

RAS-E-166

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September 10, 2008

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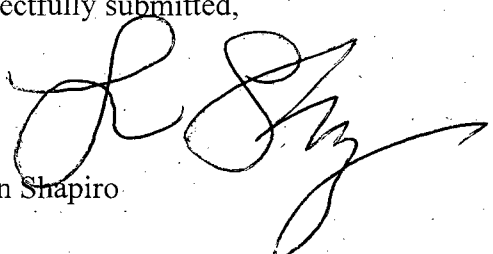
Re: License Renewal Application submitted by Entergy Indian Point Unit 2, LLC, Entergy Indian Point Unit 3, LLC, and Entergy Nuclear Operations, Inc. for Indian Point Nuclear Generating Station, Unit 2 and 3

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 the Nuclear Regulatory Commission Staff's Notice and Response to Petitioners' WestCAN et. al. appeal.

Respectfully submitted,


Susan Shapiro

cc: active parties

DOCKETED
USNRC

September 10, 2008 (4:00pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

TEMPLATE=SECY-035

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 TO
)	STRIKE THE NRC STAFF
ENTERGY NUCLEAR)	MULTIPLE ANSWERS TO
OPERATIONS, INC.)	PETITIONERS' APPEAL
)	
(Indian Point Nuclear Generating)	Docket Nos.
Units 2 and 3))	50-247 and 59-286 LR

Petitioners¹ move to strike the multiple responses by the Nuclear Regulatory Commission Staff (hereinafter "Staff") and respectfully request the Commission grant petitioners leave to reply to the Staff, and submit this document 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.

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).

PRELIMINARY STATEMENT

The NRC Staff wrongfully submitted two responses to Petitioners' appeal and accordingly both NRC Staff responses should be struck.

MOTION TO STRIKE NRC STAFF NOTICE

NRC Staff's Notice Petitioners electronically submitted an appeal of the ASLB decision of July 31, 2008 striking Petitioners' Petition to Intervene and Request for a Hearing.² On the same day, hard copies were sent by FedEx to the NRC Office of the Secretary, the licensee's counsel, and NRC Staff Counsel.³

NRC Staff Counsel Sherwin Turk, by email, notified parties that he did not receive certain exhibits by email or the hard copy. A second copy was sent by overnight courier to Attorney Turk, which was received on August 14, 2008.⁴

To ensure proper service, on August 14, 2008 Petitioners then sent each party listed on the supplemental Certificate of Service a hard copy of Petitioners' Appeal.

² The email submission was undeliverable to several recipients at the Nuclear Regulatory Commission (hereinafter "NRC"). Emails were then sent to these recipients containing portions of Petitioners' Appeal.

³ Specifically the NRC Office of Counsel mailing was sent to Counsel for NRC Staff, U.S. Nuclear Regulatory Commission, Office of the General Counsel, Washington, D.C. 20555.

⁴ NRC Staff Notice dated August 15, 2008 at p. 3, ¶ 5. Specifically the NRC Office of Counsel mailing was sent to Counsel for NRC Staff, U.S. Nuclear Regulatory Commission, Office of the General Counsel, Washington, D.C. 20555.

The NRC further complicates matters by having two addresses for mailing copies- one address for the U.S. Postal Service and a different address required for FedEx and UPS.

On August 15, 2008, Staff electronically submitted a response to Petitioners' appeal. Staff stated that it received service on August 14, 2008 and that if Staff responded it would do so by August 25, 2008. On August 25, 2008, Staff filed its second response to Petitioners' Appeal.

Staff's Notice dated August 15, 2008 is another attempt by the Staff to imply improper service of Petitioners' appeal. Electronic filing problems stem primarily from the fact the NRC's own email system and its historical record of both unreliable, and extremely limited capacity. Instead, of expediting the proceedings, NRC Staff, has shown a pattern of deliberate legal harassment of electronic clerical filing issues. No Petitioner should be punished for the failures of the NRC email system.⁵ Since February the NRC has been on notice that it had email problems receiving documents over a certain size although the same documents were received by other parties in the proceedings without problems.⁶

Staff and the ASLB failed to take all factors into account, failed to acknowledge that problems with the NRC's limited ability to receive email

⁵ The Office of the Secretary has recently improved filing procedures in which a party receives a reply email acknowledging receipt of filing through the NRC EIS.

⁶ The Guide to Model Rules of Electronic Filing and Service provides that: "If the electronic filing or service does not occur because of (1) an error in the transmission of the document to the E-filing Provider or served party which was unknown to the sending party, or (2) a failure to process the electronic document when received by the E-filing Provider, or (3) the party was erroneously excluded from the service list, or (4) rejection by the court or clerk, or (5) other technical problems experienced by the filer or E-filing Provider, the party or parties affected shall, absent extraordinary circumstances, be entitled to an order extending the date for any response or the period within which any right, duty or other act must be performed."

submissions. The ASLB has unjustly penalized Petitioners' who have in good faith diligently responded to all requests, even those due to NRC email problems, filed hard copies, and strived to following the changing regulations.⁷

The NRC has submitted two objections to Petitioner's appeal, neither by right. Therefore both Staff's responses should struck, in light of the NRC's staff attempt to circumvent regulations.

