

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 02/01/08

ATOMIC SAFETY AND LICENSING BOARD

SERVED 02/01/08

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

February 1, 2008

ORDER

(Granting the NRC Staff's Motion to Strike FUSE's Superceding Request for Hearing)

In an Order dated December 13, 2007, this Board struck a Petition to Intervene and Request for Hearing that had been filed on behalf of Friends United for Sustainable Energy (FUSE).¹ In that Order the Board advised FUSE that it had not complied with an earlier Board Order dated November 28, 2007,² noted that any of its then current derelictions would constitute sufficient grounds to dismiss FUSE's petition,³ but nevertheless allowed FUSE another opportunity to correct deficiencies in its petition and to file a Superceding Request for Hearing and Petition to Intervene on or before December 24, 2007.

¹ Licensing Board Order (Barring Sherwood Martinelli From Further Participation in This Proceeding) (Dec. 13, 2008) (unpublished) [hereinafter "Martinelli Order"].

² See Licensing Board Order (Striking FUSE's Multiple Requests For Hearing) (Nov. 28, 2007) (unpublished).

³ Martinelli Order at 5.

Seeking to avail itself of the opportunity granted to it by this Board, FUSE timely filed its Superceding Petition on December 24, 2007.⁴ That Petition consisted of 472 numbered pages and was supplemented by an electronic copy of exhibits consisting of thousands of pages. Thereafter, on January 4, 2008, the NRC Staff filed a Motion to Strike FUSE's Petition to Intervene⁵ and followed up that filing with a Supplement to its Motion on January 9, 2008.⁶ FUSE did not file a Response to the NRC Staff's Motion.⁷

In its Motion, the NRC Staff demonstrated that FUSE had not served its Superceding Petition as required by NRC Regulations (10 C.F.R. § 2.305), and had filed an inaccurate Certificate of Service which had not been corrected.⁸ As explained by the NRC Staff, FUSE stated in its Certificate of Service that it had sent its Superceding Petition to various named persons, at specified addresses, "by e-mail, with hard copies to follow via First Class U.S. mail postage prepaid."⁹ Had FUSE done what they certified they had done, they would have complied with 10 C.F.R. § 2.305. The NRC Staff, however, demonstrated that FUSE did not do what they certified.¹⁰

⁴ Superceding Request For Hearing and Petition to Intervene (Dec. 24, 2007) [hereinafter "FUSE Superceding Petition"].

⁵ NRC Staff's Motion to Strike the "Superceding Request for Hearing and Petition to Intervene" Filed by Friends United for Sustainable Energy, USA (FUSE) (Jan. 4, 2008) [hereinafter "NRC Staff Motion"].

⁶ NRC Staff's Supplement To Its Motion to Strike FUSE's Superceding Petition (Jan. 9, 2008) [hereinafter "NRC Staff Supplement"].

⁷ FUSE had the right to file a reply to the NRC Staff's Motion on or before January 22, 2008. 10 C.F.R. § 2.323(c).

⁸ NRC Staff Motion at 11-15.

⁹ FUSE Superceding Petition at 468-71.

¹⁰ NRC Staff Motion at 13.

Pursuant to NRC Regulations, a Petitioner is required to serve paper copies of its Petition and the Exhibits they rely upon in support of that Petition, unless granted a dispensation from that requirement by the Presiding Officer or the Commission. 10 C.F.R. § 2.305(c). To date FUSE has neither requested dispensation from the rule nor served a paper copy of its exhibits.¹¹

FUSE's Certificate of Service states that they sent "hard copies" to the parties via first class mail on December 24, 2007, to addresses specified in the Certificate.¹² Instead, on January 4, 2008, FUSE sent several paper copies of its Petition via UPS, accompanied by CD-ROM discs which were represented as containing the exhibits, to the Commission Secretary with an unsigned note asking the Secretary to effectuate service.¹³ To date, FUSE has not corrected its Certificate of Service.

Over the past three months we have repeatedly told FUSE what the NRC Rules of Practice require (10 C.F.R. Part 2), repeatedly explained the rationale underlying specific rules, and explained why failure to comply with the rules was unfair to the other participants in the litigation, and why it could not be allowed by the Board. As early as October 29, 2007, in

¹¹ NRC Staff's Motion at 4; NRC Staff's Supplement at 2.

