

August 14, 2008

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-LR/286-LR  
)  
(Indian Point Nuclear Generating )  
Units 2 and 3) )

NRC STAFF'S RESPONSE TO "SUPPLEMENTAL INTERVENOR  
PETITION" FILED BY WESTCHESTER CITIZEN'S AWARENESS [NETWORK], ET AL.

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1), the Staff of the U.S. Nuclear Regulatory Commission ("NRC Staff") hereby replies to "Supplemental Intervenor Petition by Westchester Citizen's Awareness [Network] (WestCAN), Rockland County Conservation Association (RCCA), Public Health and Sustainable Energy (PHASE), Sierra Club-Atlantic Chapter (Sierra Club), and Assemblyman Richard Brodsky [sic] (Brodsky)" (collectively, "WestCAN"), dated July 18, 2008 ("Supplemental Petition").<sup>1</sup> As more fully set forth below, the Staff opposes the

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<sup>1</sup> On July 18, 2008, WestCAN Counsel Susan Shapiro sent an e-mail to Staff Counsel and various other persons on the service list, to which she attached files bearing the following names: "Camera\_Contention\_Final-2.pdf" (162 kB), "Exhibit 1 JOURNAL NEWS.doc" (35 kB), "Exhibit 2 Camera Incident Report.doc" (38 kB), "Exhibit 3 LER\_IP2\_camera\_leading\_to\_mbfploss\_and\_forced\_shutdown.pdf" (800 kB), and "Exhibit 4 EPRI Portfolio 2009 - 41.07.01.02 Instrumentation and Control Aging and Obsolescence (supplemental).webarchive" (321 kB). Upon examination, Staff Counsel found that WestCAN Exhibit 4 could not be opened, and there was no Exhibit 5. On July 21, 2008, the Staff received an envelope from Ms. Shapiro, by express mail, containing a letter from Susan Shapiro to the Office of the Secretary dated July 19, 2008, along with a copy of the instant Petition and five enclosed exhibits. In her letter, Ms. Shapiro stated, "Inadvertently a set of Petitions without the exhibits was sent to you yesterday, therefore please only use this enclosed set with Exhibits as the filed version." In accordance with Ms. Shapiro's letter, the Staff considers the paper filing of July 19, 2008, with service by express mail, as the official version and date of filing of the Supplemental Petition. The Staff notes that the Certificate of Service contained in the express mail package (continued. . .)

admission of this contention on the grounds that it raises an issue that is outside the scope of a license renewal proceeding, and is untimely.

### BACKGROUND

On July 19, 2008, WestCAN filed a request for admission of a new contention ("Camera Contention") alleging that Entergy's ("Applicant" or "Licensee") License Renewal Application ("LRA") for Indian Point Units 2 and 3 does not provide

. . . an aging management plan or safeguards to prevent accidental emergency shutdowns triggered by microwatt electronic devices, currently in use such as digital cameras, cell phones, blackberys [sic], pacemakers, hearing aids, ipods, etc, or for such electronic devices which will be developed over the next 20 years.

Supplemental Petition at 2.

On July 31, 2008, before any parties had answered the new WestCAN filings, the Licensing Board issued three significant decisions concerning the hearing requests and petitions to intervene that had been filed in this proceeding: (1) Memorandum and Order (Ruling On Petitions To Intervene And Requests For Hearing) LBP-08-13, \_\_NRC \_\_, (July 31, 2008) (slip op.); (2) Order (Denying CRORIP's 10 C.F.R. § 2.335 Petition) (July 31, 2008) ("CRORIP Order"); and (3) Order (Striking WestCAN's Request For Hearing) (July 31, 2008) ("WestCAN Order"). In particular, as pertinent here, the Licensing Board dismissed WestCAN's hearing request, finding, *inter alia*, that the Board could not conduct a fair, orderly, and efficient proceeding if WestCAN was a party, since WestCAN had repeatedly demonstrated that the Board could not rely on the representations made by WestCAN's attorneys. See WestCAN

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(. . .continued)

erroneously claims that electronic service was made on July 18, 2008, with paper copies to the Office of the Secretary on that date.

Order at 12.<sup>2</sup>

The Licensing Board's Order striking WestCAN's hearing request did not specifically address WestCAN's filing of its Supplemental Petition or the Camera Contention contained therein, but effectively terminated WestCAN's right to participate in this proceeding, for all purposes. Nonetheless, inasmuch as WestCAN has appealed from the Order striking its hearing request, the Staff herein responds to WestCAN's Supplemental Petition and its new contention.

