

**STATE OF NEW YORK
REPLY IN SUPPORT OF
MOTION TO WITHDRAW
PROPRIETARY DESIGNATIONS**

DATED MAY 1, 2015

PUBLIC AND REDACTED VERSION

**UNITED STATES
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

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In re:

Docket Nos. 50-247-LR; 50-286-LR

License Renewal Application Submitted by

ASLBP No. 07-858-03-LR-BD01

Entergy Nuclear Indian Point 2, LLC,
Entergy Nuclear Indian Point 3, LLC, and
Entergy Nuclear Operations, Inc.

May 1, 2015

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Office of the Attorney General
for the State of New York
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Pursuant to the Atomic Safety and Licensing Board's (the Board's) April 24, 2015 order,¹ the State of New York respectfully submits this Reply in support of its "Motion to Withdraw the Proprietary Designation of Various Pressurized Water Reactor Owners' Group and Westinghouse Documents" (NYS Motion), filed on April 9, 2015, and in response to "Entergy's Answer Opposing New York State's Motion to Strike Proprietary Designations" (Entergy's Answer), filed April 20, 2015. In disregard of the Protective Order,² Entergy's Answer incorrectly seeks to invert and shift the burden on the State. Moreover, Entergy's Answer does not satisfy Entergy's burden of establishing that each document in its entirety should be afforded confidential treatment.

The Board granted the State's "Motion for Leave to File Reply in Support of Motion to Withdraw Proprietary Designations," filed April 22, 2015, over the objections of Entergy³ and NRC Staff,⁴ and gave the State until May 1, 2015 to submit its reply. The NYS Motion sought 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). As set

¹ See *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), Order (Granting New York's Motion for Leave to File Reply) (April 24, 2015) (unpublished).

² See *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), Protective Order (September 4, 2009) (unpublished).

³ In "Entergy's Answer Opposing New York State's Motion for Leave to File a Reply to Entergy's April 20, 2015 Answer" (Entergy's Answer Opposing Reply), Entergy states that it "expressly reserves its right to file a motion to strike and/or a response to any New York reply, as appropriate." Entergy's Answer Opposing Reply, at 1-2 n. 3. However, neither NRC regulations (10 C.F.R. §§ 2.323 and 2.390) nor the relevant Board Orders (the Board's July 2010 Scheduling Order and September 2009 Protective Order) provide Entergy the "right" to file a "sur-reply" or other response to a reply, nor does there appear to be any legal basis for the submittal of such a paper.

⁴ During consultations, NRC Staff indicated that they opposed the State's Motion for Leave to File a Reply, even though they took no position on the underlying Motion. Staff did not submit any written opposition to the State's Motion for Leave to File a Reply.

forth more fully below, the Board should grant the NYS Motion because Entergy has failed to establish that the five documents are proprietary in their entirety, and has declined multiple opportunities to redact or otherwise partially disclose the documents.

BACKGROUND

The State has fully briefed the history of events culminating in the NYS Motion. *See* NYS Motion, at 1-6. However, Entergy’s Answer contains several distortions of fact that the State would like to clarify.

First, Entergy claims that New York does not “explicitly ask that Westinghouse issue redacted versions of the documents” and therefore is seeking “public disclosure of all five documents in their entirety.” Entergy’s Answer, at 1 n. 2. However, the State has repeatedly offered Entergy opportunities to partially disclose or offer redacted versions of the documents. This dispute initially arose because Entergy refused to allow the State to refer to the results of cumulative usage factors adjusted for environmental effects (CUF_{en}) calculations – that is, the bare output numbers – for various reactor components. *See* NYS Motion, at 5.⁵ Thereafter, in the State’s initial “Objection to Continued Confidential Treatment of Certain Documents” (NYS Objection), dated March 9, 2015, the State [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] NYS Objection, Attachment 1 to NYS Motion. During subsequent verbal consultations, counsel for Entergy suggested that disclosure might be facilitated if the State narrowed its request to particular portions of the documents. Accordingly, on March 19, 2015, the State, in an attempt to resolve the objection without the need for litigation, sent an e-mail to Entergy that identified specific portions of the calculation notes that