¹² In the Licensing Board Order of December 13, the deadline set for FUSE to file and serve its Superceding Petition was Dec. 24, 2007.

¹³ NRC Staff Motion at 4.

commenting on a failure by FUSE to properly make and certify service, the Board expressly told FUSE that:

[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 on the Certificate.¹⁴

Now, despite repeated warnings from this Board and the Commission, FUSE has once again, by ignoring the Commission's Rules and the Board's Orders, improperly diverted time and attention from the NRC Staff, which had to track down FUSE's Superceding Petition and the related Exhibits. The laborious steps taken by the NRC Staff to locate FUSE's filings, and the apparent indifference to the Staff's predicament demonstrated by FUSE, are clearly articulated in the Staff's Motion and Supplement and need not be repeated here.¹⁵ We cannot allow this wasteful practice to continue. Even a pro se litigant such as FUSE cannot be excused from knowing, and adhering to the most basic pleading requirements.¹⁶

In allowing FUSE yet another opportunity to participate in this litigation, the Board, in our Order of December 13, 2007, expressly advised Petitioners that any failure by FUSE to meet all of the specific requirements articulated by the Board would result in the rejection of the

¹⁴ Licensing Board Order (Administrative Matters and Directing Parties Attention to Requirements for Proper Service) at 2 (Oct. 29, 2007) (unpublished).

¹⁵ See NRC Staff Motion at 3-6, NRC Staff Supplement at 1-3.

¹⁶ See McNeil v. U.S. 58 U.S. 106, 113 (1993) (“[W]e have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel.”); See also Iwachiw v. New York State Dept. of Motor Vehicles, 396 F.3d 525, 529 n.1 (2nd Cir. 2005) (citation omitted), Edwards v. I.N.S., 59 F.3d 5, 8 (2nd Cir. 1995) (“[P]ro se litigants generally are required to inform themselves regarding procedural rules and to comply with them.”) (citation omitted), American Ass’n of Naturopathic Physicians v. Hayhurst, 277 F.3d 1104, 1107-08 (9th Cir. 2000) (citation omitted).

Superseding Request for Hearing and Petition to Intervene.¹⁷ We included that unequivocal language in our Order of December 13, 2007, because we were not addressing the first instance in which FUSE had failed to comply with the Rules of Practice and Board Orders. More specifically, in granting FUSE yet another opportunity to file an acceptable Petition to Intervene, the Board expressly referenced eight separate Orders in which we had articulated in great detail what FUSE, and other putative intervenors, need to do in order to become participants in this litigation. These Orders, inter alia, included detailed instruction regarding the preparation of a proper Certificate of Service and detailed explanations of why accurate proof of service is necessary to the orderly progress of this proceeding.¹⁸

Having raised these issues nine times without bringing FUSE into compliance, it is the considered opinion of this Board that FUSE has demonstrated to an absolute certainty that it is either incapable or unwilling to follow directions. Accordingly, to allow any further participation in this proceeding by FUSE would serve to work manifest injustice on the other participants in

¹⁷ Martinelli Order at 5.

¹⁸ See Licensing Board Order (Administrative Matters and Directing Parties Attention to Requirements for Proper Service) at 2 (Oct. 29, 2007) (unpublished); Licensing Board Order (Authorizing FUSE to Submit a Section 2.335 Petition) at 3 (Nov. 21, 2007) (unpublished); Licensing Board Order (Denying an Extension of Time Within Which To File Requests For Hearing) at 3 (Nov. 27, 2007) (unpublished); Licensing Board Order (Granting an Extension of Time To Clearwater Within Which To File Requests For Hearing) at 3 (Nov. 27, 2007) (unpublished); Licensing Board Order (Denying Entergy's Motion to Strike But Sua Sponte Striking FUSE's Multiple Requests For Hearing) at 3 (Nov. 28, 2007) (unpublished); Licensing Board Order (Denying an Extension of Time Within Which To File Requests For Hearing) at 2 (Nov. 28, 2007) (unpublished); Licensing Board Order (Granting An Extension Of Time Within Which To File Requests For Hearing) at 4 (Nov. 29, 2007) (unpublished); Licensing Board Order (Censure of Sherwood Martinelli) at 3 (Dec. 3, 2007) (unpublished).

