

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Dale E. Klein, Chairman
Gregory B. Jaczko
Peter B. Lyons
Kristine L. Svinicki

_____)
ENTERGY NUCLEAR OPERATIONS, INC.)
)
(Indian Point Nuclear Generating Units 2 and 3))
_____) Docket Nos. 50-247-LR and 50-286-LR

CLI-08-29

MEMORANDUM AND ORDER

On December 10, 2007, Westchester Citizen’s Awareness Network, Rockland County Conservation Association, Public Health and Sustainable Energy, Sierra Club – Atlantic Chapter, and New York State Assemblyman Richard Brodsky (collectively, WestCAN) filed a joint petition to intervene and request for hearing on Entergy’s license renewal application for Indian Point Nuclear Generating Units 2 and 3. On July 31, 2008, the Board issued an Order striking WestCAN’s petition and request, thereby expelling them from this adjudication.¹ The Board rested its decision on grounds that are highly unusual in a Commission adjudication – WestCAN counsel’s “appalling lack of candor” and “repeated[] misrepresent[at]ions of the] facts.”² WestCAN has appealed the Board’s Order. We affirm.

Dismissal of a party falls within the “spectrum of sanctions . . . available to the boards to assist in the management of proceedings” under 10 C.F.R. § 2.319, although dismissal should

¹ Order (Striking WestCAN’s Request for Hearing) (July 31, 2008) (unpublished) (July 31 Order).

² *Id.* at 1.

be reserved for “severe cases.”³ Our Appeal Board stated, albeit in *dictum*, that a Licensing Board is “clearly authorized” to dismiss a party who obstructs the discovery process, disobeys the Board orders, and engages in willful, bad-faith, and prejudicial conduct towards another party.⁴ We also observe that dismissal due to counsel’s malfeasance is a logical extension of the Board’s disciplinary authority under 10 C.F.R. § 2.314(c) to reprimand, censure or suspend from a proceeding any party or representative who “refuses to comply with its directions” – a transgression that WestCAN’s counsel committed repeatedly in this adjudication.

As we announced earlier in this proceeding, we are generally loath to interfere with the Board’s management of its cases, absent an abuse of power.⁵ We find no such abuse here. We have reviewed in detail the extensive record underlying the Board’s decision and find ample evidence to support the Board’s conclusion. WestCAN counsel have, for instance, repeatedly included inaccurate service dates on pleadings, repeatedly claimed that an untimely document had been timely served, inaccurately claimed that documents submitted at different times were identical, and inaccurately certified that all participants had been served in a particular manner. We therefore affirm the Board’s July 31 Order on the grounds specified by the Board.

³ *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 454 (1981). *Cf. Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998) (referring to dismissal of a party as an appropriate sanction “in extreme cases” where the party fails to provide legal and factual support for its arguments and assertions). See generally 10 C.F.R. § 2.319(g) (The presiding officer has the power to “[r]egulate the course of the hearing and the conduct of participants”).

⁴ *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-902, 28 NRC 423, 428 (1988).

⁵ CLI-08-7, 67 NRC 187, 192 (2008).

We might be more willing to consider a lesser penalty than WestCAN's expulsion if the record showed these misrepresentations to be clearly inadvertent and isolated.⁶ But they are not. Rather, we find a pattern of disregard of our regulations and the Board's instructions. And therein lies our second, independent ground for today's affirmance of the Board's July 31 Order.

To offer but a sample: WestCAN's counsel failed to serve all participants on the official service list; failed to attach certificates of service; failed to certify in WestCAN's motions that counsel had sought to resolve the issues with opposing counsel; omitted participants from service; failed to include attachments; and submitted multiple, often non-identical versions of the same pleading to participants and/or the Board. Beginning with their very first submissions,⁷ WestCAN counsel consistently ignored both the Board's and our own warnings that failure to comply with the agency's service requirements could result in pleadings being stricken from the administrative record.⁸ This pattern of behavior regularly continued despite the Board's striking WestCAN's first two pleadings in November 2007.⁹

⁶ *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC at 454 (instructing boards to consider, among other things, whether a participant's failure to meet an obligation "is an isolated incident or part of a pattern of behavior").

⁷ Letters to Chairman Klein and Lawrence G. McDade from Susan Shapiro (Nov. 21, 2007) (Re: Additional Extension Request to File Formal Requests for Hearing and Petitions to Intervene with Contentions, due to Document Access Issues) (ML073380808 and ML073380896). Neither of these two requests for extension of time was accompanied by the required certificate of service.

