

August 15, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S NOTICE (CONCERNING WESTCAN'S
APPEAL FROM THE LICENSING BOARD'S ORDER
STRIKING WESTCAN'S REQUEST FOR HEARING)

The NRC Staff ("Staff") hereby provides notice that it received service, on August 14, 2008, of the appeal filed by Westchester Citizen's Awareness Network, *et al.* ("WestCAN"), on August 8, 2008, from the Licensing Board's "Order (Striking WestCAN's Request for Hearing)," dated July 31, 2008 ("Order"). Further, notice is hereby provided that in the event the Staff determines to file a brief in response to WestCAN's appeal, the Staff will do so by August 25, 2008, unless instructed otherwise by the Commission. In this regard, the Staff states as follows:

1. On July 31, 2008, the Licensing Board issued three decisions in this proceeding, regarding the petitions to intervene and requests for hearing which had been filed concerning the license renewal application ("LRA") of Entergy Nuclear Operations, Inc. ("Entergy" or Applicant") for Indian Point Nuclear Generating Units 2 and 3 ("Indian Point"). In particular, as pertinent here, the Licensing Board struck WestCAN's request for hearing under the provisions of 10 C.F.R. § 2.314(c). See Order, at 13. Citing numerous defects in WestCAN's certificates of service and the representations made in WestCAN's filings, the Board found that "WestCAN has repeatedly misrepresented facts in pleadings filed with [the] Board," and that "WestCAN's appalling lack of candor" rendered it "impossible for the Board to meet its responsibilities under

10 C.F.R. § 2.319 to conduct a fair, orderly, and efficient adjudicative hearing with WestCAN as a participant.” *Id.* at 1.

2. On or about August 8, 2008, WestCAN filed its appeal from the Licensing Board’s Order -- consisting of a “Notice of Appeal,” “Memorandum in Support of Petitioners’ Appeal to the Commission” (“Memorandum”), four exhibits (“Attachments” 1 – 4), and a Certificate of Service (“COS”) signed by WestCAN Counsel Susan Shapiro. In the COS, Ms. Shapiro stated that electronic copies of WestCAN’s appeal were transmitted on August 8, 2008, to persons on the service list including Staff Counsel; and that “hard copies” of its filing were also “sent” to Staff Counsel Sherwin Turk by some unspecified means of service. *Id.* at 1.

3. Notwithstanding the representations contained in WestCAN’s Certificate of Service, WestCAN did not effectuate service of its Appeal on the Staff as stated therein. Rather, Staff Counsel received an E-mail transmission from WestCAN at 8:06 PM on August 8, 2008, attaching the Notice of Appeal, the Memorandum, the COS, a Table of Contents, and Attachment 1 to the brief. Subsequently, at 10:14 PM on August 8, Staff Counsel received an empty E-mail transmission with no attachments; and at 10:34 PM and 10:36 PM, Staff Counsel received two electronic transmissions of Attachment 4. Staff Counsel did not receive any electronic transmissions of Attachments 2 and 3. See E-mail message from Sherwin Turk to Susan Shapiro of August 12, 2008 (5:06 PM) (Exhibit 1 hereto).

4. On August 12, 2008, Staff Counsel was informed by Martin O’Neill, Counsel for Entergy, that WestCAN had transmitted its appeal to Entergy’s attorneys at 4:41 PM on August 8, 2008. That transmission had not been received by the Staff, and the Staff had no knowledge that such a transmission had been made until learning of it on August 12 from Mr. O’Neill. Upon learning of that 4:41 PM electronic transmission, Staff Counsel Sherwin Turk sent an E-mail message to Counsel for WestCAN (Exhibit 1 hereto), in which he recited the

electronic transmissions which the Staff had received -- and informed WestCAN that the Staff had not received WestCAN's electronic transmission of 4:41 PM on August 8; the "hard copy" referred to in the COS; or Attachments 2 and 3 to its appeal. *Id.*

5. On August 13, 2008, Staff Counsel Sherwin Turk received a telephone call from WestCAN Counsel Sarah Wagner. Therein, Ms. Wagner agreed to send Mr. Turk a copy of WestCAN's appeal by overnight delivery. Thereafter, on the afternoon of August 14, 2008, Mr. Turk received a Federal Express package from WestCAN's attorneys, containing the Notice of Appeal, the Memorandum, the COS of August 8, and Attachments 1-4. Attached to the package was a FedEx U.S. Airbill, showing that it was delivered to FedEx on August 13 for overnight delivery on August 14, 2008. See E-mail message from Sherwin Turk to Sarah Wagner of August 14, 2008 (3:36 PM) (Exhibit 2 hereto); FedEx U.S. Airbill (Exhibit 3 hereto). The package contained neither a cover letter (*see id.*), nor a certificate of service reflecting service by Federal Express on August 13 or 14.

