

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED 03/07/08  
SERVED 03/07/08

ATOMIC SAFETY AND LICENSING BOARD

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  
  
March 7, 2008

**ORDER**

(Relating to the Service and Content of WestCAN's Reply Dated February 15, 2008)

**Introduction**

In a letter dated February 29, 2008,<sup>1</sup> Counsel for the NRC Staff raised a question regarding the Reply dated February 15, 2008, that was filed on behalf of Westchester Citizen's Awareness Network, et al. (WestCAN). Specifically, Counsel for the NRC Staff represented that the WestCAN Reply sent to his office via e-mail at 12:00 am on February 16, 2008, appeared to be different from the WestCAN Reply that was sent to the NRC Hearing Docket and the Applicant via e-mail at 12:53 am on February 16, 2008. Counsel for the NRC Staff went on in that letter to ask WestCAN whether the two versions sent via e-mail are identical, and whether the version delivered by DHL differed from the version sent via e-mail at 12:53 on February 16, 2008.

From the response sent by WestCAN to Counsel for the NRC Staff via e-mail at 2:41 on March 5, 2008 (with a copy sent by WestCAN to the Board), we are unable to determine how

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<sup>1</sup> A copy of this letter, as well as the reply to that letter by WestCAN, was sent to the Board members.

service was accomplished, when service was accomplished, to whom WestCAN's Reply was sent, and whether all litigants received identical copies of this pleading. Given the repeated difficulties that have occurred in this proceeding with the accuracy of Certificates of Service and the submission of nonidentical copies of pleadings, it is the purpose of this Order to insure that the record regarding the service and content of WestCAN's Reply is clear, so that we may determine what action by the Board, if any, is appropriate.

### **Background**

In an Order dated February 1, 2008, the Board granted a Motion filed by WestCAN in which it requested an extension of time within which to file its Reply. Pursuant to that Order, WestCAN could file its Reply on or before February 15, 2008.<sup>2</sup>

The Certificate of Service attached to the version of WestCAN's Reply that was received by the Board states that it was sent via e-mail to the three members of the Board and the Board's Law Clerk via e-mail on February 15, 2008. No member of the Board received a copy of WestCAN's Reply via e-mail on February 15<sup>th</sup> or at any time thereafter. Rather, on Thursday, February 21, 2008, the Board received a package via Federal Express, Overnight Courier Service,<sup>3</sup> that contained a copy of a cover letter dated February 19, 2008, addressed to the Office of the Secretary, US Nuclear Regulatory Commission, that was signed by Sarah L. Wagner as Counsel for WestCAN. The package also contained four copies of a CD-ROM that was referred to in the cover letter. When the Board printed the contents of the CD-ROM<sup>4</sup> it contained a 124 page, undated, unsigned, document that was captioned Reply of Petitioners Westchester Citizen's Awareness Network, et al.

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<sup>2</sup> Licensing Board Order (Granting an Extension of Time) (Feb.1, 2008).

<sup>3</sup> The documentation accompanying this package indicates that it was deposited with Federal Express on February 20, 2008.

<sup>4</sup> Two of the four copies of the CD-ROM sent to the Board could not be opened.

In this proceeding the Board and the litigants have been repeatedly presented with inaccurate Certificates of Service. As a result, the Board has repeatedly warned litigants that service must be properly made, and that 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 how, to whom, and when specified on the Certificate. The Board has repeatedly observed that the parties to this litigation must not be left uncertain regarding to whom, and when, pleadings have been provided. Given such history in this litigation, we must insure that service is properly made and apply appropriate sanctions when it is not.

Likewise, in this proceeding the Board and the litigants have repeatedly received duplicate copies of identical, or similar pleadings, and have then been left with the burden of analyzing the submissions to determine what, if any, differences exist between them and, if differences exist, which pleading is intended to be operative. The Board has repeatedly stated that this practice wastes the time of all participants, and may well result in incomplete or incorrect responses by the parties, and incorrect rulings by the Board. Accordingly, we noted that, given the complexity of this proceeding and the volume of documents that would be generated, this practice would not be tolerated.

The Board initially addressed these problems more than 4 months ago. For example, in the initial Order that the Board entered in this proceeding we stated:

Parties should not – will not – be left to assume which is the operative pleading. Accordingly, any amended pleading must be clearly labeled as such and clearly dated so as to be readily distinguishable from earlier, superceded pleadings.<sup>5</sup>

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<sup>5</sup> Licensing Board Order (Administrative Matters and Directing Parties Attention to Requirements for Proper Service) (Oct. 29, 2007) at 2.

