FUSE." Further, Staff Counsel was informed that the Office of the Secretary had not received a CD ROM disc from FUSE containing the Superceding Petition or Exhibits thereto, and that, as of Thursday afternoon, January 3, 2007, the NRC's mailroom in Rockville, MD, was not in possession of any delivery from FUSE or the representatives named in its Certificate of Service.[4]

9. On January 4, 2008, notwithstanding Mr. Martinelli's statement that FUSE was on vacation and unavailable until January 9, 2008, Mr. Turk made a final effort to contact Mr. LeKay before filing the instant Motion. Calling the telephone number provided in Exhibit 78 to FUSE's Superceding Petition, Mr. Turk was able to speak with Mr. LeKay. In a series of telephone conversations, Mr. LeKay informed Mr. Turk that on December 24, 2007, FUSE had delivered a number of boxes to a UPS drop-off site (located in a "STAPLES" store), and that these included a package addressed to Mr. Turk and a package addressed to the Office of Commission Appellate Adjudication. He informed Mr. Turk that the STAPLES manager reported that UPS did not pick up the packages until several days later, and he then provided two UPS tracking numbers to Mr. Turk: 1Z5AR1040300593662 and 1Z5AR1040300593653.

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[4] Counsel for the Staff also visited the NRC mailroom at 11:00 AM on Friday, January 4, 2008, and was informed that the mailroom was not in possession of any delivery addressed to OGC or the Office of the Secretary.

Mr. Turk performed an online tracking search, and learned that UPS had picked up the packages on December 26, but could not deliver them because "the receiver's address is incomplete" – *i.e.,* FUSE had failed to provide proper addresses. *See* Exhibit 1 hereto. At Mr. Turk's request, Mr. LeKay arranged for the STAPLES manager to send Mr. Turk the shipment tickets, showing the requested delivery addresses. The STAPLES documents show that FUSE did not provide a street address for either Mr. Turk or the Office of Commission Appellate Adjudication, providing only the U.S. Mail unique zip code address, *i.e.*, "Washington, D.C. 20555." Further, the tickets show that FUSe did not address a package for delivery to the Office of the Secretary. *See* Exhibit 2 hereto.[5]

10. Commission regulations in 10 C.F.R. § 2.302[6] permit the filing of documents in NRC adjudicatory proceedings by any of several specified methods. In particular, as pertinent here, § 2.302(a)(3) permits the filing of documents by E-mail addressed to the Office of the Secretary, but in that event, an original and two copies must be mailed to the Office of the Secretary within two days, pursuant to 10 C.F.R. § 2.304(f); failure to file the original and two copies of the documents may result in rejection of the pleadings.[7] Where documents are filed

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[5] Upon learning that the Staff intended to file the instant Motion, Mr. LeKay voluntarily offered to serve a second set of FUSE's documents by expedited delivery on Monday, January 7, 2008. *See* discussion *infra* at n.14.

[6] The Commission's rules governing electronic submission of documents in NRC adjudicatory proceedings were recently amended; the revised rules apply only to new proceedings notice on or after October 15, 2007, and do not apply in this proceeding. *See* Statement of Consideration, "Use of Electronic Submissions in Agency Hearings," 72 Fed. Reg. 49,139 (Aug. 28, 2007). All citations herein to the Commission's rules governing the service and filing of documents refer to the regulations applicable to this proceeding, as codified in 10 C.F.R. Part 2 prior to the effective date of that revision.

[7] In another proceeding, the Licensing Board observed that petitions to intervene in Commission proceedings may be filed by e-mail, pursuant to § 2.302(a)(3), but such documents "may be refused acceptance for filing" under 10 C.F.R. § 2.304(g), "unless, within two (2) days after the electronic filing, an (continued. . .)

or served by express mail or expedited delivery service, the NRC's Rules of Practice specify that delivery must be addressed to the Office of the Secretary, at 11555 Rockville Pike, Rockville, MD 20852, Attention: Adjudications and Rulemaking Staff. 10 C.F.R. §§ 2.302(a)(2), 2.305(d)(4)(ii).

