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	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 6, 2015

STATE OF NEW YORK ANSWER OPPOSING MOTION OF WESTINGHOUSE ELECTRIC COMPANY LLC TO APPEAR SPECIALLY IN CONNECTION WITH THE STATE'S MOTION TO WITHDRAW PROPRIETARY DESIGNATIONS OF WESTINGHOUSE AND PWROG DOCUMENTS

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Pursuant to 10 C.F.R. § 2.323(c) and in accordance with the Atomic Safety and Licensing Board's (Board's) July 1, 2010 Scheduling Order,[1] the State of New York (the State) submits this Answer Opposing the "Motion of Westinghouse Electric Company LLC to Appear Specially in Connection with State of New York Motion to Strike Proprietary Designations of Westinghouse and PWROG Proprietary Documents" (Westinghouse Motion), served on May 5, 2015.

Three months after this issue initially arose, Westinghouse belatedly seeks permission to "appear specially" and file additional written submissions because it claims that it now wishes to protect its interests concerning five documents that it labelled as proprietary. These documents are the subject of 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. After informal and formal consultations, the State filed its motion to remove the proprietary designation of the five 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). Entergy timely filed an "Answer Opposing New York State's Motion to Strike Proprietary Designations" (Entergy's Answer), on April 20, 2015, which included sworn statements by three Westinghouse employees. The State then sought and obtained permission from the Board[2] to file a "Reply in Support of Motion to Withdraw Proprietary Designations" (NYS Reply), which it submitted on May 1, 2015.

[1] *See Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), Scheduling Order (July 1, 2010) (unpublished).

[2] *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).

Westinghouse's motion should be denied, because Westinghouse has cited no authority permitting it to "appear specially" and there is no statutory or regulatory authority for the submission of a "response to a reply." Moreover, Westinghouse's motion is untimely. Westinghouse has been aware of the dispute over its proprietary designation of the documents since February 2015, and has already participated in the dispute through the submission of affidavits from three Westinghouse employees. Now that informal and formal consultations have failed and the NYS Motion has been fully briefed, Westinghouse should not be permitted to make an end run around the Board's Scheduling Order and Protective Order[3] to present additional arguments – arguments that could and should have been presented months ago.[4]

BACKGROUND

Westinghouse's claim that it has not had time to "fully consider" the State's position on the documents ignores the lengthy history of the instant dispute, which has involved Westinghouse from the beginning. *See* Westinghouse's Motion, at 1. This dispute first arose in early February 2015, when the State asked Entergy if the State could refer to CUF_{en} results contained in the calculation notes, which had been disclosed as proprietary documents subject to the Board's Protective Order. *See* E-mail Chain Between New York State Assistant Attorney General (AAG) John Sipos and Attorney Paul Bessette, NRC Staff Counsel Sherwin Turk, et al., dated February 4 to 10, 2015) (Non-public Attachment 1). Entergy responded that it would have to consult with Westinghouse. Thereafter, on February 10, 2015, Entergy indicated that it had consulted with Westinghouse and that Westinghouse's position was that the CUF_{en} output values were proprietary, except to the extent they had been reported in the License Renewal Application

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

[4] It is also not clear whether Westinghouse is seeking 10 days or 15 days to prepare and file a response.

or its public supplements. *Id.* at 1. At this time, Westinghouse could have offered more specific reasons for seeking to avoid public disclosure of the CUF_{en} output values, but did not.