Regrettably participants to this proceeding either did not read, did not understand, or have ignored that simple directive. Accordingly, we reiterated our directives with regard to Certificates of Service and duplicative pleadings, and advised litigants that they should anticipate that the Board would sua sponte strike defective pleadings from the record and not allow them to be refiled.

We repeatedly directed participants in this litigation to examine Certificates of Service and pleadings before they are filed so that corrections would seldom, if ever, need to be filed and, in the event a mistake was made and it was necessary to file a corrected pleading, to clearly label such pleadings, and accompany the pleading with a cover letter which clearly explains the differences between the two pleadings, and why a supplemental filing was necessary.

We repeatedly noted that such practice is no more than common courtesy and that, without such practice, we could not conduct this proceeding in an orderly manner. See, inter alia, Licensing Board Order (Administrative Matters and Directing Parties Attention to Requirements for Proper Service) (Oct. 29, 2007); Licensing Board Order (Authorizing FUSE to Submit a Section 2.335 Petition) (Nov. 21, 2007); Licensing Board Order (Denying an Extension of Time Within Which To File Requests For Hearing) (Nov. 27, 2007); Licensing Board Order (Granting an Extension of Time To Clearwater Within Which To File Requests For Hearing) (Nov. 27, 2007); Licensing Board Order (Denying Entergy's Motion to Strike But Sua Sponte Striking FUSE's Multiple Requests For Hearing) (Nov. 28, 2007); Licensing Board Order (Denying an Extension of Time Within Which To File Requests For Hearing) (Nov. 28, 2007); Licensing Board Order (Granting An Extension Of Time Within Which To File Requests For Hearing) (Nov. 29, 2007); Licensing Board Order (Censure of Sherwood Martinelli) (Dec. 4, 2007).

**Response Required**

The accuracy of the Certificate of Service and the integrity of WestCAN's Reply being in question, the Board believes that these issues must be resolved before we consider the admissibility of WestCAN's contentions and possibly admit WestCAN as a party to this proceeding. Accordingly, the NRC Staff shall, as soon as is practicable but in any event no later than March 18, 2008, provide to the Board the following:

- 1) A copy of the document identified as the WestCAN Reply that was received by Staff Counsel via e-mail at 12:00 am on February 16, 2008.
- 2) A copy of the e-mail banner identifying to whom the 12:00 am, February 16, 2008, submission was sent.
- 3) A copy of the e-mail banner identifying to whom the 12:53 am, February 16, 2008, submission was sent.
- 4) A copy of any documentation that the Staff received indicating that the version of the WestCAN Reply received at 12:00 am, February 16, 2008, was not intended to be the operative pleading.
- 5) A brief statement explaining how and when NRC Staff Counsel first came to suspect that a nonidentical version of WestCAN's Reply had been sent to any participant in this proceeding.
- 6) A brief statement explaining the differences which Staff Counsel believes exist between the version of WestCAN's Reply that was received at 12:00 am, February 16, 2008, and the version of WestCAN's Reply that was sent to the NRC Hearing Docket at 12:53 am, and/or between the version of WestCAN's Reply that was received by Staff Counsel through the mail or via a courier service.
- 7) A brief statement summarizing any other information that Staff Counsel believes that the Board should consider in order to have a complete and accurate understanding of this incident.

As soon as is practicable after it has received Staff Counsel's submission, but in any event no later than 72 hours after receipt, WestCAN shall provide to the Board the following:

- 1) A copy of the document identified as the WestCAN's Reply that was sent to Staff Counsel via e-mail at 12:00 am on February 16, 2008.
- 2) A copy of the e-mail banner identifying to whom the 12:00 am, February 16, 2008, submission was sent.



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER (RELATING TO THE SERVICE AND CONTENT OF WESTCAN'S REPLY DATED FEBRUARY 15, 2008) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Docket Nos. 50-247/286-LR  
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WESTCAN'S REPLY DATED FEBRUARY 15, 2008)

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Docket Nos. 50-247/286-LR  
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Docket Nos. 50-247/286-LR  
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[Original signed by Christine M. Pierpoint]

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Office of the Secretary of the Commission

Dated at Rockville, Maryland  
this 7<sup>th</sup> day of March 2008