

March 6, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

SUPPLEMENT TO "NRC STAFF'S ANSWER TO
ENERGY'S MOTION TO STRIKE THE REPLY OF WESTCAN, *ET AL.*
TO THE RESPONSES FILED BY ENERGY AND THE NRC STAFF"

The NRC Staff ("Staff") has discovered new information which requires the correction of a statement in the "NRC Staff's Answer to Entergy's Motion to Strike the Reply of WestCAN, *et al.* to the Responses Filed by Entergy and the NRC Staff" ("Answer"), dated March 3, 2008. Further, the Staff herein supplements its Answer to the Applicant's motion to strike,¹ based upon this newly discovered information.

Specifically, at page 2 of the Staff's Answer to the Applicant's Motion, the Staff reported that Petitioners Westchester Citizens Awareness Network, *et al.* (hereinafter referred to as "WestCAN") had transmitted their February 15, 2008 Reply Brief² to the Staff at 12:00 AM on February 16, 2008. Staff Counsel has now learned that the 12:00 AM transmittal was superseded by a substantively different version of the document, transmitted by E-mail at 12:53 AM on February 16 to various persons, including the Applicant, the NRC Hearing Docket, and the OGC mailroom -- but not to Staff Counsel. Counsel for WestCAN has informed Staff

¹ "Entergy Nuclear Operations, Inc. Motion to Strike WestCAN, *et al.* Reply to Entergy and the NRC Staff" ("Motion"), dated February 22, 2008.

² "Reply of Petitioners Westchester Citizen's Awareness Network (WestCAN), [*et al.*]" ("WestCAN's Reply") [to Entergy's and the NRC Staff's responses to WestCAN's "Petition to Intervene with Contentions and Request for Hearing"], dated February 15, 2008.

Counsel that the 12:53 AM version corresponds to the paper version delivered by DHL on February 19, 2008, and that the version that was transmitted to Staff Counsel at 12:00 AM on February 16 should be discarded.³ Accordingly, the Staff withdraws its statement that WestCAN served its Reply Brief on the Staff by E-mail at 12:00 AM on February 16, and states that WestCAN's Reply Brief was transmitted by E-mail, without attachments or exhibits, to the OGC mailroom (but not to Staff Counsel) at 12:53 AM on February 16, 2008.

Further, based on this information, it now appears that WestCAN's Reply Brief was not properly served by E-mail on the Staff. In this regard, the Certificate of Service accompanying WestCAN's Reply Brief of 12:53 AM states that WestCAN transmitted its Reply Brief by E-mail to: sherwin.turk@nrc.gov, beth.mizuno@nrc.gov, Kimberly.sexton@nrc.gov, and Christopher.chandler@nrc.gov. *Id.* at 2, 3.⁴ Contrary to this representation, however, none of the above attorneys has any record or recollection of having received such an E-mail transmission from the WestCAN Petitioners – and, in fact, no transmission to these attorneys appears to have been made.⁵ Rather, WestCAN transmitted its E-mail to the OGC mailroom, without serving Staff Counsel of record, despite repeated instructions to WestCAN;s Counsel, by both the Commission and the Licensing Board, that proper service must be made upon Counsel for the parties, including Staff Counsel.⁶ As a result, Staff Counsel only learned belatedly that WestCAN's 12:00 AM transmittal did not constitute its actual Reply Brief.

³ See E-mail message from Sherwin Turk to Sarah Wagner, transmitted at 1:21 PM on March 5, 2008; and E-mail message from Sarah Wagner to Sherwin Turk, transmitted at 2:41 PM on March 5, 2008 (Attachment A hereto).

⁴ Inexplicably, WestCAN lists Mr. Turk and Ms. Mizuno's E-mail addresses under the entry for Entergy Counsel William Dennis.

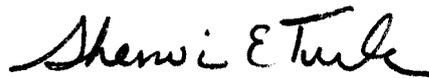
⁵ Staff Counsel informed Sarah Wagner, Counsel for WestCAN, of this discrepancy prior to filing the instant Supplement; Ms. Wagner advised that someone else made the 12:53 AM transmittal, and that her records do not show that the 12:53 AM transmittal was sent to Staff Counsel.

⁶ See, e.g., Commission Order, dated November 16, 2007; Memorandum and Order (Administrative Matters and Directing Parties Attention to Requirements for Proper Service), dated October 29, 2007, at 1-2; Order (Denying an Extension of Time Within Which to File Requests for Hearing), dated November 27, 2007, at 2-3;

Further, WestCAN's Certificate of Service appears to be materially incorrect, insofar as it states that WestCAN served its Reply Brief by E-mail upon the four named Staff attorneys. WestCAN's failure to provide a correct representation of how service was made is contrary to the Licensing Board's specific instructions in this proceeding that "Certificates of Service must be accurate and complete," with a certification "that service has been made exactly as specified on the Certificate."⁷

For the reasons stated above, the Staff reiterates the position stated in the Staff's Answer to the Applicant's motion to strike. As stated therein, the Staff "did not receive timely service of WestCAN's Reply or the exhibits and references attached to that document." Answer at 2. Further, "WestCAN's Reply was untimely served and fails to meet the Commission's requirements governing proper service of pleadings." *Id.* WestCAN's Reply Brief should be stricken for the reasons stated above, in addition to the reasons set forth in the Staff's Answer.

Respectfully submitted,



Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, MD
this 6th day of March 2008

⁷ "Order (Granting the NRC Staff's Motion to Strike FUSE's Superceding Request for Hearing)," dated February 1, 2008, at 3-4; "Order (Administrative Matters and Directing Parties Attention to Requirements for Proper Service)," dated October 29, 2007, at 2.

