

April 18, 2008 (9:30am)

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

BEFORE THE COMMISSION

| | | | |
|---|---|---|-------------------------------|
| |) | | Docket Nos. 50-247-LR and 50- |
| In the Matter of |) |) | 286-LR |
| |) |) | |
| ENERGY NUCLEAR OPERATIONS, INC. |) |) | ASLBP No. 07-858-03-LR- |
| |) |) | BD01 |
| (Indian Point Nuclear Generating Units 2 and 3) |) |) | |
| |) |) | |
| |) |) | April 14, 2008 |

**ANSWER OF ENERGENCY NUCLEAR OPERATIONS, INC. OPPOSING
WESTCAN, ET AL. PETITION FOR REVIEW OF LICENSING BOARD ORDERS**

I. INTRODUCTION

On April 4, 2008, Westchester Citizen’s Awareness Network, Sierra Club-Atlantic Chapter, Rockland County Conservation Association, Public Health and Sustainable Energy, and New York State Assemblyman Richard Brodsky (jointly, “WestCAN”) filed a “Petition for Review of Atomic Safety and License Board (ASLB) Orders of March 25, 2008 and March 31, 2008 Cancelling Oral Arguments on WestCAN’s Contentions” (“Petition”).¹ In accordance with 10 C.F.R. § 2.341(b)(3), Entergy Nuclear Operations, Inc. (“Entergy”) hereby files its Answer in opposition to the Petition.

As set forth below, the Petition is a *de facto* request for interlocutory review of a discretionary Board decision. WestCAN has not shown the existence of “immediate and serious irreparable” harm or a “pervasive or unusual” effect on the basic structure of this proceeding, as required by 10 C.F.R. § 2.341(f)(2). Furthermore, even if discretionary Commission review were warranted here—and plainly it is not—WestCAN has failed to show clear or prejudicial

¹ Although the Petition seeks review of a March 31, 2008, Atomic Safety and Licensing Board (“Board”) Order, Entergy is unaware of the issuance of any such order in this proceeding. Presumably, WestCAN seeks review of the April 3, 2008, Board Order relating to the March 31, 2008, letter from Sarah L. Wagner, which is appended to the Petition as Exhibit #9. Accordingly, Entergy will treat the Petition as if it seeks review of the Order of April 3, 2008, as well as the Order of March 25, 2008.

procedural error by the Board that would justify Commission reversal of the Board's action, pursuant to 10 C.F.R. § 2.341(b)(4). As such, the Petition must be rejected.

II. BACKGROUND

On April 23, 2007, Entergy submitted an application to the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") to renew the Indian Point Energy Center ("IPEC") Unit 2 and Unit 3 operating licenses for an additional 20 years. In accordance with various scheduling orders, a number of organizations, including WestCAN, filed petitions for leave to intervene in this proceeding. Entergy and the NRC Staff filed timely answers to those petitions on January 22, 2008, to which WestCAN and the other petitioners replied in February 2008.

By Order dated January 24, 2008, the Board announced its intention to hear oral argument on the admissibility of proposed contentions during the week of March 10, 2008, in White Plains, New York.² Entergy, the NRC Staff, and all petitioners except WestCAN notified the Board that they would be available that week for oral argument. WestCAN notified the Board that neither of its then-identified two representatives, Susan Shapiro nor New York State Assemblyman Richard Brodsky, would be available anytime that week.³ WestCAN requested that oral argument on its contentions be scheduled for March 27-28. On February 4, 2008, a third attorney, Sarah Wagner, submitted a Notice of Appearance on behalf of WestCAN.⁴

On February 29, 2008, the Board issued an Order establishing a schedule for oral argument on the admissibility of the petitioners' proposed contentions.⁵ Given that WestCAN

² See Licensing Board Order (Preliminary Notification Regarding the Scheduling of Oral Argument) (Jan. 24, 2008) (WestCAN Ex. #1).

³ Notification of Conflicts Anticipated during the Week of March 10, 2008 (Jan. 30, 2008) (WestCAN Ex. #2). WestCAN indicated that Ms. Shapiro would be unavailable due to a "pre-planned vacation" from March 8 to March 24, and that Mr. Brodsky would be unavailable due to the need to attend a session of the New York State Assembly the week of March 10, 2008.

⁴ See Notice of Appearance of Sarah L. Wagner, Esq. (Feb. 4, 2008).

