

August 18, 2008 (4:57pm)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

BEFORE THE COMMISSION

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

August 18, 2008

ENTERGY NUCLEAR OPERATIONS, INC. ANSWER OPPOSING
WESTCAN ET AL. NOTICE OF APPEAL

I. INTRODUCTION

On July 31, 2008, the Atomic Safety and Licensing Board ("Board") issued an Order striking the Request for Hearing filed by Westchester Citizen's Awareness Network ("WestCAN"), Rockland County Conservation Association, Inc. ("RCCA"), Public Health and Sustainable Energy ("PHASE"), Sierra Club - Atlantic Chapter, and New York State Assemblyman Richard L. Brodsky (collectively, "WestCAN" or "Petitioners") in the Indian Point Nuclear Generating Units 2 and 3 license renewal proceeding.¹ In its Order, the Board indicated that "[p]ursuant to 10 C.F.R. § 2.314(c)(3), an appeal of [its] Order may be filed with the Commission within ten (10) days after issuance"²

In response to the Board's Order, however, WestCAN filed a Notice of Appeal ("Notice") and accompanying Memorandum of Law ("Appeal") seeking review³ under both 10 C.F.R. §§ 2.341(b) and § 2.311. Thus, pursuant to 10 C.F.R. §§ 2.341(b)(3) and 2.311(b),

¹ See Licensing Board Order (Striking WestCAN's Request for Hearing) (July 31, 2008) (unpublished) ("Board Order").

² Board Order at 1.

³ There is some ambiguity with regard to whether WestCAN intended to file its Notice of Appeal before the Board or the Commission. Although WestCAN notes in the text that it seeks Commission review of the Licensing Board Order, the caption of the Notice of Appeal indicates that it is before the Licensing Board. See WestCAN Notice at 1.

Entergy Nuclear Operations, Inc. (“Entergy” or “Applicant”), hereby files this Answer opposing WestCAN’s Appeal. To the extent that WestCAN’s filing could be construed as an appeal under 10 C.F.R. § 2.314,⁴ Entergy respectfully seeks leave to reply.

In its appeal, WestCAN alleges that the Board erred in finding that, because of WestCAN’s “appalling lack of candor,” during the pendency of this proceeding, WestCAN’s Request for Hearing should be stricken. As discussed more fully below, the Board Order is entirely consistent with applicable regulations, Commission precedent, and the Board’s Orders in this proceeding. Given the egregious nature of WestCAN’s conduct from the outset of this proceeding, the Board Order is reasonable and appropriate and should be affirmed by the Commission.

II. BACKGROUND

On April 23, 2007, Entergy submitted an application to the NRC to renew the Indian Point Nuclear Generating Units 2 and 3 operating licenses (License Nos. DPR-26 and DPR-64) for an additional 20 years. The Commission published a notice of opportunity for hearing on Entergy’s license renewal application (“LRA”) in the *Federal Register* on August 1, 2007,⁵ and by further notice dated October 1, 2007,⁶ extended the period for filing hearing requests until November 30, 2007. On December 10, 2007, after receiving an additional 10-day extension from the Licensing Board,⁷ WestCAN, among other petitioners, filed a Request for Hearing and

⁴ Appeal at 5.

⁵ See Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing, 72 Fed. Reg. 42,134 (Aug. 1, 2007).

⁶ See Notice of Opportunity for Hearing, Extension of Time for Filing of Requests for Hearing or Petitions for Leave to Intervene in the License Renewal Proceeding, 72 Fed. Reg. 55,834 (Oct. 1, 2007).

⁷ Licensing Board Order (Granting an Extension of Time Within Which to File Requests for Hearing) (Nov. 29, 2007) (unpublished).

Petition to Intervene in this proceeding.⁸ Entergy and the NRC Staff filed answers thereto on January 22, 2008, to which WestCAN replied on February 15, 2008.⁹ On February 22, 2008, Entergy moved to strike WestCAN's Reply for introducing new arguments, failing to properly serve its reply on Entergy, and failing to serve a complete and consistent pleading, among other issues.¹⁰

On July 31, 2008, the Board ruled on eight then-pending petitions to intervene in this proceeding.¹¹ By Order also dated July 31, 2008, the Board struck WestCAN's Request for Hearing.¹² Citing primarily WestCAN's lack of credibility and candor surrounding its February 15 Reply, the Board found that it "cannot conduct a fair, orderly, and efficient proceeding if [it] can not rely on the integrity of the parties, and WestCAN has repeatedly demonstrated that [the Board] can not rely on their attorneys to be credible in their dealings with the Board and the parties."¹³ On August 8, 2008, WestCAN filed its Appeal.