On March 9, 2015, in accordance with the Atomic Safety and Licensing Board's Protective Order, the State filed a Notice of Objection with Entergy, formally objecting to the proprietary designation of the documents, and requested that Entergy or its vendor specify what portions of the documents were considered proprietary, the basis for that claim, and the harm that would result from disclosure. NYS Objection, Attachment 1 to NYS Motion. During subsequent verbal consultations, counsel for Entergy suggested that Westinghouse might be more inclined to consider disclosure if the State narrowed its request to particular portions of the calculation notes. Accordingly, on March 19, 2015, the State sent an e-mail to Entergy identifying specific portions of the calculation notes that the State believed were both particularly relevant and non-proprietary. *See* March 9-30, 2015 E-mail Thread between AAG Lisa Kwong and Attorney Raphael Kuyler (E-mail Thread), Attachment 7 to NYS Motion, at 2-3. Again, Entergy consulted with Westinghouse. *Id.* Again, Entergy reported generically and without supporting arguments that Westinghouse would not permit any part of the documents to be publicly disclosed. *Id.* at 2.

Thereafter, on April 9, 2015, and again consistent with the Protective Order, the State filed its "Motion to Withdraw the Proprietary Designation of Various Pressurized Water Reactors Owners' Group and Westinghouse Documents" (NYS Motion), formally seeking the Board's intervention in the dispute over the documents. The State fully briefed the history of the dispute, and set forth the relevant legal standards, which place the burden of establishing the proprietary status of the documents on the initial holder of the documents, which in this proceeding is Entergy. NYS Motion, at 1-2; *see* Protective Order, at ¶D. Entergy opposed the

Motion on April 20, 2015, and submitted two affidavits and a declaration from three Westinghouse employees supporting the proprietary status of the documents. *See* Entergy's Answer, attachments 1-3. Although these affidavits and declaration were prepared in direct response to the State's Motion, they contained skeletal, *pro forma* arguments and conclusory allegations in support of the continued proprietary designation of every document in its entirety. On May 1, 2015 the State filed, with the Board's permission, a Reply to Entergy's Answer, which responded to the affidavits and declaration as well as the legal arguments set forth by Entergy.

After the Reply was filed – nearly three months after Entergy claims that it first consulted with Westinghouse regarding the dispute over the CUF_{en} output values – Westinghouse notified the parties of its intent to move for permission to enter a special appearance to defend the proprietary designation. Westinghouse concedes that it is seeking leave to appear and make additional written submissions in order to respond to arguments raised in the NYS Reply. *See* Westinghouse's Motion, at 4. Meanwhile, the Board, noting that Entergy has failed to offer "an 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 competitive harm to Westinghouse, ordered oral arguments on the State's motion for the week of May 11, 2015. *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), Order (Setting Oral Argument on Proprietary Designation of Documents) (May 5, 2015) (unpublished), at 2-3. The Board also offered counsel for Westinghouse the opportunity to participate in the oral arguments. *Id.* at 3.

ARGUMENT

I. Westinghouse Has Failed to Identify Any Authority Permitting It to "Appear Specially" in Connection with the NYS Motion.

As an initial matter, the Board should deny Westinghouse's Motion because Westinghouse has not cited any NRC statute or regulation authorizing it to "appear specially" to submit additional briefing on a Motion that has already been subject to an Answer and Reply, and has been set down for oral argument. There is no provision under 10 C.F.R. Part 2, the Board's Scheduling Order, or the Board's Protective Order, for the submission of a response to a reply in connection with a Motion. Under 10 C.F.R. 2.323(c) and the Scheduling Order, ¶G(3), a party must typically seek leave to file a reply. However, the applicable regulations do not authorize the submission of any subsequent responses to a reply. Furthermore, the Scheduling Order ¶G(2) notes that, in certain situations, a part may file a "reply" by right, but that "[e]xcept as otherwise specified herein, no further supporting statements or responses thereto will be entertained." These provisions make clear that a reply may only be submitted with Board permission, and that a further response or "sur-reply" may not be submitted at all. Notably, with respect to motions for public disclosure of purportedly proprietary documents, the Protective Order provides for review of Board orders through "interlocutory appeal or request that the issue be certified to the Commission" and provides that allegedly proprietary documents may not be publicly disclosed while such appellate review is pending. Protective Order, ¶E. In short, Westinghouse's Motion is not authorized by the regulations or Scheduling Order, and circumvents the review process created by the Board's Protective Order.