6. The Licensing Board's Order striking WestCAN's appeal was issued pursuant to 10 C.F.R. § 2.314(c). See Order at 13.¹ Here, WestCAN does not base its right to appeal on 10 C.F.R. § 2.314(c)(2); instead, it cites the right to appeal afforded in both 10 C.F.R. §§ 2.311 and 2.341. See Memorandum at 3.² While §§ 2.311(a) and 2.341(b)(3) afford the Staff a right to file a responsive brief (within 10 days after service of an appeal), 10 C.F.R. § 2.314(c)(2) does not explicitly provide a right (or a due date) to respond to appeals under that regulation.³

¹ To be sure, WestCAN does refer to "10 C.F.R. § 2.314" – but that reference was made in the course of WestCAN's discussion of whether its conduct was appropriate. See Memorandum at 5.

² These two regulations are mutually exclusive of each other. See 10 C.F.R. § 2.341(a)(1).

³ On August 14, 2008, the Staff filed a response to a supplemental petition filed by WestCAN before the Licensing Board, in which the Staff stated that responses to WestCAN's appeal from the Order striking its request for hearing "are due on or about August 18, 2008." See "NRC Staff's Response to 'Supplemental Intervenor Petition' Filed by [WestCAN], et al," dated August 14, 2008, at 3 n.2. That (continued. . .)

7. The Staff has not yet determined whether to file a brief in response to WestCAN's appeal. However, in the event that the Staff determines to file a responsive brief, the Staff hereby provides notice that, unless the Commission instructs otherwise, the Staff will file such brief on or before August 25, 2008 (*i.e.*, 10 days after WestCAN effectuated service of its appeal on the Staff). See 10 C.F.R. §§ 2.306(a), 2.306(b)(2), 2.311(a) and 2.341(b)(3).⁴

Respectfully submitted,



Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 15th day of August 2008

(...continued)

statement erroneously assumed that WestCAN had correctly cited 10 C.F.R. §§ 2.311 and/or 2.341 as the applicable regulation governing its appeal, and that WestCAN had effectuated service of its appeal on August 8, 2008, as stated in its COS.

⁴ The Staff notes that as of 5:00 PM on August 15, 2008, the Staff has still not received the "hard copy" which WestCAN stated, in its COS of August 8, 2008, it had "sent" to Staff Counsel.

Sherwin Turk

From: Sherwin Turk
Sent: Tuesday, August 12, 2008 5:06 PM
To: 'Susan H. Shapiro'
Cc: 'Arthur J. Kremer'; 'Arthur J. Kremer(2)'; 'Daniel E. O'Neill'; 'Daniel Riesel'; 'Diane Curran'; 'Elise N. Zoli'; Hearing Docket; 'Janice A. Dean'; 'Jessica Steinberg'; 'Joan Leary Matthews'; 'John J. Sipos'; 'John LeKay'; 'John Louis Parker'; 'Justin D. Pruyne'; 'Kathryn M. Sutton'; Kaye Lathrop; Lawrence McDade; 'Manna Jo Greene'; Marcia Carpentier; 'Martin J. O'Neill'; 'Michael J. Delaney'; 'Mylan L. Denerstein'; 'Nancy Burton'; OCAAMAIL Resource; 'Paul M. Bessette'; 'Phillip Musegaas'; 'Richard L. Brodsky'; 'Richard L. Brodsky(2)'; Richard Wardwell; 'Robert Snook'; 'Sarah L. Wagner'; 'Susan H. Shapiro'; 'Victor Tafur'; 'William C. Dennis'; Zachary Kahn; 'Beth Mizuno'; 'David Roth'; 'Jessica Bielecki'; Marcia Simon
Subject: WestCAN's Appeal Brief of August 8, 2008

Ms. Shapiro:

I have received your E-mail message of 2:51 PM today (entitled, "Follow up to Petitioners Appeal of ASLB decision to Strike Petitioner's Intervenor Petition"). Unfortunately, you appear to have failed to make proper service of your appeal brief on the NRC Staff -- and your certificate of service fails to correctly reflect proper service upon the Staff.

Specifically, I and other Staff Counsel received an E-mail transmission from your "palisadesart@aol.com" address, at 8:06 PM on August 8, 2008, attaching the notice of appeal, a 10-page appeal brief, a Table of Contents, and Attachment 1 to the brief -- as well as a certificate of service stating that E-mail service was made upon five Staff attorneys (including me) and that a "hard copy" was served on the Office of the Secretary, "the licensee's attorney," and "NRC Staff Attorney Sherwin Turk," without indicating the means by which the "hard copy" was served. As of this afternoon, I have not yet received a hard copy of your filing.

At 10:14 PM on August 8, Staff Counsel received an empty E-mail transmission with no attachments from you, entitled "Re: 2nd email."

At 10:34 PM and 10:36 PM on August 8, we received two transmissions from you, of Attachment 4.

We have never received Attachments 2 and 3 to your appeal.

Several minutes ago, I called Mr. O'Neill, Counsel for the Applicant, and was informed that you transmitted an appeal brief to them, with attachments, at 4:41 PM on August 8, 2008. You did not serve that document on the Staff.