this litigation who, unlike FUSE, have demonstrated that they take their responsibilities seriously, and have the capacity to participate in this serious and complicated matter.¹⁹

As pointed out in its Petition,²⁰ and as is evident from the documents presented, FUSE has spent a great deal of time studying this matter and preparing its Petition. Likewise it is clear that the members of FUSE have a real and legitimate interest in the safe operation of the Indian Point facility and a need to know that, if it will continue to operate, it will operate safely. Nothing less than the lives and health of FUSE's members and the lives and health of their families are the issue. Accordingly, the Board has extended chance after chance to the Petitioner in the forlorn hope that FUSE would read and heed the Board's Orders, use the highly professional submissions of other Petitioners²¹ as models to go by, learn from its mistakes, control its passion, and participate in this proceeding in a responsible manner. Our efforts have proved unsuccessful. In fairness to all of the participants in this litigation, we must move on.

¹⁹ We note with dismay that after being directed in our Order of December 13, 2007, "to delete or correct language [from their Petition to Intervene] not meeting common standard of practice and decorum," Martinelli Order at 5, FUSE failed to do so. For example they refer to Entergy as "low life, filthy dirty lying scum," and "scoundrels of the wors[t] [kind] lower than OJ Simpson and Adolf Hitler." FUSE Superceding Petition at 276-77. FUSE is no more polite to the NRC Staff: "NRC stands for no regulatory control. Maybe if the NRC took their heads out of NEI's ass long enough to look at these serious issues . . ." Id. at 256. FUSE also repeatedly makes false, unsupported allegations regarding the Board, and uses disrespectful language regarding the Board. For example, "members of this [B]oard played some part in the creation and acceptance of some of the criteria found in those documents [supporting Entergy's aging management plans]," and "[h]ells bells, the [B]oard dismissed all of FUSE USA's contentions because Entergy whined." Id. at 95, 288. Such language and unsupported allegations have no legitimate role in a serious adjudicative proceeding.

²⁰ FUSE Superceding Petition at 87.

²¹ See New York State Notice of Intention to Participate and Petition To Intervene (Nov. 30, 2007).

Accordingly, after consideration of the NRC Staff Motion, and the entire history of this proceeding, the Board grants the Staff's Motion and strikes FUSE's Superceding Request for Hearing and Petition to Intervene with prejudice.²²

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 February 11, 2007.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD²³

/RA/

Lawrence G. McDade, Chairman
ADMINISTRATIVE JUDGE

Rockville, MD
February 1, 2008

²² On January 10, 2008, the Applicant, Entergy Nuclear Operations, Inc. (Entergy), also filed a Motion to Strike FUSE's Superceding Request for Hearing and Petition to Intervene. By granting the earlier Motion to Strike that was filed by the NRC Staff, we render Entergy's Motion moot. We noted above that FUSE did not respond to the NRC Staff's Motion to Strike. We note here that FUSE likewise did not reply to Entergy's Motion to Strike.

²³ Copies of this Order were sent this date by Internet e-mail to: (1) Counsel for the NRC Staff; (2) Counsel for Entergy; (3) Counsel for the State of New York; (4) Counsel for the State of Connecticut; (5) Counsel for Riverkeeper, Inc.; (6) Counsel for WestCan, RCCA, PHASE, the Sierra Club - Atlantic Chapter, and Richard Brodsky; (7) Nancy Burton, the Representative of CRORIP; (8) Manna Jo Green, the Representative for Clearwater; (9) John LeKay, the Representative for FUSE; (10) Counsel for Westchester County; and (11) Counsel for the Town of Cortlandt.

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NUCLEAR REGULATORY COMMISSION

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Units 2 and 3))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER (GRANTING THE NRC STAFF'S MOTION TO STRIKE FUSE'S SUPERCEDING REQUEST FOR HEARING) 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 R. L. Giitter]
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Dated at Rockville, Maryland
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