11. Service of documents upon parties to a proceeding may be accomplished by any of several specified methods, including E-mail. 10 C.F.R. § 2.305(c). Where service is made by E-mail, the rules further provide that a paper copy thereof must be served:

> (c) How service may be made. Service may be made by personal delivery or courier, by express mail or expedited delivery service, by first class, certified or registered mail, by e-mail or facsimile transmission, or as otherwise authorized by law. If service is made by e-mail or facsimile transmission, the original signed copy must be transmitted to the Secretary by personal delivery, courier, express mail or expedited delivery service, or first class, certified, or registered mail. In addition, <u>if service is by e-mail, a paper copy must also be served by any other service method permitted under this paragraph</u>. . . .

Id.; emphasis added. Where documents are served by E-mail, service upon a party is deemed to be complete "<u>on transmission thereof, and service of a copy by another method of service permitted in paragraph (c) of this section</u>." 10 C.F.R. § 2.305(e)(3); emphasis added.

12. The Commission has clearly stated that, "[f]or purposes of service of documents, the staff of the Commission is considered a party." 10 C.F.R. § 2.302(b). Further, the rules

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original and two copies of these documents, in the format specified at Section 2.304(b)," are mailed to the Office of the Secretary, in accordance with 10 C.F.R. § 2.304(f). *Nuclear Management Co., LLC* (Monticello Nuclear Generating Plant), LBP-05-31, 62 NRC 735, 741 n.6 (2005). The Staff does not know if the Office of the Secretary, here, has accepted FUSE's E-mail transmission of its Superceding Petition for filing; however, in accordance with 10 C.F.R. § 2.304(g), it would appear that FUSE's E-mail transmission of its Superceding Petition may be rejected for filing, due to FUSE's apparent failure to file an original and two copies of that document by other means, as required by § 2.304(f).

direct that "[s]ervice shall be made upon the NRC staff of all papers and documents required to be filed with parties and the presiding officer in all proceedings . . . " 10 C.F.R. § 2.305(f).[8] Moreover, the *Federal Register* Notice of Opportunity for Hearing for this proceeding specifically required that any requests for hearing or petitions to intervene in this proceeding, in addition to being filed with the Office of the Secretary, "must also be sent to the Office of the General Counsel."[9] Where service is made upon the NRC Staff, the Rules require that such service "shall be by the same or equivalent method as service upon the Office of the Secretary and the presiding officer, e.g., electronically, personal delivery or courier, express mail, or expedited delivery service." 10 C.F.R. § 2.305(f).

13. Proper service upon other parties of all documents filed in a proceeding is a fundamental obligation applicable to any litigant, to assure that other parties become aware of and can properly address, in a timely manner, the matters stated in those documents. A litigant's failure to serve a pleading upon a party may provide grounds for dismissal of that pleading. *See, e.g., Nuclear Management Co., LLC* (Monticello Nuclear Generating Plant), LBP-05-31, 62 NRC 735, 743 n.13 (2005); *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 2), LBP-92-26, 36 NRC 191, 194-95 (1992).

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[8] Where a party has appeared by attorney, "service must be made upon the attorney of record." 10 C.F.R. § 2.305(b) ("Service of papers, methods, proof"). The Staff has previously filed Notices of Appearance for Staff Counsel in this proceeding. *See* "Notices of Appearance" for Sherwin E. Turk, Lloyd B. Subin, and Beth N. Mizuno, filed October 25, 2007.

[9] Entergy Nuclear Operations, Inc., Indian Point Nuclear Generating Unit Nos. 2 and 3; "Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Nos. DPR-26 and DPR-64 for an Additional 20-Year Period," 72 Fed. Reg. 42,134, 42,135 (Aug. 1, 2007).

14. The Licensing Board has specifically cautioned litigants in this proceeding that petitions to intervene must be properly filed and served. In its Memorandum and Order (Administrative Matters and Directing Parties Attention to Requirements for Proper Service)," issued on October 29, 2007, the Licensing Board warned that "[i]f Requests for Hearing or Petitions for Leave to Intervene are not properly filed and properly served on or before November 30, 2007,[10] a Motion to Dismiss the Petition, rather than, or in addition to, an Answer would be an appropriate pleading." *Id.* at 1, emphasis added. The Board further specifically called to the litigants' attention the requirement that service must be made upon the NRC Staff, through its Counsel, Id. at 1-2, and reminded them that certificates of service must be accurate and complete.[11] Noting various deficiencies in filings made by FUSE and others, the Board specifically instructed litigants in this proceeding as follows:

> The litigation in this matter may well attract numerous parties and the pleadings may well be lengthy. . . . [T]he Board and the parties must not be left uncertain as to whom, and when, pleadings have been provided. Accordingly, service must be properly made and Certificates of Service must be accurate and complete, including the identity of the person served, the address to which it was sent, the method of service, and the signature (in writing or electronic) of the person who has certified that service has been made exactly as specified in the Certificate of Service.
>
> We urge all persons or organizations who wish to participate in this matter to read the Commission's Rules of Practice, 10 C.F.R. Part 2. Those Rules outline procedures that allow hearings to proceed in a fair and orderly manner. 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

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[10] This date was later extended for FUSE to December 10, 2007, by Commission Order (Granting an Extension of Time), dated November 16, 2007.

