

September 23, 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 RESPONSE TO THE "MOTION TO STRIKE THE
NRC STAFF MULTIPLE ANSWERS TO PETITIONERS' APPEAL"
FILED BY WESTCHESTER CITIZEN'S AWARENESS NETWORK, ET AL.

The NRC Staff ("Staff") hereby responds to the "Petitioners' Motion to Strike the NRC Staff's Multiple Answers to Petitioners' Appeal" ("Motion") filed by Westchester Citizen's Awareness Network ("WestCAN"), Rockland County Conservation Association ("RCCA"), Public Health and Sustainable Energy ("PHASE"), Sierra Club – Atlantic Chapter, and Assemblyman Richard Brodsky (collectively, "WestCAN"), on September 10, 2008.¹

As more fully set forth below, the Staff submits that (a) WestCAN's Motion should be denied insofar as it constitutes a reply to the Staff's August 25, 2008 response² to WestCAN's appeal³ from the Atomic Safety and Licensing Board's ("Licensing Board" or "Board") "Order (Striking WestCAN's Request for Hearing)," issued on July 31, 2008 ("WestCAN Order"), and (b) WestCAN's Motion should be denied as altogether lacking in any legal or factual basis.

¹ WestCAN served its Motion by mail on September 10, 2008; service was received by the Staff on September 16, 2008. Pursuant to 10 C.F.R. §§ 2.306(b)(1) and 2.323(c), the Staff's response is due to be filed no later than September 23, 2008 (10 days plus three days where service is made by mail).

² See "NRC Staff's Response to Appeal of [WestCAN] From the Licensing Board's Order (Striking WestCAN's Request for Hearing)," filed August 25, 2008 ("Staff Response").

³ See "Notice of Appeal," "Memorandum in Support of Petitioners' Appeal to the Commission" ("Memorandum"), with attachments, filed by WestCAN on August 8, 2008.

BACKGROUND

The background of this proceeding is set forth in the Staff's Response to WestCAN's appeal (see Staff Response at 2-5), and need not be reiterated at length herein. In brief, on December 10, 2007, WestCAN filed a petition for leave to intervene and request for hearing,⁴ concerning the license renewal application ("LRA") submitted by Entergy Nuclear Operations, Inc. ("Applicant"), for Indian Point Nuclear Generating Units 2 and 3 ("Indian Point"). On January 22, 2008, the Staff and Applicant filed their answers to WestCAN's Petition to Intervene,⁵ and in a submittal dated February 15, 2008, WestCAN filed a 124-page reply to the Applicant's and Staff's Answers.⁶ As discussed in the Staff's August 25, 2008 Response to WestCAN's appeal, questions arose as to the date and method of service by which WestCAN served its Reply of February 15, 2008. See Staff Response at 3-4. The Licensing Board issued a series of Orders requiring clarification of this matter by WestCAN.⁷ Subsequently, on July 31, 2008, the Board issued an Order pursuant to 10 C.F.R. § 2.314(c), striking WestCAN's request for hearing due to the numerous misrepresentations and "appalling lack of candor"

⁴ "Petition for Leave to Intervene With Contentions and, Request for Hearing," dated December 10, 2007 ("WestCAN's Petition to Intervene").

⁵ See "NRC Staff's Response to Petitions for Leave to Intervene Filed By (1) Westchester Citizen's Awareness Network, . . . and (2) Friends United for Sustainable Energy, USA," dated January 22, 2008 ("Staff's Response"); "Answer of Entergy Nuclear Operations, Inc. Opposing WestCAN, et al. Petition for Leave to Intervene and Request for Hearing," dated January 22, 2008 ("Applicant's Answer").

⁶ "Reply of Petitioners Westchester Citizen's Awareness Network (WestCAN), [et al.]," dated February 15, 2008 ("WestCAN's Reply"), as amended by Errata filed on February 27, 2008.

⁷ See (1) "Order (Relating to the Service and Content of WestCAN's Reply Dated February 15, 2008)," issued March 7, 2008; (2) "Order (Second Order Relating to the Service and Content of WestCAN's Reply Dated Feb. 15, 2008)," issued March 24, 2008; Relating to the Service and Content of WestCAN's Reply," dated February 15, 2008), (3) "Order (Third Order Relating to the Service and Content of WestCAN's Reply Dated Feb. 15, 2008)," issued April 1, 2008; and (4) "Order (Revised Third Order Relating to the Service and Content of WestCAN's Reply Dated Feb. 15, 2008)," issued April 2, 2008. The Board had previously issued an Order striking various exhibits submitted by WestCAN in support of its petition to intervene, due to inconsistent and defective service, and instructed WestCAN and other participants to make proper service in the future in the manner set forth therein. See "Order (Concerning Certain Exhibits Submitted by WestCAN and Associated Petitioners)," issued February 1, 2008.

shown by WestCAN in its responses to the Board's previous Orders. WestCAN Order of July 31, 2008, at 1.

