

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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Commissioners:

Dale E. Klein, Chairman  
Gregory B. Jaczko  
Peter B. Lyons  
Kristine L. Svinicki

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In the Matter of )

ENTERGY NUCLEAR OPERATIONS, INC. )  
(Indian Point Nuclear Generating Unit )  
Nos. 2 and 3) )

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Docket Nos.  
50-247-LR  
and 50-286-LR

**CLI-08-07**

**MEMORANDUM AND ORDER**

This order responds to a request, styled a “petition for review,” by Westchester Citizen’s Awareness Network (WestCAN), Sierra Club – Atlantic Chapter, Rockland County Conservation Association, Public Health and Sustainable Energy, and Assemblyman Richard Brodsky (together, WestCAN).<sup>1</sup> The Petition asks us to reverse an Atomic Safety and Licensing Board order cancelling oral argument on the issue of contention admissibility in the proceeding to

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<sup>1</sup> See Petition for Review of Atomic Safety and License [*sic.*] Board (ASLB) Orders of March 25, 2008 and March 31, 2008 [*sic.*] Cancelling Oral Arguments on WestCAN’s Contentions (Apr. 4, 2008) (Petition). (Board order denying reconsideration was actually dated April 3, 2008).

renew the operating license of the Indian Point Nuclear Generating Unit Nos. 2 and 3.<sup>2</sup> For the reasons set forth below, we deny the petition.

## I. BACKGROUND

The Indian Point license renewal application is highly controversial and the associated adjudication promises to challenge the Board's case management skills. In addition to the organizations who have joined with WestCAN in its petition to intervene, numerous other organizations, as well as state and local governments, have sought admission as parties to this proceeding. These various petitioners have asserted dozens of proposed contentions, many of which set forth similar issues.<sup>3</sup> WestCAN's petition to intervene is no exception, with 51 contentions proposed in a 785-page pleading (including supporting documents).

Given the large number of petitioners, even scheduling an opportunity for the Board to hear from the various participants on the threshold issue of contention admissibility proved complex. On January 24, 2008, the Board notified the participants that it intended to schedule oral argument on contention admissibility for the week of March 10 in White Plains, New York,

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<sup>2</sup> Order (Canceling Oral Argument on WestCAN's Contentions) (Mar. 25, 2008) (unpublished); *reconsideration denied*, Order (Relating to Wagner Letter Dated March 31, 2008) (Apr. 3, 2008) (unpublished).

<sup>3</sup> *Compare, e.g.*, WestCAN proposed contention 13 (Time-limited aging analyses), Petition to Intervene with Contentions and Request for Hearing (Dec. 10, 2007), at 109; *with* Friends United for Sustainable Energy (FUSE) USA proposed contention 48, Superceding Formal Petition to Intervene, Formal Request for Hearing, and Contentions (Dec. 31, 2007), at 359.

and asked them to notify the Board of any scheduling conflicts.<sup>4</sup> In a February 29 order, the Board scheduled oral arguments, and directed that each petitioner would have the opportunity to make a 10-minute opening statement, followed by questions from the Board.<sup>5</sup> In the February 29 order, the Board acknowledged that two out of three of WestCAN representatives had notified the Board that they were not available at the proposed time. The Order stated that if the third WestCAN representative was also unavailable at that time, the Board would hear WestCAN's oral argument at NRC headquarters in Rockville, MD during the week of March 24, 2008, "or as soon thereafter as is practicable."<sup>6</sup> In a subsequent order, the Board set argument on WestCAN's petition for April 1, 2008, in Rockville.<sup>7</sup> This scheduling order provided that the Board would follow the same format as for the other oral arguments: a 10-minute presentation by the representatives followed by questions from the Board. The Board cautioned that it did not intend to hear duplicative material or take supplementary evidence:

It is not the purpose of this proceeding to entertain general presentations regarding contentions which have already been adequately explained in the pleadings. Likewise, this proceeding is intended only as an opportunity for the Board to question, and the litigants to explain, what has previously been submitted. This will not be an evidentiary hearing and, without a specific

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<sup>4</sup> Order (Preliminary Notification Regarding the Scheduling of Oral Argument) (Jan. 24, 2008) (unpublished).

<sup>5</sup> Order (Scheduling Oral Argument on the Admissibility of Contentions) (Feb. 29, 2008)(unpublished).

<sup>6</sup> *Id.* at 3.

<sup>7</sup> Order (Scheduling WestCAN Oral Argument) (March 7, 2008) (unpublished).

exemption from the Board, the litigants will not be given an opportunity to supplement the already voluminous record at this point in the proceeding.<sup>8</sup>

Thus, the purpose of the oral argument on contention admissibility was solely to ensure that the Board understood the participants' positions.

The Board canceled the oral argument scheduled relevant to WestCAN's petition to intervene following the prehearing conference. In a March 25 Order, the Board explained that "[b]ased on the pleadings submitted, and the insights into the relevant issues in [the] 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."<sup>9</sup>

WestCAN responded by letter asking the Board to reconsider and explain its decision to cancel the oral argument.<sup>10</sup> The Board responded with an Order explaining simply that it had no questions for WestCAN, the NRC Staff, or the applicant on any of the matters raised in WestCAN's petition.<sup>11</sup>

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<sup>8</sup> *Id.* at 3.

