

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 04/01/08
SERVED 04/01/08

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

April 1, 2008

ORDER

(Third Order Relating to the Service and Content of WestCAN's Reply Dated Feb. 15, 2008)

Introduction

The accuracy of Certificates of Service, and the submission of nonidentical copies of pleadings, have been a recurring problem in this proceeding. Accordingly, on March 7, 2008, the Board issued an Order in which we requested specific information relating to the service and content of a pleading dated February 15, 2008, that had been filed on behalf of Westchester Citizen's Awareness Network, Rockland County Conservation Association, Public Health and Sustainable Energy, Sierra Club - Atlantic Chapter, and Assemblyman Richard Brodsky (collectively, "WestCAN").¹ Not having received a fully responsive reply from WestCAN to that Order, on March 24, 2008, we issued a second Order relating to the service of WestCAN's February 15, 2008, pleading.² Once again having failed to receive a fully responsive reply from WestCAN, we now issue a third Order on this topic.

¹ Licensing Board Order (Relating to the Service and Content of WestCAN's Reply Dated Feb. 15, 2008) (Mar. 7, 2008) [hereinafter March 7 Order].

² Licensing Board Order (Second Order Relating to the Service and Content of WestCAN's Reply Dated Feb. 15, 2008) (Mar. 24, 2008) [hereinafter March 24 Order].

Background Regarding the Accuracy of Certificates of Service³

As explained in greater detail in our previous Orders, on February 21, 2008, the Board received copies of a reply pleading submitted by WestCAN that was dated February 15, 2008.⁴ The Certificate of Service accompanying that pleading, which was signed by Sarah L. Wagner, Esq. as an attorney for WestCAN, stated that the February 15 Reply had been served upon each of the three Members of the Board, and upon one of the Board's Law Clerks, via electronic mail on February 15, 2008.⁵ Thereafter, a Revised Certificate of Service was submitted to the Board by Sarah L. Wagner on behalf of WestCAN, which stated that copies of WestCAN's Reply had been sent to each of the three Members of the Board, and one of the Board's Law Clerks, via DHL Courier Service on February 15, 2008, and via electronic mail on February 16, 2008.⁶ Finally, on March 7, 2008, each of the three Members of the Board, and one of the Board's Law Clerks, received an electronic mail transmission from Sarah L. Wagner, which enclosed a document captioned "Second Revised Certificate of Service," dated March 6, 2008,

³ Over the past several months this Board has issued numerous Orders explaining the necessity for litigants to accurately state in certificates of service exactly how, when, and to whom service of pleadings is made. We will not repeat, but simply note that long history in this Order.

⁴ Reply of Petitioners [WestCAN] (Feb. 15, 2008) [hereinafter February 15 Reply]. February 15, 2008, was the revised deadline for the submission of this pleading. See Licensing Board Order (Granting Extension of Time to File a Reply) (Feb. 1, 2008).

⁵ February 15 Reply, Certificate of Service. We note that this Certificate of Service had accurate surface mail and electronic mail addresses for the Board members and the Board's Law Clerk. We also note that the Certificate of Service that was submitted with WestCAN's February 15 Reply did not list the Legal Counsel for the NRC Staff as a party on whom service was made. See Exhibit D to WestCAN's March 21 Reply. However, counsel for the NRC Staff, Mr. Turk et al., had been listed on the Certificate of Service which accompanied WestCAN's Petition to Intervene (Dec. 10, 2007) but WestCAN has provided no explanation of why Staff Counsel was not included on the original Certificate of Service for their February 15 Reply.

⁶ Errata at ii and App. B (Feb. 27, 2008). We note that this Certificate submission also had accurate surface mail and electronic mail addresses for the Board members and the Board's Law Clerk and was served on Staff Counsel.

which stated that the “Reply of WestCAN et al. dated February 15, 2008,” had been served upon each of the three Members of the Board, and on one of the Board’s Law Clerks, on the “15th day of February, 2008 by DHL courier service.”⁷ This Certificate made no representation regarding electronic service of WestCAN’s Reply on the Board. Likewise, this submission offered no explanation for the differences between this Certificate and the earlier Certificates of Service. It was left to speak for itself.⁸

In the March 7 Order, we sought to determine which, if any, of the Certificates were accurate, and to receive an explanation from WestCAN’s counsel for the discrepancies in the Certificates of Service. In doing so we directed WestCAN to submit certain specific information and documentation including, but not limited to, “a brief explanation of exactly how service of WestCAN’s Reply on the Board was perfected (enclose a copy of tracking documents from any courier service).”⁹

As noted in the March 24 Order, the initial response from WestCAN to the March 7 Order was received by the Board via electronic mail on March 21st.¹⁰ However, the submissions by WestCAN did not answer the Board’s questions and only raised further questions. That submission made reference to Exhibits H and I, but those Exhibits were not listed in the Table of Contents accompanying the response that was received by the Board, and Exhibits H and I

⁷ Second Revised Certificate of Service (Mar. 6, 2008).