The relief requested by Westinghouse is also not authorized by *Kansas Gas and Electric Company and Kansas City Power and Light Company* (Wolf Creek Nuclear Generating Station, Unit No. 1), ALAB-311, 3 N.R.C. 85 (1976). In that order, which related to a dispute over the

proprietary designation of a contract by Westinghouse, the NRC's Atomic Safety and Licensing Appeal Board noted, in dicta, that it could

> "see no reason why, *upon its being advised of the endeavors of the intervenors to obtain unrestricted disclosure of the contract* through a discovery request made of the applicants, Westinghouse would not have been entitled to enter a special appearance in the proceeding for the limited purpose of asserting its claim that any disclosure should be made subject to a protective order."

3 N.R.C. 85; 1976 NRC Lexis 124, at 4-5 (emphasis added). This ALAB statement is consistent with the State's position that Westinghouse should have sought to participate in the proceeding when it learned that the State was seeking access to the protected documents, and in any case no later than ten days after the NYS Motion. *See* 10 C.F.R. § 2.323(a)(2). Indeed, the ALAB concluded in *Kansas Gas* that Westinghouse was "obviously aware of the attempt being made to obtain disclosure of the contract in sufficient time to have injected itself into the case to protect its own interest" and having missed its opportunity to do so, could not simply swoop in at the last minute in order to defend its proprietary designation. 3 N.R.C. 85; 1976 NRC Lexis 124, at 5-6.

Westinghouse tries to analogize the circumstances of its proposed "special appearance" to intervention in a federal judicial action. *See* Westinghouse's Motion, at 2-3. However, a separate set of procedures, set forth in 10 C.F.R. § 2.309, govern intervention in an NRC proceeding. The State has been held to these standards every step of the way in this proceeding by NRC Staff and Entergy, and asks that the Board apply the same "strict by design" standards to Westinghouse. Moreover, under Federal Rule of Civil Procedure 24, mandatory or permissive intervention must be sought by "timely motion." For the reasons set forth below, Westinghouse's Motion is not timely.

II. The Westinghouse Motion is Untimely.

The Board should deny Westinghouse Motion because it is untimely. Under 2 C.F.R § 2.323(a)(2), "[a]ll motions must be made no later than ten (10) days after the occurrence or circumstance from which the motion arises." At any time since Entergy first consulted with Westinghouse regarding the State's request to use CUF_{en} output values in early February 2015, Westinghouse could have come forward to defend its proprietary designation of the subject documents. At the very latest, the "occurrence or circumstance" underlying the Westinghouse Motion arose on April 9, 2015, when the State moved to withdraw the proprietary designation of the documents. *See Kansas Gas*, 3 N.R.C. 85; 1976 NRC Lexis 124, at 4-5. As of that date, Westinghouse knew that the State would seek to have the Board revoke the proprietary designation of the documents. If Westinghouse wished to seek permission to appear to defend its proprietary designation, it should have moved for such relief within 10 days. Instead, Westinghouse submitted two affidavits and a declaration in support of Entergy's Answer opposing the NYS Motion. *See* Entergy's Answer, attachments 1-3. Westinghouse should not now be permitted to bolster those affidavits simply because the State submitted a Reply responding to them.

In short, Westinghouse chose not to avail itself of numerous opportunities over the last three months to offer a detailed and specific justification for its position that the documents are proprietary in their entirety. Westinghouse has not offered an explanation for its failure to come forward at an earlier date to directly explain its proprietary designation of the documents. Moreover, Westinghouse has not explained why it did not set forth its more detailed justification for the proprietary designation of the subject documents in the affidavits and declaration from its employees submitted in support of Entergy's Answer opposing the State's Motion. Now that the

Motion has been fully briefed and oral argument – in which Westinghouse has been given the opportunity to participate – is being scheduled, it is too late for Westinghouse to seek leave to submit additional briefing to bolster its proprietary designation of the documents.