⁵ The dispute subsequently expanded to include the BTP 5-3 Memo.

the State believed were both particularly relevant and non-proprietary. *See* March 9-30, 2015 E-mail Thread between L. Kwong and R. Kuyler (E-mail Thread), Attachment 7 to NYS Motion, at 2-3. Nonetheless, Entergy maintained, in a March 26, 2015 e-mail, that [REDACTED]

[REDACTED] E-Mail Thread, at 2. In short, despite the State's ongoing willingness to consider specific designations of proprietary information in the documents, Entergy and its vendors have maintained that all five documents are categorically exempt from public disclosure. Considering that a party seeking non-disclosure always retains the burden to establish that information is proprietary, *see* Protective Order, ¶D, Entergy's suggestion that the State has somehow behaved unreasonably in failing to make an explicit motion for redaction of the documents is entirely off base.

Second, Entergy proudly trumpets its supposed compliance with the Protective Order, and criticizes the State's suggestion that Entergy should have submitted more detailed statements in defense of the proprietary designation during the consultation period. *See* Entergy's Answer, at 7 (claiming that New York could not "identify any authority" requiring Entergy to show "that the documents at issue are proprietary" during informal consultation, and that the State "casually dismisses Entergy's good faith representation as 'conclusory'"). However, in this context, it is significant to highlight what Entergy did *not* say during consultations. Entergy utterly ignored the State's request, in its initial Objection, for the specific bases of its proprietary claims and the harm that would result if the documents were disclosed. *See* NYS Objection, Attachment 1 to NYS Motion. With respect to the four calculation notes, Entergy simply stated that they were proprietary in full because [REDACTED]

[REDACTED] E-mail Thread, Attachment 7

to NYS Motion, at 2.⁶ With respect to the BTP 5-3 Memo, Entergy claimed generally that it

[REDACTED]

[REDACTED] *Id.* at 2. In short, despite being asked point blank by the State to provide a specific justification for the continued confidential treatment of the documents, Entergy offered no justifications that the State could evaluate or respond to. Indeed, Entergy failed even to allege that disclosure of the documents would result in competitive harm to Westinghouse or PWROG. Entergy's position that it did all that was required under the Protective Order misses the point: Entergy did not offer any specific defense of the proprietary designations until after the State moved to strike them.

LEGAL STANDARDS

The applicable legal standards are established by the Board's September 4, 2009 Protective Order and 10 C.F.R § 2.390, and have previously been fully briefed. *See* NYS Motion, at 1-2, 7-10. However, Entergy's Answer appears to suggest that the NYS Motion should be denied because the State has failed to establish that the documents, in their entirety, are not proprietary. *See* Entergy's Answer, at 4-7.⁷ This subverts the applicable legal standards,

⁶ The State rebutted this categorical claim in its Motion, citing several Westinghouse calculation notes that had been publically released. *See* NYS Motion, at 13 n. 3. In response, Entergy modified its position by claiming that no calculation notes had been publically disclosed *except* for the three cited by the State. *See* Entergy's Answer, at 14; Gray Declaration, ¶5, Attachment 3 to Entergy's Answer.

⁷ Entergy objects to this characterization in their "Answer Opposing New York State's Motion for Leave to File a Reply." *See* Entergy's Answer Opposing Reply, at 6. However, Entergy's Answer is replete with insinuations that the State has not done enough to establish that the documents are non-proprietary, including (1) noting that the State did not request the creation of redacted version of the documents in its Motion, and thus must be seeking the release of the entire documents, Entergy's Answer, at 1 n. 2; (2) claiming that there should be a "presumption" that maintaining the proprietary designation of the documents will not impact public participation at the Track 2 hearing, *id.* at 2; (3) claiming that "*New York* has not alleged any problems related to access to the proprietary information[.]" *id.* at 4 (emphasis added); (4) noting that "New York argues that its Motion should be granted because Entergy and Westinghouse 'have failed to show' that the documents at issue are proprietary" but claiming that "New York does not identify any authority requiring Entergy and Westinghouse to have done so during informal consultation[.]" *id.* at 7; (5) arguing that the Court should defer to the opinions expressed in the Gresham Affidavit and Gray Declaration, because Westinghouse personnel are "more qualified" than New York to determine what should be

which place the burden of establishing the need for nondisclosure on the party seeking to prevent public disclosure of information. Indeed, 10 C.F.R § 2.390(a) establishes a presumption that documents should be made available for public inspection and copying, while section 2.390(b) establishes “procedures” that “must be followed by anyone submitting a document to the NRC who seeks to have the document, or a portion of it, withheld from public disclosure because it contains trade secrets, privileged, or confidential commercial or financial information.” The Protective Order makes clear that the initial holder⁸ of allegedly proprietary information – in this case, Entergy –

