

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NANCY BURTON,)	
)	
)	
Petitioner,)	
)	Federal Respondents'
)	Response to Petitioner's
v.)	Motion to Reinstate Appeal
)	
UNITED STATES OF AMERICA)	
)	
and)	
)	
U.S. NUCLEAR REGULATORY)	
COMMISSION,)	Docket No. 09-1901-ag
)	
)	
Respondents,)	
)	
and)	
)	
DOMINION NUCLEAR CONNECTICUT,)	
INC.,)	
)	
)	
Intervenor-Respondent.)	
)	

**Federal Respondents' Response to Petitioner's Motion to Reinstate
Appeal and for Leave to File Documents *Nunc Pro Tunc***

Petitioner presents heart-felt reasons, relating to family health emergencies, for reinstating her petition for review, which this Court dismissed on November 18, 2009. Petitioner's reasons may well have justified an extension of her briefing schedule or even additional time to correct her filing deficiencies. But it is not clear that they justify reinstating

a case that this Court has already dismissed, after giving petitioner ample opportunity to cure her prior default.

Respondents Nuclear Regulatory Commission and the United States cannot consent to petitioner's motion to reinstate her appeal, because she has not explained when the family medical emergencies described in her affidavit actually occurred, and how these emergencies interfered with filing her brief on time as well as correcting the filing deficiencies noted by the Clerk in her Order to Show Cause of November 3, 2009.

In addition, while it is perfectly understandable that family medical emergencies might cause a party in federal court to miss a deadline, that does not in and of itself adequately explain why no contact with the Court or opposing counsel occurred throughout an apparently lengthy period of personal hardship. We review the history of petitioner's default to highlight these concerns.

As stated in this Court's "Order to Show Cause – Dismissal on Default," entered November 3, 2009, this petition for review was filed on May 4, 2009. The Certified Index of the Record was served on June 15, 2009. The initial Scheduling Order of July 29, 2009 required petitioner to file her brief and Joint Appendix on August 28, 2009. Petitioner requested and was granted an extension to September 28, 2009. Petitioner requested

and was granted a second extension to October 5, 2009.

Counsel for respondents received Petitioner's brief electronically on or about the due date, but did not receive hard copies of the brief and a copy of the Joint Appendix. The undersigned counsel for NRC contacted petitioner in early October, informing her of this defect in service.

Subsequently, counsel for respondents received, albeit untimely, hard copies of petitioner's brief and the Joint Appendix (mislabeled as a Special Appendix). (On December 22, 2009, counsel received a copy of another document entitled "Special Appendix," with misnumbered pages, containing the relevant agency decisions.)

On October 26, 2009, counsel for NRC learned from the Clerk of the Court that petitioner had not filed the Joint Appendix with the Court. Counsel then wrote the Clerk a letter confirming that a new scheduling order would be served upon petitioner's filing of the Joint Appendix (10 copies) with the Court. The same day, the Clerk mailed a Notice of Defective Filing to petitioner, requiring various deficiencies to be corrected by November 2, 2009, including petitioner's failure to file the Joint Appendix copies.

When petitioner failed to comply, the Clerk issue an Order to Show Cause – Dismissal on Default, dated November 3, 2009, requiring petitioner to show cause why the proceeding should not be dismissed for "failure to

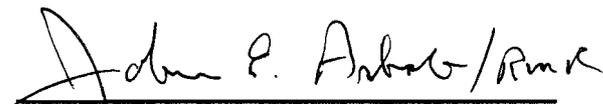
file the brief and 10 copies of appendix by 10/5/2009[,] the date set forth in the [second] scheduling order.” The Order was self-executing, stating that “the proceeding will be dismissed” upon petitioner’s failure to comply. Not having received a responsive pleading from petitioner, the Clerk issued an Order dismissing this proceeding on November 18, 2009. On or about December 18, 2009, the Mandate issued. Therefore, if petitioner’s case were to be reinstated, the Court would have to recall its Mandate.

Mindful as we are of petitioner’s circumstances, we must note that no mention of a family medical emergency was made to counsel or (to our knowledge) the Court until a month after the dismissal of this proceeding. Moreover, petitioner’s supporting affidavit offers no insight into when these emergencies overcame her ability to file her brief and Joint Appendix in proper form and on time, or correct her filing deficiencies, or respond to the Clerk’s Order to Show Cause.

Finally, we do not share petitioner’s view of this case as an “important appeal” involving “a risky power uprate.” Motion at 2. In fact, power uprates, like the one for which petitioner has sought review, have been granted by NRC in 124 separate instances to commercial power reactor operators. The instant petition raises only ordinary issues of contention and late contention admissibility.

For these reasons, federal respondents cannot consent to petitioner's motion to reinstate her appeal. We note that Petitioner did not seek federal respondents' consent to her motion in advance of filing it. We leave the matter to this Court's informed discretion.

Respectfully submitted,



JOHN E. ARBAB

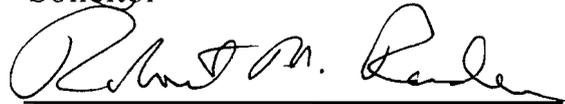
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December 29, 2009



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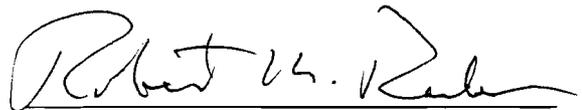
CERTIFICATE OF SERVICE

I hereby certify that I have on this 29th day of December 2009 served upon the following, by deposit in the United States Mail, first class, postage prepaid, and by electronic transmission, a copy of Federal Respondents' Response to Petitioner's Motion to Reinstate Appeal and for Leave to File Documents *Nunc Pro Tunc*:

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Robert M. Rader
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ANTI-VIRUS CERTIFICATION FORM

See Second Circuit Interim Local Rule 25(a)6.

CASE NAME: Burton v. United States, et al

DOCKET NUMBER: 09-1901-ag

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email=Robert.Rader@nrc.gov, c=US
Date: 2009.12.29 13:40:01 -0500

Date: 12/29/2009