### DISCUSSION

#### I. Standing to Intervene

In LPB-08-13, the Board articulated the standards for establishing standing, proffering contentions, and the scope of issues in requests to intervene. In brief, petitioners must provide basic information to establish standing to intervene, including their right to intervene, and their interest in the proceeding; in addition, organizations seeking to establish representational standing must identify a member by name and address, show how the member would be affected by the challenged licensing action, and that the member has authorized the organization to represent its interests in the proceeding. *See generally*, LBP-08-13 at 4. The Staff has previously contested the standing of the Sierra Club and Assemblyman Richard Brodsky to intervene in this proceeding, but did not challenge the standing of WestCAN, RCCA or PHASE to intervene herein.<sup>3</sup> For the reasons set forth in the Staff's Response of January 22,

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<sup>2</sup> On August 8, 2008, WestCAN filed an appeal from the Order striking its request for hearing; responses to that appeal are due on or about August 18, 2008.

<sup>3</sup> See "NRC Staff's Response To Petitions For Leave To Intervene Filed By (1) Westchester Citizen's Awareness Network, Rockland County Conservation Association, Public Health And Sustainable Energy, Sierra Club – Atlantic Chapter, And Assemblyman Richard Brodsky, And (2) Friends United For Sustain[a]ble Energy, USA," at 2 and 14-20 (January 22, 2008) ("Staff's Response").

2008, the Staff renews its opposition to the standing of petitioners Sierra Club and Richard Brodsky.

Further, inasmuch as WestCAN's initial hearing request and petition to intervene have been dismissed, WestCAN's Supplemental Petition – filed seven months after the deadline for filing petitions to intervene (*i.e.*, December 10, 2007) -- is nontimely, and lacks any showing that the factors specified in 10 C.F.R. § 2.309(c)(1)-(2) support the admission of its new contention. Accordingly, if WestCAN's Supplemental Petition is considered as having been made by a new or previously dismissed petitioner, the Supplemental Petition should be denied as nontimely under 10 C.F.R. § 2.309(c).

## II. Admissibility of WestCAN's Proffered Contention

### A. General Requirements

The standards governing the admissibility of contentions are well established. Most recently, in LBP-08-13, the Licensing Board in this proceeding summarized these standards as follows:

Pursuant to 10 C.F.R. § 2.309(f), an admissible contention must (1) provide a specific statement of the legal or factual issue sought to be raised; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at hearing; and (6) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief.

The purpose of the contention rule is to "focus litigation on concrete issues and result in a clearer and more focused record for decision." The Commission has stated that it "should not have to expend resources to support the hearing process unless there

is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing.” The Commission has emphasized that the rules on contention admissibility are “strict by design.” Failure to comply with any of these requirements is grounds for the dismissal of a contention.

*Id.* at 5-6 (citation footnotes omitted). Significantly, where an omission is alleged, a contention that mistakenly alleges an omission of a relevant issue from the application may be dismissed.

*Id.* at 10. (citations omitted). Further, in a license renewal proceeding, the Petitioner must demonstrate that the subject matter of the contention is material to the license renewal proceeding. *Id.* at 7-8.

B. Scope of License Renewal

The Commission has an ongoing responsibility to oversee the safety and security of operating nuclear reactors, and thus the NRC maintains an aggressive and ongoing program to oversee plant operation. See, e.g., *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 8 (2001). For license renewal, the Commission has found that it is unnecessary to review all those issues already monitored, reviewed, and commonly resolved as needed by ongoing regulatory oversight. *Id.*

Indeed, the Licensing Board in this proceeding had recognized that the scope of a license renewal proceeding is limited. See LBP-08-13 at 13-14. As the Board observed, compliance with the current license basis (CLB) is monitored on an on-going basis, and is not subject to review in a license renewal proceeding. *Id.* at 15. As the Board has further observed, 10 C.F.R. Part 54 governs the issuance of renewed operating licenses. *Id.*; see 10 C.F.R. § 54.1. Pursuant to the Commission’s license renewal regulations, the scope of the safety review for license renewal is confined to the potential detrimental effects of aging that are not addressed by ongoing regulatory oversight programs. See CRORIP Order at 2 n.2 (quoting *Turkey Point*, CLI-01-17, 54 NRC at 4).