⁸ We note that WestCAN has now submitted three different Certificates of Service which purport to state how, when, and to whom they perfected service of their February 15 Reply. While each Certificate is somewhat different, the two Revised Certificates of Service state that service on each of the three Board Members was made on February 15, 2008 via DHL courier service. The Board, however, has no record of having received delivery of any package from WestCAN via DHL.

⁹ March 7 Order at 6.

¹⁰ Petitioners’ WestCAN et al. Reply to the Atomic Safety and Licensing Board Order of March 7, 2008 (Mar. 21, 2008) [hereinafter March 21 Reply].

were not enclosed with any of the five electronic submissions received by the Board on March 21st.¹¹ Thereafter, on March 24, 2008, the Board received via electronic mail a second copy of WestCAN's Reply to our March 7 Order. This submission, as received by the Board, was accompanied by a Table of Contents which, unlike the earlier submission on March 21st, listed Exhibits H and I, and the submission included a copy of Exhibit I. However, neither submission, as received by the Board, included a copy of "Exhibit H - DHL receipts."¹²

Prompted by these two, apparently different, but unresponsive replies, on March 24, 2008, the Board issue another Order in which we directed WestCAN to submit copies of the courier service tracking documents that were requested in the March 7 Order.¹³ The Board also directed WestCAN to "submit a brief explanation (not more than 2 pages including heading and signature) of why these documents were not included with WestCAN's Reply on March 21st or March 24th and why WestCAN did not highlight and explain that the Table of Contents submitted on March 24th was different from the Table of Contents submitted with WestCAN's March 21 Reply."¹⁴

In response to the Board's March 24 Order, WestCAN responded the following day.

¹¹ As accurately reflected on the Certificate of Service, identical submissions of WestCAN's March 21 Reply were received by each of the three Members of the Board and by two Law Clerks.

¹² We note that the Board had not directed WestCAN to provide DHL receipts. We had directed WestCAN to provide DHL tracking documents.

¹³ We had directed WestCAN to provide copies of the DHL tracking documents which reflected service of the February 15 Reply on the Board. Instead, on March 21, and again on March 24, the Board received submissions from WestCAN which did not enclose any DHL documentation. Then, in response to the Board's Order of March 24, 2008, on March 25 we received copies of what appeared to be the sender copy of DHL receipts which purport to show shipments of documents from WestCAN to the NRC Staff Counsel, Entergy's Counsel, and the Office of the Secretary of the Nuclear Regulatory Commission. No receipts for DHL shipments to the Board Members have been received by the Board as of the date of this Order.

¹⁴ March 24 Order at 2.

That response, however, was not particularly helpful. It stated that a complete Table of Contents, and copies of exhibits H and I, had been served electronically on March 21, 2008.¹⁵ However, in none of the five electronic submissions received by the Board on March 21, 2008, did those documents appear.¹⁶

On March 21, 2008 (at 5:01 pm), the Board received from Sarah Wagner, a copy of an e-mail that she had previously sent to other parties in which she had informed them that:

I attempted to email you two separate emails containing Petitioners' WestCAN et al.'s reply to the Atomic Safety and Licensing Board Order of 3/7/08. I received notification that the email was not deliverable due to the size of the emails or that delivery of the email failed. Please contact me if you would like me to re-send the emails. Please advise what your megabits [sic] size limitation is. Thank you.¹⁷

We note that Ms. Wagner had been informed that the server for the NRC could accommodate submissions of up to 10 megabytes.¹⁸ Thereafter, on March 24, 2008, the Board received a 4 megabyte zipped submission from Ms. Wagner which, when opened, contained documents totaling approximately 5.3 megabytes.¹⁹ This leads the Board to believe that the problem with service of WestCAN's Reply to the Board's March 7 Order, which was due on March 21st, lies either with WestCAN's computer equipment or candor, and we hope to verify that it is the former.

¹⁵ WestCAN et al. Reply to the Atomic Safety and Licensing Board Order of March 24, 2008 (Mar. 25, 2008).

¹⁶ The three Board Members and two Law Clerks each received identical copies of WestCAN's March 21 Reply. None of those five transmissions included copies of Exhibits H or I, nor references to them in the Table of Contents.

¹⁷ Electronic mail transmission from Sarah Wagner to ASLBP (Mar. 21, 2008).

¹⁸ See WestCAN's March 21 Reply, Exhibit I.

¹⁹ The 5.3 megabyte submission received by the Board from WestCAN on March 21st contained 2 copies of WestCAN Exhibit D. Without that duplication the submission would have been approximately 4.3 megabytes.

