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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
CHAFFIN

Before Administrative Judges:

Ivan W. Smith, Chairman  
Dr. Charles N. Kelber  
Dr. Jerry R. Kline

SERVED SEP 18 1992

In the Matter of  
NORTHEAST NUCLEAR ENERGY  
COMPANY  
  
(Killstone Nuclear Power  
Station, Unit No. 2)

Docket Nos. 50-336-OLA  
FOI No. DPR-65  
(ASLBP No. 92-665-02-OLA)  
(Spent Fuel Pool Design)

September 17, 1992

MEMORANDUM AND ORDER  
(Imposing Sanctions upon CCMN and Striking Petitions)

Introduction

Co-Operative Citizen's Monitoring Network, Inc. (CCMN), represented by Ms. Mary Ellen Marucci, has repeatedly failed to comply with NRC regulations and the Licensing board's directives pertaining to the filing and service of pleadings. As a consequence, two intervention pleadings filed by CCMN were not served timely upon members of the Board, Licensee and the NRC Staff. The purpose of this order is to impose appropriate sanctions upon CCMN by striking the noncomplying pleadings, to admonish CCMN that continued noncompliance may result in more severe sanctions,

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and to memorialize a background record against which possible future sanctions may be considered. In a related determination, the Board also rules that the two pleadings that were not timely served may not be entertained because CCMN failed to address the regulatory factors which must be considered in granting or denying nontimely petitions.

#### Discussion

In our Memorandum and Order (Establishing Pleading Schedule), July 29, 1992, we noted that the petitioners are responsible for serving their papers directly upon members of the Board and other parties pursuant to the provisions of 10 C.F.R. § 2.701. We warned that petitioners must carefully follow the Rules of Practice in future pleadings. Pp. 12-13, n.10. That order also reminded petitioners that nontimely filings would not be entertained absent a balancing of the five factors specified in 10 C.F.R. § 2.714(a)(1)(i)-(v). As a courtesy to petitioners, the order set out the text of those factors. *Id.* at 10. n.7.

The Federal Register notice of this proceeding also cautioned that "nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions, and/or requests for hearing will not be entertained absent a determination ..." that the petitions or requests should be granted based upon a balancing of the five pertinent factors. 57 Fed. Reg. 17834, 17835, April 28, 1992. Our

order of July 29 also reminded petitioners of that Federal Register guidance. Id. at 10.

On August 3, 1992, Mrs. Doris M. Moran, Clerk to this Licensing Board, wrote to Ms. Marucci and other petitioners reminding them of the Board's order of July 29 respecting service of papers. At the Board's direction, Mrs. Moran provided petitioners with a then complete service list and instructions pertaining to Certificates of Service.<sup>1</sup>

On August 12, 1992, Ms. Marucci, on behalf of CCMN, moved for an extension of time to file contentions. That motion also contained substantive intervention arguments. There was no Certificate of Service for this pleading nor did CCMN serve it upon the other participants.<sup>2</sup>

On August 14, 1992, CCMN filed an "Amendment To Intervention and Hearing Request" dated August 13, 1992. Again, there was no Certificate of Service. Other participants were not served.<sup>3</sup>

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<sup>1</sup>The service list provided by Mrs. Moran did not include Frank X. Lo Sacco and Don't Waste Connecticut whose petitions were filed after Mrs. Moran's letter. Ms. Marucci has complained orally to Mrs. Moran that serving all of the parties is expensive. Ms. Marucci may eliminate from her service list those petitioners who expressly authorized CCMN to represent their interests if she chooses.

<sup>2</sup>By order dated August 18, 1992, the Board granted to CCMN an extension of time to August 24, 1992 to file amended and supplemental petitions. The Board will not consider the substantive intervention arguments made in the motion.

<sup>3</sup>On September 11, 1992, Ms. Marucci served an unsigned copy of CCMN's August 13 "Amendment to Intervention and Hearing Request" and other papers. She also served a copy

On August 24, 1992, Ms. Marucci timely filed CCMN's contentions and supporting documents. She served Judge Smith but failed to serve Judges Kline and Kelber. Her Certificate of Service does not reflect service upon the NRC Office of General Counsel nor upon several of the other petitioners in this proceeding.

Also on August 24, Ms. Marucci mailed to the Secretary of the Commission a packet of papers including a letter dated August 7, 1992 from Mr. Kacich of Northeast Utilities to Ms. Marucci. This communication had no Certificate of Service, nor were other participants and Board members served by Ms. Marucci.

On August 25, 1992, Judge Smith reminded Ms. Marucci that petitioners are required to serve their pleadings on all other participants in the proceeding. Judge Smith explained to Ms. Marucci that the Licensee and the NRC Staff

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of a U.S. Postal Service Certificate of Mailing, dated August 14, 1992. Although the Postal Service Certificate states that the addressee was the "Atomic Safety and Licensing Board," the letter was actually addressed to the Atomic Safety and Licensing Board Panel -- exactly as indicated on the inside address of the amendment letter. Papers addressed to the Panel are filed in a central docket file. Docket personnel assume that individual Board members receive their own service copy of any pleading, as required by NRC practice, and do not normally inform the Board members of the mailing. In this case the members of the Board did not become aware of the August 13 amendment letter until Ms. Marucci inquired about it on September 10. See attached memoranda from Ms. Hughes and Ms. Donovan. Even if the August 13 amendment letter had been delivered promptly to a member of the Board, service would not have been complete.

must be given an opportunity to respond to late-filed petitions. See Memorandum, August 25, 1992. Since this discussion, Ms. Marucci filed the two pleadings in question with a Certificate of Service showing service consistent with the service list provided by Mrs. Moran on August 3.

