UNITED STATES
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In re:	Docket Nos. 50-247-LR; 50-286-LR
License Renewal Application Submitted by Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc.	ASLBP No. 07-858-03-LR-BD01 April 22, 2015

STATE OF NEW YORK MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF MOTION TO WITHDRAW PROPRIETARY DESIGNATIONS

Office of the Attorney General
for the State of New York
The Capitol
Albany, New York 12224

The State of New York respectfully requests leave from the Atomic Safety and Licensing Board (the Board) to file a reply to "Entergy's Answer Opposing New York State's Motion to Strike Proprietary Designations" (Entergy's Answer), filed April 20, 2015. Entergy's Answer opposed the State's "Motion to Withdraw the Proprietary Designation of Various Pressurized Water Reactor Owners' Group and Westinghouse Documents" (NYS Motion), filed on April 9, 2015. The State's Motion seeks to strike the proprietary designation of five specific documents (collectively, the documents): (1) a memorandum entitled "BTP 5-3 Industry Issue: Executive Review" (the BTP 5-3 Memo) created by the Pressurized Water Reactor Owners Group (PWROG); and (2) four calculation notes (the calculation notes) prepared by Westinghouse Electric Company LLC (Westinghouse). Good cause exists to permit the State's reply because, as described more fully below, Entergy's Answer contains new arguments and supporting affidavits that PWROG and Westinghouse did not disclose during consultation and which the State could not have reasonably anticipated when it made its initial motion. Accordingly, a reply is appropriate under 10 C.F.R. § 2.323(c) and the Board's July 1, 2010 Scheduling Order.

The State has consulted with counsel for Entergy, NRC Staff, Riverkeeper and Clearwater regarding this motion for leave. Riverkeeper and Clearwater support the motion for leave. Entergy and NRC Staff oppose the motion for leave, on the grounds that the State has not met the legal standard to justify a reply and could reasonably have anticipated the arguments raised in Entergy's Answer.

LEGAL STANDARDS FOR REPLY

Under 10 C.F.R. § 2.323(c), a "moving party has no right to reply, except as permitted by the Secretary, the Assistant Secretary, or the presiding officer. Permission may be granted only in compelling circumstances, such as where the moving party demonstrates that it could not

reasonably have anticipated the arguments to which it seeks leave to reply." Under the Board's July 1, 2010 Scheduling Order, "[a] motion to file a reply must demonstrate good cause for permitting the reply and must indicate whether the request is opposed or supported by the other participants in the proceeding and, if opposed, to succinctly describe the grounds stated for such opposition." *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), Scheduling Order at 7 (July 1, 2010) (unpublished).

GOOD CAUSE AND COMPELLING CIRCUMSTANCES JUSTIFY THE STATE'S MOTION FOR LEAVE TO REPLY

As described in the NYS Motion and evidenced by the e-mail chain submitted as attachment 7 to the NYS Motion, neither Entergy, Westinghouse, or PWROG (collectively, the companies) offered a specific justification for the continued designation of the subject documents as proprietary during the consultation period preceding the filing of the State's Motion. NYS Motion, at 5-6 (April 9, 2015); March 9 to 30, 2015 E-Mail Thread Between L. Kwong and R. Kuyler, Attachment 7 to NYS Motion (E-Mail Thread). The State offered the companies an opportunity to redact or partially withhold the subject documents, and – in an effort to avoid litigation and without prejudice to future requests for the full documents – tailored its request for disclosure to particular portions of the subject documents which the State considered particularly relevant to this proceeding. Nonetheless, the companies stood by their blanket assertion of proprietary status for every word of all five documents. *Id.* Notably, during consultation the companies never even claimed that disclosure of the documents would cause competitive harm. *Id.* at 7; *see also* E-Mail Thread, Attachment 7 to NYS Motion. Only after the State prepared and submitted its motion to strike the proprietary designations did Entergy obtain affidavits from Westinghouse and PWROG employees describing the basis for their designation of the documents as proprietary. *See* Entergy's Answer, at 8 ("In response to the Motion . . . authorized

PWROG and Westinghouse officials prepared affidavits that address, with specificity, the considerations listed in 10 C.F.R. § 2.390(b)(4)"). Accordingly, the State could not have reasonably anticipated the arguments raised in Entergy's Answer that rely on these newly created Westinghouse and PWROG affidavits.