On or about August 8, 2008, WestCAN filed its appeal from the Licensing Board's Order striking its request for hearing. On August 15, 2008, the Staff filed a Notice (advising that the Staff had received belated service of WestCAN's appeal documents, and unless instructed otherwise by the Commission, the Staff would file any response to WestCAN's appeal by August 25, 2008).⁸ The Applicant filed its response to WestCAN's appeal on August 18, 2008,⁹ and the Staff filed its response on August 25, 2008. On September 3, 2008, WestCAN filed a motion to strike the Applicant's Response to its appeal;¹⁰ on September 10, 2008, WestCAN filed the instant motion to strike the Staff's August 15 Notice and August 25 Response to WestCAN's appeal.

DISCUSSION

A. WestCAN's Motion to Strike Is Without Merit and Should Be Rejected.¹¹

WestCAN's motion seeks to strike two pleadings filed by the Staff: (1) the Staff's Notice of August 15, 2008, and (2) the Staff's Response to WestCAN's appeal, filed on August 25,

⁸ "NRC Staff's Notice (Concerning WestCAN's Appeal from the Licensing Board's Order Striking WestCAN's Request for Hearing)" ("Staff Notice") filed on August 15, 2008.

⁹ "Entergy Nuclear Operations, Inc. Answer Opposing WestCAN, et al. Notice of Appeal," dated August 18, 2008 ("Applicant's Response").

¹⁰ "Petitioners' Motion and Reply to Entergy's Opposition to Petitioners' Appeal to the Commission" ("WestCAN's Motion to Strike Entergy's Response"), dated September 3, 2008. The Applicant subsequently filed a response to that motion to strike. See "Entergy Nuclear Operations, Inc. Answer Opposing WestCAN et al. Motion to Strike" ("Applicant's Response to WestCAN's Motion to Strike"), dated September 16, 2008.

¹¹ The Staff notes that, contrary to the requirements of 10 C.F.R. § 2.323(b), WestCAN's motion does not contain a certification by WestCAN's attorneys that WestCAN "has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion." In fact, WestCAN never contacted the Staff to discuss its motion, either before or after it was filed. For this reason alone, WestCAN's motion "must be rejected." 10 C.F.R. § 2.323(b) (emphasis added).

2008. In support of this request, WestCAN argues that the Staff had “wrongfully” filed “multiple responses” to its appeal (Motion at 1, 2); and that the Staff’s Notice of August 15 constitutes “another attempt by the Staff to imply improper service of Petitioners’ appeal,” as part of “a pattern of deliberate legal harassment of electronic clerical filing issues” (*id.* at 3). Further, WestCAN implies – but does not state -- that it had properly served its appeal by E-mail or otherwise (see Motion at 2), and it claims that “[e]lectronic filing problems stem primarily from the fact that the NRC’s own email system . . . [is] unreliable and [of] extremely limited capacity.” *Id.* These assertions fail to provide any support for WestCAN’s motion to strike the Staff’s Notice of August 15 or the Staff’s Response of August 25, 2008.

First, no showing has been made by WestCAN that it had properly served its appeal on August 8, 2008, or that there was any impropriety in the Staff’s filings of August 15 and 25, 2008. The Staff’s Notice of August 15 was a procedural filing, only, indicating that, unless the Commission instructed otherwise, the Staff’s brief in response to WestCAN’s appeal would be filed by August 25, due to the Staff’s belated receipt of service of a complete copy of WestCAN’s appeal. See Notice at 2-4. Significantly, WestCAN does not refute the Staff’s description of how and when the Staff received service of WestCAN’s appeal,¹² nor does WestCAN explain, in its reply to the Staff’s Response, why it failed to effectuate service of its appeal on the Staff more promptly, whether by mail, express mail, or electronically; nor does WestCAN address the fact that Staff Counsel had previously informed WestCAN that any electronic filings by WestCAN must take into account the size limitation of the NRC’s servers.¹³

¹² As indicated in the Staff’s Notice, the Staff received service of a complete copy of WestCAN’s appeal by FedEx delivery on August 14, 2008 (sent by WestCAN on August 13, 2008), after Staff Counsel had contacted WestCAN to request a complete copy of its appeal. See Notice at 2-3.

¹³ See E-mail messages from Sherwin Turk to Counsel for WestCAN, dated February 14 and 15, 2008, provided as Attachments 1 and 2 to Staff Response of August 25, 2008.

Further, although WestCAN claims that the NRC Staff is somehow at fault for filing its Notice of August 15, WestCAN fails to explain what other actions it believes the Staff should have taken to inform the Commission and parties that it might file a response to WestCAN's appeal beyond the time afforded by regulation, and why the Staff might find it necessary to do so.