<sup>9</sup> Order (Canceling Oral Argument on WestCAN's Contentions), at 2.

<sup>10</sup> Letter from WestCAN representative Sarah L. Wagner (Mar. 31, 2007). In particular, WestCAN inquired as to whether the Board changed its mind based on information gained from the oral argument that WestCAN was unable to attend.

<sup>11</sup> Order (Relating to Wagner Letter Dated March 31, 2008).

WestCAN contends that the Board's order rescinding the opportunity for oral argument deprived it of a procedural right that was granted to all other would-be intervenors, the NRC Staff, and the applicant.

## II. DISCUSSION

This preliminary, procedural Board ruling does not merit Commission review. Although WestCAN invokes our rule of procedure at 10 C.F.R. § 2.341, that rule provides standards for review of *final* Board decisions (full or partial initial decisions).<sup>12</sup> The Board here has not made even the threshold ruling on WestCAN's standing and contentions. Therefore, we consider WestCAN's Petition under our usual standard for review of an interlocutory Board order: whether the ruling threatens the petitioner with "immediate and serious, irreparable impact" or will affect the "basic structure of the proceeding in a pervasive and unusual manner."<sup>13</sup> WestCAN's pleading does not address the standards for interlocutory review, and they clearly have not been met.

First, it cannot be said that the Board's order has harmed WestCAN at all, let alone to a "serious" degree. Oral argument on contention admissibility is not a "right." Rather, Boards often schedule these arguments, as this Board did here, to ensure that its members fully understand the participants' positions. Our rules provide that a petitioner must explain and

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<sup>12</sup> 10 C.F.R. §2.341(b)(1).

<sup>13</sup> 10 C.F.R. § 2.341(f)(2).

support its contention in the petition to intervene.<sup>14</sup> The rules further allow a petitioner to reply to any answers to its petition, and WestCAN took the opportunity to file a lengthy reply in this matter.<sup>15</sup> And, as this Board cautioned in its orders scheduling oral argument, a petitioner may not offer additional evidence or arguments during such an oral presentation.

Further, even assuming that the Board's refusal to hear WestCAN's oral presentation and ask follow-up questions could be said to negatively affect WestCAN, the "impact" would not be irreparable. The supposed harm — which is speculative at this point — would be the Board's misunderstanding of WestCAN's position. If the Board rejects WestCAN's petition in its entirety, then WestCAN may appeal to the Commission at that time.<sup>16</sup> On the other hand, if the Board grants WestCAN party status, but declines to admit some of its contentions, this would not constitute "immediate and serious irreparable impact." We have found — repeatedly — that the rejection or admission of a contention, where the Petitioner has been admitted as a party and has other contentions pending, neither constitutes serious and irreparable impact, nor affects the "basic structure of the proceeding in a pervasive and unusual manner."<sup>17</sup>

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<sup>14</sup> 10 C.F.R. § 2.309(f).

<sup>15</sup> Reply of Petitioners Westchester County Citizen's Awareness Network (WestCAN), Sierra Club – Atlantic Chapter, Rockland County Conservation Association, Public Health and Sustainable Energy, and Assemblyman Richard Brodsky (Feb. 15, 2008). That there appears to be an ongoing issue regarding service of that reply is not material to today's decision.

<sup>16</sup> 10 C.F.R. § 2.311(b).

<sup>17</sup> See, e.g., *Exelon Generation Co., LLC* (Early Site Permit for the Clinton ESP Site), CLI-04-31, 60 NRC 461, 466-67 (2004). See also *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.*

We note that our Boards have broad discretion to issue procedural orders to regulate the course of proceedings and the conduct of participants. It is the Board's responsibility to "conduct a fair and impartial hearing according to law, to take appropriate action to control the prehearing and hearing process, and to maintain order."<sup>18</sup> As a general matter, we decline to interfere with the Board's day-to-day case management decisions, unless there has been an abuse of power.<sup>19</sup> We see no abuse in the Board's actions here.

### III. CONCLUSION

For the foregoing reasons, the Petition is denied.

IT IS SO ORDERED.

For the Commission

/RA/

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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, MD  
This 30<sup>th</sup> day of April, 2008

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(Pilgrim Nuclear Power Station), 65 NRC 10, 12 (2007); *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77, 79-80 (2000).

<sup>18</sup> 10 C.F.R. § 2.319.

<sup>19</sup> *E.g. Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Unit Nos. 2 and 3), CLI-07-28, 66 NRC 275 (2007); *Consolidated Edison Co. of New York* (Indian Point, Unit 2), CLI-82-5, 16 NRC 27, 37 (1982).

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-08-07) have been served upon the following persons by electronic mail this date, followed by deposit of paper copies in the U.S. mail, first class, and NRC internal mail.

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[Original signed by Evangeline S. Ngbea]

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