UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket Nos. 50-247-LR and 50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.	)	
(Indian Point Nuclear Generating Units 2 and 3)	)	
	)	April 23, 2015

ENTERGY'S ANSWER OPPOSING NEW YORK STATE'S MOTION FOR LEAVE TO FILE A REPLY TO ENTERGY'S APRIL 20, 2015 ANSWER

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c) and in accordance with the Atomic Safety and Licensing Board's ("Board") July 1, 2010 Scheduling Order,[1] Entergy Nuclear Operations, Inc. ("Entergy") submits this Answer opposing New York State's ("New York") April 22, 2015 "Motion for Leave to File a Reply in Support of Motion to Withdraw Proprietary Designations" ("Motion for Leave"). New York seeks leave from the Board to file a reply to Entergy's April 20, 2015 Answer[2] opposing New York's April 9, 2015 Motion for a Board order striking the proprietary designations of five documents previously produced by Entergy as part of the mandatory disclosure process in this proceeding.[3] Those documents include a memorandum prepared by the

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1 Licensing Board Scheduling Order at 8 (July 1, 2010) (unpublished) ("Scheduling Order") (stating that an answer to a motion to file a reply shall be filed and served within one business day after the filing of the motion).

2 Entergy's Answer Opposing New York State's Motion to Strike Proprietary Designations (Apr. 20, 2015) ("Entergy April 20th Answer").

3 State of New York Motion to Withdraw the Proprietary Designation of Various Pressurized Water Reactor Owners' Group and Westinghouse Documents (Apr. 9, 2015) ("April 9th Motion"). The Board's Scheduling Order states that "for a reply to be timely it would have to be filed within seven days of the date of service of the answer it is intended to address." Scheduling Order at 7 n.22. However, New York requests seven days from the date of any Board order granting the Motion for Leave. Motion for Leave at 8. Thus, New York is in effect also seeking an extension of time, which it did not mention to the other parties during their consultation on the Motion for Leave. Thus, if the Board

Pressurized Water Reactor Owners Group ("PWROG"),[4] and four calculation notes prepared by Westinghouse Electric Company LLC ("Westinghouse"),[5] (individually, the "PWROG Memo" and "Calculation Notes", and collectively, "the Documents").

Entergy opposed New York's April 9th Motion on the grounds that the Documents contain trade secrets or privileged or confidential commercial or financial information and the public interest does not outweigh the substantial competitive harm that is likely to accrue to the PWROG and Westinghouse as a result of forced public disclosure of the Documents.[6] In support of its April 20th Answer, Entergy submitted two affidavits and a declaration prepared by authorized PWROG and Westinghouse personnel.[7] Those documents fully explain the bases for treating the Documents as confidential proprietary information and withholding them from public disclosure.[8] Entergy also cited New York's inability to explain how public disclosure of the Documents is necessary to inform the public with respect to agency decision-making, particularly in light of the extensive discussion of Entergy's aging management program for environmentally-assisted metal

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grants the motion for leave, then the reply should be due within seven days of the date of Entergy's April 20th Answer. *Cf. Entergy Nuclear Vt. Yankee, LLC, & Entergy Nuclear Operations, Inc.* (Vt. Yankee Nuclear Power Station), Licensing Board Order (Denying Motion to Stay the Proceeding and Extending Deadline for Reply) at 2 (Mar. 16, 2015) (denying petitioner's motion for stay and request for a seven-day extension of time to file a reply where the consultation was not "effective" and petitioner had "not explained why a seven-day extension [was] necessary for the filing of its reply brief"). Furthermore, Entergy expressly reserves its right to file a motion to strike and/or a response to any New York reply, as appropriate.

4 PWROG, BTP 5-3 Industry Issue; Executive Review (Oct. 28, 2014) ("PWROG Memo").

5 *See* Westinghouse, CN-PAFM-09-77, Indian Point Units 2 & 3 Accumulator Nozzle Environmental Fatigue Evaluation (2010); Westinghouse, CN-PAFM-12-35, Indian Point Unit 2 and Unit 3 EAF Screening Evaluations (2012); Westinghouse, CN-PAFM-13-32, Indian Point Unit 2 (IP2) and Unit 3 (IP3) Refined EAF Analyses and EAF Screening Evaluations (2013); CN-PAFM-13-40, Indian Point Unit 2 Pressurizer Spray Nozzle Transfer Function Database Development and Environmental Fatigue Evaluations (2013).

6 *See* Entergy April 20th Answer at 2, 15-18. As Entergy explained in its April 20th Answer, this is not a case of failure to disclose any documents—Entergy promptly disclosed to New York all of the documents subject to New York's April 9th Motion pursuant to the Protective Order. *See id.* at 3-4; Licensing Board Protective Order (Sept. 4, 2009) (unpublished) ("Protective Order").