“shall have the burden of showing that the applicable information in the proprietary document is a trade secret and/or commercial or 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.”

Protective Order, ¶D. Accordingly, it is Entergy’s burden to justify the withholding of any purportedly proprietary information in the documents from public disclosure. This is a burden that Entergy has not met for the documents in their entirety.

ARGUMENT

I. ENTERGY HAS FAILED TO ESTABLISH THAT THE DOCUMENTS SHOULD BE WITHHELD FROM PUBLIC DISCLOSURE IN THEIR ENTIRETY

Entergy’s position that all five documents are proprietary in their entirety is not supported by the affidavits and declaration from PWROG and Westinghouse officials, and is belied by the content of the documents. Critically, Entergy has failed to establish that disclosure of the

considered proprietary, *id.*, at 13, and (6) claiming that CUF_{en} output values cannot be disclosed because they are “derived from analysis and calculations – which New York seeks to make public[,]” *id.* at 14.

⁸ The “initial holder” refers to any “Participant in this proceeding” who holds proprietary documents. Protective Order, at 2. Accordingly, the initial holder of the subject documents is Entergy, and it has the burden to establish that the documents are propriety – Westinghouse and PWROG are not participants in this proceeding.

documents, even in redacted form, would result in competitive harm to Westinghouse or PWROG.

1. BTP 5-3 Memo

Entergy has failed to establish that any part of the BTP 5-3 memo – let alone the document in its entirety – is proprietary. The generalized claim by W. Anthony Nowinowski, a PWROG manager, that disclosure of the BTP 5-3 Memo would harm PWROG’s competitive position by providing “insight” into PWROG’s deliberative process regarding [REDACTED] [REDACTED] is simply not supportable. *See* Nowinowski Affid., ¶3, Attachment 1 to Entergy’s Answer.

As an initial matter, there is no “deliberative process” privilege for industry documents submitted to the NRC. Rather, 10 C.F.R. § 2.390(b)(3) exempts “trade secrets or confidential or privileged commercial or financial information” from disclosure and embodies FOIA exemption 4, *see Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-05-08, 61 N.R.C. 129, 163 (March 16, 2005), while the deliberative process privilege falls under FOIA exemption 5, *see, e.g., NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). Accordingly, Entergy’s claim that the “deliberative nature” of the BTP 5-3 Memo entitles it to non-disclosure is entirely inapposite.

Additionally, each page of the BTP 5-3 Memo is manifestly non-proprietary. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *See, e.g.,* BTP 5-3 Memo, Attachment 2 to NYS Motion, at 1, 3 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Moreover, much of the information set forth in the BTP 5-3 Memo has been disclosed in publically available documents, including in public presentations made by PWROG and other industry groups to the NRC, undermining the claim that disclosure of the BTP 5-3 Memo would result in competitive harm. For example, the BTP 5-3 Memo describes [REDACTED], *see* BTP 5-3 Memo, at 1, both of which are publically available in full, *see* Letter from Pedro Salas, Regulatory Affairs Director, to U.S. Nuclear Regulatory Commission, “Potential Non-Conservatism in NRC Branch Technical Position 5-3” (Jan. 30, 2015) (ML14038A265); Troyer, et al., “An Assessment of Branch Technical Position 5-3 to Determine Unirradiated RT_{NDT} for SA-508 CL. 2 Forgings,” Presented at the Proceedings of the ASME 2014 Pressure Vessels and Piping Conference (July 20-24, 2014) (publically available at <http://proceedings.asmedigitalcollection.asme.org/proceeding.aspx?articleid=1937910>).⁹ As another example, the BTP 5-3 Memo discusses [REDACTED], [REDACTED], BTP 5-3 Memo, at 4, while a slideshow describing the results of the material flaw orientation analyses is available online and was presented at a public meeting. *See* PWROG, Slides, “Material Orientation Toughness Assessment (MOTA) for the Purpose of Mitigating Branch Technical Position (BTP) 5-3 Uncertainties (Feb. 19, 2015) (ML15061A095). In short, Entergy