⁵ Licensing Board Order (Scheduling Oral Argument on the Admissibility of Contentions) (Feb. 29, 2008) (WestCAN Ex. #4).

had identified a third representative (*i.e.*, Ms. Wagner), and the New York Assembly did not appear scheduled to meet on March 13, the Board designated March 13, 2008, as the date for oral argument on the admissibility of WestCAN's contentions.⁶ The Board nonetheless directed WestCAN to notify the Board whether it wished to proceed with oral argument in White Plains on March 13, 2008, and, if not, to notify the Board of any conflicts that would prevent its representatives from appearing in Rockville, Maryland between March 24 and April 4, 2008.⁷

On March 6, 2008, WestCAN notified the Board that it did not wish to proceed with oral argument in White Plains on March 13, 2008, citing the purported unavailability of all three of its representatives.⁸ WestCAN instead requested that oral argument on its contentions be held in White Plains on March 14, 2008—an option not presented by the Board in its Order.⁹

As WestCAN did not notify the Board of any scheduling conflicts that would preclude its representatives from appearing in Rockville between March 24 and April 4, the Board, by Order dated March 7, 2008, scheduled oral argument on the admissibility of WestCAN's contentions for April 1, 2008, in Rockville.¹⁰ In accordance with the Board's March 7 Order, counsel for Entergy and the NRC Staff notified the Board that they would be available on April 1, 2008.

As scheduled, the Board held oral argument on the admissibility of the other petitioners' proposed contentions in White Plains from March 10-12, 2008. The following week, WestCAN requested that the scheduled April 1 oral argument on its proposed contentions be relocated and

⁶ *Id.* at 2.

⁷ *Id.*

⁸ See Letter from Sarah L. Wagner, WestCAN, to Administrative Judges (Mar. 6, 2008) (WestCAN Ex. # 5) ("WestCAN March 6 Letter"). In its March 6, 2008, letter, WestCAN noted that Assemblyman Brodksy and Ms. Wagner would be unavailable on March 13 because they were "tentatively scheduled to participate in legislative budget conference committees that were scheduled months ago." *Id.* WestCAN indicated that Ms. Shapiro could not attend due to a "previously scheduled trip associated with a serious family emergency" (as opposed to the "pre-planned vacation" cited in WestCAN's January 30 letter to the Board). *Id.*

⁹ *Id.* at 2. Given the schedule established by the Board's February 29 Order, holding oral argument on March 14 would have required the Board, the NRC Staff, and Entergy to spend an additional day in White Plains, at their own expense, waiting idly for WestCAN's representatives to arrive on March 14.

¹⁰ Licensing Board Order (Scheduling WestCAN Oral Argument) (Mar. 7, 2008) (WestCAN Ex. #6).

held at a venue in or nearby White Plains, New York.¹¹ On March 25, 2008, the Board issued an order canceling the April 1 oral argument on WestCAN's contentions, explaining as follows:

Based on the pleadings submitted, and the insights into the relevant issues in this proceeding gained by the Board during the oral arguments that were presented in White Plains, New York, on March 10-12, 2008, the Board has concluded that its understanding of the issues presented by WestCAN's contentions is adequate to enable us to properly rule on their admissibility and would not be materially assisted by oral argument.¹²

Significantly, the Board noted that, "[i]f during the process of drafting its decision on the admissibility of WestCAN's contentions, the Board determines that clarification of any issue is necessary, [it] will schedule additional oral argument at that time."¹³

Notwithstanding this explanation, WestCAN submitted a letter dated March 31, 2008, to the Board seeking clarification of the basis for the Board's action and requesting that a hearing be held in Westchester County on WestCAN's contentions.¹⁴ Treating WestCAN's letter as a motion for clarification and reconsideration, the Board denied the motion due to its procedural defects and failure to show how oral argument would materially assist the Board's understanding of the issues raised by WestCAN in its proposed contentions.¹⁵

As demonstrated below, WestCAN's Petition seeking Commission review of the Board's decision to cancel oral argument on the admissibility of WestCAN's proposed contentions is, in effect, a request for discretionary interlocutory review by the Commission. It fails to meet either of the threshold criteria for such review set forth in 10 C.F.R. § 2.341(f)(2). Moreover, the

¹¹ Letter from Sarah L. Wagner, WestCAN, to Administrative Judges (Mar. 18, 2008). Despite including all other relevant correspondence, WestCAN neglected to include this letter as an exhibit to its Petition.

