

April 20, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
ENTERGY NUCLEAR OPERATIONS, INC.) Docket Nos. 50-247-LR/286-LR
)
(Indian Point Nuclear Generating)
Units 2 and 3))

NRC STAFF'S ANSWER TO "STATE OF NEW YORK
MOTION TO WITHDRAW THE PROPRIETARY DESIGNATION
OF VARIOUS PRESSURIZED WATER REACTOR OWNERS'
GROUP AND WESTINGHOUSE DOCUMENTS"

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the NRC Staff ("Staff") hereby responds to "State of New York Motion to Withdraw the Proprietary Designation of Various Pressurized Water Reactor Owners' Group and Westinghouse Documents" ("Motion"), filed by the State of New York ("New York") on April 9, 2015. New York seeks to compel the public disclosure of five documents that were produced by Entergy Nuclear Operations, Inc. ("Entergy") as part of its mandatory disclosures in this proceeding. For the reasons set forth below, the Staff takes no position with respect to New York's Motion, but agrees that the Motion should be resolved by the Board in accordance with the criteria established in 10 C.F.R. § 2.390(b).

DISCUSSION

I. Applicable Legal Principles Governing the Protection of Proprietary Documents from Public Disclosure

The Commission has established general requirements that govern the protection of confidential proprietary documents from public disclosure, as set forth in 10 C.F.R. § 2.390 and 10 C.F.R. Part 9 ("Public Records"). Pursuant to 10 C.F.R. § 2.390(a), "final NRC records and

documents, including . . . correspondence to and from the NRC regarding the issuance . . . of a license . . . shall not, in the absence of an NRC determination of a compelling reason for nondisclosure after a balancing of the interests of the person or agency urging nondisclosure and the public interest in disclosure, be exempt from disclosure,” except for matters that fall within one of the nine specified categories set forth in § 2.390(a)(1)-(9). Among the matters that are authorized to be withheld from disclosure are confidential proprietary documents – which are defined in § 2.390(a)(4) as “[t]rade secrets and commercial or financial information obtained from a person and privileged or confidential.”¹

The Commission’s regulations further establish procedures to be followed by persons who submit documents to the NRC that they seek to have withheld from public disclosure, as set forth in 10 C.F.R § 2.390(b), including, *inter alia*, a designation of the portion(s) of the document sought to be protected from public disclosure, an indication of the basis for proposing that the information be withheld from disclosure, and an affidavit explaining the reasons why the information should be withheld from public disclosure and the harm that could ensue if the information is disclosed to the public. Pursuant to 10 C.F.R. § 2.390(b)(3), the Commission will determine “whether information sought to be withheld from public disclosure under this paragraph: (i) Is a trade secret or confidential or privileged commercial or financial information; and (ii) If so, should be withheld from public disclosure.” Further, 10 C.F.R § 2.390(b)(4) establishes that in determining whether the information constitutes a trade secret or confidential or privileged commercial or financial information under § 2.390(b)(3)(i), the Commission will consider:

¹ Cf. 10 C.F.R. § 9.17(a)(4) (“trade secrets and commercial or financial information obtained from a person that are privileged or confidential” are exempt from disclosure by the NRC under the Freedom of Information Act); Freedom of Information Act, 5. U.S.C. § 552(b)(4) (“trade secrets and commercial or financial information obtained from a person and privileged or confidential”).

- (i) Whether the information has been held in confidence by its owner;
- (ii) Whether the information is of a type customarily held in confidence by its owner and, except for voluntarily submitted information, whether there is a rational basis therefor;
- (iii) Whether the information was transmitted to and received by the Commission in confidence;
- (iv) Whether the information is available in public sources;
- (v) Whether public disclosure of the information sought to be withheld is likely to cause substantial harm to the competitive position of the owner of the information, taking into account the value of the information to the owner; the amount of effort or money, if any, expended by the owner in developing the information; and the ease or difficulty with which the information could be properly acquired or duplicated by others.²

If the documents are determined to contain “trade secrets or privileged or confidential commercial or financial information,” the Commission will then determine “whether the right of the public to be fully apprised as to the bases for and effects of the proposed action outweighs the demonstrated concern for protection of a competitive position, and whether the information should be withheld from public disclosure.”³

Finally, the regulations provide means for participants in NRC proceedings to obtain access to confidential proprietary documents under a protective order and to utilize the documents in *in camera* hearing sessions.⁴ As the Atomic Safety and Licensing Appeal Board observed long ago, these measures assure that parties in NRC proceedings are able to make effective use of any documents that are withheld as proprietary:

In Commission licensing proceedings, protective orders provide an effective means for safeguarding proprietary information, where . . . the party seeking discovery is not a competitor. Further, the rules differentiate between the release of information to the public and to interested parties, and provide that “[w]ithholding from public inspection shall not affect the right, if any, of persons properly and directly concerned to inspect the document.” They

² 10 C.F.R. § 2.390(b)(4).

³ 10 C.F.R. § 2.390(b)(5).

⁴ 10 C.F.R. § 2.390(b)(6).

explicitly authorize the use in appropriate circumstances of a protective order and of in camera sessions of the hearing.

Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-196, 7 AEC 457, 469 (1974) (quoting former 10 C.F.R. § 2.790(b)(2)). The Board has adopted such a protective order in this proceeding,⁵ thus assuring that New York and other participants in the hearing have an effective means to utilize the protected information even if the documents containing such information are withheld from public disclosure.