⁹ Both documents were also submitted to the Board in this proceeding, as attachments 1 and 2 to the Declaration of Lisa Kwong, on February 13, 2015. As of the date of this Reply, no ADAMS number is available for that Declaration and attachments.

cannot claim that the release of general descriptions of PWROG’s preliminary discussions and review of the BTP 5-3 issue would harm PWROG’s competitive interests by allowing “competitors of PWROG to duplicate this information,” Nowinowski Affidavit ¶(3)(iii) (April 20, 2015), Attachment 1 to Entergy’s Answer, when the same information has been publically released in more detailed and developed form.

Other information, while perhaps not yet publically disclosed, is nonetheless clearly not proprietary. For example, the BTP 5-3 Memo reports that [REDACTED] [REDACTED] [REDACTED] BTP 5-3 Memo, at 2. [REDACTED] is not proprietary business information.

Ultimately, if Entergy wishes to withhold the BTP 5-3 Memo in its entirety, it has the burden to establish that it is propriety in its entirety. The conclusory claims of “commercial value” and “competitive harm” in the Nowinowski Affidavit are insufficient to establish that the BTP 5-3 Memo – which concerns an important issue that has relevance to Indian Point – should be withheld from public review.

2. Calculation Notes

Entergy has likewise failed to establish that the calculation notes are proprietary in their entirety. Notably, the affidavit and declaration submitted by Entergy in support of the proprietary designation of the calculation notes are completely silent on why significant portions of the notes – such as cover pages, tables of contents, lists of acronyms, definitions, and references, general descriptions of the bases for the CUF_{en} calculations grounded in publically available NUREG or ASME code volumes, and the final CUF_{en} output values calculated for reactor components – should be considered proprietary. Contrary to the conclusory claims set forth in the Gray Declaration, disclosure of this general information will not offer “insights into the specific functioning of the WESTEMS™ software code” or any other sensitive

methodologies employed by Westinghouse to calculate the CUF_{en} values. Gray Declaration, ¶7(a)-(d).

In particular, Entergy has failed to establish any justification for withholding the CUF_{en} output values for reactor vessel components. Disclosure of these output numbers would offer no insights into any methodologies used to formulate them. *See, e.g.*, CN-PAFM-13-32, at 7-9 (summary tables of CUF_{en} values for reactor components). Furthermore, the CUF_{en} values are particularly relevant to this proceeding, since “crack initiation is assumed to have started in a structural component when the fatigue usage factor at the point of the component reaches the value of 1, the design limit on fatigue.” Generic Aging Lessons Learned (GALL) Report, NUREG-1801, Rev. 2 (2010), X.M1-1. Under Entergy’s Fatigue Monitoring Program, components with CUF_{en} values of more than 1.0 require corrective action. *See* LRA Commitment 49, Attachment 1 to Letter from Fred Dacimo to USNRC Document Control Desk, NL-13-052 (May 7, 2013), at 9 (ML13142A202); LRA Commitment 33, Attachment 2 to NL-13-052, at 15. Refusing to publically release the CUF_{en} values while claiming that they do not exceed 1.0 is akin to a police officer refusing to release the results of a breathalyzer test or speed gun, but assuring a judge or jury that the results exceeded the legal limit. Even accepting that Entergy’s representations that no CUF_{en} values exceeds 1.0, the public has an interest in knowing how close the values are to 1.0, and how many times the results had to be re-calculated before they came out to less than 1.0. Indeed, at least one NRC inspector was sufficiently concerned with the CUF_{en} results for the IP2 pressurizer nozzle to note, in a public inspection report, that it is “0.999 at 60 years.” USNRC Region 1 Inspection Report No. 05000247/2013010, at 7, enclosure to Letter from USNRC Region 1 to John Ventosa, Entergy Site Vice President (Sept.

