

RAS E-155

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September 3, 2008

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Re: License Renewal Application submitted by Entergy Indian Point Unit 2, LLC, Entergy Indian Point Unit 3, LLC, and Entergy Nuclear Operations, Inc. for Indian Point Nuclear Generating Station, Unit 2 and 3

Docket Nos. 50-247-LR/50-286-LR; ASLB No. 07-858-03-LR-BD01

To whom it may concern:

Enclosed for filing please find the original and two copies of Petitioners' WestCAN et. al. Reply to Entergy Nuclear Operations, Inc. Opposition to Petitioners' WestCAN et. al. appeal.

Respectfully submitted,



Susan Shapiro

DOCKETED
USNRC

September 8, 2008 (4:00pm)

cc: active parties

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

TEMPLATE = SECY-037

DS03

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Lawrence G. McDade, Chairman
Dr. Kaye D. Lathrop
Dr. Richard E. Wardwell

In the Matter of)	PETITIONERS' MOTION AND
)	REPLY TO ENTERGY'S
ENTERGY NUCLEAR)	OPPOSITION TO
OPERATIONS, INC.)	PETITIONERS' APPEAL TO
)	THE COMMISSION
)	
(Indian Point Nuclear Generating)	Docket Nos.
Units 2 and 3))	50-247 and 59-286 LR

Petitioners¹ respectfully seeks leave to reply to Entergy's Opposition to Petitioners' Appeal and in further support of Petitioners' appeal of the Atomic Safety and Licensing Board (hereinafter "ASLB") decision to "*strike*" Petitioners' pleadings without consideration of its merits.

ARGUMENT

The ASLB decision to *strike* all 50 of Petitioners contentions based on minor clerical errors and electronic filing issues reveals a clear posture by the

¹ "Petitioners" include Richard L. Brodsky, New York State Assemblyman, from the 92nd Assembly District in his Official and individual capacities, Westchester Citizen's Awareness Network (WestCAN), Rockland County Conservation Association, Inc. (RCCA), Public Health And Sustainable Energy (PHASE), And Sierra Club - Atlantic Chapter (Sierra Club).

ASLB of prejudicial treatment towards Petitioners and constitutes an abuse of discretion. Despite the substantial deference to the presiding officers' procedural decisions, such decisions are reviewable on appeal.²

Entergy Nuclear Operations, Inc. (hereinafter "Entergy") argues that it was necessary to strike all of Petitioners' pleadings, barring Petitioners from the proceeding, and ignore the merits of Petitioners' contentions in order for the ASLB to conduct a fair and impartial hearing, to control the pre-hearing and hearing process, to avoid delay, and to maintain order.³ Entergy's position is not consistent with the support cited, is without any legal basis and should be rejected.

In support of Entergy's position it cites to a Nuclear Regulatory Commission (hereinafter "NRC") proceedings involving Millstone Nuclear Power Station⁴ and ASLB orders⁵ in the proceeding in which Petitioners appeal from. Neither *Millstone* case cited by Entergy strikes all the pleadings for

²10 C.F.R. § 2.311; *see also, In the Matter of Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2)*, CLI-03-17, 58 N.R.C. 419 (2003); *In the Matter of Int'l Uranium (USA) Corp. (White Mesa Uranium Mill)*, CLI-02-13, 55 N.R.C. 269 (2002).

³Entergy Nuclear Operations, Inc. Answer Opposing WestCAN et al. Notice of Appeal, dated August 18, 2008 at p. 5. (hereinafter "Entergy Answer").

⁴Entergy Answer at pp. 5, 7.

⁵Entergy Answer at pp. 5-6.

failure to follow NRC practices and procedures.⁶ *In the Matter of Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 & 3)*, CLI-04-36, 60 N.R.C. 631 (2004), the Commission instructed the Office of the Secretary to screen all filings by the petitioner and reject any that failed to meet all procedural requirement. Here, the ASLB has gone beyond the remedy in Millstone and struck all the pleadings submitted by Petitioners.

The ASLB has never stated that one improper filing will result in complete dismissal from the proceeding.⁷ The appropriate remedy, as previously taken by the ASLB in this proceeding, is to strike the particular improperly filed documents, not strike the entire pleading or pleadings in the case.⁸

Moreover, Entergy's reference to the censure of Sherwood Martinelli is inappropriate and irrelevant.⁹ Petitioners are not affiliated with FUSE or Mr. Martinelli. Nor were Petitioners' censured for the derogatory remarks to the

⁶ In contrast to the Petitioners action *In the Matter of Hydro Resources, Inc.*, LBP-98-4, 47 N.R.C. 17 (1998), Petitioners alleged egregious conduct if true does not warrant dismissal of all its pleadings.