ATTACHMENT A
TO
NRC STAFF'S
SUPPLEMENT
OF MARCH 6, 2008

Sherwin Turk

From: Sherwin Turk
Sent: Wednesday, March 05, 2008 1:21 PM
To: 'Sarah L. Wagner (sarahwagneresq@gmail.com)'
Cc: 'Bessette, Paul'; 'Brodsky(2), Richard'; 'Brodsky, Richard'; 'Burton, Nancy'; 'Curran, Diane'; 'Delaney, Michael'; 'Dennis, William'; 'Greene, Manna'; Hearing Docket; Kaye Lathrop; 'Kremer(2), Arthur'; 'Kremer, Arthur'; Lawrence McDade; 'LeKay, John'; Marcia Carpentier; 'Matthews, Joan'; 'Musegaas, Phillip'; 'Office of Commission Appellate Adjudication'; 'O'Neill, Daniel'; 'O'Neill, Martin'; 'Parker, John Louis'; 'Pruyne, Justin'; Richard Wardwell; 'Riesel, Daniel'; 'Shapiro, Susan'; 'Sipos, John'; 'Snook, Robert'; 'Steinberg, Jessica'; 'Sutton, Kathryn'; 'Tafur, Victor'; Zachary Kahn; 'Zoli, Elise'
Subject: Different versions of WestCAN's 2/15/08 Reply

Dear Ms. Wagner:

I am writing with regard to the Reply filed by Petitioners WestCAN, et al., dated February 15, 2008, which you transmitted to me and the NRC Hearing Docket by E-mail at 12:00 AM on Saturday, 2/16/08. Apparently, WestCAN, et al. sent a second E-mail of that Reply to other persons on the service list (including the Applicant, the NRC Hearing Docket, and the OGC mailroom, but not Staff Counsel) at 12:53 AM on 2/16/08.

Until now, I was not aware that the E-mail version that you sent me at 12:00 AM on 2/16/08 differed from the version sent by E-mail at 12:53 AM. However, in attempting to insert WestCAN, et al.'s errata of 2/27/08 into WestCAN's Reply of 2/15/08, I noticed that the E-mailed version of the Reply that you sent to me contains substantive differences from 12:53 AM and signed versions of that document. For example, see the discussion of Contentions 22-25, commencing on page 70 of each document.

In the Staff's March 3, 2008 Answer to the Applicant's motion to strike WestCAN's Reply, I stated that WestCAN had sent its Reply to the Staff by E-mail at 12:00 AM on 2/16/08. *See id.* at 2. Apparently, my statement may not be correct, if the version you sent to me at 12:00 AM differs from the later-transmitted document.

Am I correct that the two E-mailed versions are not identical? Further, does the version delivered by DHL differ in any way from the version E-mailed at 12:53 AM on 2/16/08? I would appreciate your prompt reply.

Thank you.

Sincerely,

Sherwin Turk
Counsel for NRC Staff

Sherwin Turk

From: Sarah Wagner [sarahwagneresq@gmail.com]
Sent: Wednesday, March 05, 2008 2:41 PM
To: Sherwin Turk
Cc: Bessette, Paul; Brodsky(2), Richard; Brodsky, Richard; Burton, Nancy; Curran, Diane; Delaney, Michael; Dennis, William; Greene, Manna; Hearing Docket; Kaye Lathrop; Kremer(2), Arthur; Kremer, Arthur; Lawrence McDade; LeKay, John; Marcia Carpentier; Matthews, Joan; Musegaas, Phillip; OCAAMAIL Resource; O'Neill, Daniel; O'Neill, Martin; Parker, John Louis; Pruyne, Justin; Richard Wardwell; Riesel, Daniel; Shapiro, Susan; Sipos, John; Snook, Robert; Steinberg, Jessica; Sutton, Kathryn; Tafur, Victor; Zachary Kahn; Zoli, Elise
Subject: Re: Different versions of WestCAN's 2/15/08 Reply

Dear Mr. Turk:

The Reply Brief which you received in the mail and in adobe is the Petitioners WestCAN's Reply Brief. The email transmittal letter said to discard the potentially corrupt word file. The abode file is exactly the same as the printed version mailed on the 15th of February.

Sincerely,
Sarah L. Wagner

On 3/5/08, **Sherwin Turk** <Sherwin.Turk@nrc.gov> wrote:

Dear Ms. Wagner:

I am writing with regard to the Reply filed by Petitioners WestCAN, et al., dated February 15, 2008, which you transmitted to me and the NRC Hearing Docket by E-mail at 12:00 AM on Saturday, 2/16/08. Apparently, WestCAN, et al. sent a second E-mail of that Reply to other persons on the service list (including the Applicant, the NRC Hearing Docket, and the OGC mailroom, but not Staff Counsel) at 12:53 AM on 2/16/08.

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Am I correct that the two E-mailed versions are not identical? Further, does the version delivered by DHL differ in any way from the version E-mailed at 12:53 AM on 2/16/08? I would appreciate your prompt reply.

Thank you.

Sincerely,

Sherwin Turk

Counsel for NRC Staff

--

Sarah L. Wagner
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518-455-5753

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 "SUPPLEMENT TO 'NRC STAFF'S ANSWER TO ENTERGY'S MOTION TO STRIKE THE REPLY OF WESTCAN, ET AL. TO THE RESPONSES FILED BY ENTERGY AND THE NRC STAFF'", dated March 6, 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 6th day of March, 2008:

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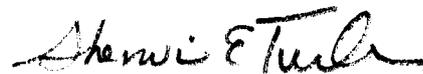
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