19, 2013) (ML13263A020).¹⁰ Entergy claims that the disclosure of this CUF_{en} value was made without Westinghouse’s “prior knowledge or consent.” Entergy’s Answer, at 13. However, the 2013 release by NRC Staff of one CUF_{en} value highlights the fact that the CUF_{en} results have no obvious intrinsic commercial value.¹¹

Entergy claims that the CUF_{en} output values cannot be released because “they are derived from analyses and calculations – which New York seeks to make public[.]” Entergy’s Answer, at 14. This turns the legal standard for withholding information on its head – the documents are presumptively open for public review, and Entergy has the burden to show why any information within the document should be considered proprietary. *See* Protective Order, ¶D (“The Initial Holder shall have the burden of showing that *the applicable information* in the proprietary document is a trade secret and/or commercial or financial information that is privileged or confidential[.]” [emphasis added]). Entergy has declined multiple opportunities to offer redacted versions of the documents, and has failed to establish that the documents are proprietary in their entirety. Accordingly, the Board should grant the State’s motion and strike the proprietary designations for all four calculation notes.

¹⁰ The NRC Inspection Report discusses the inspectors’ review of two of the calculation notes – CN-PAFM-13-32 and CN-PAFM-12-35. USNRC Region 1 Inspection Report No. 05000247/2013010, at 7. [REDACTED]

¹¹ Oddly, despite the discussion of two calculation notes in the inspection report and the direct relevance of the CUF_{en} values to the license renewal proceeding, NRC Staff insists that it has never had any of these calculation notes in its possession, except for courtesy copies produced by Entergy to NRC as a result of the State’s disclosure request. *See* “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” (April 20, 2015), at 5.

II. THE STATE IS NOT CHALLENGING THE PROTECTIVE ORDER, MERELY ITS MISUSE BY ENTERGY IN THIS CASE

Entergy claims that the NYS Motion challenges the Board's Protective Order. *See* Entergy's Answer, at 4, 15. This is a strawman that Entergy vigorously knocks down to avoid grappling with the actual issues raised in the Motion – namely, Entergy's *misuse* of the Protective Order to shield broad swaths of manifestly non-proprietary information from public disclosure and review. By selectively quoting from portions of the NYS Motion, Entergy misrepresents the State's position. *See* Entergy's Answer, at 4 (claiming that the State “contests proper application of the Protective Order – the need for and contents of which it endorsed nearly six years ago – inexplicably claiming that it ‘is contrary to NRC’s regulations’”); *id.*, at 15 (claiming that the State “argues that the Protective Order serves as a ‘general cloak of secrecy’ that is ‘contrary to the NRC’s regulations’). In fact, the State said that “[s]hielding such information” as is contained in the documents “from public view under the Protective Order’s general cloak of secrecy is contrary to the NRC’s regulations in favor of public disclosure of such information.” NYS Motion, at 13. As should be clear from the full quote, the State objects to the continued misuse of the Protective Order to shield broad swaths of non-proprietary information from public disclosure and review, not the need for a Protective Order to protect truly proprietary information.

CONCLUSION

For the reasons described above, Entergy has failed to meet its burden to establish that the documents are proprietary in their entirety. In light of the fact that Entergy has refused to offer redacted versions of the documents or identify specific sections that are allegedly proprietary, the Board should grant the State's Motion and strike the proprietary designations for all five documents.

Respectfully submitted,

Signed (electronically) by

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Dated: May 1, 2015

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD**

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In re: Docket Nos. 50-247-LR and 50-286-LR

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Entergy Nuclear Indian Point 2, LLC, DPR-26, DPR-64
Entergy Nuclear Indian Point 3, LLC, and
Entergy Nuclear Operations, Inc. May 1, 2015
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CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2015, copies of the public, redacted version of the State of New York's Reply to Entergy and NRC Staff's Responses to New York State's Motion to Withdraw Proprietary Designation of Various Pressurized Water Reactor Owners' Group and Westinghouse Documents were served electronically via the NRC's Electronic Information Exchange on the following recipients:

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