Westinghouse's claim that it could not respond until after the NYS Reply because "many aspects of the attack by the State of New York on the proprietary nature of the Documents" were not clear until that time highlights the fundamental misunderstanding of the evidentiary burden that has occurred throughout this dispute. Westinghouse Motion, at 4. As the State has repeatedly emphasized and as the plain text of the Protective Order makes clear, the burden to justify the withholding of allegedly proprietary documents rests squarely on the party seeking to withhold them. *See* NYS Motion, at 1-2; NYS Reply, at 4-5. Westinghouse should have been prepared to set forth its justification for the withholding of the subject documents without the need for the State's various requests for explanation, culminating in the NYS Motion and NYS Reply. The fact that Westinghouse now purports to need time to "consider [the NYS] attack, both from a legal and technical standpoint" suggests that Westinghouse had not previously considered the basis for its proprietary designation, seeking instead to withhold relevant information as a matter of course. *See* Westinghouse Motion, at 4.

More generally, the Westinghouse Motion would undermine the procedures set forth in the Board's Scheduling Order and Protective Order for the resolution of disputes over the proprietary designation of documents. The State has progressed through the various procedures set forth in the Board's orders and the governing regulations, from informal consultations in February 2015, to formal notice of objection and discussion in March 2015, to bringing a formal motion to withdraw the proprietary designations and then seeking permission to file, and filing, a Reply in April 2015. Throughout this process, the State understood that Entergy was consulting

fully with its vendor, Westinghouse, in order to negotiate in good faith with the State regarding the proprietary designations. Now, Westinghouse seeks to make an end-run around the Board's Scheduling and Protective Orders by appearing, after all consultations have failed and the motion has been fully briefed, in order to bolster its own inadequate defense of the proprietary designation of the subject documents.

CONCLUSION

For the reasons set forth above, the State opposes the Westinghouse Motion. The issues raised in the State's Motion have been fully briefed, and the parties – as well as Westinghouse – will now have the opportunity to participate in oral arguments. Westinghouse should not be permitted to bolster the record with additional argument or written submissions at this late date and in derogation of the framework established by the Protective Order.

Respectfully submitted,

Signed (electronically) by

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Dated: May 6, 2015

10 C.F.R. § 2.323 Certification

In accordance with the Board's Scheduling Order of July 1, 2010 (at 8-9) and 10 C.F.R. § 2.323(b), the undersigned counsel hereby certifies that counsel for the State of New York has participated in discussions between Westinghouse Electric Company LLC ("Westinghouse"), the movant, Entergy Nuclear Operations, Inc. ("Entergy"), and NRC Staff, concerning Westinghouse's "Motion To Appear Specially in Connection with State of New York Motion to Strike Proprietary Designations of Westinghouse and PWROG Proprietary Documents," served May 5, 2015, in this matter, and has made a sincere effort to make themselves available to listen and respond to the movant, Entergy and NRC Staff, and to resolve the factual and legal issues raised in the motions. The State of New York did not oppose Westinghouse's proposed use of e-mail to effect service of the Motion, but its efforts to resolve the issue of whether Westinghouse should be permitted to "appear specially" were unsuccessful.

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May 6, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In re:	Docket Nos. 50-247-LR and 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.	DPR-26, DPR-64 May 6, 2015

CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2015, copies of the State of New York's Answer Opposing Motion of Westinghouse Electric Company LLC to Appear Specially in Connection with the State's Motion to Withdraw Proprietary Designations of Westinghouse and PWROG Documents was served electronically via the Electronic Information Exchange on the following recipients:

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In addition, I hereby certify that on May 6, 2015, copies of the State of New York's Answer Opposing Motion of Westinghouse Electric Company LLC to Appear Specially in Connection with the State's Motion to Withdraw Proprietary Designations of Westinghouse and PWROG Documents was served electronically via e-mail on the following recipients:

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Dated at Albany, New York
This 6th day of May 2015