If this recent compliance were to provide assurance that CCMN would comply with filing requirements in the future, one of the three reasons for the sanctions we impose below would disappear. However, Ms. Marucci has never acknowledged her earlier errors in failing to comply with servicing requirements. In fact, her most recent communication suggests that she still does not understand these requirements.<sup>4</sup> Further, as we explain below, the failure to timely serve the most recent pleadings rendered them effectively nontimely within the meaning of the intervention rule. Ms. Marucci has not evinced any understanding of that problem.

On September 8, 1992, Ms. Marucci mailed "CCMN Contentions regarding Millstone 2 - FINAL VERSION." This document, dated August 24, 1992, purports to replace the similar "draft" contentions, also dated August 24, 1992.

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<sup>4</sup>See n.3, supra. Ms. Marucci's note to Judge Smith of September 11, 1992 suggests that she expects the Board to serve her papers.

setting out CCMN's contentions.<sup>5</sup> The "FINAL VERSION" differs materially from the "draft" version. The problem of course is that the Licensee<sup>6</sup> and the NRC Staff have already filed lengthy and painstakingly prepared answers to CCMN's "draft" set of contentions.

As noted in footnote 3, above, Ms. Marucci, for the first time, served on September 11, 1992 an unsigned version of CCMN's August 13, 1992 "Amendment to Intervention and Hearing Request." Again, the Licensee and the NRC Staff were unable to address the August 13 pleading in their respective answers to CCMN contentions.

Neither the "FINAL VERSION" of CCMN's contentions nor the memo covering the late service of the August 13, 1992 amendment letter contains any discussion of the reasons for the failure to properly file and serve those pleadings on time. The Board, the NRC Staff and the Licensee have already spent considerable time evaluating CCMN's "draft" set of contentions under the assumption that they were

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<sup>5</sup>Ms. Marucci telephoned Mrs. Moran on September 4, 1992 stating that the August 24, 1992 pleading was mistakenly filed in draft form and that she intended to file a corrected version. Mrs. Moran's memorandum is attached.

<sup>6</sup>Northeast Nuclear Energy Company's (1) Answer to the Licensing Board's Questions and (2) Answers to Petitions and Supplemental Petitions to Intervene, September 3, 1992. The Board would appreciate succinct titles to pleadings in order to simplify citations.

<sup>7</sup>NRC Staff Response to Supplemental Petitions and CCMN Contentions, September 14, 1992.

CCMN's last and complete position on the intervention issues.

CCMN's undisciplined approach to intervention is wasteful of NRC and Licensee resources -- resources which could be better expended for improvements in safety. These errors also delay the resolution of the intervention issues notwithstanding CCMN's repeated requests for an early hearing.

The Board has decided on its own motion to strike CCMN's late-filed petitions for the following independently sufficient reasons:

1. The Board may not entertain the nontimely petitions absent a determination by the Board that the petitions should be granted based upon a balancing of the five factors set out in Section 2.714(a)(1)(i)-(v). Since CCMN has not addressed those factors, and since the Board cannot on its own find any good cause for the late filings, it cannot make such a determination.

2. Striking the petitions is the least onerous remedy to mitigate the harm which would arise from repeating the effort invested by the NRC Staff and Licensee in responding to CCMN's "draft" contentions.


3. Striking the petitions is an appropriate sanction to educate CCMN to the need to comply with NRC Rules of Practice and Board directives and to improve future compliance. In this respect, the Board advises CCMN that

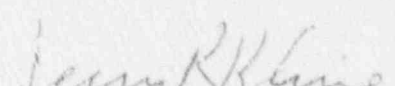
similar or more severe sanctions may be imposed in the future in the event CCMN fails to meet its obligations as a participant in this proceeding. Such sanctions would be tailored to mitigate any harm caused by noncompliance and could range in severity up to dismissing CCMN as a party to the proceeding.<sup>8</sup>


ORDER

The Board strikes from the record of this proceeding, (1) CCMN's Contentions Regarding Millstone 2 - FINAL VERSION, dated August 24, 1992 and served September 8, 1992; and (2) CCMN's Amendment to Intervention and Hearing Request dated August 13, 1992. CCMN is admonished as above stated.

ATOMIC SAFETY AND LICENSING BOARD

  
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Charles N. Kelber  
ADMINISTRATIVE JUDGE

  
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Jerry R. Kline  
ADMINISTRATIVE JUDGE

  
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Ivan W. Smith, Chairman  
ADMINISTRATIVE JUDGE

Bethesda, Maryland  
September 17, 1992

<sup>8</sup>See the Commission's Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 18 N.R.C. 452, 454 (1981).