[11] Pursuant to 10 C.F.R. § 2.302(a)(4), "[a]ll documents offered for filing must be accompanied by proof of service on all parties to the proceeding or their attorneys of record."

> Rules can well result in a litigant being dismissed from this proceeding.

Memorandum and Order of October 29, 2007, at 2-3.

15. Nor is the Licensing Board alone in its admonition that FUSE and other litigants in this proceeding must comply with the Commission's rules regarding the filing and service of documents. The Secretary of the Commission has reminded litigants herein that "all filings concerning the Indian Point license renewal proceeding must be served upon all participants and accompanied by a signed Certificate of Service."[12] Moreover, the Commission, in its Order of November 16, 2007 (granting FUSE's request for an extension of time), specifically directed FUSE that it must comply with the service requirements in 10 C.F.R. Part 2:

> Finally, 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.

Order of November 16, 2007, at 1-2; emphasis added.

16. In an Order issued on November 27, 2007, the Licensing Board again called the litigants' attention to the NRC's rules regarding proper service of pleadings. The Board stated:

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[12] Memorandum from Annette L. Vietti-Cook to Lawrence G. McDade, Chair, *et al.*, dated November 13, 2007.

> . . .. [T]his Board has repeatedly advised participants in this proceeding that, pursuant to NRC regulations, all pleadings must be accompanied by a Proof of Service. This point was also repeatedly made by the Commission in this proceeding. We reiterate here what was clearly stated in our Order of October 29, 2007: at this point in this proceeding the NRC Staff is a party to this proceeding, 10 C.F.R. § 2.302(b), and the licensee, Entergy, is also a party to this proceeding. 10 C.F.R. § 2.309(a). We also again note that when a party has appeared by attorney, service must be made upon the attorney of record. 10 C.F.R. § 2.305(b). Accordingly, any pleading in this proceeding which is not accompanied by a Proof of Service on the attorneys for the NRC Staff and Entergy is subject to being struck from the record.
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> The Board does not comprehend how such a simple and universal requirement in litigation as the preparation of a Certificate of Service can be repeatedly ignored. Regardless of the reason for this dereliction, however, litigation cannot proceed in a fair and orderly manner unless the participants inform themselves of the applicable rules and then follow those rules. <u>To allow a participant to ignore the rules without consequences would work a fundamental unfairness upon the other participants in this proceeding</u>.

Order (Denying an Extension of Time Within Which to File Requests for Hearing), dated November 27, 2007, at 2-3; footnotes omitted, emphasis added.

17. Here, despite the clear requirements set forth in the Commission's regulations and the *Federal Register* Notice for this proceeding, and despite repeated admonitions from the Licensing Board and the Commission, FUSE has failed properly to serve its Superceding Petition and Exhibits upon the Staff. As set forth above, the Staff has not received a paper copy of the Superceding Petition and Exhibits; [13] and it has not received a copy of the Exhibits

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[13] As stated *infra* at 4, Mr. Martinelli has informed Staff Counsel that FUSE's Exhibits total approximately 20,000 pages, and that it would be too expensive for FUSE to provide paper copies of those documents. By the same token, however, parties who must review and respond to FUSE's petition and exhibits are entitled, under the rules governing this proceeding, to receive paper copies of those filings – in the absence of which, they would have to devote the time, attention and resources necessary to (continued. . .)

in any form, including by E-mail or CD ROM disc. FUSE's failure to properly serve its pleadings upon the Staff is not an altogether isolated instance, nor is there reason to believe that FUSE should be given any further opportunity to satisfy its obligations as a litigant.[14]

18. Moreover, Mr. Turk's December 27 telephone call to the number provided for Mr. LeKay and FUSE in the Superceding Petition, notice of which was given to Mr. LeKay by Mr. Martinelli (as both Mr. Martinelli and Mr. LeKay have confirmed) effectively put FUSE on notice that something was remiss in its service of the Superceding Petition. FUSE apparently made no effort to investigate this matter further, and did so only after Mr. Turk called again prior to filing this Motion. FUSE's failure to make proper service on the Staff has diverted substantial time and attention from the Staff, which is otherwise needed to prepare responses to the petitions and contentions filed by other litigants in this proceeding. The Staff respectfully submits that a dismissal of FUSE's Superceding Petition is warranted at this time.