7 *See* Entergy April 20th Answer, Attach 1, Affidavit of W. Anthony Nowinowski, Manager, PWROG Project Management Office (Apr. 20, 2015); *id*., Attach 2, Affidavit of James A. Gresham, Manager, Regulatory Compliance, Westinghouse Electric Company LLC (Apr. 16, 2015); *id*., Attach 3, Declaration of Mark A. Gray, Principal Engineer, Westinghouse Electric Company LLC (Apr. 20, 2015).

8 *See id*. at 8-14.

fatigue and related license renewal commitments contained in the NRC Staff's safety evaluation report and two supplements thereto.[9]

II. ARGUMENT

The Board should deny New York's Motion for Leave. New York acknowledges that under 10 C.F.R. § 2.323(c), a moving party has no right to file a reply, and that 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."[10] It further acknowledges that Section G.3 of the Board's Scheduling Order states that a motion for leave to file a reply "must demonstrate good cause for permitting the reply to be filed and must indicate whether the request is opposed or supported by the other participants in the proceeding."[11] In short, New York has not identified any compelling circumstances that would establish good cause for allowing it to file a reply to Entergy's April 20th Answer. For that reason, both Entergy and the Staff opposed New York's Motion for Leave during the parties' related consultations.[12]

Contrary to New York's claims, Entergy's April 20th Answer and the affidavits and declaration attached thereto do not contain new arguments or information that New York could not have reasonably anticipated. The parties have been discussing the proprietary designation issue since March 9, 2015—nearly six weeks.[13] As reflected in the e-mails attached to New York's April 9th Motion, counsel for Entergy conveyed the following positions to counsel for New York:

- "The PWROG Industry Issue memo contains ***sensitive and confidential commercial information belonging to the members of the PWROG***, of the type that the PWROG does

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9 *See id.* at 15-18.

10 Motion for Leave at 2-3 (quoting 10 C.F.R. § 2.323(c)).

11 *Id.* at 3 (quoting Scheduling Order at 7).

12 *See id.* at 2.

13 *See id.* at 3.

not customarily release to the public. Therefore, the PWROG Industry Issue memo should remain subject to the terms of the Protective Order."[14]

- "It is Westinghouse's position that ***each of the Calc Notes*** (CN-PAFM-09-77/CN-PAFM-13-40/CN-PAFM-13-32/ CN-PAFM-12-35), ***in their entirety, are proprietary***. …Westinghouse believes that each of these Calc Notes should remain subject to the terms of the Protective Order."[15]

Significantly, in its April 9th Motion, New York explicitly stated that commercial or financial information is confidential "if its disclosure would … cause substantial harm to the *competitive position* of the person from whom the information was obtained."[16] New York also discussed the requirements in the Board's Protective Order and 10 C.F.R. § 2.390 at length, including the concept of competitive harm—as embodied in 10 C.F.R. § 2.390(b)(4)(v)—and related case law.[17] Section 2.390(b)(4), in particular, states:

> In making the determination required by paragraph (b)(3)(i) of this section, the Commission will consider … (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."[18]

New York even faulted Entergy for purportedly not asserting "that release of the documents will cause Westinghouse substantial competitive harm."[19] It also cited the lack of "particularized statements or *affidavits* … in support of Westinghouse's position" and Entergy's alleged reliance

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[14] E-mail from Ray Kuyler, Morgan, Lewis & Bockius LLP, to Lisa Kwong, New York State Office of the Attorney General, "Subject: RE: IP – Notice of objection to proprietary/confidentiality designation" (Mar. 30, 2015) (Attach. 7 to Declaration of Lisa S. Kwong dated April 9, 2015, as appended to April 9th Motion) (emphasis added).

[15] E-mail from Ray Kuyler, Morgan, Lewis & Bockius LLP, to Lisa Kwong, New York State Office of the Attorney General, "Subject: RE: IP – Notice of objection to proprietary/confidentiality designation" (Mar. 27, 2015) (Attach. 7 to Declaration of Lisa S. Kwong dated April 9, 2015, as appended to April 9th Motion) (emphasis added).

[16] April 9th Motion at 9 (emphasis added).

[17] *See id.* at 1-2, 7-10.

[18] 10 C.F.R. § 2.390(b)(4) (emphasis added).