Specifically, the State seeks leave to reply to the following new arguments presented in support of Entergy's Answer:

1. Nowinowski Affidavit: The Affidavit of W. Anthony Nowinowski, a manager for PWROG, sets forth various arguments in support of the proprietary designation of PWROG's BTP 5-3 Memo that the State could not have reasonably anticipated. *See* Nowinnowski Affidavit (April 20, 2015), Attachment 1 to Entergy's Answer. Mr. Nowinowski describes a system allegedly used by PWROG to determine whether information should be held in confidence, as well as the "policy reasons" supposedly underlying that system. Nowinowski Affid. ¶3(ii), (iii). Additionally, Mr. Nowinowski alleges the information contained in the BTP 5-3 Memo "has substantial commercial value" because (1) "PWROG and one or more of its individual members plan to employ the information used in this document to prepare a response to the U.S. NRC Branch Technical Position 5-3 for the purpose of supporting reactor internal aging management," and (2) "the information requested to be withheld reveals the preliminary, strategic deliberations of the PWROG and one or more of its individual members." *Id.* ¶3(vi). Moreover, Mr. Nowinowski claims that "[p]ublic disclosure of this proprietary information is likely to cause substantial harm to the competitive position of PWROG and one or more of its individual members because it provides insight into the PWROG's and its individual member's preliminary, strategic deliberations related to responding to the issues surrounding U.S. NRC Branch Technical Position 5-3." *Id.* ¶3.

Prior to the filing of Entergy's Answer, the State had not been provided with any specific arguments underlying PWROG's proprietary designation of the BTP 5-3 Memo. *See* NYS Motion, at 7; E-Mail Thread, Attachment 7 to NYS Motion (claiming broadly that the BTP 5-3 Memo is proprietary because it "contains sensitive and confidential commercial information belonging to the members of the PWROG, of the type that the PWROG does not customarily release to the public"). The Nowinowski affidavit sets forth, for the first time, PWROG's alleged system for determining whether information is proprietary as well as the basis for PWROG's claim that disclosure of the information in the BTP 5-3 memo would result in competitive harm. The State could not have reasonably anticipated the details of PWROG's system for classifying information as proprietary or the specific justifications set forth in the Nowinowski affidavit, and good cause therefore exists to permit the State to reply to this information.

2. Gresham Affidavit: The Affidavit of James A. Gresham, Manager of Regulatory Compliance at Westinghouse, sets forth various arguments in support of the proprietary designation of Westinghouse's four "Calculation Notes" that the State could not have reasonably anticipated. Gresham Affidavit (April 16, 2015), Attachment 2 to Entergy's Answer. Among other things, Mr. Gresham describes Westinghouse's alleged system for determining whether information is proprietary. *Id.* ¶4(ii). He also alleges that one piece of information contained in a calculation note "was made public without Westinghouse's prior knowledge or consent." *Id.* ¶4(v). Mr. Gresham alleges that the calculation notes, in their entirety, have "substantial commercial value" because (1) "Westinghouse plans to employ the method(s) used in each of these documents to sell services to its customers for the purpose of supporting reactor internals aging management" and (2) "[t]he information requested to be withheld reveals the

distinguishing aspects of a methodology(ies) which was developed by Westinghouse." *Id.* ¶4(vi)(a),(b). Additionally, Mr. Gresham claims that (1) "[p]ublic disclosure of this proprietary information is likely to cause substantial harm to the competitive position of Westinghouse because it would enhance the ability of competitors to provide similar technical justifications and licensing defense services for commercial power reactors without commensurate expenses" and (2) "public disclosure of the information would enable other to use the information to meet NRC requirements for licensing documentation without purchasing the right to use the information." *Id.* ¶4(vi).

Once again, the State had no inkling of the information and arguments set forth in the Gresham Affidavit prior to the filing of Entergy's Answer. Indeed, Entergy had never before submitted specific claims relating to Westinghouse's internal procedures for determining whether information is proprietary, the alleged commercial value of the calculation notes, or the supposed competitive harm that would result from the disclosure of the information in the calculation notes. NYS Motion, at 6-7; E-Mail Thread, Attachment 7 to NYS Motion (noting Westinghouse's position that the calculation notes are proprietary simply because "Westinghouse has never publically released a Calc Note"). Additionally, the revelation that the public disclosure of one figure from a calculation note in an NRC report was made without Westinghouse's notice or consent is entirely new. The State could not have reasonably anticipated the information and arguments set out in the Gresham Affidavit, and good cause exists to permit the State to submit a reply on these issues.