¹² Licensing Board Order (Canceling Oral Argument on WestCAN's Contentions) (Mar. 25, 2008) (WestCAN Ex. #7) at 2.

¹³ *Id.*

¹⁴ Letter from Sarah L. Wagner, WestCAN, to Administrative Judges (Mar. 31, 2008) (WestCAN Ex. #8).

¹⁵ Licensing Board Order (Order Relating to Wagner Letter Dated March 31, 2008) (Apr. 3, 2008) (WestCAN Ex. #9).

Petition fails to show clear or prejudicial procedural error, as would otherwise be required by 10 C.F.R. § 2.341(b)(4). Therefore, the Petition must be denied.

III. ARGUMENT

A. **WestCAN's Petition is a *De Facto* Request for Interlocutory Review**

The Board's decision to cancel oral argument is interlocutory in nature, because the Board has not ruled on the admissibility of WestCAN's proffered contentions. NRC regulations create no "right" to support proffered contentions through oral argument, the denial of which triggers mandatory Commission review. Rather, Commission regulations give the Board broad discretion to determine whether oral argument might be warranted under case-specific circumstances: "When, *in the opinion of the presiding officer*, time permits and the nature of the proceeding and the public interest warrant, the presiding officer *may* allow, and fix a time for, the presentation of oral argument."¹⁶ Thus, the Board's March 25 Order is not the type of "final" action subject to discretionary review under the provisions of 10 C.F.R. § 2.341(b).

B. **WestCAN Has Not Satisfied the Strict Standards for Interlocutory Review**

The NRC has long disfavored discretionary interlocutory review of Licensing Board Orders, particularly those of a procedural stripe.¹⁷ "As a general matter, a licensing board's action is final for appellate purposes where it either disposes of at least a major segment of the case or terminates a party's right to participate; rulings which do neither are interlocutory."¹⁸ The Board Orders challenged by WestCAN here plainly do not produce either of those results.

Nonetheless, there are limited circumstances in which the Commission may in its discretion grant such review. Discretionary interlocutory review will be granted if the Board's

¹⁶ See 10 C.F.R. § 2.331 (emphasis added).

¹⁷ See *Boston Edison Co.* (Pilgrim Nuclear Power Station, Unit 1), ALAB-231, 8 AEC 633, 634 (1974) (stating that absent extraordinary circumstances, alleged procedural irregularities will not be reviewed).

¹⁸ See *Pub. Serv. Co. of N.H.* (Seabrook Stations, Units 1 and 2), ALAB-731, 17 NRC 1073, 1074 (1983).

action either: (1) threatens the party adversely affected with immediate and serious irreparable harm that could not be remedied by a later appeal, or (2) affects the basic structure of the proceeding in a pervasive or unusual manner.¹⁹ As shown below, WestCAN has not addressed, and has not satisfied, either of the Commission's criteria for interlocutory review.

1. WestCAN Has Not Demonstrated Immediate or Serious Irreparable Harm

WestCAN asserts that the cancellation of the oral argument²⁰ denied it the "right" to support proffered contentions in oral argument.²¹ This argument fails to satisfy the immediate or serious irreparable harm standard defined in 10 C.F.R. § 2.341(f)(2)(i). First, as noted above, the decision whether to hear oral argument on the admissibility of proposed contentions is one that is committed to the sound discretion of the presiding officer.²² Indeed, the Board made clear that it provided an opportunity for oral argument on contention admissibility for the specific purpose of allowing the Board to clarify its understanding of the litigants' positions: "[T]his proceeding is intended only as an opportunity for the Board to question, and the litigants to explain, what has previously been submitted."²³ The Board further stated that, "[w]here the positions of the litigants on a particular contention are clear to all members of the Board based on the pleadings, we will ask no questions and entertain no presentations regarding that contention."²⁴

¹⁹ 10 C.F.R. § 2.341(f)(2)(i)-(ii). *See also Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-08-2, 67 NRC __ (Jan. 15, 2008) (slip op. at 4).