[19] April 9th Motion at 7.

on "mere conclusory allegations" rather than "an *affidavit* addressing the considerations set forth in 10 C.F.R. § 2.390(b)(4)."[20]

Thus, New York could not have been surprised when the PWROG and Westinghouse responded by supplying affidavits that explain the bases for their positions that disclosure of the Documents would substantially harm their competitive positions. Indeed, given New York's previous statements, it cannot now tenably claim that it had "no inkling" of the information and arguments set forth in the PWROG and Westinghouse affidavits and Entergy's April 20th Answer.[21] The likelihood of competitive harm associated with public disclosure of the information in question is a principal consideration in determining whether that information constitutes a trade secret or confidential commercial information that should be withheld from public disclosure.[22] Thus, the fact that the affidavits and declaration provided by the PWROG and Westinghouse address the likelihood of competitive harm and the specific commercial considerations listed in Section 2.390(b)(4)(v) should have been fully anticipated by New York—not unexpected. Additionally, certain statements in the affidavits and declaration clearly were intended to respond to specific New York arguments (*e.g.*, arguments concerning the disclosure of a "CUF_{en}" value in an NRC inspection report, and the availability of three unrelated Westinghouse calculations in ADAMS).[23] They also cannot reasonably be considered a surprise to New York.

Similarly, Entergy's April 20th Answer contains no arguments or information that New York could not reasonably have anticipated. First, it responds directly to the arguments presented in New York's April 9th Motion and is based, in large part, on statements contained in the PWROG and Westinghouse affidavits and declaration (which, as discussed above, should have

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[20] *Id.* at 6, 7 (emphasis added).

[21] Motion for Leave at 6.

[22] *See* 10 C.F.R. § 2.390(b)(4)(v); Entergy April 20th Answer at 5-7.

[23] *See* April 9th Motion at 12, 13 n.3.

been fully anticipated by New York). As noted above, New York criticized Energy for not furnishing affidavits.[24] Entergy, unsurprisingly, responded with affidavits from the PWROG and Westinghouse.[25] Second, Entergy's statement that New York "contests proper application of the Protective Order" responds to New York's claims that the Protective Order serves as a "general cloak of secrecy" and is "contrary to the NRC's regulations."[26] Finally, New York incorrectly claims that Entergy suggested that "it is somehow the State's burden to prove that the subject documents are non-proprietary."[27] Entergy's April 20th Answer refers explicitly to Entergy's burden under the Protective Order to show that the Documents are proprietary.[28] Entergy did not attempt to reallocate that burden, but rather, highlighted New York's inability to show that there is a countervailing public interest that outweighs the substantial competitive harm to the PWROG and Westinghouse that likely would result from public disclosure of the Documents.[29]

III. CONCLUSION

For the foregoing reasons, the Board should deny New York's Motion for Leave. New York has not identified any compelling circumstance that warrants the filing of an otherwise unauthorized reply. Therefore, it has not shown good cause for its request. Additionally, Entergy respectfully submits that the parties already have developed a sufficient record, and that based on that record, the Board should order that the Documents continue be withheld from public disclosure under 10 C.F.R. § 2.390 and the Protective Order.

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24 *Id.* at 6, 7.

25 *See* Entergy April 20th Answer, Attach. 1-3.

26 *Id*. at 4, 15-16; April 9th Motion at 13.

27 Motion for Leave at 7-8.

28 *See* Entergy April 20th Answer at 4 n.15 & 8.

29 *See id.* at 2, 15-18.

Respectfully submitted,

Signed (electronically) by Paul M. Bessette

Kathryn M. Sutton, Esq.
Paul M. Bessette, Esq.
Martin J. O'Neill, Esq.
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
E-mail: ksutton@morganlewis.com
E-mail: pbessette@morganlewis.com

Counsel for Entergy Nuclear Operations, Inc.

William B. Glew, Jr., Esq.
Entergy Nuclear Operations, Inc.
440 Hamilton Avenue
White Plains, NY 10601
Phone: (914) 272-3360
E-mail: wglew@entergy.com
Phone: (202) 739-5738

Dated in Washington, D.C.
this 23rd day of April 2015

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ANSWER CERTIFICATION

Counsel for Entergy certifies that he has made a sincere effort to make himself available to listen and respond to the moving parties, and to resolve the factual and legal issues raised in the motion, and that his efforts to resolve the issues have been unsuccessful.

Executed in Accord with 10 C.F.R. § 2.304(d) by Paul M. Bessette

Paul M. Bessette, Esq.
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave. NW
Washington, DC 20004
Phone: (202) 739-5796
Fax: (202) 739-3001
E-mail: pbessette@morganlewis.com

Counsel for Entergy Nuclear Operations, Inc.

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305 (as revised), I certify that, on this date, copies of "Entergy's Answer Opposing New York State's Motion for Leave to File a Reply to Entergy's April 20, 2015 Answer" were served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned proceeding.

Signed (electronically) by Martin J. O'Neill
Martin J. O'Neill, Esq.
MORGAN, LEWIS & BOCKIUS LLP
1000 Louisiana Street, Suite 4000
Houston, TX 77002
Phone: (713) 890-5710
Fax: (713) 890-5001
E-mail: martin.o'neill@morganlewis.com

Counsel for Entergy Nuclear Operations, Inc.