III. LEGAL STANDARDS

As noted above, contrary to the Board's direction, WestCAN filed its appeal pursuant to 10 C.F.R. §§ 2.341(b)(1) and 2.311, rather than 10 C.F.R. § 2.314(c)(3).¹⁴ As a preliminary matter, there appears to be no basis for WestCAN's appeal under 10 C.F.R. § 2.341(b)(1). That

⁸ See Westchester Citizen's Awareness Network ("WestCAN"), Rockland County Conservation Association, Inc ("RCCA"), Public Health and Sustainable Energy ("PHASE"), Sierra Club – Atlantic Chapter ("Sierra Club") and Richard Brodsky Petition to Intervene and, [sic] Request for Hearing (Dec. 10, 2007) ("Original Petition").

⁹ Reply of Petitioners Westchester Citizen's Awareness Network ("WestCAN"), Rockland County Conservation Association, Inc ("RCCA"), Public Health and Sustainable Energy ("PHASE"), Sierra Club – Atlantic Chapter ("Sierra Club") and New York State Assemblyman Richard Brodsky (Feb. 15, 2008) ("WestCAN February 15 Reply").

¹⁰ See Entergy Nuclear Operation, Inc. Motion to Strike WestCAN, et al. Reply to Entergy and the NRC Staff (Feb. 22, 2008).

¹¹ Licensing Board Memorandum and Order (Ruling on Petitions to Intervene and Requests for Hearing), LBP-08-13, 68 NRC __ (slip op. July 31, 2008).

¹² Board Order at 1.

¹³ *Id.* at 12.

¹⁴ Appeal at 3.

regulation applies to appeals for Commission review of a Board's full or partial initial decision,¹⁵ or other appeals authorized by the regulation, *by a party*.¹⁶ The Board has neither issued a full or partial initial decision nor admitted WestCAN as an intervenor to this proceeding.

Likewise, WestCAN seemingly has no basis for appeal under 10 C.F.R. § 2.311.¹⁷ That regulation applies to appeals from a Licensing Board decision wholly granting or denying intervention.¹⁸ Rather than rule on WestCAN's Request for Hearing, the Board *struck it*.¹⁹

To the extent that WestCAN is appealing under 10 C.F.R. § 2.314(c)(3), Entergy respectfully seeks leave to reply, as this provision does not explicitly provide a right to submit an answer to such appeals. In any event, as discussed in greater detail below, WestCAN has failed to demonstrate that the Board Order's is erroneous, either as a matter of law or fact.

IV. DISCUSSION

A. The Board's Order Is Consistent With the Commission's Regulations, With Commission Case Law, and With the Board's Prior Orders in this Proceeding

In its Appeal, WestCAN asserts that the Board's Order striking its Request for Hearing constitutes an abuse of discretion.²⁰ According to WestCAN, any action on the part of the Board

¹⁵ *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Unit Nos. 2 and 3), CLI-08-07, 68 NRC ___, slip op. at 5 (April 30, 2008).

¹⁶ 10 C.F.R. § 2.341(a)(1)-(b)(1); *see also Duke Energy Corporation* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2); CLI-03-17, 58 NRC 419, 422 (2003) (finding that 10 C.F.R. § 2.341(b) (formerly 10 C.F.R. § 2.786(b)) applies to already admitted "intervenor," whereas 10 C.F.R. § 2.311 (formerly 10 C.F.R. § 2.714) applies to petitioners for intervention).

¹⁷ When reviewing a Board Order under 10 C.F.R. § 2.311, the Commission gives substantial deference to Board conclusions on standing and contention admissibility unless an appeal points to an error of law or abuse of discretion. *See Dominion Nuclear Connecticut*, (Millstone Power Station, Unit 3), CLI-08-17, 68 NRC ___, slip. op at 4 (Aug, 13, 2008).