Responses Required From WestCAN Regarding Certificates of Service

We direct an attorney representing WestCAN, other than Ms. Wagner, to investigate and report to the Board the circumstances surrounding the submission of WestCAN's Reply to the Board's March 7 Order. In addition to a written explanation, this report shall include, at a minimum, copies of all electronic mail sent or received by WestCAN on March 21, 2008, that reflect or otherwise relate to the service of, or any attempt to serve, WestCAN's Reply to the Board's March 7 Order.

The Board further directs WestCAN to provide copies of all documents, including receipts and DHL tracking documents relating to the submission to the Board of WestCAN's February 15 Reply.²⁰ This submission shall, at a minimum, include a copy of the DHL waybills, and those documents generated by DHL which reflect when the packages containing WestCAN's pleading that were addressed to the Board and/or the Board's Law Clerk, were received by the courier service, and the disposition of the packages, specifically to whom and when they were delivered. WestCAN shall also submit an explanation for the discrepancies in the three different Certificates of Service that were represented as accurately describing the manner by which this pleading was submitted to the Board. Finally, as they were directed to do in our Orders of March 7th and March 24th, WestCAN shall submit "a brief explanation of exactly how service of WestCAN's Reply on the Board was perfected" ²¹ These submissions shall be sent by WestCAN so that they are received by the Board²² no later than 5:00 PM, EDT, Monday, April 7, 2008.

²⁰ WestCAN shall also provide the DHL tracking documents relating to all the DHL receipts submitted to the Board on March 25, 2008, as part of WestCAN Exhibit H.

²¹ March 7 Order at 6.

²² All other litigants listed on the service list in footnote 30 below shall be served in the same manner as the Board. In addition, service on the Secretary of the Commission shall be made consistent with 10 C.F.R. § 2.302.

Background Regarding Discrepant Pleadings²³

In the Board's March 7 Order, we also directed WestCAN to provide:

A brief statement explaining the differences, if any, between the version of the WestCAN's Reply that was sent to Staff Counsel at 12:00 am, February 16, 2008, and the version of the 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 sent to the Board via Federal Express on February 20, 2008. If there were differences, an explanation of what those differences were, what caused or otherwise led to the transmission of nonidentical versions of the Reply, and an explanation of how and when WestCAN learned that nonidentical versions of its Reply had been sent to participants in this litigation, and what action WestCAN took to notify the recipients of the discrepancies.²⁴

This direction to WestCAN to provide additional information to the Board has not been adequately complied with and, accordingly, as will be explained below, we direct WestCAN to supplement its earlier reply. In addition, we direct that all three attorneys who have entered notices of appearance for WestCAN sign the reply to this Order. We impose this unusual requirement because past submissions made on behalf of WestCAN have been so confused as to border on the incomprehensible.²⁵ As a result, rather than clarifying the record regarding WestCAN's position on relevant issues, they have served only to confuse the record and waste the time of the Board and the litigants. We can not allow this abuse of the Board and the other participants in this litigation to continue. We hope that by requiring all of WestCAN's attorneys to read, edit as appropriate, and sign the reply to this Order, we will receive a useful pleading.

²³ Over the past several months this Board has issued numerous Orders explaining to the litigants in this proceeding that the filing of different versions of similar pleadings without clearly identifying subsequent versions as superceding, and explaining the need for and the differences between different versions of the document, needlessly waste the time of the Board and the other litigants and could not be tolerated. Once again, we will not repeat, but simply note that long history in this Order.

²⁴ March 7 Order at 6.

²⁵ For example, as explained, the parties to this proceeding and the Board were left to work through the inarticulate puzzle submitted by WestCAN as its Reply to the March 7 Order.

On March 21, 2008, the Board received a Reply to our March 7 Order via electronic mail from WestCAN. That submission contained a Table of Contents that listed as Exhibit F the following:

Redline version of WestCAN's Reply Brief and Exhibits highlighting the differences between the 12:00 a.m. compared to the 12.53 a.m., paper copy, and CD-ROM submissions.²⁶

Although listed in the Table of Contents, the Board did not receive a copy of WestCAN's Exhibit F on March 21, 2008. Thereafter, on March 24, the Board received a second submission of WestCAN's Reply. This submission enclosed two copies of a document identified as WestCAN Exhibit F, Part 1. The first of these two attachments was identified as "3.21.08 Exhibit F Part 1 REDLINED OCUMENT.pdf" and consisted of 556 KB. The second of these two attachments was identified as "3.21.08_Exhibit F Part 1_REDLINE WestCAN_ Reply_ Brief_Final.pdf" and consisted of 476 KB. When opened, neither of these documents, as received by the Board, was in fact a redlined document, and WestCAN offered no explanation of why two non-identical, somewhat differently paginated versions of Exhibit F, Part 1, were enclosed with the submission, how they were different, and which, if either, was intended to be an operative part of their reply.