⁷ 10 C.F.R. § 2.314 also does not give the Board authority to dismiss all of a petitioners pleadings if disciplinary action is taken under § 2.314.

⁸ See Licensing Board Memorandum and Order 2/29/08 Scheduling oral arguments. Petitioners' maintain that the exhibits struck by the ASLB were publicly available and therefore should be considered regardless of the ASLB ruling.

⁹ Entergy Answer at p. 7.

NRC made by Sherwood Martinelli.

The ASLB erred in its unprecedented¹⁰ ruling to strike Petitioners' Reply brief and Petition for only minor clerical and electronic filing problems caused, in part caused by the NRC's own limited electronic mail system.¹¹

Entergy argues because the ASLB chose to "strike" Petitioners pleadings, rather than deny the Petition, Petitioners cannot appeal the ASLB ruling.¹² *In the Matter of Dominion Nuclear Connecticut, Inc. (Millstone Power Station, Unit 3)*, 2008 WL 3540073(N.R.C.) (April 18, 2008), cited by Entergy does not stand for the proposition that Petitioners have no basis for appeal under 10 C.F.R. § 2.311.

There is no definition in the NRC regulations distinguishing striking verses denying a Petition to Intervene. Section 2.311(a) of 10 C.F.R. provides that "an order of the presiding officer . . . may be appealed to the Commission with respect to: (1) A request for hearing; (2) A petition to intervene. Whether Petitioners' Petition to Intervene and Request for a Hearing was struck or denied, the result is the same. Applying § 2.311, Petitioners appeal the decision

¹⁰ See e.g., *In the Matter of Int'l Uranium (USA) Corp. (White Mesa Uranium Mill)*, CLI-02-13, 55 N.R.C. 269 (2002).

¹¹ In relicensing proceedings of Indian Point 2 and 3, 154 contentions were raised; Petitioners filed 50 of those contentions. It is the largest Petition by any group of Petitioners, with a 400 page petition, and more than 70 exhibits, amounting to a document containing 1200 pages.

¹² Entergy Answer at p. 4.

striking the Petition “on the question as to whether the request and/or petition should have been granted.”¹³

If Entergy’s position is adopted then the Board can decide who is a party or not, and thereby bar public participation by striking pleadings, rather than denying the pleadings. This would be a clear abuse of the ASLB’s discretion.

While a number of options were available, the option selected by the Board to *strike* is by far most severe and a clear material error. This action by the Board to *strike* flies in the face of just reasonable hearings, where the public is given its lawful right to be heard. The ASLB ruling is unprecedented, unreasonable, and is a continuation of a clear pattern of prejudicial treatment toward Petitioners. In making its ruling the ASLB has continued its persistent prejudicial treatment of Petitioners by striking the Reply Brief as well as the Petition.

Entergy further argues that Petitioners pleadings¹⁴ should be struck because Entergy has “dedicated extraordinary resources” to review Petitioners’

¹³ 10 C.F.R. § 2.311(c).

¹⁴ Petitioners submitted 50 of the 154 contentions initially raised, compared to the 6 contentions filed by the lay person representative referenced in Entergy’s Answer at p. 9. It is the largest Petition by any group of Petitioners, with a 400 page petition, and more than 70 exhibits, amounting to a document containing 1200 pages. Due to the enormity of the issues raised it was more complicated and complex than other filings.

submissions.¹⁵ Entergy's argument is ironic since its LRA is incomplete, often incomprehensible, inaccurate, and misleading. As a result, Entergy has submitted multiple amendments to the LRA each requiring complete exhaustive reviews. Entergy's exhibits submitted with its Answer to Petitions to Intervene were not labeled and did not include a table of contents or any reference to what the documents were. Entergy did not submit exhibits cited in its Answer that it alleged were publicly available.

The ASLB has made a material error by unjustly and improperly striking Petitioners' Petition and exceeded its authority. The ASLB failed to take all factors into account, acknowledge that problems with the NRC's computer system had contributed to difficulty in filing large documents via email and the ASLB's changing regulations.

From the outset of this proceeding the ASLB have treated Petitioners prejudicially.¹⁶ Petitioners have followed decorum and the rules as reasonably possible. Since the commencement of this proceeding the NRC has changed procedures.¹⁷ Since February the NRC has been on notice that it had email

¹⁵ Entergy Answer at p. 8.