II. New York's Motion

In its Motion, New York seeks to withdraw the proprietary designation of five documents that it obtained from Entergy's monthly document disclosures, in accordance with the provisions of the Board's Protective Order in this proceeding.⁶ The five documents are (1) a memorandum prepared by the Pressurized Water Reactor Owners' Group ("PWROG"), concerning NRC Staff Branch Technical Position (BTP) 5-3,⁷ and (2) four calculation notes prepared by Westinghouse Electric Company, LLC ("Westinghouse") for Indian Point Units 2 and 3, concerning environmentally assisted fatigue ("EAF").⁸

⁵ *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), "Protective Order" (Sept. 4, 2009).

⁶ In accordance with the Board's Protective Order, any participant in the proceeding may object to the designation of a document as proprietary, after which the parties involved in the dispute are to consult; if, at the end of a 20-day consultation period, the dispute remains unresolved, the requesting participant is to file a motion for disclosure with the Board. In that event, "[t]he Initial Holder shall have the burden of showing that the applicable information in the proprietary document is a trade secret and/or commercial and financial information that is privileged or confidential so that the Board can determine, as applicable, whether, on balance, protection of the document from public disclosure is warranted under 10 C.F.R. § 2.390." *Id.* at 4, ¶ D.

⁷ New York identified this document as "Pressurized Water Reactor Owners Group, BTP 5-3 Industry Issue, Executive Review (Oct. 28, 2014)." Motion at 5, Table Item 1.

⁸ Westinghouse's proprietary documents are subject to the terms of the Board's Protective Order as "Vendor Proprietary Information." Protective Order at 9-10, ¶ T. The Westinghouse documents identified in New York's Motion are four Westinghouse Proprietary Reports, Class-2, for Indian Point Unit 2 and/or Unit 3: (a) "Accumulator Nozzle Environmental Fatigue Evaluation, CN-PAFM-09-77 (2010)"; (b) "EAF Screening Evaluations, CN-PAFM-12-35 (2012)"; (c) "Refined EAF Analyses and EAF Screening Evaluations, CN-PAFM-13-32 (2013)"; and (d) "Pressurizer Spray Nozzle Transfer Function Database Development and Environmental Fatigue Evaluations, CN-PAFM-13-40 (2013)." Motion at 5, Table Items 2-5.

New York's Motion demonstrates that it has engaged in consultations with Entergy (and though Entergy, with Westinghouse) in an effort to obtain public disclosure of the five documents; that in those consultations, Westinghouse has maintained its position that the documents comprise confidential commercial information; and that New York's efforts to obtain public disclosure of the documents have been unsuccessful.⁹ As such, New York appears to have complied with Paragraph D of the Board's Protective Order, thus rendering this dispute ripe for consideration by the Board.

The Staff notes that it does not have a direct interest in the resolution of this particular dispute. In this regard, the Staff notes that it was not involved in consultations between the parties and Westinghouse regarding this matter, and it has no knowledge of those discussions or the reasons underlying Westinghouse's position that the documents should be withheld from public disclosure under 10 C.F.R. § 2.390(b).¹⁰ Moreover, to the best of the Staff's knowledge, information and belief, only one of the documents was in the Staff's possession prior to New York's submission of the documents as attachments to its Motion – *i.e.*, Westinghouse Proprietary Report CN-PAFM-09-77 – which New York filed several years ago as a (non-public) hearing exhibit in this proceeding (Ex. NYS000366).¹¹ The four other documents do not appear to have been in the Staff's possession prior to New York's filing of its Motion, and do not appear to have been submitted to the Staff by Westinghouse or any other entity under a request for confidentiality. As a result, the Staff has had no reason or opportunity to consider whether any of the documents should be withheld from public disclosure as confidential proprietary information under 10 C.F.R. § 2.390, prior to New York's filing of the instant Motion.

⁹ See Motion at 5-6.

¹⁰ See, *e.g.*, Motion at 5-6 and 16 (Certification by Lisa S. Kwong, Esq., attesting to her having consulted with "counsel for Entergy"; no certification is made regarding any consultation with the Staff).

¹¹ This document is available as a non-public document in the NRC's Agencywide Documents Access and Management System (ADAMS) at ADAMS Accession No. ML12341A406.

The Staff notes that it frequently has occasion to consider requests for confidentiality, and that it addresses those requests in accordance with the provisions of 10 C.F.R. § 2.390 and/or 10 C.F.R. Part 9. The Staff notes that the Commission has an interest in assuring that all documents in the agency's possession are made public, except as provided by in the exceptions stated in its regulations and the Freedom of Information Act; at the same time, the Commission has an interest in assuring its continued ability to obtain confidential proprietary information from the holders of such information, as necessary to assure the continued proper performance of the agency's statutory responsibilities. Accordingly, the Staff agrees that New York's Motion should be resolved in accordance with the criteria in 10 C.F.R. § 2.390(b).

CONCLUSION

For the reasons set forth above, the Staff takes no position with respect to New York's Motion at this time, but agrees that the Motion should be resolved in accordance with the criteria established in 10 C.F.R. § 2.390(b).

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, MD
this 20th day of April 2015

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER TO 'STATE OF NEW YORK MOTION TO WITHDRAW THE PROPRIETARY DESIGNATION OF VARIOUS PRESSURIZED WATER REACTOR OWNERS' GROUP AND WESTINGHOUSE DOCUMENTS,'" dated April 20, 2015, have been served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above captioned proceeding, this 20th day of April 2015.

/Signed (electronically) by/

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