3. Gray Declaration: The declaration of Mark A. Gray, a Principal Engineer for Westinghouse, also contains arguments in support of the proprietary designation of the calculation notes that the State could not have reasonably anticipated. Declaration of Mark A.

Gray (April 20, 2015), Attachment 3 to Entergy's Answer. Mr. Gray describes various "analyses" contained in the calculation notes, which he alleges constitute proprietary information, and seeks to establish how disclosure of that information would cause competitive harm. *Id.* ¶7. Generally, he contends that public disclosure of any part of the calculation notes would "provide a competitor with insights into how" the methodology allegedly contained in each calculation note "were derived and are utilized by Westinghouse." *Id.* He also claims that disclosure of one calculation note (CN-PAFM-13-40) would "provide a competitor with insights into the specific functioning of the WESTEMS software code and the specific considerations used by Westinghouse to determine how the WESTEMS software code is applied on a plant-specific basis[.]" *Id.* ¶7(d).

As previously noted, Entergy's Answer, filed April 20, marked the first occasion that any specific claims of competitive harm or commercial value were made with respect to the calculation notes. *See* NYS Motion, at 6-7; E-Mail Thread, Attachment 7 to NYS Motion. Accordingly, the State could not have reasonably anticipated the specific claims of competitive harm set forth in the Gray Declaration. Therefore, good cause exists to permit the State to reply to this issue.

4. Entergy's Answer: Entergy's Answer also contains arguments in opposition to the State's Motion that the State could not have reasonably anticipated. First, to the extent that Entergy's Answer relies on the two Affidavits and one Declaration described above, the State could not have reasonably anticipated these arguments for the reasons previously set forth above. Second, Entergy's argument that the State "contests proper application of the Protective Order" appears to misconstrue the State's position and could not have been reasonably anticipated by the State. Entergy's Answer, at 4. Third, Entergy's suggestion that it is somehow the State's burden

to prove that the subject documents are non-proprietary – contrary to the NRC's governing regulations and the Board's Protective Order – is a fundamental misreading of the governing law, and could not have been reasonably anticipated by the State. *See, e.g.*, Entergy's Answer, at 2. Accordingly, good cause exists to permit the State to reply to Entergy's Answer.

PERMITTING THE STATE TO SUBMIT A REPLY WOULD NOT DELAY THIS PROCEEDING

Although not specifically a requirement for granting a motion for leave to file a reply, the Board has previously considered relevant whether granting permission to file a reply would delay the "progress or resolution of the proceeding." *See Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), Order (Granting New York's Motion) (Jan. 14, 2014) (unpublished). Here, granting the State permission to submit a reply would not impact the various deadlines set forth in the Board's most recent scheduling order, which would culminate in a November 2015 hearing on the Track 2 contentions. *See Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), Revised Scheduling Order (Dec. 9, 2014) (unpublished). In fact, by fully considering the State's arguments with respect to the proprietary designation of the subject documents, the Board ultimately could streamline the Track 2 hearing procedures and reduce the administrative burden on the parties and the Board by revoking an unwarranted and unsupported proprietary designation.

CONCLUSION

For the reasons set forth above, the State respectfully submits that good cause and compelling circumstances exist for the Board to permit the State to file a Reply in Support of Its Motion to Withdraw Proprietary Designations. If the Board grants this motion, the State requests seven (7) days from the date of the Board's order to submit a reply.

Respectfully submitted,

Signed (electronically) by

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Dated: April 22, 2015

10 C.F.R. § 2.323 Certification

Pursuant to 10 C.F.R. § 2.323(b) and the Board's July 1, 2010 Scheduling Order (at 8-9), I certify that I have made a sincere effort to contact counsel for the other parties in this proceeding, to explain to them the factual and legal issues raised in this motion, and to resolve those issues, and I certify that my efforts have been unsuccessful.

Signed (electronically) by

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Brian Lusignan
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State of New York

April 22, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc.	DPR-26, DPR-64 April 22, 2015

CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2015, copies of the State of New York's Motion for Leave to File Reply in Support of Motion to Withdraw Proprietary Designation were served electronically via the NRC's Electronic Information Exchange on the following recipients:

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Dated at Albany, New York
this 22nd day of April 2015