

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Lawrence G. McDade, Chairman
Dr. Michael F. Kennedy
Dr. Richard E. Wardwell

In the Matter of

ENTERGY NUCLEAR OPERATIONS, INC.

(Indian Point Nuclear Generating Units 2 and 3)

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

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

May 5, 2015

ORDER

(Setting Oral Argument on Proprietary Designation of Documents)

On April 9, 2015, the State of New York (New York) filed a motion to withdraw the proprietary designation and compel the public disclosure of five documents produced by Entergy Nuclear Operations, Inc. (Entergy) as part of its mandatory disclosures.¹ Entergy opposed the motion.² The NRC Staff took no position, but filed an answer on the governing legal principles.³ On April 22, 2015, New York sought leave to file a reply,⁴ which Entergy

¹ State of New York Motion to Withdraw the Proprietary Designation of Various Pressurized Water Reactor Owners' Group and Westinghouse Documents (Apr. 9, 2015). The documents include a memorandum prepared by the Pressurized Water Reactor Owners Group and four calculation notes prepared by Westinghouse Electric Company LLC (Westinghouse), Entergy's vendor. *Id.* at 1.

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

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" (Apr. 20, 2015).

⁴ State of New York Motion for Leave to File Reply in Support of Motion to Withdraw Proprietary Designations (Apr. 22, 2015).

opposed,⁵ and which the Board granted.⁶ New York's reply was received on May 1, 2015.⁷ Despite these filings, the Board lacks information necessary to rule on the propriety of the proprietary designations, and it therefore schedules oral argument.

Pursuant to the Protective Order, "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 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."⁸ As such, the burden is on Entergy to demonstrate that the five documents—in their entirety—are entitled to protection. NRC regulations at 10 C.F.R. § 2.390(b)(4)(i)-(v) specifies that the Board, in making a determination that a document is proprietary, due to trade secrets and commercial or financial information, is to consider:

(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 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.

It is about this fifth consideration that the Board lacks information because Entergy's arguments are merely conclusory. Entergy asserts that public disclosure of the documents would cause substantial harm as it would: 1) reveal strategic deliberations, 2) enhance competitors' capacity to offer similar services with less expense and/or obviate a client's need

⁵ Entergy's Answer Opposing New York State's Motion for Leave to File a Reply to Entergy's April 20, 2015 Answer (Apr. 23, 2015).

⁶ Licensing Board Order (Granting New York's Motion for Leave to File a Reply) (Apr. 24, 2015) (unpublished).

⁷ State of New York Reply in Support of Motion to Withdraw Proprietary Designations (May 1, 2015).

⁸ Protective Order (Sept. 4, 2009) at ¶ D (unpublished).

for their service, and 3) afford competitors insights into the WESTEMS software code and Westinghouse's methodology.⁹ However, Entergy offers no explanation as to *how* disclosure of these documents—many pages of which contain summary results, void of methodology, complex formula, or inputs—would result in such harm.

Nonetheless, the Board has a duty to protect documents whose disclosure would cause substantial harm to the competitive position of the owner of the information, PWROG or Westinghouse. As such, prior to acting upon New York's motion, the Board will convene a telephonic oral argument during the week of May 11, 2015.

Parties should be prepared to discuss:

- 1) *section by section*, the contents of the documents in dispute, and specifically how competitive injury could follow, and the likelihood thereof; and
- 2) the public interest, or lack thereof, in disclosure of the information.

Participants in this proceeding who have filed briefs on this matter shall contact the Board's law clerk, Alana Wase (Alana.wase@nrc.gov) no later than noon, Thursday, May 7, 2015, notifying her of the dates and times when they are unavailable to participate. As the substantial harm alluded to would fundamentally impact Westinghouse, which, based on earlier filings is acting on behalf of PWROG, counsel for Westinghouse may also participate. Entergy

⁹ Entergy Answer, attach. 1, Aff. of W. Anthony Nowinowski at 4 (Apr. 20, 2015) (stating that public disclosure of the PWROG memo "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"); Entergy Answer, attach. 2, Aff. of James A. Gresham at 4 (Apr. 16, 2015) ("Public 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 evaluation justifications and licensing defense services for commercial power reactors without commensurate expenses. Also, public disclosure of the information would enable others to use the information to meet NRC requirements for licensing documentation without purchasing the right to use the information."); Entergy Answer, attach. 3, Decl. of Mark A. Gray ¶¶ 7(a)-(d) (Apr. 20, 2015) (stating that public disclosure of calculation notes CN-PAFM-13-40 and CN-PAFM-09-77 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" and disclosure of calculation notes CN-PAFM-12-35 and CN-PAFM-13-32 "would provide a competitor with insights into how this methodology was derived and is utilized by Westinghouse").

should notify Westinghouse of this opportunity and the need to provide information relating to its counsel's availability. Once the Board selects a date and time for the argument a follow-up Notice to this Order will be issued.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Lawrence G. McDade, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
May 5, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **ORDER (Setting Oral Argument on Proprietary Designation of Documents)** have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Brian Newell]
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Dated at Rockville, Maryland
this 5th day of April, 2015