Also, as part of WestCAN's March 21 Reply, the Board received an attachment that was identified as "3.21.08 Exhibit F Part 2 WORD DOCUMENT.pdf" which consists of unnumbered pages and which apparently were represented as being excerpts from a Word Document transmitted to the NRC Staff at 12:00 am on February 15, 2008.²⁷ Various portions of the text of WestCAN Exhibit F, Part 2 are highlighted in yellow. No reference to, or explanation of, Exhibit F, Part 2 was made in WestCAN's Reply. The Board, and the parties to this litigation, were left

²⁶ WestCAN's March 21 Reply, Table of Contents.

²⁷ The heading only states: "WORD DOCUMENT 12:00AM Submission"

to make what we could from these three documents without guidance from WestCAN.

Upon review, it appears to the Board that there are no material differences between the text in Exhibit F, Part 2 and that in the 556 KB version of Exhibit F, Part 1.²⁸ However, the highlighted portions of Exhibit F, Part 2 appear to identify editorial changes between the two versions of Exhibit F, Part 1. Using Exhibit F, Part 2, the Board determined that specific portions of the text contained in the 556 KB version of Exhibit F, Part 1 were deleted from the 476 KB version. In addition, several exhibit numbers were changed between the two versions, language placed in footnotes in the 556 KB version were placed in the text in the 476 KB version, minor formatting changes were made between the two versions, and minor changes in the language used appear.

From the Board's review of these documents, we conclude that WestCAN electronically submitted a version of their Reply to the NRC Staff Counsel at midnight on February 15, 2008 (Exhibit F, Part 1 – 556 KB version), that minor editorial changes were made in the version of the Reply that was sent to Staff Counsel, and a revised version of the pleading was sent to other participants in this litigation at 12:53 am on February 16, 2008 (Exhibit F, Part 1 – 476 KB version). As a result Counsel for the NRC Staff was left to craft a response to a pleading that misidentified numerous exhibits.²⁹

Responses Required From WestCAN Regarding Discrepant Pleadings

WestCAN shall advise the Board in its reply to this Order whether the Board's interpretation of these documents as outlined above is correct and, if WestCAN believes that

²⁸ In Exhibit F, Part 2 the word "fire" appears out of any context by itself in the middle of an otherwise unoccupied line. It does not appear in the corresponding place (page 88) in the 556 KB version of Exhibit F, Part 1. That was the only difference, except for yellow highlighting on Exhibit F, Part 2, that the Board identified between the two documents.

²⁹ As noted in footnote 5 above, the edited pleading was not served on Staff Counsel and, accordingly, they did not become aware of the discrepancy until many weeks later.

the Board's interpretation of these documents is incorrect, it shall provide a coherent explanation of its interpretation of these documents.

Additional Response Required From Other Litigants

All other participants in this litigation (those organizations listed below in footnote 30) shall, no later than 5:00 PM, EDT, Monday April 7, 2008, advise the Board whether, in the electronic transmissions that were sent to them by WestCAN on Friday, March 21, 2008, they received copies of WestCAN Exhibits H and I, and also whether those Exhibits were listed in the electronic Table of Contents that they received from WestCAN on March 21, 2008. In addition, copies of those electronic transmissions received from WestCAN on March 21, 2008, forwarding WestCAN's Reply to the Board's Order of March 7, 2008, shall be forwarded to the Office of the Secretary, Nuclear Regulatory Commission, at HEARING DOCKET@nrc.gov.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD³⁰

/RA/

Lawrence G. McDade, Chairman
ADMINISTRATIVE JUDGE

Rockville, MD
April 1, 2008

³⁰ Copies of this Order were sent this date by Internet e-mail to: (1) Counsel for WestCAN, RCCA, PHASE, the Sierra Club - Atlantic Chapter; and Richard Brodsky; (2) Counsel for the NRC Staff; (3) Counsel for Entergy; (4) Counsel for the State of New York; (5) Counsel for the State of Connecticut; (6) Counsel for Riverkeeper, Inc.; (7) Nancy Burton, the Representative of CRORIP; (8) Manna Jo Green, the Representative for Clearwater; (9) Counsel for Westchester County; and (10) Counsel for the Town of Cortlandt.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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 LB ORDER (THIRD ORDER RELATING TO THE SERVICE AND CONTENT OF WESTCAN'S REPLY DATED FEB. 15, 2008) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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 LB ORDER (THIRD ORDER RELATING TO THE SERVICE AND
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Docket Nos. 50-247/286-LR
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Docket Nos. 50-247/286-LR
LB ORDER (THIRD ORDER RELATING TO THE SERVICE AND
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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 1st day of April 2008