To be sure, dismissal ordinarily should be employed as a sanction only when a plaintiff's misconduct is extreme. *See Enlace Mercantil International, Inc. v. Senior Indus., Inc.*, 848 F.2d 315, 317 (1st Cir.1988). Dismissal should not be viewed either as a sanction of first resort or as an automatic penalty for every failure to abide by a court order. When noncompliance occurs, the ordering court should consider the totality of events and then choose from the broad universe of available sanctions in an effort to fit the punishment to the severity and circumstances of the violation." *Young v. Gordon*, 330 F.3d 76, 81 (1st Cir. 2003) citing *Tower Ventures*, 296 F.3d at 46.

The *Young* Court stated that "[w]hen noncompliance occurs, the ordering court should consider the totality of events and then choose from the broad universe of available sanctions in an effort to fit the punishment to the severity and circumstances of the violation." *Young*, 330 F.3d at 81. In *Young v. Gordon* the Plaintiff failed to appear at deposition, did not participate in filing

⁷ At the time that the application was filed for renewal (approximately August 3, 2007 as published in the Federal Register) the new rules had not been ratified, therefore the old rules govern the proceeding.

join scheduling statement, failed to file an answer to defendant's counterclaims until the court threatened to dismiss the case and did not file discovery responses and various orders to comply. *Id.* at 79. Petitioners on the other hand have been responsive to any and all requests of the ASLB.

PETITIONERS' REPLY TO NRC STAFF RESPONSE

Staff raises three arguments in its response to the Petitioners' Appeal. First, the Licensing Board struck the Petition to Intervene and Request for a Hearing because of an alleged misrepresentation of the facts involving the service of Petitioners' Reply Brief. NRC Staff Response dated August 25, 2008 at p. 6)(hereinafter "Staff Resp."). Second, the Staff argues that Petitioners' did not address the conflicting statements concerning the service of its February 15 Reply." Staff Resp. at p.6. The third argument by the Staff states that Petitioners have not shown that the Licensing Board abused its discretion in its determination to strike Petitioners request for a hearing. Staff Resp. at p. 7-8 citing 10 C.F.R. 2.319(g), *Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1)*, CLI-89-02, 29 N.R.C. 211 (1989)(p.8), court cases on p. 9, fn #15.

The *Shoreham* case is clearly distinguished from the Petitioner's appeal. In *Shoreham* the Commission found that the Government used "obstructionist tactics by failing to produce witness and documents in the discovery process" whereby the Government stalled the proceedings. Unlike *Shoreham*, Petitioners' never caused

any delays or employed obstructionist tactics that stalled the proceedings.⁸

The Commission further stated that “[w]here the penalty results in ending an adjudicatory hearing, we must be especially circumspect, for the opportunity for public hearings on nuclear power plant licensing is a central element of the NRC's governing statute, the Atomic Energy Act of 1954.” *Shoreham*, CLI-89-02, 29 N.R.C. 211 (1989).

Staff cites *John's Insulation, Inc. v. L. Addison and Associates, Inc.*, 156 F.3d 101 (1st Cir. 1998) this case is distinguished and irrelevant to Petitioners' appeal because in *John's Insulation* the plaintiff delayed proceedings for over one year by failing to retain counsel and failed to appear at a status conference after a continuance had been rejected, and therefore the court dismissed the suit for failure to prosecute and entered default judgment.

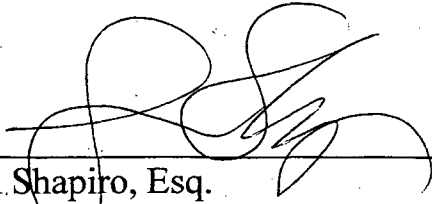
In the present case, Petitioner's caused no delays, answered the ASLB's concerns, and were willing and able to attend the oral arguments on the revised date set by the ASLB in Washington, D.C., which were subsequently cancelled without explanation or cause by the ASLB.

⁸ Petitioners could not have delayed the proceedings since the ASLB never considered the merits of the Petitioners' contentions and the ASLB notified parties that its ruling on the admissibility of contentions would be approximately 90 after the last submission of May 1, 2008 .

CONCLUSION

For the reasons stated above, Petitioners seek an Order from the Commission to (1) strike the NRC's Responses to Petitioners' appeal and (2) remand the case for consideration on the merits of Petitioners' contentions.

Dated: September 10, 2008

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

Susan Shapiro, Esq.
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)	Docket Nos. 50-247/286-LR
OPERATIONS, INC.)	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 NRC Staff Responses Opposing WestCAN's Appeal has been served upon the following by U.S. First Class Mail to the address below, this 10th day of September, 2008.

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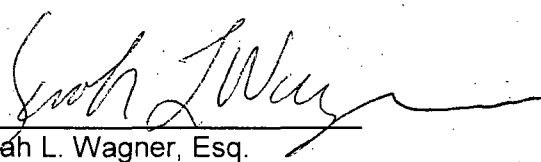
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* Original and two copies