⁸ See, e.g., Commission Order (Nov. 16, 2007) at 1-2 (unpublished); Order (Denying an Extension of Time Within Which To File Requests For Hearing) (Board Nov. 27, 2007) at 2-4 (unpublished) (November 27 Order); Memorandum and Order (Administrative Matters and Directing Parties Attention to Requirements for Proper Service) (Board Oct. 29, 2007) at 1-2 (unpublished) (October 29 Order).

⁹ November 27 Order. See also Order (Denying an Extension of Time Within Which to File Requests for Hearing) (Nov. 28, 2007) (unpublished).

WestCAN counsel likewise ignored both the Board's express warning that it would dismiss litigants who failed to comply with the Commission's procedural rules¹⁰ and the Board's subsequent expulsion of another petitioner (one who had earlier been represented by one of WestCAN's own attorneys) for that very reason.¹¹ And counsel's sequential submission of multiple, often non-identical copies of WestCAN pleadings – notably, its Reply – forced the Board and the other participants to needlessly expend large amounts of time, effort and resources simply to determine exactly which document WestCAN intended as its filing. The Board's ultimate expulsion of WestCAN came only after multiple warnings and the use of lesser disciplinary measures (striking two of WestCAN's pleadings from the record) – none of which had gained the desired result of WestCAN counsel's compliance.

WestCAN counsel's repeated inability or refusal to comply with the Board's instructions and our procedural rules has seriously disrupted the Board's efforts to meet its responsibility to conduct a fair, orderly and efficient hearing, has interfered with the other participants' efforts to use their own litigation resources efficiently, and has made our own review of the appellate documents and the underlying record far more time-consuming than necessary.¹² It would be

¹⁰ October 29 Order at 3.

¹¹ Order (Granting the NRC Staff's Motion to Strike FUSE's Superceding [*sic*] Request for Hearing) (Feb. 1, 2008) (unpublished). There, the Board relied in significant part on counsel's submission of an inaccurate certificate of service, and counsel's repeated failure to comply with the agency's procedural regulations despite numerous instructions from the Board. *Id.* at 2-6.

¹² Furthermore, WestCAN counsel continue to make similar procedural errors in conjunction with this appeal. One example of WestCAN's flawed appellate pleadings is its *Motion and Reply to Entergy's Opposition to Petitioners' Appeal to the Commission* (Sept. 3, 2008). This pleading included a motion to strike Entergy's Answer to WestCAN's Appeal. We reject the motion on the grounds that WestCAN counsel failed to comply with the certification requirements of 10 C.F.R. § 2.323(b) regarding consultation with opposing counsel (an error counsel repeatedly committed before the Board), and also failed to "state with particularity the grounds" for the motion, as likewise required under 10 C.F.R. § 2.323(b). WestCAN also moved (continued . . .)

unfair to all these entities if we were to permit WestCAN to continue draining their time, effort and resources. For all these reasons, we include WestCAN counsel's consistent abuse of the adjudicatory process as our own independent ground for dismissing WestCAN's petition and request.

In only one prior adjudication (*Millstone*) have we faced this degree of consistent procedural noncompliance from an attorney. There, we eventually directed our Office of the Secretary (SECY) to "screen all filings bearing [that counsel's] signature[, . . .] not to accept or docket them unless they meet all procedural requirements. . . [and] to reject summarily any nonconforming pleadings without referring them to the Atomic Safety and Licensing Board Panel or the Commission."¹³ Our directive applied not only in the *Millstone* case then at bar but in all subsequent adjudications. We now issue this same directive to SECY regarding any filings it receives from Ms. Susan Shapiro or Ms. Sarah Wagner in this or any other proceeding.

to strike the NRC Staff's "multiple answers" to WestCAN's appeal. *Petitioners' Motion to Strike the NRC Staff[s] Multiple Answers to Petitioners' Appeal* (Sept. 10, 2008) at 9. We deny this second motion on the first ground set forth above.

¹³ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-06-4, 63 NRC 32, 38-39 (2006).

CONCLUSION

We *deny* WestCAN's appeal of the Board's July 31 Order and *affirm* that same order.

IT IS SO ORDERED.

For the Commission

(NRC Seal)

/ RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 9th day of December, 2008.