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print copies of those materials. Moreover, it is unclear why FUSE felt it necessary to file 20,000 pages of exhibits, but that decision was one of its own making – and having done so, it is obliged to comply with the Rules of Practice governing the filing and service of pleadings.

[14] As stated in n.4, *supra*, upon learning that the Staff intended to file the instant Motion, Mr. LeKay voluntarily offered to serve a second set of FUSE's documents by expedited delivery on Monday, January 7, 2008. While that offer is appreciated, the Staff believes that it was FUSE's obligation to read the Commission's Rules of Practice – as the Commission and Licensing Board have repeatedly instructed – and that it was FUSE's responsibility to assure that it properly files and serves its documents. This is particularly true in light of the fact that petitions were due to be filed and served on December 10 -- and the Licensing Board went out of its way, when dismissing Mr. Martinelli from the proceeding, to afford FUSE one final opportunity to file its documents correctly, conditioned on FUSE's filing of the revised petition on or before December 24, 2007.

B. FUSE's Certificate of Service Appears to Be Misleading or Inaccurate.

19. As set forth in Paragraph 4 above, the Certificate of Service attached to FUSE's Superceding Petition states that a copy of FUSE's Superceding Petition was "sent by email, with hard copies to follow via First Class U.S. Mail postage prepaid" to various persons on the Indian Point service list, including Counsel for the NRC Staff. *See* Superceding Petition at 468-69; emphasis added. Notwithstanding this certification, the Staff has not received a "hard copy" of the Superceding Petition or Exhibits thereto, nor has it received an electronic copy of FUSE's Exhibits (other than Exhibits 76-80), by mail or any other means of delivery. Moreover, it does not appear that FUSE ever sent a paper copy of its exhibits to the Staff. In addition, it appears that FUSE sent a package to the Staff by UPS – not by U.S. Mail postage prepaid, as stated in the Certificate of Service. The Certificate of Service, signed by Mr. LeKay on behalf of FUSE, therefore appears to be misleading or incorrect, and is materially deficient.[15]

20. Pursuant to 10 C.F.R. § 2.304(c), the filing of an inaccurate certificate of service may, in appropriate circumstances, cause a pleading to be stricken:

> (c) The original of each document must be signed in ink by the party or its authorized representative, or by an attorney having authority with respect to it. The document must state the capacity of the person signing; his or her address, and the date of signature. The signature of a person signing in a representative capacity is a representation that the document has been subscribed in the capacity specified with full authority[,] that he or she has read it and knows the contents[,] that to the best of his or her knowledge, information, and belief the statements made in it

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[15] Even though FUSE is presently represented in this proceeding by a non-lawyer, it is nonetheless expected to comply with the Rules of Practice -- including the rules pertaining to service of documents. *See, e.g., Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-778, 20 NRC 42, 46-47 n.4 (1984), *citing Pennsylvania Power and Light Co.* (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-563, 10 NRC 449, 450 n.1 (1979).

> are true, and that it is not interposed for delay. If a document is not signed, or is signed with intent to defeat the purpose of this section, it may be stricken.

10 C.F.R. § 2.304(c); emphasis added.[16] In the present circumstances, FUSE's filing of an incorrect certificate of service, representing that hard copies of the Superceding Petition would be served on the Staff by U.S. Mail, coupled with its failure to effect service the Staff to this date, warrants that its Superceding Petition be stricken.[17]

21. Finally, the Staff notes that this matter could have been resolved more promptly, if FUSE had identified Mr. LeKay's own telephone number and address in the Notice of Appearance (Superceding Petition at 2) and its Certificate of Service, instead of Mr. Martinelli's home telephone number and address, or if FUSE had investigated this matter after receiving

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[16] Any document that fails to comply with these and other requirements of 10 C.F.R. § 2.304 may be refused acceptance for filing and returned to the sender, and will not be entered on the Commission's docket. 10 C.F.R. § 2. 304(f).