Further, contrary to WestCAN's assertion, any problem with the electronic service of WestCAN's appeal was not a problem of the NRC's making; rather, any such problems were directly caused by WestCAN's own failure to heed the advice provided by Staff Counsel six months earlier, as to the size limitations of the NRC's servers.¹⁴ Contrary to WestCAN's assertions, the Staff's filing of its Notice and subsequent Response did not, in any way, constitute a "wrongful" action or an "attempt . . . to imply improper service of Petitioners' appeal" as part of "a pattern of deliberate legal harassment of electronic clerical filing issues." Rather, WestCAN's failure to effectively serve its appeal on the Staff in a timely manner necessitated that the Staff's filing of a notice informing the Commission and parties that it might file a response to WestCAN's appeal later than the 10-day period provided for filing a response under 10 C.F.R. §§ 2.306, 2.311(a) and 2.341(b)(3).

Second, contrary to WestCAN's assertions, the Staff's filing of its Notice and Response did not constitute the filing of "multiple responses" to WestCAN's appeal. The Staff filed a single response to WestCAN's appeal, set forth in the Staff's Response of August 25, 2008. The Staff's prior Notice of August 15, 2008 addressed only the timeliness of any subsequent brief which the Staff might file, and did not present any arguments concerning the merits of WestCAN's appeal or the correctness of the Licensing Board's decision to strike WestCAN's

¹⁴ For example, WestCAN could have readily adapted the filing of its appeal to account for this size limitation, by E-mailing its appeal brief and related documents in separate electronic transmissions, so as to assure that any individual transmission would not exceed the capacity of the electronic servers to receive those transmissions.

request for hearing. Accordingly, there is no basis for WestCAN's assertion that the Staff improperly filed "multiple responses" to its appeal.

Finally, WestCAN has failed to provide any legal basis to support its request to strike the Staff's Notice and Response to its appeal. The sole decision cited by WestCAN is the First Circuit's decision in *Young v. Gordon*, 330 F.3d 76 (1st Cir. 2003) – a decision that was cited by the Staff in its Response to WestCAN's appeal. See Staff Response at 9, n.15. The court's decision in *Young v. Gordon* provides general guidance as to the appropriateness of sanctions that may be selected in response to conduct by participants in an adjudicatory proceeding, and supports the dismissal of a party due to disobedience of court orders. See Staff Response at n.15, citing *Young v. Gordon*, 330 F.3d at 81, 83. Nothing in the court's decision in *Young v. Gordon* supports the imposition of sanctions as requested in WestCAN's motion to strike.

B. WestCAN's Motion to Strike Should Be Denied Insofar as It Constitutes a Reply to the Staff's Response to WestCAN's Appeal.

Although WestCAN labels its filing a "motion to strike" the Staff's response to WestCAN's appeal, its "motion" consists, in part, of a reply to the Staff's Response. Thus, WestCAN's Motion includes a section entitled "Petitioners' Reply to NRC Staff Response," Motion at 5-6, in which WestCAN presents arguments that reply directly to legal arguments contained in the Staff's Response – demonstrating that WestCAN's "motion" is, in part, a reply to the Staff's Response.¹⁵ Insofar as WestCAN presents a reply to arguments contained in the Staff's Response, its actions militate in favor of considering the respective merits of the Staff's

¹⁵ Similarly, the cover letter transmitted with WestCAN's "motion" describes the enclosed document as "Petitioners' WestCAN et al. Reply to the [NRC] Staff's Notice and Response to Petitioners' WestCAN et al. [A]ppeal." Letter from Susan Shapiro to the Office of the Secretary, dated September 10, 2008 (emphasis added). In addition, the Certificate of Service attached to WestCAN's Motion certifies that service was made "of the foregoing Petitioners' WestCAN et al. Reply to the NRC Staff Responses Opposing WestCAN's Appeal . "Certificate of Service" dated September 10, 2008, signed by Sarah L. Wagner, Esq. (emphasis added).

Response and WestCAN's reply thereto, rather than striking the Staff's filings. Accordingly, to the extent that WestCAN's "motion" constitutes a reply to the Staff's Response, its motion to strike should be denied.¹⁶

CONCLUSION

For the reasons set forth above, the Staff respectfully submits that WestCAN's motion to strike the Staff's Notice of August 15 and the Staff's Response of August 25 should be denied.

Respectfully submitted,



Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 23rd day of September 2008

¹⁶ The Staff notes that it does not respond herein to any statements contained in the portion of WestCAN's Motion that constitutes its "Reply" to the Staff's Answer to WestCAN's appeal.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S RESPONSE TO THE 'MOTION TO STRIKE THE NRC STAFF MULTIPLE ANSWERS TO PETITIONERS' APPEAL' FILED BY WESTCHESTER CITIZEN'S AWARENESS NETWORK, *ET AL.*" dated September 23, 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 23rd day of September, 2008:

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