Where a petitioner seeks to challenge issues outside the scope of the license renewal

proceeding, it must petition for, and be granted, a waiver of the regulation in accordance with 10 C.F.R. §2.335. CRORIP Order at 2 (citing *Turkey Point*, CLI-01-17, 54 NRC at 11-13). As the Licensing Board has further observed, the Commission's regulations are not subject to attack in a license renewal proceeding. LBP-08-13 at 10-11.

C. Operational Issues Are Beyond the Scope of License Renewal

In WestCAN's own words, the proffered contention, as framed by WestCAN, "clearly demonstrates a problem in current operations." Supplemental Petition at 10. WestCAN describes a recent event in which a camera used in the Indian Point Unit 2 control room caused a shutdown of Unit 2, and asserts that the licensee's investigation into the event attributed to the camera was insufficient. *Id.* at 7. WestCAN further asserts that restarting the plant might have been a violation of the plant's Technical Specifications. *Id.* WestCAN then offers its view of the necessary corrective action: "design and operational controls<sup>4</sup> must be established to prevent similar types of incidents." *Id.* at 8. WestCAN further argues that a design change (i.e. shielding) should be imposed, or that a generic regulatory change (i.e. limits on emission of RFI/EMI) should be adopted. *Id.* at 10.

Notwithstanding WestCAN's interest in pursuing this matter, its concerns are clearly outside the scope of the license renewal proceeding. In this regard, the issues raised in WestCAN's new contention arose due to a current operational event, are unrelated to plant aging, and are not issues that would be addressed in an aging management plan ("AMP"). WestCAN Exhibit 3 documents the corrective actions taken by Entergy, and shows them to be current activities, not aging plans. See Exhibit 3 at 3-4 - 3-5. Moreover, the shutdown event is

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<sup>4</sup> As shown in Exhibit 3, the licensee has stated that it plans to develop guidance and fleet procedures for the control of EMI/RFI devices in sensitive areas by July 31, 2008. Exhibit 3 at 3-5.

the kind of operational issue that the Commission clearly excluded from license renewal proceedings. See *Turkey Point*, CLI-01-17, 54 NRC at 8. All of WestCAN's alleged operational problems, investigations, claimed violations, and suggested operational or design changes to prevent shutdowns pertain to how Entergy is currently conducting its licensed activities, not how it will manage the effects of aging. In sum, the Supplemental Petition should be denied as it raises an operational issue, rather than an aging issue that is within the scope of this proceeding.

D. Cameras Are Not Within the Scope of License Renewal

WestCAN's concerns pertain in part to cameras and other electronic items that currently exist. WestCAN fails to show how small portable electronics constitute the types of systems, structures and components ("SSCs") that are within the scope of license renewal as defined by 10 C.F.R. § 54.4, which an applicant must address in a license renewal application. Further, WestCAN makes no showing that the devices represent some new aging mechanism for SSCs that are within the scope of license renewal, which was overlooked by the Applicant.

In sum, WestCAN's new contention must be rejected under 10 C.F.R. § 2.309(f)(1)(vi), which requires that a contention of omission must pertain to a relevant matter required by law, within the permissible scope of the adjudicatory proceeding. WestCAN has not shown any regulation that would require an aging management plan for small portable electronics, and its contention must be rejected as raising a matter that is beyond the scope of this license renewal proceeding.

E. The Commission's Timeliness Requirements Have Not Been Met

In accordance with applicable regulations, WestCAN may add a new contention only with leave of the presiding officer upon a showing that:

- (i) The information upon which the amended or new contention is based was not previously available;

(ii) The information upon which the amended or new contention is based is materially different than information previously available; and

(iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

10 C.F.R. § 2.309(f)(2).

Here, the event of concern to WestCAN occurred in March 2008, but first became known to WestCAN when it read a newspaper account dated June 12, 2008. Supplemental Petition at 3. These facts fail to establish the timeliness of WestCAN's new contention.

It is well established that a petitioner such as WestCAN has an ironclad obligation to examine the publicly available documentary material with sufficient care to enable them to uncover any information that could serve as the foundation for a specific contention. See *Duke Energy Corporation* (McGuire Nuclear Station, Units 1 & 2, Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 386 (2002) (citing See, Final Rule, Rules of Practice for Domestic Licensing Proceedings --Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989)).

The appearance of a newspaper article does not in and of itself create good cause for late filing. *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 & 2) LBP-82-11, 15 NRC 348, 352 (1982). Thus, it has been held that permitting a newspaper article that reflected information widely available previously to be considered as good cause for late filing would virtually wipe out any good cause requirement. *Id.* (referring to the "good cause" standard for failing to file on time, set forth in 10 C.F.R. § 2.714(a)(1) (1982)).