¹⁸ 10 C.F.R. § 2.311(c) states, in relevant part, "An order denying a petition to intervene and/or request for hearing, . . . is appealable by the requestor/petitioner on the question *as to whether the request and/or petition should have been granted.*" (emphasis added).

¹⁹ Board Order at 12.

²⁰ Appeal at 1.

beyond striking its February 15 Reply constitutes “a violation of the governing Order, the rules of the NRC, and the law governing these proceedings”²¹

The Commission has delegated to licensing boards all powers necessary to fulfill their duties to conduct fair and impartial hearings, to control the prehearing and hearing process, to avoid delay, and to maintain order.²² Those powers include the power to strike pleadings or issue other orders, as necessary, to carry out the Board’s duties and responsibilities.²³ In exercising its control over an orderly hearing, the Board is aided by the long-standing, generally-applicable Rules of Practice at 10 C.F.R. Part 2, Subpart C. Those rules include, among other things, a requirement for appropriate decorum by all participants in NRC adjudicatory hearings.²⁴

The Board’s power to enforce these standards include “reprimand, censure or suspension from the proceeding” of either a party or its representative “who refuses to comply with [the presiding officer’s or Commission’s] directions, or who is disorderly, disruptive, or engages in contemptuous conduct.”²⁵ Contrary to WestCAN’s assertions, pursuant to the Commission’s regulations, the Board has full authority to strike its Request for Hearing in order to maintain an orderly and fair proceeding.

The Board Order also is consistent with applicable Commission and Board case law. Indeed, in *this very proceeding*, with regard to *this very petitioner*, the Commission explained that “Boards have broad discretion to issue procedural orders to regulate the course of

²¹ *Id.* at 9.

²² 10 C.F.R. §§ 2.321(c), 2.319.

²³ 10 C.F.R. § 2.319(d), (q); *see also Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 643-44 (2004) (noting the propriety of a Board imposing sanctions under 2.319(g) for repeated refusal to comply with the Board’s direction).

²⁴ 10 C.F.R. § 2.314(a) (“parties and their representatives in proceedings subject to this subpart are expected to conduct themselves with honor, dignity, and decorum as they should before a court of law”).

²⁵ *Id.* § 2.314(c).

proceedings and *the conduct of participants.*”²⁶ Further, the Commission reiterated the Board’s charge to conduct a fair and impartial hearing, to take appropriate action to control the prehearing and hearing process, *and to maintain order.*²⁷ Based on the Commission’s unambiguous directive to the Board in this proceeding, WestCAN cannot legitimately argue that the Board has somehow overstepped its authority.

In addition, this is not the first time in this proceeding that, in the interest of maintaining an orderly process, the Licensing Board has reprimanded a petitioner engaged in inappropriate or disruptive conduct. As WestCAN is fully aware, the Board in this case took disciplinary action against another intervenor, by first censuring, and later barring him from further participation in this proceeding.²⁸ On appeal of the Board’s censure ruling, the Commission, citing 10 C.F.R. § 2.314(c), deferred to the Board and indicated that its Order was “a reasonable response to Mr. Martinelli’s conduct.”²⁹

The Board Order striking WestCAN’s Request for Hearing in this proceeding is consistent with the Commission’s instruction to other Boards regarding appropriate disciplinary action. For example, in the *Millstone* license renewal proceeding, counsel for petitioner Connecticut Coalition Against Millstone (“CCAM”), like WestCAN’s counsel, repeatedly and inexplicably ignored the Commission’s rules of practice.³⁰ After several Board reprimands, the Commission instructed the Board to exercise its authority under Section 2.319(g), in the event of

²⁶ *Indian Point*, CLI-08-07, 68 NRC ___, slip op. at 7 (emphasis added) (denying WestCAN’s petition for review seeking reversal of a Board order cancelling oral argument on the issue of contention admissibility).

²⁷ *Id.* citing 10 C.F.R. § 2.319 (emphasis added).

²⁸ See Licensing Board Order (Censure of Sherwood Martinelli) (Dec. 3, 2007) (unpublished); Licensing Board Order (Barring Sherwood Martinelli From Further Participation In This Proceeding) (Dec. 13, 2007) (unpublished).