[17] The Commission has previously addressed the imposition of sanctions where a litigant fails to comply with its obligations, the range of sanctions available to the Board (including the dismissal of a party or its contentions), and the factors that should be considered in imposing a sanction:

> Fairness to all involved in NRC's adjudicatory procedures requires that every participant fulfill the obligations imposed by and in accordance with applicable law and Commission regulations. . . . [T]he fact that a party may have personal or other obligations or possess fewer resources than others to devote to the proceeding does not relieve that party of its hearing obligations. . . . In selecting a sanction, boards should consider the relative importance of the unmet obligation, its potential for harm to other parties or the orderly conduct of the proceeding, whether its occurrence is an isolated incident or a part of a pattern of behavior, the importance of the safety or environmental concerns raised by the party, and all of the circumstances. Boards should attempt to tailor sanctions to mitigate the harm caused by the failure of a party to fulfill its obligations and bring about improved future compliance.

Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981).

Mr. Turk's telephone call of December 27, 2007.[18] In any event, however, even if FUSE had been able to correct its improper filing and service more promptly, the fact remains that FUSE's required filing of December 24 would still have been filed and served improperly – even though the Commission and Licensing Board had both repeatedly admonished FUSE that it must read the Rules of Practice and assure that its filings comply with the requirements stated therein.[19]

CONCLUSION

FUSE's Superceding Petition fails to comply with the Commission's Rules governing the service of documents, in that it has failed to serve a hard copy of its petition and Exhibits on the Staff, and failed to serve its exhibits on the Staff, in any form; the Certificate of Service attached to the Superceding Petition appears to be misleading or inaccurate, insofar as it certifies that a hard copy of the Superceding Petition was or would be made upon the Staff (whether by U.S. Mail, as stated in the Certificate, or by any other means). Fairness to the Staff and other

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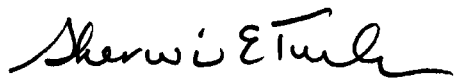
[18] While Mr. LeKay signed his personal Notice of Appearance (FUSE Exhibit 78), giving his own telephone number and address, the Notice of Appearance contained in the Superceding Petition, at 1-2, provides FUSE's office number and address (*i.e.,* Mr. Martinelli's home number and address) for Mr. LeKay and FUSE's other representatives. Similarly, the E-mail address provided for Mr. LeKay (fuse_usa@yahoo.com) is the E-mail address which Mr. Martinelli has been using on behalf of FUSE – most recently in his January 1, 2008 E-mail message to Mr. Turk (with copies to the Board and persons on the service list).

[19] The Staff is cognizant of FUSE's expressed interest in litigating the issues raised in its Superceding Petition and placing those issues before the Commission in this license renewal proceeding. The Staff notes, however, that other litigants (in particular, the organizations represented by FUSE's former attorney), have filed numerous contentions which raise issues that are similar, if not identical, to a large number of the issues raised by FUSE. Thus, although a dismissal of FUSE's Superceding Petition would preclude FUSE from participating in the hearing, a substantial number of the issues it raised would nonetheless be considered here, to the extent that they form an admissible contention and are within the permissible scope of this license renewal proceeding. Further, the Staff is conducting a comprehensive safety and environmental review, in accordance with the Commission's license renewal regulations; and any decision on the license renewal application in this proceeding would necessarily consider the Staff's evaluations and other evidence introduced by parties in the proceeding. Thus, the Commission will fully consider pertinent safety and environmental issues, and no harm to the public interest would result from a dismissal of FUSE's Superceding Petition.

participants in this proceeding – all of whom are required to comply with the Commission's Rules of Practice, including the rules governing the filing and service of documents -- requires that FUSE's Superceding Petition and exhibits should now be stricken, and that FUSE should be dismissed as a participant in this proceeding.

Respectfully submitted,



Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 4th day of January 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
ENTERGY NUCLEAR OPERATIONS, INC.	)	Docket Nos. 50-247/286-LR
	)	
(Indian Point Nuclear Generating	)	
Units 2 and 3)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S MOTION TO STRIKE THE 'SUPERCEDING REQUEST FOR HEARING AND PETITION TO INTERVENE' FILED BY FRIENDS UNITED FOR SUSTAINABLE ENERGY, USA (FUSE)," dated January 4, 2008, have been served upon the following through deposit in the NRC's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by deposit in the U.S. Postal Service, as indicated by double asterisk, with copies by electronic mail this 4th day of January, 2008:

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