WestCAN argues that section 2.309(f)(2) standards are met because WestCAN did not know about this specific event until members of WestCAN read the June 12, 2008 newspaper article. Supplemental Petition at 3. Significantly, however, WestCAN does not show the technical information that forms the basis for the contention is new. To the contrary, the

potential for cameras in a control room to cause a plant shutdown is neither new nor materially different from previously available information. Thus, the exhibits offered by WestCAN show that the information upon which the contention is based is not new. Exhibit 1, the "Journal News" article, documented that other camera flash-related events had occurred in control rooms throughout the years, demonstrating that knowledge that a camera can cause problems in a reactor control room was publicly available. Another of the Petitioners' exhibits, Exhibit 3, Licensee Event Report (LER), states, "[t]he Camera is rated by the Federal Communications Commission (FCC) as radio frequency interference." Exhibit 3 at 3-3. The LER documents that "[a]lthough RFI is a known phenomenon with a potential for un-intentional effects on electronic equipment, digital photography as an RFI source was not recognized or understood." Exhibit 3 at 3-4.<sup>5</sup> The LER did not provide new information but instead discussed a known issue that was simply not recognized by the Indian Point plant employees involved in the event. *Id.*

WestCAN tries to make the issue seem new by incorrectly claiming that the nuclear industry does not have guidance or rules in place to preclude these events from continuing to occur during the proposed new superseding license period. Supplemental Petition at 7. WestCAN is apparently unaware of the NRC's published information. For example, Draft Regulatory Guide DG-1119 (Proposed Revision 1 of Regulatory Guide 1.180) "Guidelines For Evaluating Electromagnetic And Radio-Frequency Interference In Safety-Related Instrumentation And Control Systems," (August 2002) ("DG-1119"), provides the industry with the following guidance on how to avoid problems caused by cameras and flashes:

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<sup>5</sup> WestCAN's contention cites its concern for RFI from "digital cameras, cell phones, blackberrys, pacemakers, hearing aids, ipods, etc[.]," See Supplemental Petition at 1. The event at Indian Point involved RFI from a camera, rather than any other devices; moreover, it is well known that cell phones and BlackBerry® wireless devices produce radio signals, such that their use is restricted on commercial airplanes. This is not new information as required for a new contention.

Exclusion zones should be established through administrative controls to prohibit the activation of portable EMI/RFI emitters (e.g., welders, transceivers, cameras, flash attachments) in areas where safety-related I&C systems have been installed. An exclusion zone is defined as the minimum distance permitted between the point of installation and where portable EMI/RFI emitters are allowed to be activated.

DG-1119 at 8. In addition, in 2003 the NRC published research that presented recommendations and the associated technical basis for addressing the effects of EMI and RFI conducted along interconnecting signal lines in safety-related instrumentation and control (I&C) systems. NUREG/CR-5609 ORNL/TM-13705, "Electromagnetic Compatibility Testing for Conducted Susceptibility Along Interconnecting Signal Lines" (Aug. 2003).<sup>6</sup>

In sum, although WestCAN may have learned of the March 2008 Indian Point event upon reading a newspaper article about it in June, it has not shown that it could not have learned of the issue of EMI/RFI sooner. Further, the NRC and the nuclear industry have long

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<sup>6</sup> NUREG/CR-5609 documented additional previous research into EMI/RFI:

Oak Ridge National Laboratory (ORNL) has been engaged by the U.S. Nuclear Regulatory Commission (NRC) Office of Nuclear Regulatory Research (RES) to perform confirmatory research associated with developing the technical basis for regulatory guidance to address electromagnetic interference (EMI), radio-frequency interference (RFI), and surge withstand capability (SWC) in safety-related instrumentation and control (I&C) systems. To date, ORNL staff have issued three technical reports detailing their findings and recommendations. NUREG/CR-5941, *Technical Basis for Evaluating Electromagnetic and Radio-Frequency Interference in Safety-Related I&C Systems*, discusses the test criteria and associated test methods recommended for safety-related I&C systems to be installed in nuclear power plants. NUREG/CR-6436, *Survey of Ambient Electromagnetic and Radio-Frequency Levels in Nuclear Power Plants*, reports on the measurement data collected at selected nuclear power plant (NPP) sites and the resulting electromagnetic emission profiles. NUREG/CR-6431, *Recommended Electromagnetic Operating Envelopes for Safety-Related I&C Systems in Nuclear Power Plants*, presents recommendations for operating envelopes to augment the test criteria and test methods discussed in NUREG/CR-5941.