¹⁶ This action goes hand in hand with denial for oral argument ostensibly by the Board first committing to holding the public hearings in White Plains, and then refusing to hear Petitioners' argument with the exception of a single day where lead counsel Richard Brodsky was not available.

¹⁷ At the time that the application was filed for renewal (approximately August 3, 2007 as

problems receiving documents over a certain size although the same documents were received by other parties in the proceedings without problems. In fact, the hard copy filing governs when there is a failure of electronic filing.¹⁸

If the ASLB ruled in an even-handed manner it would have struck the unsubstantiated NRC Staff and Entergy's Answers to the Petitioners' Petition to Intervene and Request for a Hearing.¹⁹ Instead the ASLB accepted incomplete filings from Staff and Entergy, At the very least, Petitioners' Petition should be remanded to the ASLB for consideration on the merits, rather than prejudicially punish Petitioners' good faith efforts to provide all documentation, whether or not it's publicly available. Petitioners have raised real and legitimate contentions in the interest of the safe operation of Indian Point facility and thus Petitioners' contentions should not be struck without consideration on the merits.

Even if the ASLB allegations pertaining to Petitioners are true-which

published in the Federal Register) the new rules had not been ratified, therefore the old rules govern the proceeding.

¹⁸ Petitioners encountered further email delivery problems when sending its appeal. As such, Petitioners were forced to mail their appeal documents to all 26 plus parties, to ensure that all parties received the entire submission.

¹⁹Neither the NRC Staff nor Entergy supplied any exhibits in their reply brief is complete disregard for 10 C.F.R. § 2.323(d) which provides "All parties are obligated, in their filings before the presiding officer and the Commission, to ensure that their arguments and assertions are supported by appropriate and accurate references...[to] citations to the record...[failure to do so may result in appropriate sanctions, including striking a matter from the record or, *in extreme circumstances, dismissal of the party.*" (emphasis added).

Petitioners vigorously maintain are false, unwarranted, and offense- the ASLB exceeded its authority by completely barring Petitioners from the entire proceeding and ignoring the merits of Petitioners' contentions.²⁰ Without substantiate basis or extreme circumstances, the ASLB unjustly foreclosed Petitioners ability to participate. To condone a clear abuse of discretion to avoid consideration of the contentions merits violates the public's right to participate, NRC regulations, the Atomic Energy Act and other applicable laws and regulations.

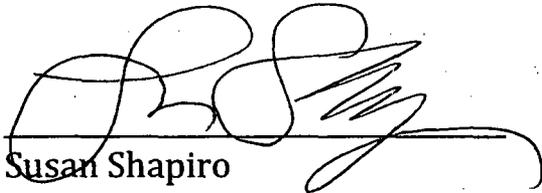
The attack contained in the Board's ruling of Petitioners' counsel's integrity is both unwarranted and offensive. Counsel has repeatedly cooperated with each new request in establishing a clear, and unambiguous record, in answering alleged filing issues such as alleged corrupted electronic files, as well as alleged late filings. The former is not sufficient ground for striking a petition, and the latter is simply not true. Counsel has done this with the utmost decorum and has acted judiciously and professionally as officers of the court. The ASLB, Entergy's and the NRC Staff's defaming of Petitioners' attorneys in court documents is unwarranted, contemptuous and inappropriate.

²⁰ ~~*In the Matter of Dominion Nuclear Connecticut, Inc. (Millstone Power Station, Unit 3)*~~, 2008 WL 3540073(N.R.C.) (April 18, 2008), despite petitioners failure to comply with NRC procedural regulations, the Commission exercised its discretion to overlook the mistake and examine the merits of the contentions.

CONCLUSION

Based on the aforesaid, Petitioners seek an Order from the Commission to (1) strike Entergy's Answer to Petitioners' appeal and (2) remand the case for consideration on the merits of Petitioners' contentions.

Dated: September 3, 2008

A handwritten signature in black ink, appearing to read 'Susan Shapiro', written over a horizontal line.

Susan Shapiro
Co-counsel for Petitioners' WestCAN et. al

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
ENTERGY NUCLEAR OPERATIONS, INC.) Docket Nos. 50-247/286-LR
) ASLBP No. 07-853-03-LR-BD01
(Indian Point Nuclear Generating))
Units 2 and 3))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petitioners' WestCAN et. al Reply to the Licensee's Answer Opposing WestCAN's Appeal has been served upon the following by U.S. First Class Mail to the address below, this 3rd day of September, 2008.

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