²⁹ *Energy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-07-28, 66 NRC 275, 275 (2007).

³⁰ See *Millstone*, CLI-04-36, 60 NRC 631, 643-44 (2004).

additional breaches, and impose “appropriate sanctions.”³¹ The Commission eventually instructed the Office of the Secretary to screen all filings bearing the name of CCAM’s representative and summarily reject any pleading that failed to meet all procedural requirements.³²

Lastly, the Board’s decision is fully consistent with its own Orders in this proceeding regarding the potential for disciplinary action. WestCAN argues that, rather than strike its Request for Hearing, the appropriate remedy is to strike *only* its February 15 Reply.³³ WestCAN neglects to acknowledge, however, that the Board repeatedly reminded all parties of the necessity to scrupulously follow the rules of practice and the potential consequences of not doing so, which includes striking pleadings *and sanctioning parties*.³⁴

Specifically, from the outset of this proceeding, the Board, recognizing the potential complexity of the litigation, urged all parties to digest and scrupulously adhere to the rules of practice in 10 C.F.R. Part 2. As the Board explained, “[f]ailure by a party to comply with the Rules works an injustice on the other parties to the proceeding. Accordingly, failure to comply with the Rules can well result in a litigant being dismissed from the proceeding.”³⁵ The Board reminded WestCAN of the pleading requirements *yet again* in its February 1 Order regarding

³¹ *Id.* at 644.

³² *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-06-04, 63 NRC 32, 38 (2006).

³³ Appeal at 4, 8-9.

³⁴ *See, inter alia*, Licensing Board Memorandum and Order (Administrative Matters and Directing Parties Attention to Requirements for Proper Service (Oct. 29, 2007) (unpublished) (“October 29 Board Order”); Licensing Board Order (Denying an Extension of Time Within Which to File Requests for Hearing) (Nov. 27, 2007) (unpublished); Licensing Board Order (Granting an Extension of Time to Clearwater Within Which to File Requests for Hearing) (Nov. 27, 2007) (unpublished); Licensing Board Memorandum and Order (Denying Entergy’s Motion to Strike But *Sua Sponte* Striking FUSE’s Multiple Requests for Hearing (Nov. 28, 2007); (unpublished); Licensing Board Order (Denying an Extension of Time Within Which to File Requests for Hearing) (Nov. 28, 2007) (unpublished); Licensing Board Order (Granting an Extension of Time Within Which to File Requests for Hearing (Nov. 29, 2007) (unpublished) (“November 29 Board Order”); Licensing Board Order (Censure of Sherwood Martinelli) (Dec. 3, 2007) (unpublished).

³⁵ October 29 Board Order at 3.

WestCAN's Original Petition exhibits.³⁶ Given the repeated and unambiguous direction from the Board, WestCAN can neither credibly claim ignorance regarding potential disciplinary measures nor argue that the Board violated its own Orders.

B. The Board's Order is Reasonable and Appropriate

WestCAN essentially argues, with respect to the Board's Order, that the crime does not fit the punishment. Entergy respectfully disagrees.

First, as the Board explains, WestCAN's actions have impeded the conduct of a "fair, orderly, and efficient proceeding."³⁷ Specifically, Entergy (and presumably other participants in this proceeding) have had to dedicate extraordinary resources attempting to decipher WestCAN's myriad of inconsistent, disorganized, and deficient filings from the very outset of this proceeding. Briefly, after the Board's October 29 Order notifying all of the parties and intervenors in this proceeding of the requirements for proper service of documents under the Commission's rules of practice,³⁸ and after the Board (in part in response to WestCAN's actions) expressed its "amazement that attorneys can not, or will not, follow even the simplest of directions,"³⁹ WestCAN filed its Original Petition with numerous omissions and inconsistencies in the identification and service of exhibits. The Board and parties ultimately could not fully reconcile WestCAN's exhibits, prompting the Board to index WestCAN's exhibits itself, and issue an Order notifying WestCAN of its intent to strike numerous exhibits unless WestCAN explained to the Board how and when those exhibits had been served.⁴⁰ WestCAN's own

³⁶ Licensing Board Order (Concerning Exhibits Submitted by WestCAN and Associated Petitioners) (Feb. 1, 2008) (unpublished) ("February 1 Board Order").