NUREG/CR-5609 at 1 (citation footnotes omitted).

been aware of the potential problems posed by EMI/RFI; thus, the issue of EMI/RFI is not new, different, or previously unavailable. WestCAN fails to meet the standards for new contentions set forth in 10 C.F.R. § 2.309(f)(2)(i)-(iii), and its new contention should therefore be rejected as untimely.

F. WestCAN Provides No Support or Expert Opinion

Pursuant to 10 C.F.R. § 2.309(f)(1)(v), WestCAN is obliged to provide a concise statement of the alleged facts or expert opinions that support its Supplemental Petition along with references to the specific sources and documents that support its position. WestCAN fails to do so. The Supplemental Petition generally rests on summaries and excerpts of the enclosed exhibits,<sup>7</sup> none of which suggest the need to address EMI/RFI from small portable devices in aging management programs.<sup>8</sup> Further, no expert support is provided. Accordingly, WestCAN fails to satisfy section 2.309(f)(1)(v).

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<sup>7</sup> WestCAN also claims that restarting the reactor may have violated the plant's Technical Specifications (Supplemental Petition at 7), that the scope of review of the reactor trip was incorrect (*id.*), that design and operational controls must be established to prevent similar trips (*id.* at 8), that it is unacceptable risk to public health and safety for small devices to cause unplanned shutdowns (*id.* at 10), that the corrective actions in the LER were insufficient (*id.*), and that regulatory limits should be considered (*id.*). Claims of violations, requests for design and operational changes, and rulemaking are not within the scope of a license renewal proceeding, and are instead handled under other agency regulations. See 10 C.F.R. § 2.206(a) ("Any person may file a request to institute a proceeding . . . to modify, suspend, or revoke a license, or for any other action as may be proper."); see also 10 C.F.R. § 2.802(a) ("Any interested person may petition the Commission to issue, amend or rescind any regulation.").

<sup>8</sup> Exhibits 1, 2, and 3 all directly concern the reactor trip of March 23, 2008, and do not mention aging. Exhibit 4 is nothing more than a summary of a plan for future research into system upgrades, and the plan does not mention any aging effects. Exhibit 5 is the report summary and abstract from a May 2005 report on "Evaluating the Effects of Aging on Electronic Instrument and Control Circuit Boards and Components in Nuclear Power Plants," which was sponsored by the Electric Power Research Institute and the U.S. Department of Energy. WestCAN only provided the summary and abstract section of the report, instead of any relevant pages of the body of the report. The report summary says that the report describes potentially useful techniques for monitoring the aging of instrumentation and control boards. Exhibit 5 at 5-4. Nothing in the report summary and abstract suggest the need to address aging related to small portable devices.

G. WestCAN's Claim That *Non-Existent* Devices Must Be Managed Is Not Litigable

WestCAN claims that the Indian Point license renewal application omits an aging management plan to prevent accidental emergency shutdowns caused by RFI/EMI produced by existing and yet-to-be-invented devices. Supplemental Petition at 10-11. WestCAN offers no regulation, study, guidance document, or expert to support the novel idea that an application must contain an AMP to address things that do not exist and have yet to be invented. The Commission recently reiterated that the agency's contention standards help assure that the hearing process will be focused on disputes that can be resolved in adjudication. *Dominion Nuclear Connecticut, Inc.*, (Millstone Power Station, Unit 3) CLI 08-17, \_\_\_ NRC \_\_\_ (Aug. 13, 2008) (slip op.). WestCAN's suggestion that the Applicant is remiss for not addressing non-existent devices in an AMP should be rejected as failing to raise a matter that is appropriate for resolution in a license renewal proceeding, as it would require a determination as to the adequacy of aging management programs for non-existent devices that are outside the scope of license renewal.

CONCLUSION

For the reasons set forth above, WestCAN's Supplemental Petition and its proffered late-filed Supplemental Petition should be rejected, in that it raises a current operating issue which is beyond the scope of license renewal, is unsupported, and is untimely.

Respectfully submitted,



David E. Roth  
Counsel for NRC Staff

Dated at Rockville, MD  
this 14<sup>th</sup> day of August 2008

UNITED STATES OF AMERICA  
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC Staff's Response to 'Supplemental Intervenor Petition' Filed by Westchester Citizen's Awareness [Network], et al.", dated August 14, 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 14th day of August, 2008:

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