²⁰ WestCAN appears to use the terms "oral argument" and "hearing" interchangeably in its Petition. Under NRC regulations, the terms imply different concepts. "Oral argument," as contemplated by the regulations, is an appellate-style argument, without witnesses. Under NRC regulations, however, the word "hearing" refers to an evidentiary procedure, which is what the WestCAN petition for leave to intervene requests. Notably, in its March 6, 2008, letter to the Board, WestCAN stated that "most of the responses proffered [in response to Board questions] will be made by Petitioners' expert witness, Ulrich Witte." WestCAN March 6 Letter at 2.

²¹ Petition at 3-6.

²² *See* 10 C.F.R. § 2.331.

²³ February 29 Order at 4.

²⁴ *Id.* at 4-5.

The Board's cancellation of oral argument, based on its finding that oral argument was not necessary for it to properly rule on the admissibility of WestCAN's contentions, has resulted in no harm to WestCAN. WestCAN has been given ample opportunity to petition for leave to intervene and to correct the numerous procedural defects in its pleadings.²⁵ For example, the Board provided WestCAN an additional 10 days (beyond the additional 60 days provided to all petitioners by the Commission) in which to file its petition to intervene, even after WestCAN first submitted two procedurally defective requests for the granted extension.²⁶ On December 10, 2008, WestCAN filed a nearly 400-page petition containing over 50 proposed contentions and over 1000 pages of exhibits. Similarly, the Board granted WestCAN a 7-day extension in which to file its reply to Entergy's January 22, 2008, Answer.²⁷ WestCAN filed a 124-page reply with several hundred pages of exhibits. Thus, in view of the extensive opportunity given to WestCAN to proffer contentions, clearly no harm—let alone immediate or serious harm—has resulted from cancellation of the oral argument on its proposed contentions.

Furthermore, even if there were some cognizable harm resulting from the Board's discretionary decision not to hold oral argument, WestCAN fails to show why that harm is irreparable. To be "irreparable," the harm must be of a kind that cannot be alleviated by Commission review at the end of the proceeding.²⁸ WestCAN's proffered contentions remain before the Board pending its admissibility ruling. Should the Board find that none of WestCAN's contentions is admissible, WestCAN will have the opportunity to seek Commission

²⁵ See, e.g., Licensing Board Order (Third Order Relating to the Service and Content of WestCAN's Reply Dated Feb. 15, 2008) (Apr. 1, 2008).

²⁶ See Licensing Board Order (Granting an Extension of Time within Which to File Requests for Hearing) (Nov. 29, 2007).

²⁷ See Licensing Board Order (Granting an Extension of Time to File Reply) (Feb. 1, 2007).

²⁸ See, e.g., *Ga. Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-95-15, 42 NRC 181, 184 (1995) (concerning harm resulting from release of privileged information).

review of the Board's admissibility decision.²⁹ WestCAN thus fails to demonstrate how the Board's Order canceling oral argument on the admissibility of WestCAN's contentions threatens immediate or serious irreparable harm that cannot be remedied through other available procedural mechanisms, contrary to 10 C.F.R. § 2.341(f)(2)(i).

2. WestCAN Has Not Demonstrated a Pervasive or Unusual Impact on the Proceeding

WestCAN asserts that the Board's interlocutory decision to cancel oral argument undermines its ability to ensure that its "unique" concerns are presented to and considered by the Board.³⁰ WestCAN's argument, however, does not pass muster under 10 C.F.R. § 2.341(f)(2)(ii). A mere claim of error by a licensing board does not *per se* justify interlocutory review by the Commission.³¹ This is because interlocutory errors are correctable on appeal from final board decisions, and a legal error alone does not alter the basic structure of an ongoing proceeding in a pervasive or unusual manner.³² Accordingly, WestCAN fails to demonstrate how the cancellation of oral argument has resulted in a pervasive or unusual impact on the proceeding, in accordance with 10 C.F.R. § 2.341(f)(2)(ii).

In summary, WestCAN has not provided a sufficient basis for the Commission to take the extraordinary step of taking interlocutory review of the Board's March 25 or April 3 Orders at this time. Accordingly, the Petition should be summarily denied.

²⁹ As demonstrated below, however, the Board acted reasonably in canceling the oral argument.

³⁰ Petition at 3-8.

³¹ See *Va. Elec. & Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 378 n.11 (1983) (denying applicant's motion for directed certification of interlocutory Licensing Board ruling).

³² See *Conn. Yankee Atomic Power Co.* (Haddam Neck Plant), CLI-01-25, 54 NRC 368, 373 (2001) (citations omitted) (denying applicant's motion for interlocutory review of Board order admitting a contention).