I would appreciate your prompt response to this message.

Sincerely,
Sherwin Turk
Counsel for NRC Staff

Sherwin Turk

From: Sherwin Turk
Sent: Thursday, August 14, 2008 3:36 PM
To: 'Sarah L. Wagner'
Cc: 'Arthur J. Kremer'; 'Arthur J. Kremer(2)'; 'Daniel E. O'Neill'; 'Daniel Riesel'; 'Diane Curran'; 'Elise N. Zoli'; 'Hearing Docket'; 'Janice A. Dean'; 'Jessica Steinberg'; 'Joan Leary Matthews'; 'John J. Sipos'; 'John LeKay'; 'John Louis Parker'; 'Justin D. Pruyne'; 'Kathryn M. Sutton'; 'Kaye Lathrop'; 'Lawrence McDade'; 'Manna Jo Greene'; 'Marcia Carpentier'; 'Martin J. O'Neill'; 'Michael J. Delaney'; 'Mylan L. Denerstein'; 'Nancy Burton'; 'OCAAMAIL Resource'; 'Paul M. Bessette'; 'Phillip Musegaas'; 'Richard L. Brodsky'; 'Richard L. Brodsky(2)'; 'Richard Wardwell'; 'Robert Snook'; 'Susan H. Shapiro'; 'Victor Tafur'; 'David Roth'; 'William C. Dennis'; 'Zachary Kahn'; 'Beth Mizuno'; 'Jessica Bielecki'; 'Edward Williamson'; 'Marcia Simon'; 'Bo Pham'; 'Andrew Stuyvenberg'; 'Brian Newell'
Subject: Receipt of WestCAN's appeal brief dated August 8, 2008 - Indian Point license renewal proceeding

Ms. Wagner:

This is to confirm that I received a few minutes ago, via Federal Express, the package which you sent me following our telephone conversation yesterday. The package contains WestCAN's August 8, 2008 notice of appeal from the Licensing Board's Order striking WestCAN's request for hearing in the Indian Point license renewal proceeding, WestCAN's supporting memorandum, the certificate of service, and Attachments 1 - 4. The package bears a FedEx Airbill showing that it was delivered to FedEx on August 13, and was marked for overnight delivery to me on August 14 (today). No cover letter was enclosed.

As I had stated in my E-mail message of August 12, 2008, the multiple electronic transmittals you had made to Staff Counsel on August 8, 2008 (at 8:06, 10:14, 10:34 and 10:36 PM) were incomplete; further, the Staff had not received the 4:41 PM August 8 electronic transmittal which you sent to Counsel for the Applicant, and we had not received a paper copy of your filing. Although the certificate of service accompanying your appeal states that a "hard copy" of the filing was "sent" to me by some unspecified method on August 8, 2008, I have still not received that copy of your filing.

Sincerely,
Sherwin Turk
Counsel for NRC Staff

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE 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

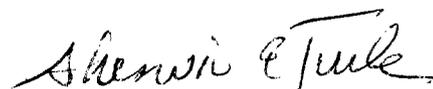
I hereby certify that copies of the foregoing "NRC STAFF'S NOTICE (CONCERNING WESTCAN'S APPEAL FROM THE LICENSING BOARD'S ORDER (STRIKING WESTCAN'S REQUEST FOR HEARING))", dated August 15, 2008, have been served upon the following through deposit in the NRC's internal mail system, with copies by electronic 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 15th day of August, 2008:

Lawrence G. McDade, Chair* Atomic Safety and Licensing Board Panel Mail Stop - T-3 F23 U.S. Nuclear Regulatory Commission Washington, D.C. 20555-0001 E-mail: LGM1@nrc.gov	Office of Commission Appellate Adjudication* U.S. Nuclear Regulatory Commission Mail Stop: O-16G4 Washington, DC 20555-0001 E-mail: OCAAMAIL@nrc.gov
Dr. Richard E. Wardwell* Atomic Safety and Licensing Board Panel Mail Stop - T-3 F23 U.S. Nuclear Regulatory Commission Washington, D.C. 20555-0001 E-mail: REW@nrc.gov	Office of the Secretary* Attn: Rulemaking and Adjudications Staff Mail Stop: O-16G4 U.S. Nuclear Regulatory Commission Washington, DC 20555-0001 E-mail: HEARINGDOCKET@nrc.gov
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<p>Atomic Safety and Licensing Board Panel* U.S. Nuclear Regulatory Commission Mail Stop: T-3 F23 Washington, DC 20555-0001 (Via Internal Mail Only)</p>	<p>Marcia Carpentier* Law Clerk Atomic Safety and Licensing Board Mail Stop: T-3 E2B U.S. Nuclear Regulatory Commission Washington, DC 20555-0001 (E-mail: Marcia.Carpentier@nrc.gov)</p>
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Sherwin E. Turk
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