³⁷ Board Order at 12.

³⁸ October 29 Board Order.

³⁹ November 29 Board Order at 4.

⁴⁰ February 1 Board Order at 2-3.

Answer to that Order includes exhibits that contain e-mails documenting in detail the NRC Staff's and Applicant's extensive, but ultimately futile, efforts to decipher WestCAN's Original Petition and its associated exhibits.⁴¹

In its Appeal, WestCAN itself acknowledges that it has submitted different versions of the same pleading⁴² and acknowledges that a Certificate of Service filed on March 7, 2008 was incorrect.⁴³ In what can only be described as sheer irony, WestCAN apparently failed to properly serve its Appeal on the Staff⁴⁴ – the very pleading in which WestCAN espouses its credibility as a petitioner. Given the already extensive resources necessary to maintain order in this already complex litigation, the Board's Order is reasonable and appropriate.

Second, other petitioners in this proceeding have generally been able to adhere to the rules of practice and to the Board's Orders.⁴⁵ Indeed, at least one admitted party to this proceeding is represented by a lay representative.⁴⁶ In contrast, counsel of record for WestCAN are practicing attorneys,⁴⁷ and there is no valid excuse for their demonstrated inability to follow the basic rules of practice in this proceeding.

Lastly, WestCAN argues that “[b]y striking the Petitioners [sic] Petition the NRC has unfairly and unjustly barred consideration of many significant issues on the merits and

⁴¹ Answer to Order (Concerning Certain Exhibits Submitted by Petitioners WestCAN et. [sic] al.) (Feb. 11, 2008), Exh. C, D, and E.

⁴² Appeal at n. 4.

⁴³ *Id.* at 8.

⁴⁴ See NRC Staff's Notice (Concerning WestCAN's Appeal from the Licensing Board's Order Striking WestCAN's Request for Hearing) (Aug. 15, 2008).

⁴⁵ While minor errors occasionally occurred, they were quickly resolved by the party with virtually no impact to the proceeding.

⁴⁶ Based on Entergy's understanding, Ms. Manna Jo Greene, Hudson River Sloop Clearwater's representative, is not a member of the Bar. See Notice of Appearance of Manna Jo Greene (Nov. 23, 2007). The Board has admitted Hudson River Sloop Clearwater as a party to this proceeding. See LBP-08-13, 68 NRC __ (slip op. at 3).

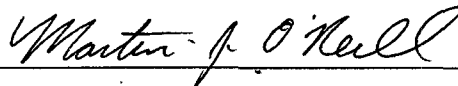
⁴⁷ See Declaration of Susan H. Shapiro, Esq. (Dec. 8, 2007) (filed on Dec. 10, 2007 with WestCAN's Original Petition); Errata from Sarah L. Wagner (Feb. 27, 2008).

forestalled public participation.”⁴⁸ To the contrary, WestCAN’s nearly incomprehensible filings have complicated participation in this proceeding. WestCAN’s persistent disregard for the rules has rendered its pleadings laborious to comprehend, let alone answer. As the Board has indicated, WestCAN’s actions have placed “an enormous burden on the Board, other litigants, and even on members of the Petitioners’ organization” to simply follow the record.⁴⁹ The Board noted that, [t]he matters presented in this proceeding are too important to have the time and attention of the Board . . . wasted by WestCAN’s unwillingness to consistently deal in a forthright manner.”⁵⁰

V. CONCLUSION

For the foregoing reasons, the Commission should reject WestCAN’s Appeal and affirm the Board’s Order.

Respectfully submitted,



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⁴⁸ Appeal at 9.

⁴⁹ February 1 Order.

⁵⁰ Board Order at 12.

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NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

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))	
)	August 18, 2008

CERTIFICATE OF SERVICE

I hereby certify that copies of the "Entergy Nuclear Operations, Inc. Answer Opposing WestCAN Et Al. Notice of Appeal," dated August 18, 2008, were served this 18th day of August, 2008 upon the persons listed below, by first class mail and e-mail as shown below.

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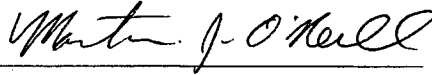
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