C. The Board's Decision to Cancel Oral Argument Was Not Clearly Erroneous or Prejudicial and Should Be Affirmed by the Commission

Assuming *arguendo* that the Commission chooses to treat WestCAN's Petition as a colorable petition for review under 10 C.F.R. § 2.341(b), it should decline review and affirm the Board's decision to cancel oral argument.³³ WestCAN has not made the requisite showing under 10 C.F.R. § 2.341(b)(4). WestCAN's Petition does not raise a "substantial question" regarding the propriety of the Board's actions by demonstrating any clear or prejudicial procedural error.

As noted above, the Board's actions are consistent with governing regulations and precedent. The Board clearly acted well within the bounds of the broad discretion vested in it by the Commission.³⁴ The Board explained that it no longer viewed the argument as necessary to its ability to properly rule on the admissibility of WestCAN's contentions. As noted above, WestCAN's written submittals in this proceeding already are voluminous, readily exceeding 2,500 pages in length to date.

In any case, the Board afforded WestCAN the same opportunity as the other petitioners in the proceeding to present oral argument (during the week of March 10, 2008, in White Plains, and between March 24 and April 4, 2008, in Rockville). The clear lack of flexibility manifested by WestCAN's three representatives—which stands in stark contrast to the latitude shown by the Board and all of the other participants in this proceeding with respect to WestCAN—is certainly not grounds for discretionary Commission review.

Furthermore, the alleged "uniqueness" of certain contentions proffered by WestCAN in no way demonstrates clear error by the Board. The Board explained the rationale for its

³³ By its terms, Section 2.341(b) applies only to "a full or partial initial decision by a presiding officer." 10 C.F.R. § 2.341(b)(1). Plainly, the Board's March 25 and April 3 Orders are not of this type.

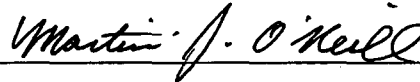
³⁴ Indeed, when presented with similar situations, the Commission has denied requests for oral argument when it fully understands the positions of the participants based on written submissions and has sufficient information upon which to base its decision. *See, e.g., Tex. Utils. Elec. Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 68-69 (1992) (request for oral argument regarding a petition for review).*

decision. WestCAN, in contrast, fails to explain how oral argument would “materially assist” the Board’s consideration of its concerns. Furthermore, as noted above, the Board’s Order does not obviate WestCAN’s right to seek Commission review—at an appropriate juncture in this proceeding—of the Board’s forthcoming ruling on the admissibility of its contentions.³⁵

V. CONCLUSION

For the foregoing reasons, WestCAN has not demonstrated that interlocutory Commission review is warranted. The Commission thus should reject WestCAN’s Petition. Even if review were warranted under 10 C.F.R. § 2.341, WestCAN has presented no basis to suggest that the Board committed clear or prejudicial error or otherwise abused its discretion.

Respectfully submitted,



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Dated at Washington, D.C.
this 14th day of April, 2008

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³⁵ WestCAN’s sundry other procedural arguments are unavailing. The Board did not cite “waiver” as a reason for cancelling oral argument (Petition at 5), fail to “place” the April 1 oral argument on the so-called “ASLB schedule” (*id.* at 6), or cancel the argument based on “scheduling conflicts.” *Id.* WestCAN presents no information to suggest that the Board cancelled the oral argument for reasons other than those stated in its March 25 and April 3 Orders.

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

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| In the Matter of |) | Docket Nos. 50-247-LR and 50-286-LR |
| ENTERGY NUCLEAR OPERATIONS, INC. |) | ASLBP No. 07-858-03-LR-BD01 |
| (Indian Point Nuclear Generating Units 2 and 3) |) | April 14, 2008 |

CERTIFICATE OF SERVICE

I hereby certify that copies of the "ANSWER OF ENTERGY NUCLEAR OPERATIONS, INC. OPPOSING WESTCAN, ET AL. PETITION FOR REVIEW OF LICENSING BOARD ORDERS," dated April 14, 2008, were served this 14th day of April 2008 upon the persons listed below, by first class mail and e-mail as shown below.

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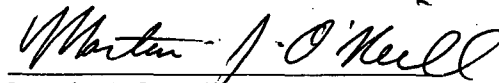
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